Employment Standards TRIBUNAL

An appeal

- by -

Clark Reefer Lines Ltd.
("Clark Reefer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2015A/99

DATE OF DECISION: November 3, 2015

DECISION

SUBMISSIONS

Kacey A. Krenn	counsel for Clark Reefer Lines Ltd.
Kelly N. Cummine	on his own behalf
Melanie Zabel	on behalf of the Director of Employment Standards

OVERVIEW

1. On June 12, 2015, a delegate of the Director of Employment Standards issued a Determination ordering Clark Reefer Lines Ltd. ("Clark Reefer") to pay its former employee, Kelly N. Cummine ("Mr. Cummine"), the total sum of $4,442.88 on account of 3 weeks' wages as compensation for length of service payable under section 63 of the *Employment Standards Act* (the "*Act*") together with an additional 6% vacation pay and section 88 interest. Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98 of the *Act*) against Clark Reefer based on its contravention of section 63 of the *Act*. Thus, the total amount payable under the Determination is $4,942.88.

2. Clark Reefer appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *Act*).

3. I am adjudicating this appeal based on the parties' written submissions. In addition to reviewing the parties' written submissions, I have also reviewed the subsection 112(5) record that was before the delegate when she issued the Determination.

4. I should also add that Clark Reefer applied for a section 113 suspension of the Determination. The delegate advised the Tribunal that the Director of Employment Standards would not take any enforcement proceedings pending the final resolution of the appeal. The Tribunal's Appeals Manager advised the parties, by letter dated July 22, 2015, that in light of the Director's undertaking, "the Tribunal does not find it necessary to make an Order on the suspension issue".

FACTUAL BACKGROUND

5. Clark Reefer is a trucking firm and formerly employed Mr. Cummine as a sales representative; his employment commenced on July 4, 2011, and ended on February 13, 2015. The event that precipitated Mr. Cummine's termination was a letter, dated February 12, 2015 (delivered to Clark Reefer the next day), from Mr. Cummine's legal counsel to Clark Reefer's Chief Financial Officer. The relevant excerpts from this letter are reproduced, below:

> …Company President, Marcus Clark, announced a unilateral change in the Company bonus program at a BDR meeting held on October 4, 2013, which has since proven to be retroactive as my client received no further bonuses from the Company beyond the first quarter of 2013. However, my client had already worked, performed well and far exceeded his targets in every quarter of 2013 in reliance on the bonus, which historically and contractually had been offered to sales people in the Company…
>
> While he understands that it might be difficult to determine exact amounts owing to him, based on the enclosed calculation, the fact that he received $2,500 for the first quarter, and based on his sales in the subsequent 3 quarters, he should have received a minimum of $2,500 per quarter thereafter and he is

> willing to accept that sum. Although he never received written confirmation of the change in Company policy with regard to the payment of bonuses, he acknowledges that he had prior verbal notice of the change for the 2014 year, and therefore does not expect bonuses beyond the last quarter of 2013. Should you fail to pay him $7,500.00 accordingly, within one week of the date of this letter, we expect to receive instructions to commence an action against you for the payment of 2013 bonuses and a complete accounting of same.
>
> Thank you for your anticipated cooperation.

6. Clearly, Mr. Cummine's counsel's expectation that there would be "anticipated cooperation" was sadly misplaced. According to Clark Reefer's counsel, the firm was "shocked to receive the Demand letter". Thereafter, things immediately went awry for Mr. Cummine. As recounted at page R2 of the delegate's "Reasons for the Determination" issued concurrently with the Determination (the "delegate's reasons), Clark Reefer was not at all impressed with the demand letter and moved very quickly to terminate Mr. Cummine's employment:

> Later that day [February 13, 2015], Richard Saumier ("Mr. Saumier), the vice president of Clark Reefer Lines, arranged for Mr. Cummine to attend an office to meet with Mr. Saumier and Robert Shears, the chief financial officer. When Mr. Cummine attended the office, Mr. Saumier informed him that the Employer had no intention of addressing the letter from his lawyer. Mr. Saumier told Mr. Cummine that the Employer had to take decisive action to end the employment relationship because in getting a lawyer to send a letter to the Employer asking for wages and threatening further legal action if the Employer did not pay him $7,500.00, Mr. Cummine created a situation where there were "irrevocable differences" between him and the Employer. Therefore, the Employer could no longer count on Mr. Cummine to represent its interests. Mr. Saumier informed Mr. Cummine that his employment was being terminated immediately for cause. Mr. Saumier also told Mr. Cummine that the need to terminate his employment took the Employer by surprise. Mr. Saumier asked Mr. Cummine to return property that belonged to the Employer, and stated his final pay and paperwork would be sent to his home address. Mr. Cummine stated he was disappointed and he exited the premises quickly and professionally.

7. It should also be noted that, as recorded in the delegate's reasons (at page R4), "Mr. Cummine agreed with Mr. Saumier's description of the February 13, 2015 termination meeting and had nothing else to add".

8. That same day, February 13, Clark Reefer issued a Record of Employment to Mr. Cummine and in the form indicated that the "reason for issuing this ROE" was "dismissal" (code M on the form). On March 9, 2015, Mr. Cummine, not having achieved any success using the Employment Standards Branch's "self-help kit", filed an unpaid wage complaint seeking approximately $11,650 on account of compensation for length of service and the $7,500 claimed "bonus money for 2013.

9. This complaint was the subject of an oral hearing before the delegate on June 2, 2015, at which both Mr. Saumier and Mr. Cummine attended and gave evidence. The delegate issued the Determination and her accompanying reasons less than two weeks after the date of the hearing, on June 12, 2015.

10. At the hearing, Mr. Cummine indicated that he was only seeking compensation for length of service and was not proceeding with a claim for any "bonus money". Further, the parties agreed that if Mr. Cummine were entitled to compensation for length of service, the sum of $4,151.70 would be awarded on that account (as it ultimately was so awarded).

11. There were two issues before the delegate, both concerning whether Reefer Clark had "just cause" to dismiss Mr. Cummine. First, Clark Reefer argued that it had just cause based on Mr. Cummine's threat to sue it if he did not receive the bonus to which he alleged he was entitled. Second, Clark Reefer advanced what is known

as "after-acquired cause" (see *Lake Ontario Portland Cement Co. Ltd. v. Groner*, [1961] S.C.R. 553). More specifically, and as recounted in the delegate's reasons (at page R4):

> After the termination of Mr. Cummine's employment, the Employer discovered that Mr. Cummine had been looking for another job while he was still employed for Clark Reefer Lines, and that he had already secured alternate employment before February 13, 2015. Mr. Saumier suggested that this was the motive for Mr. Cummine to arrange for his lawyer to send the letter to the Employer asking for wages. Mr. Saumier referred to text messages that the Employer gathered after February 13, 2015. He asserted the Employer had after acquired cause to terminate Mr. Saumier's employment [*sic*, clearly this should be a reference to Mr. Cummine's employment].

12. Mr. Cummine testified that he was "frustrated" that his compensation "was not as lucrative as it once was" and because he was not presented with any bonus scheme after the end of 2013. This lead him to have his lawyer send the precipitating letter rather than deal with the matter directly with Mr. Saumier or his sales manager. Mr. Cummine stated there "was no significance to the timing of the letter" (see delegate's reasons, page R4). As will be seen, I am of the view that the timing of the letter was very deliberate – he wanted it be in his employer's hands while he was still employed and before he resigned to take up new employment with a direct competitor.

THE DETERMINATION

13. As noted above, the only issue before the delegate was whether Clark Reefer's statutory obligation to pay Mr. Cummine compensation for length of service was discharged by reason of subsection 63(3)(c) of the *Act*: "The liability [to pay compensation for length of service] is deemed to be discharged if the employee…(c)… is dismissed for just cause". On this point the delegate made the following findings:

> …the Employer did not argue that there were any issues of minor misconduct involving Mr. Cummine. Rather, the Employer argued that by arranging for his lawyer to send a letter to the Employer that demanded payment of bonuses and informed the Employer that further action would be considered if the Employer did not comply with the demand, Mr. Cummine committed serious misconduct, breaching the Employer's trust. (page R5)

14. I should note, at this juncture, that the delegate understated the nature of the lawyer's demand letter – it went well beyond indicating that further action "would be considered", stating that legal action would likely ensue. The lawyer's February 12 letter reads, on this point, as follows: "Should you fail to pay him $7,500.00 accordingly, within one week of the date of this letter, *we expect to receive instructions to commence an action against you* for the payment of 2013 bonuses and a complete accounting of same." (my *italics*)

15. The parties' written employment contract contained a reference to a "Sales Bonus Program" but bonus payments were "at the company's discretion".

16. The delegate noted (page R5) that "Mr. Cummine was a respected sales representative" generating substantial revenues for the firm and that he was held "in high regard". Clark Reefer was "blind-sided" by the letter. The delegate stated "it was evident that Mr. Cummine and Mr. Saumier had an amicable working relationship and had respect for each other on a professional level." The delegate concluded (at page R5):

> …it was out of character, and even insolent for Mr. Cummine to have arranged for a lawyer to demand wages from the Employer in a strongly worded letter containing the intimation that further action would be considered if the wages were not paid [note my earlier comment regarding the delegate's characterization of this evidence], particularly in light of the fact that he really offered no explanation,

other than that he was frustrated, as to why he chose to communicate with his employer via his lawyer about wages.

17. However, the delegate wholly discounted Clark Reefer's concerns and held that it did not have just cause for termination based on the February 12th letter from Mr. Cummine's legal counsel (at page R6):

> …the "threat" from Mr. Cummine's lawyer…was that the lawyer would expect to receive instructions from Mr. Cummine to "commence an action" if the Employer did not pay the bonuses as specified. As the Employer felt certain that Mr. Cummine's claim for bonuses was completely without merit and not recoverable anyway [note, as the delegate stated in her reasons, such a claim was statute barred under the *Act*, but it certainly may have been recoverable under common law via a civil court action], it does not follow that the *possibility* [*italics* in original text] of Mr. Cummine commencing "an action" if the bonuses were not paid conveyed a threat so serious as to prevent the Employer from at least calling Mr. Cummine on his insolence during the meeting with him on February 13, 2015 and asking him to explain why he resorted to the letter.
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> …the Employer did not provide any evidence that, during his employment, Mr. Cummine had failed to faithfully serve Clark Reefer Lines, that he revealed confidential information, or that he was dishonest. Despite the Employer asserting that Mr. Cummine's single act of insolence broke the Employer's "trust", the Employer provided no evidence of how or why they could no longer trust him to do his sales duties and represent the company at least while working out a three week notice period [under subsection 63(3)(a)(iii) of the *Act*, Clark Reefer's obligation to pay Mr. Cummine compensation for length of service would have been fully discharged had it given him 3 weeks' written notice of termination].
>
> While it may have been entirely reasonable for Mr. Cummine to talk directly to his superiors at Clark Reefer Lines about wages he still felt were owed to him from 2013, and while it was insolent for him to ask his employer for wages in the form of a strongly worded letter from legal counsel that suggested possible further action if the wages were not paid, I simply cannot find the insolence so egregious that it warranted the summary dismissal of Mr. Cummine. Given the evidence, I find the Employer has not established just cause for terminating Mr. Cummine's employment.

18. The delegate refused to consider Clark Reefer's "after acquired cause" argument finding that she had no jurisdiction to entertain the argument (page R6): "As the Act is broad-based remedial legislation administered on its own terms, the common law concept of 'after acquired cause' is not incorporated into the operation of section 63 of the Act."

19. The delegate thus awarded Mr. Cummine 3 weeks' wages as compensation for length of service (in the amount agreed between the parties) together with concomitant vacation pay and interest.

FINDINGS AND ANALYSIS

20. Clark Reefer says that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Clark Reefer's latter ground of appeal is largely (but certainly not entirely) a derivative of its fundamental position that the delegate erred in law in finding that Mr. Cummine was entitled to any compensation for length of service

Just Cause and Repudiatory Breach

21. The concept of "just cause" is a question of mixed fact and law in the sense that the decision-maker must "apply a legal standard to a set of facts" (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26) and, as such, should not be set aside unless the decision-maker made a "palpable and overriding error". However, "an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness

standard" if the decision-maker failed to take into account relevant criteria and thus, "what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law" (*Housen*, para. 27).

22. Just cause is simply a term used to characterize a repudiation of an employment contract. Similarly, the common law notion of "constructive dismissal" is also a term used to describe a repudiatory breach of an employment contract. Just cause refers to a repudiatory breach by an employee whereas constructive dismissal refers to a repudiatory breach by an employer. A repudiatory breach is a significant or serious breach of contract that entitles the party not in breach to elect to treat the contract as discharged. In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, the Supreme Court of Canada suggested that a breach that "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer" can give the employer the right to summarily dismiss the employee for cause without providing notice or pay in lieu of notice.

23. The concept of "after-acquired cause" refers to a breach that occurred during the currency of an employment relationship but is not discovered until after the employment relationship has ended. In *Groner*, *supra*, the Supreme Court of Canada clearly held that an employer is entitled to rely on such "after-acquired cause" in order to demonstrate that it had just cause for dismissal (at pages 563 – 564):

> The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:
>
> > It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

24. The notion of "after-acquired cause" continues to be a part of our common law having been recently applied by our Court of Appeal in *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168, and by the New Brunswick Court of Appeal in *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44.

25. Under subsection 63(3)(c) of the *Act*, an employee is not entitled to compensation for length of service if the employee was dismissed for "just cause". There is no definition of "just cause" in the *Act* and, accordingly, the Tribunal is guided by common law jurisprudence (see, for example, *Buddenhagen*, BC EST # D045/07, and the other decision cited therein; *Tortorella*, BC EST # D055/08). Consequently, common law notions such as "progressive discipline" (see *J-W Research Ltd.*, BC EST # D090/14) and "condonation" (see *Le Soleil Hospitality Inc.*, BC EST # D050/14) must, where possibly relevant, be considered when assessing if an employer has just cause for dismissal.

26. In *Benoit*, BC EST # D138/00, the employer first raised the issue of "after-acquired cause" at the oral appeal hearing. The employer did not have any specific evidence regarding this issue but, rather, wished to have the Tribunal issue various summons to "representatives of other agencies he felt Miwa might have provided services to while she was employed by [the employer]" (page 4). Ultimately, Tribunal Member Stevenson decided that the requested summons would not be issued and that an employer is not entitled to raise an "after-acquired cause" argument on appeal when this ground had not previously been advanced as justifying

the employee's termination. Member Stevenson reiterated his position in *BNW Travel Management Ltd.*, BC EST # D170/04, and *Stahlcon Construction Ltd.*, BC EST # D069/14, that after-acquired cause did not fall within the ambit of the subsection 63(3)(c) "just cause" provision. In *Kootenay Uniform and Linen Ltd.*, BC EST # D126/07, Tribunal Member Matsuno, referring to Member Stevenson's two decisions, held that "employers may not avoid giving compensation for length of service by using evidence of just cause that was acquired after the employee was given notice of termination of employment" (para. 34; underlining in original text). The Tribunal has also issued at least one decision where the employer was not permitted to introduce "new evidence" in the form of a vague after-acquired cause assertion (see *Southern Cross Machining Inc.*, BC EST # D048/10 (Member Bhalloo)).

27. In other decisions, although perhaps only obliquely, the Tribunal has recognized that after-acquired cause could fall within the scope of the subsection 63(3)(c) "just cause" provision – see, for example, *Praxis Technical Group, Inc.*, BC EST # D608/01 (Member Stevenson) and *Ganapathi*, BC EST # D213/03 (Member Thornicroft).

28. In my view, particularly since a reconsideration panel has never addressed this issue, it may be the case that after-acquired cause could fall within the ambit of the subsection 63(3)(c) "just cause" provision in a case where the relevant facts are provided to the Director of Employment Standards prior to a determination being issued.

Clark Reefer's Submission

29. In the instant appeal, Clark Reefer's counsel does not rely on after-acquired cause *per se*, but says that, at the complaint hearing, Clark Reefer was entitled to rely on evidence relating to, and otherwise more fully explore through cross-examination, Mr. Cummine's search for alternative employment while still employed with Clark Reefer in an effort to demonstrate that Mr. Cummine's behaviour (both in sending the bonus demand letter and searching for new employment) evinced an intention to no longer be bound by his employment contract with Clark Reefer (*i.e.*, that Mr. Cummine repudiated his employment contract). Counsel, in turn, says that the delegate's refusal to allow Clark Reefer to question Mr. Cummine on this matter was a breach of the principles of natural justice. However, as noted above, counsel does not strictly rely on an after-acquired cause argument:

> The Employer does not allege that the Delegate erred in law in failing to apply the common law doctrine of after-acquired cause to uphold the Employer's decision to terminate Mr. Cummine's employment for cause. Rather, the Employer's position is that the facts relating to Mr. Cummine's search for alternate employment, and the timing of same, were and are part of the larger factual matrix relating to the Complainant and the Employer's defence.
>
> The Employer submits that during the hearing, the Delegate expressly *prevented* the Employer's representative from questioning Mr. Cummine further in relation to his efforts to attain alternate employment. It would be unfair, then, to fault the Employer for failing to challenge Mr. Cummine further when it had been directed not to do so.
>
> It is the Employer's submission on appeal that the question of when Mr. Cummine secured alternate employment was and is relevant because, at the very least, the timing of that decision could serve to *confirm* whether Mr. Cummine subjectively intended when sending the Demand Letter to no longer be bound by the contract. That is, the timing of Mr. Cummine's securing of alternate employment serves to *confirm* that the Employer had cause to dismiss in the first place. (*italics* in original text)

30. Notwithstanding the foregoing position, Clark Reefer's counsel also says "the Delegate erred in determining that the Demand Letter *alone* was insufficient to evidence an intention on the part of Mr. Cummine to no

longer be bound by the employment contract" (*italics* in original text). Counsel submits that in light of Mr. Cummine's important "key employee" position, the fact that he had not made any prior effort to bring his concerns about an alleged bonus entitlement to senior management, the confrontational tone of the lawyer's demand letter, and the fact that he had already secured alternate employment, the only reasonable conclusion to be drawn was that Mr. Cummine clearly evinced an intention to no longer be bound by his employment contract with Clark Reefer.

Mr. Cummine's Position

31. Despite the express wording of his employment contract to the effect that the bonus plan was discretionary, Mr. Cummine maintains that he was entitled to a bonus for the final three fiscal quarters of 2013 and that he had every right to pursue that claim since Clark Reefer was "in breach of contract". He says that since he "was out of time to make an Employment Standards claim for the unpaid bonus" he "therefore had no choice but to commence a civil suit, the first step of which was to make demand in order to preserve his claim". This latter statement strikes me as somewhat incongruous since Mr. Cummine specifically included a claim for an unpaid bonus in both his February 25, 2015 "Request For Payment" (sent as part of the Branch's mandatory "self-help kit" process) and in his complaint filed March 9, 2015 (less than one month after his dismissal).

32. In any event, Mr. Cummine maintains that since Clark Reefer "did not have an excuse for failing to pay…[the] 2013 bonus, and because [I] was demanding it, they fired [me]".

Repudiation – the Bonus Demand Letter

33. The delegate rightly characterized the February 13 demand letter as "strongly worded" and reflecting "insolent" behaviour on Mr. Cummine's part. It must be remembered that Mr. Cummine was a key employee who held a position of considerable responsibility and trust. As recorded in the delegate's reasons (page R3), Mr. Cummine was responsible for 81 accounts representing over 25% of Clark Reefer's total client complement and 18% ($4.4 million) of the company's total revenues. By his employment contract, Mr. Cummine was to devote his full-time efforts to Clark Reefer. Mr. Cummine acknowledged that his position obliged him to exercise "the highest level of integrity" and that Clark Reefer had to have "complete confidence" in him. The uncontested evidence before the delegate (page R4) was that Mr. Cummine had already secured new employment before the bonus demand letter was sent to Clark Reefer although this was not known to Clark Reefer on February 13, 2015, when it decided to terminate Mr. Cummine's employment.

34. In *Suleman v. British Columbia Research Council*, 1990 CanLII 746 (B.C.C.A.), a 41-year old clerical employee was given 6-months' working notice; however, about 3 weeks' later, she sued her employer alleging constructive dismissal. About one month later, her employer took the position that by suing she had elected to treat her employment as terminated. Justice Hutcheon wrote the unanimous appeal court decision and the relevant excerpts from his judgment are set out, below:

> Unless, therefore, Mrs. Suleman is able to establish a case of constructive dismissal the issue of the Writ of Summons on October 22, 1986 was premature and amounted to a repudiation of her contract of employment…Mrs. Suleman did not regard either the loss of job title or the loss of a private office as a breach of a fundamental term of her contract of employment [and] for these reasons, I am of the opinion that Mrs. Suleman has not made out a case of constructive dismissal. On the other hand B.C. Research has made out its case of a repudiation by Mrs. Suleman of her contract of employment by the position she took in her statement of claim…I would allow the appeal and order that the action be dismissed.

35. In *Zaraweh v. Hermon, Bunbury & Oke*, 2001 BCCA 524, the 54-year old employee, "a secretary and general clerical assistant", sued her former employer while still employed, but working after having been given notice of termination. A few days after she had served the necessary court documents on the employer, she was dismissed, the employer taking the position that she had repudiated the employment contract. Justice Saunders, writing the unanimous 3-justice panel, held (at para. 21):

> …I am of the view that the acts of issuing the writ and statement of claim and serving them upon the partnership were conduct incompatible with continuation of the contract of employment. Absent a prior repudiation by the partnership which would allow Ms. Zaraweh to elect to end the contract, or which alternatively could be viewed as justifying her termination of the contract, such actions must be viewed as unjustified repudiation by Ms. Zaraweh.

36. However, Justice Saunders cautioned (para. 22):

> In reaching this conclusion I refer only to the facts of this case which were issuance of a writ of summons and statement of claim seeking general and punitive damages, some time before the end of the working notice. It may be that not all actions by an employee against an employer are of the same nature.

37. The terminations in both *Suleman* and *Zaraweh* were each precipitated by the formal commencement of legal proceedings and, of course, in the case at hand, legal proceedings were threatened, but not actually commenced, prior to Mr. Cummine's dismissal. Thus, the instant circumstances are closer to those in *Helbig v. Oxford Warehousing Ltd. et al.*, 1985 CanLII 2081 (leave to appeal to the Supreme Court of Canada refused: December 10, 1985. S.C.C. Bulletin, 1985, p. 1,434. S.C.C. File No. 19524), a decision of the Ontario Court of Appeal, where the employee – a senior executive – claimed ownership of certain patents regarding an invention created in the course of his employment. Mr. Helbig claimed ownership of a worldwide patent while his employer took the position that the intellectual property belonged to the company. The event that precipitated Mr. Helbig's dismissal was a letter from his legal counsel to his employer described by the Court of Appeal as follows:

> This letter (ex. 38) is reproduced in full in the reasons of the trial judge. It not only fails to back down from the position previously advocated by Helbig, it advances it. It is the letter of a patent attorney to a third party laying down the terms of contract for future usage of a patent whose ownership is no longer in dispute. It states that Helbig will give to any company associated with the Alltrans Group a royalty-free licence so long as he is associated with the company. Certain demands are made in return including "up to six weeks per annum for fully paid travel to all foreign countries where any licence is given for purposes of market development…". The tone of the letter is offensive, coming as it does on behalf of an officer of the company to his superior. Helbig says he never saw the letter before it was sent but at no time disavowed it or attempted to moderate its message.

38. The court held that the sole reason for Mr. Helbig's dismissal was his lawyer's letter and concluded that this conduct, standing alone, gave the employer just cause for dismissal:

> …the position of Helbig with respect to his asserted rights in the plastic hangers was entirely inconsistent with his duty to his employer, and his persistence, despite the clearest directives from management, made his position entirely incompatible with that of management. Since he did not elect to leave, management was entitled to tell him to leave. The dismissal was for cause.

39. The court noted that Mr. Helbig stood in a fiduciary relationship *vis-à-vis* his employer and that fact distinguishes the present case where Mr. Cummine, although a key employee, was not a fiduciary. The decision in *Skidd v. Canada Post Corporation*, [1997] O.J. No. 712 (Ont. C.A.), presents a case involving an employee whose duties placed him on an organizational level below Mr. Cummine. Mr. Skidd, a lower to

middle-level manager, after receiving a negative performance review (which he was later told to ignore) became concerned that he was being subjected to a progressive discipline process. He consulted legal counsel who sent a letter to the employer's vice-president in charge of Mr. Skidd's division in which the lawyer asserted that Mr. Skidd had a claim for damages for constructive dismissal. Canada Post took the view that the letter constituted a resignation; Mr. Skidd sued for wrongful dismissal. The trial judge characterized the lawyer's letter as "highly confrontational" especially given a threat to commence legal action if the matter could not be resolved. The trial judge rejected Canada Post's position that the letter could be taken as a voluntary resignation but also held that in instructing his lawyer to send this letter to his employer, Mr. Skidd evinced an intention to be no longer bound by his employment contract and, accordingly, Canada Post "was justified in terminating Skidd", a position confirmed on appeal (see also *Grewal v. Khalsa Credit Union*, 2012 BCCA 56).

40. *Kucera v Qulliq Energy Corporation*, 2015 NUCA 2, is yet another case where a dissatisfied employee, in this case an executive assistant, had her legal counsel forward a letter to her employer in which she claimed she had been constructively dismissed and seeking to negotiate a severance package. The employer responded by terminating her for cause. Both the trial judge and the appeal court held that the lawyer's letter constituted a repudiation of Ms. Kucera's employment contract and that her employer, as it was entitled to do, simply elected to accept the repudiation thereby discharging the underlying employment contract.

41. An employee may repudiate their employment contract if they evince an intention to no longer be bound by the agreement. As stated by the Alberta Court of Appeal in *Globex Foreign Exchange Corporation v. Kelcher*, 2011 ABCA 240 (para. 46): "Repudiation occurs by words or conduct evincing an intention not to be bound by the contract. If the non-repudiating party accepts the repudiation, the contract is terminated and the parties are discharged from future obligations." At para. 141, the court also observed: "It does not follow automatically that a breach of the contract ends the contract. If one party to a contract commits a breach that is serious enough to evince an intention "not to be bound by the contract", the other party can accept the repudiation of the contract and terminate it. Whether the breached covenant is important enough to justify terminating the contract depends on the construction of the contract."

Conclusion

42. Thus, the critical question in this case is whether Mr. Cummine's conduct in having his lawyer forward a demand letter, accepted by the delegate to be "strongly worded" and an act of "insolence", evinced an intention on his part to be no longer bound by his employment contract. Mr. Cummine, who was a trusted and important key employee within the Clark Reefer organization, had no explanation for the letter other than the fact he was frustrated. He did not first attempt to discuss the issue with Mr. Saumier or his sales manager prior to instructing his lawyer to send the letter (delegate's reasons, page R4) and, by the express terms of his employment contract, bonus payments were at Clark Reefer's discretion. Mr. Cummine conceded that he was "frustrated that his compensation at Clark Reefer Lines was not as lucrative as it once was and that, after the year 2013, the Employer did not present a sales bonus package to him." (delegate's reasons, page R4).

43. Undoubtedly, Mr. Cummine's frustration with his compensation triggered his search for new employment. The record before the delegate (Employer exhibits 6, 7 and 8) included evidence that Mr. Cummine had been looking for new employment at least since the fall of 2014 and that he secured new employment – with a direct competitor (Hercules Transport) – either during, or shortly following, the end of his employment with Clark Reefer. Clark Reefer was not aware of these facts as of February 13, 2015, only because Mr. Cummine chose not to disclose this information to his employer (itself a breach of his duty of loyalty, fidelity and good faith toward Clark Reefer – see, for example, *Felker v. Cunningham*, 2000 CanLII 16801 (Ont. C.A.), leave to

appeal to the Supreme Court of Canada refused: [2000] S.C.C.A. No. 538 and *Zoic Studios B.C. Inc. v. Gannon*, 2015 BCCA 334). This latter evidence sheds a great deal of light on the February 12 demand letter. Mr. Cummine knew his employment would be ending shortly and he thus decided to make one last strong surge to try and recover some bonus monies.

44. Mr. Cummine was actively preparing – or indeed had already made arrangements – to leave his employment with Clark Reefer when his lawyer sent the bonus demand letter to Clark Reefer. In light of his senior and trusted position with the company, the fact that his contract did not guarantee any sort of bonus, the fact that he was arranging – or had already arranged – to take up employment with a direct competitor and the provocative, insolent tone of the February 12 letter, I consider that Clark Reefer was legally entitled to take the position that Mr. Cummine was evincing a clear intention to no longer be bound by his employment agreement with Clark Reefer.

45. Clark Reefer was not obliged to accept this repudiation, but it was entitled to elect to do so. This it did and, accordingly, Mr. Cummine was not entitled to any compensation for length of service and, in my view, the delegate erred in law when she determined otherwise.

ORDER

46. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal