

An appeal

- by -

Brian Burke

- 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.: 2005A/86

DATE OF DECISION: July 29, 2005

DECISION

SUBMISSIONS

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| Brian Burke | on his own behalf |
| Ken White | on behalf of the Director of Employment Standards |

OVERVIEW

1. This is an appeal by Brian Burke pursuant to section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued on April 11, 2005 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. The appeal is brought on the grounds that the Director erred in law, and failed to observe the principles of natural justice in making the Determination.
3. The Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

4. The issues to be determined in this case are the following:
 - (a) Did the Director err in law in concluding there was just cause to terminate Mr. Burke's employment?
 - (b) Did the Director fail to observe the principles of natural justice in making the Determination?

THE FACTS

5. The employer, Isfeld Ford Sales Ltd. operates an automobile dealership in Abbotsford, B.C. The appellant, Brian Burke, was employed by Isfeld Ford Sales Ltd. from June 17, 1998 to July 28, 2004 as an Automobile Technician, and was paid \$25.80 per hour.
6. The appellant’s complaint concerning regular wages and vacation pay was settled during a mediation process. The only issue which remained in dispute for adjudication by the delegate for the Director was whether Mr. Burke was entitled to compensation for length of service pay following the termination of his employment.
7. A hearing was conducted on December 1, 2004 by the delegate for the Director. In the Determination, the delegate concluded that Mr. Burke was terminated for just cause. As a result of that decision, the delegate found that the employer had not contravened the *Act*, and no wages were outstanding.

ARGUMENT

8. The appellant submitted that the evidence presented by the employer demonstrated that it had engaged in a pattern of not following through with promises or threats to terminate his employment, and this amounted to condonation.
9. Mr. Burke also contended that the employer had not met the criteria for dismissal due to unsatisfactory performance because he had not been offered any assistance by the employer with issues concerning job performance.
10. The appellant referred to two decisions he had relied on in the hearing before the delegate (BC EST #D236/97 and BC EST #D027/02). Mr. Burke acknowledged that the facts of those cases were not identical to his, but maintained that they were relevant, and could be applied to support his position.
11. The Director's delegate maintained that the appellant had put forth the same arguments at the hearing that he had presented in filing his appeal. The appeal process was not intended to be an opportunity for a party to the process to have their case re-heard. The position that the respondent had condoned Mr. Burke's actions and therefore owed him compensation for length of service was addressed in the Determination.
12. Mr. Burke replied that he was aware of the purpose of the appeal process, and was not seeking to have the case re-heard. Rather, he believed that the delegate for the Director had made an error in law in the decision, and sought an unbiased review, and reversal of his decision.

ANALYSIS

13. Subsection 112(1) of the *Act* provides as follows:
 - 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 made.
14. Subsection 115(1) of the *Act* provides as follows:
 - 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

NATURAL JUSTICE

15. In essence, the principles of natural justice are procedural rights to ensure 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.
16. Clearly, Mr. Burke takes issue with the findings which were made by the delegate for the Director in the Determination. However, there was no evidence adduced, and no submissions were made on the Appeal Form, or in the material filed with the appeal to support the assertion that the delegate failed to observe the rules of natural justice.
17. The delegate for the Director conducted an oral hearing and, based on what is written in the Determination, the delegate reviewed the material before him and arrived at reasoned conclusions. There is no evidence that the investigation process, including the hearing conducted by the delegate for the Director, was unfair. The parties had the opportunity to present evidence and explain their positions. It was not alleged that the delegate for the Director had refused to consider evidence or submissions, or was not an independent decision maker. There is no evidence of a denial of natural justice.

ERROR OF LAW

18. In many decisions, the Employment Standards Tribunal has adopted the definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). The Court held in that case that the following could constitute an error of law:
 1. a misinterpretation or misapplication of a section of a statute;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a methodology that is wrong in principle.
19. Mr. Burke contends that the Director erred in law with respect to the conclusion that he was terminated for just cause. This raises the question of whether or not the error alleged is in fact an error of law.
20. The Supreme Court of Canada has indicated that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (see: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748).
21. A decision relating to whether there was just cause for termination of an employee is a question of mixed fact and law. However, it has not been argued, and I cannot find, that the delegate for the Director erred in the legal analysis applied to the facts as found. Rather, Mr. Burke contends that the delegate for the Director erred in making the findings of fact based on which the legal analysis was performed. In essence, Mr. Burke requests that the Tribunal reach a different conclusion on the facts as he presents them. This amounts to an allegation of an error in findings of fact, and does not raise an error in law

(see: *Britco Structures Ltd.* BC EST #D260/03). A challenge to findings of fact does not fall within the grounds of appeal in Section 112 of the *Act*.

22. The Director's delegate noted in the Determination that section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee was dismissed for just cause.
23. The delegate correctly identified that the burden of proof in demonstrating just cause for termination is on the employer, and referred to the elements set out in the four-part test that the Tribunal has applied in cases of unsatisfactory performance.
24. In cases involving a determination as to whether an employee was dismissed for just cause, where there is no misconduct and no fundamental breach of the employment relationship, the employer must be able to satisfy the following four part test (see: *Silverline Security Locksmith Ltd.*, BC EST #D207/96):
 1. Reasonable standards of performance were established and communicated to the employee;
 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 3. The employee was adequately warned that his or her employment was in jeopardy by continuing to fail to meet the standard; and
 4. The employee failed to meet the standard.
25. In the present case, the delegate for the Director found that Isfeld Ford Sales Ltd. had demonstrated that reasonable standards of performance were set and communicated to Brian Burke and that Mr. Burke was advised that if those standards were not met, his employment would be terminated. The delegate reviewed the history of warnings concerning unsatisfactory performance which were given to Mr. Burke. He noted that in June 2004, when Mr. Burke returned after being absent from the workplace, the concerns regarding his performance were reviewed with him, and he was placed on probation. Mr. Burke was clearly advised at that time that if there was any recurrence of the issues discussed, he would be immediately terminated. Mr. Burke's employment was subsequently terminated during the probation period because his performance had not improved, and he had not met the standard for performance.
26. In the Determination, the delegate for the Director considered the specific area of concern raised by Mr. Burke that the employer had not followed through with promises or threats, and his contention that this amounted to condonation of his conduct. The two decisions of the Tribunal which were submitted to the delegate by Mr. Burke were reviewed, and the delegate explained the reasons why he found that the situations involved in those cases were different than the circumstances of Mr. Burke's case.
27. The delegate for the Director concluded that the employer's conduct did not amount to condonation and Mr. Burke was not entitled to compensation for length of service. I find that this conclusion was supportable on the evidence before the delegate. Mr. Burke has repeated in his appeal the same arguments he made at the hearing before the delegate concerning condonation.
28. Mr. Burke raised another argument on appeal similar to that which he had raised at the hearing when he claimed that the employer had not offered training to support his performance. Mr. Burke pointed out

that in the Employment Standards Factsheet on Just Cause, in the paragraph on Unsatisfactory Performance, one of the bullet points made reference to “the employer’s reasonable efforts to assist”. He maintained that the employer had not met the criteria for dismissal due to unsatisfactory performance because he had never been offered assistance by the employer.

29. The delegate for the Director did not directly address this argument in the Determination, except to outline that Mr. Burke had claimed there was no offer of training to support his performance.
30. While efforts to assist an employee with performance issues may be considered in a determination regarding whether there was just cause to terminate an employee based on performance concerns, this factor does not form part of the four part test outlined in the *Silverline* case, Supra. Even if Mr. Burke’s assertion that he had not received assistance from the employer had been accepted by the delegate, it would therefore not have resulted in a conclusion that the employer had failed to meet the criteria required to establish that there was just cause for termination.
31. Mr. Burke disagrees with the Determination, but has not provided persuasive evidence that the conclusion reached by the delegate for the Director was unsupported by the material before him. As the Tribunal has stated on many occasions, an appeal is not an opportunity to re-argue a case.
32. The delegate’s decision was based on a consideration of the evidence presented by the parties, and an application of the test from the *Silverline* case, Supra.. I find that the delegate made reasoned findings of fact based on the evidence, applied the *Silverline* criteria appropriately, and did not err in law in the Determination.
33. I have not been shown that the delegate for the Director erred in law or a failed to observe principles of natural justice such that the Determination should be varied or a matter or matters referred back to the Director. The Determination is therefore confirmed.

ORDER

34. Pursuant to Section 115 of the *Act*, I order that the Determination of the delegate for the Director dated March 31, 2005 be confirmed. The Appellant is not entitled to compensation for length of service pursuant to Section 63(2)(b) of the *Act*.

Carol Ann Hart
Member
Employment Standards Tribunal