



An appeal

- by -

Courtenay Marshall
(the “Appellant” or “Mr. Marshall”)

- 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: Carol-Ann Hart

FILE No.: 2010A/115

DATE OF DECISION: November 2, 2010

DECISION

SUBMISSIONS

Peter W. Lightbody

Counsel for Convoy Supply Ltd.

Karpal Singh

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Mr. Courtenay Marshall, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination of the Director of Employment Standards (the “Director”) issued on July 8, 2010 (the “Determination”).
2. The delegate for the Director (the “Delegate”) conducted an adjudication hearing on March 8, 2010, and issued the Determination following that hearing.
3. The Appellant contends that the Delegate failed to observe the principles of natural justice in making the Determination, and that new evidence has become available which was not available at the time the Determination was made. Mr. Marshall requests that the Determination be cancelled and referred back to the Director.

ISSUES

4. The issues in this case are the following:
 1. Did the delegate fail to observe the principles of natural justice in making the Determination?
 2. Is there new evidence which was not available at the time the Determination was made which would change the conclusion of the Delegate on a material issue?

FACTS

5. According to the Determination, Mr. Marshall was employed as a truck driver for Convoy Supply Ltd. (“Convoy” or the “Respondent”) from May 1, 2006, to September 28, 2009.
6. Mr. Marshall, the Appellant, and Mr. Rick Peniuk, Operations Manager for Convoy, attended the adjudication hearing, and one witness also testified.
7. The Delegate concluded that Convoy had terminated the employment of Mr. Marshall for just cause, and as a result, Mr. Marshall was not entitled to compensation for length of service under section 63 of the *Act*.

ARGUMENT

For the Appellant

8. Mr. Marshall maintained that Convoy had provided false information to the Delegate and had made allegations about him which were untrue and taken out of context. He contended that there had not been three written

warnings, as Convoy had stated. The Appellant also took issue with a number of other findings of fact and the conclusion which had been reached by the Delegate in the Determination.

For the Respondent

9. The Respondent maintained that the Appellant had failed to provide a detailed submission indicating why the appeal should be allowed.
10. It was the position of the Respondent that the Appellant had failed to identify any failure on the part of the Delegate to observe the principles of natural justice. All elements of natural justice had been met at the hearing to ensure procedural fairness for all parties.
11. The Respondent submitted that in the materials filed by the Appellant on appeal, no new evidence had been identified. The Appellant was attempting to re-argue the matter on appeal.

For the Director

12. The Delegate submitted that the Appellant had not provided any convincing arguments or sufficient evidence to substantiate that the Director had failed to observe the principles of natural justice.
13. With respect to the ground of appeal based on new evidence, the Delegate argued that the Appellant had provided evidence before, during, and after the adjudication hearing.
14. With regards to the submission made by the Appellant about three written warnings, no such evidence was submitted by Convoy or Mr. Marshall during the adjudication hearing. The evidence which was provided to the Delegate was that there were three situations involving the Appellant which had led to the termination of his employment.
15. The Delegate maintained that the new evidence submitted on appeal by Mr. Marshall did not have high potential probative value, and would not have led the Delegate to a different conclusion on a material issue.

ANALYSIS

16. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

1. Did the Delegate fail to observe the principles of natural justice in making the Determination?

17. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them, the right to present their evidence, and the right to be heard by an independent decision maker.

18. There was no evidence or argument put forward by the Appellant to demonstrate that the Delegate had failed to observe the principles of natural justice. The Appellant did not assert that the Delegate was not an independent decision maker.
19. In this case, an adjudication hearing was conducted by the Delegate. The Determination sets out that both parties attended at the hearing and were given the opportunity to present evidence and make submissions. The parties and the witness testified under oath. The Delegate provided detailed reasons regarding the decision he reached in the Determination.
20. I do not find that there is merit to the allegation of the Appellant that the Delegate had failed to act in accordance with the principles of natural justice in making the Determination.

2. Is there new evidence which was not available at the time the Determination was made which would change the conclusion of the Delegate on a material issue?

21. The Tribunal set out four requirements which must be met before new evidence will be considered on appeal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. The Appellant has the onus of proving that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
22. On appeal, Mr. Marshall's submissions addressed "*3 written warnings*". There is a reference to three written warnings in the Service Canada document dated November 5, 2009, which the Appellant submitted for the appeal. However, that document was prepared in relation to a process unrelated to Mr. Marshall's employment standards complaint, and it did not appear on the Record which was submitted for the appeal by the Delegate.
23. There was no reference to three written warnings in the Determination. The Delegate referred to evidence regarding one written warning in the Determination, which notified Mr. Marshall that his employment was in jeopardy as a result of his conduct. The Delegate found that despite that written warning and verbal warnings given to Mr. Marshall by Convoy, he did not change his behavior. The Delegate concluded that: "*...Mr. Marshall acted in a manner inconsistent with the continuation of the contract of employment and inconsistent with the proper discharge of his duties as an employee*". As a result, the Delegate determined that Mr. Marshall's employment had been terminated for just cause, and he was not entitled to compensation for length of service.
24. The Appellant did not provide any new evidence on appeal which was not available before the Determination was made. The written statements signed by the Appellant and the witness and declared before a Notary Public did not contain any evidence which was not already presented at or available at the time of the adjudication hearing before the Delegate.
25. An appeal is not an opportunity to re-argue the matters which were addressed in the Determination. It is clear that the Appellant disagrees with findings of fact and conclusions reached by the Delegate. However, the

Appellant has failed to meet the onus of proving that an appeal should be allowed based on the grounds set out in section 112 of the *Act*.

26. The appeal is dismissed.

ORDER

27. I order pursuant to Section 115 of the *Act*, that the Determination dated July 8, 2010, is confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal