An appeal

- by -

Santokh Phangura

- 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: Yuki Matsuno

FILE No.: 2010A/118

DATE OF DECISION: November 15, 2010

DECISION

SUBMISSIONS

Santokh Phangura	on his own behalf
Martin Ellefson	on behalf of West Fraser Mills Ltd.
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW AND THE DETERMINATION

1. Santokh Phangura (the "Employee") appeals a Determination of the Director of Employment Standards issued July 27, 2010 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Determination was issued by a delegate of the Director of Employment Standards (the "Delegate") after an investigation of a complaint filed by the Employee under section 74 of the *Act* against West Fraser Mills Ltd. (the "Employer"). The Employee alleged in his complaint that the Employer failed to pay compensation for length of service after terminating his employment, and alleged that he had received inadequate warnings and inadequate training. The Employee had begun his employment with the Employer on December 9, 1975 and his employment was terminated on December 9, 2009.

2. In the Determination, the Delegate outlined the issues to be determined as follows: 1) did the Employer have just cause to terminate the employment of the Employee? 2) if the Employer did not have just cause, is the Employee entitled to compensation for length of service? 3) if the Employee is entitled to compensation for length of service, what is the quantum to which he is entitled?

3. The Delegate outlined the argument and evidence presented by the Employer, briefly summarized as follows: from the Employer's view, the Employee was terminated for just cause because of serious safety violations. The Employee began working on cleanup duty at a new sawmill built by the Employer in 2008, after having been trained on safety procedures. There were a few issues with respect to safety when he first started with this position and the Employer talked to the Employee about these issues and gave him training on safety protocol. On October 14, 2009, the Employee was observed working in a lock-out area that had not been locked out. Locking out an area involves locks being physically attached to equipment to ensure that air, hydraulics and electrical sources are disabled and the equipment cannot be activated. Locking out is essential to ensure employee safety. Areas that require locking out are identified by signs as being restricted areas. At the time of the incident, the Employee stated to his supervisor that he was in a restricted access area, but at a meeting on October 16, 2009, to review the incident he said he was not in the restricted access area. There was another meeting conducted on November 12, 2009, and after that meeting, the Employer suspended the Employee for 10 days for violating safety requirements and for lying about not being in the restricted area. The Employee was given a "last chance" warning and advised that a further infraction of the Employer's safety procedures would result in the termination of his employment. The details of the suspension and warning were outlined in writing in a letter sent to the Employee dated November 12, 2009.

4. The Employee returned to work from his suspension on November 26, 2009, and was retrained on the company's safety procedures. On December 7, 2009, the Employee was observed working in the merchandiser area, which the Employer stated is a restricted access area, clearly posted as such. The Employee was told to immediately leave the area and on December 9, 2009, he met with the Employer and was advised by the Employer that his employment was terminated. The Delegate noted the numerous

documents submitted by the Employer, including notes from meetings, the letter dated November 12, 2009, and documents outlining safe work procedures.

5. The Employee argued that the Employer did not have just cause to terminate his employment because he was not adequately trained in the safety procedures associated with his job duties. He said that he did not receive adequate warnings about the consequences of violating safety requirements. The Employee said with respect to the December 7 incident that there was no indication on the door that the area he was in was a restricted area. The Employee said that when he was called in to meet with the Employer on December 9 the Employer did not allow a third party to be present at the meeting, though a translator (whose Punjabi language abilities the Employee questioned) was present. The Employee was told at this meeting that he was fired and says he was fired without warning after 34 years of service. The Delegate outlined in the Determination the questions he put to the Employee, and notes in particular that the Employee, when asked about previous suspensions and warnings, only referred to one incident in July 2009 when he was told to "go home" and did not mention the suspension he was served in November 2009.

6. The Delegate went on in the Determination to make several findings "on the evidence and on the balance of probabilities". He found that the Employee's credibility was "impaired" by the fact that the Employee did not advert to the 10-day suspension in November 2009 when the Delegate asked him if he had been warned or suspended before. He found that the Employee was clearly advised verbally at the meeting on November 12, 2009, and in writing by way of the November 12 Letter that his continued employment was in jeopardy. The Delegate found that this warning was adequate. The Delegate found that the Employee had received safety training in the safety protocols established by the Employer. He found that at the December 9, 2009, meeting the Employer, having given repeated opportunities to the Employee to correct his behaviour, and having told the Employee that if he continued to fail to comply with safety procedures his employment would be terminated, decided to terminate the employment relationship. The Delegate found the Employee's arguments regarding inadequate training and warning to be of no merit, and found that the Employer had just cause to terminate the employment of the Employee.

7. The Employee appeals the Determination on the ground the Director failed to observe the principles of natural justice in making the Determination. In addition, the Employee's submissions also suggest that the Delegate on behalf of the Director erred in concluding that the Employee's employment was terminated for just cause. I rely on *Triple S. Transmission Inc.*, BC EST # D141/03, in adopting a large and liberal view of the Employer's grounds of appeal and consider that the Employee also appeals on the ground that the Director erred in law, although the Employee did not check off this ground of appeal on his appeal form.

8. I am able to decide this appeal on the basis of the written materials submitted before me, namely: the Employee's appeal form and submissions; the Director's submissions; the Employer's submissions; and the Record forwarded by the Director under section 112(5).

ISSUES

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

10. 2. Did the Director err in law?

ARGUMENT AND ANALYSIS

11. The onus rests with the appellant Employee to establish the grounds of the appeal. I will refer only to those portions of the submissions and Record that are relevant to the disposition of this appeal.

Natural Justice

12. The principles of natural justice refer to the procedural rights to which a party to a dispute is entitled, such as: the right to know the case against oneself; the right to have an opportunity to respond; the right to have the matter decided by an unbiased decision maker; and the right to be given reasons for the decision.

13. The Employee says in his appeal submissions that the Delegate's finding that he lacked credibility was "very unfair and one-sided." He says that his lack of English fluency; lack of preparation; the fact that he found the process confusing; the fact that that he is easily intimidated and is not demonstrative; all led him to "not contribute much" and to not "vigorously challenge the allegations made". He says the translator provided for him during the investigation was not of much help. The Employee says that he feels that the decision "had already been made in this matter", which I take to mean that the decision had been predetermined by the Delegate.

14. In response, in its submissions the Employer argues that the Delegate's findings with respect to the credibility of the parties were well-founded and appropriate; that the Employee did not take steps during the investigation to ameliorate the shortcomings which he now says he was experiencing during the process (e.g. the Employee did not ask for an adjournment to better prepare his case; the Employee did not complain about the usefulness of the interpreter). The Employer says that the Employee had a reasonable opportunity to make his case, and that there is no evidence of bias on the part of the Delegate.

15. In his submissions, the Delegate points out that the Employee was aware of the Employer's contention that it had just cause to terminate his employment; the Employee was aware of the documentary evidence the Employer had to support this position; and that while the Employer had the burden to prove there was just cause for dismissal, the Employee would have some responsibility to show why the Employer's actions were wrong. The Delegate further says that that reasonable efforts were made to ensure the Employee was able to present his case: he was advised that he could have an agent or representative assist him in presenting the case (he chose not to do so) and was advised to ensure that he showed why the Employer's decision to terminate his employment was wrong. In the Determination, the Delegate notes, "[b]ecause the Employee's first language is not English, a Punjabi-speaking employee of the Employment Standards Branch assisted in the investigation."

16. After considering the submissions, it is my view that the Employee was afforded natural justice in the course of this investigation. He was aware of the case put forward by the Employer; he had an opportunity to respond; he was given an opportunity to have an agent or representative assist him during the investigation; and a Punjabi-speaking employee of the Employment Standards Branch assisted in the investigation so that, presumably, any communication challenges because of language could be overcome. With respect to the Employee's allegation that the Delegate's findings about his credibility were "unfair and one-sided", my view is that on the contrary, the Delegate, as the finder of fact, made decisions regarding the credibility in a transparent manner and explained the reasons for his findings in the Determination. There is no indication that there was any bias on the part of the Delegate, nor is there any indication that the Delegate had made up his mind ahead of time about the Employee's complaint. I do not find that the Delegate's actions in any way offended the principles of natural justice.

Error of Law

17. The Employee says that the Delegate's finding that there was just cause to terminate his employment was wrong. This amounts to an allegation that the Delegate erred in law in finding the Employer had just cause

and therefore concluding that the Employee was not entitled to compensation for length of service under section 63 (1) of the *Act*.

18. The relevant portions of section 63 read as follows:

> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
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> (2) The employer's liability for compensation for length of service increases as follows:
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> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
>
> (i) one week's notice after 3 consecutive months of employment;
>
> (ii) 2 weeks' notice after 12 consecutive months of employment;
>
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
>
> (b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or
>
> (c) terminates the employment, retires from employment, or is dismissed for just cause.

19. The Tribunal uses the test outlined in *Britco Structures Ltd.*, BC EST # D260/03, to determine whether an error of law has been made. An error of law could result from:

1. a misinterpretation or misapplication of a section of the *Act*;
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 method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).

20. In this case, the question is whether the Delegate erred in law in finding that the Employer had just cause to terminate the employment of the Employee. The following passage from *Kenneth Kruger*, BC EST # D003/97, is of assistance when considering the issue of whether just cause has been proved:

> The tribunal has addressed the question of dismissal for just cause on many occasions. The following principles may be gleaned from those decisions:
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> 1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
> 2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

1. A reasonable standard of performance was 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 notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

21. The Employer had the burden of proving it had just cause to dismiss the Employee. This is not a case where a single act of misconduct was so egregious so as to justify dismissal without warning. Nor is it a case where there was any evidence that the employee was unable to meet the requirements of the job. Rather, this is a case that falls under the "minor misconduct" rubric of employment offences described in the passage from *Kruger*, above, even though there may be varying perspectives on whether breaches of safety procedures could be considered "minor". In any event, this was the analysis that the Delegate applied to the situation before him. The Delegate found that the Employer conveyed to the Employee the safety procedures that were to be followed at the mill; that the Employee made some errors in safety procedures and was spoken to about those issues; that the Employee on October 14 breached a safety protocol for which he was subsequently disciplined by a 10-shift suspension; that the Employee was told, verbally and in writing, that any subsequent breach of safety procedures would bring an end to his employment; that when the Employee returned to work after the suspension he was re-trained on safety protocols; and that when the Employee breached a safety protocol again on December 7 his employment was subsequently terminated on December 9, 2009. The Delegate found that the Employee's assertions that he was not adequately warned that his employment was at risk, and that he was not adequately trained, to be unfounded.

22. In my view, it cannot be said that the Delegate erred in making the findings contained in the Determination. There is no misapplication or misinterpretation of the *Act* or principle of general law; the Delegate properly applied the relevant provisions of the *Act* as well as the principles concerning the determination of just cause. Further, the Delegate's findings were based on the evidence before him and it cannot be said that he acted on a view of the facts that could not be reasonably entertained. The Delegate did not err in finding that the Employer had just cause to terminate the Employee's employment.

Disposition of the Appeal

23. The appeal fails on both grounds.

ORDER

24. Pursuant to Section 115 of the *Act*, I order that the Determination dated July 27, 2010, be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal