

An appeal

- by -

Douglas Dang

- 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: C.L. Roberts

FILE No.: 2005A/178

DATE OF DECISION: November 28, 2005

DECISION

SUBMISSIONS

Doug Dang	on his own behalf
Ken Maclean	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Doug Dang pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued September 1, 2005.
2. Mr. Dang worked for PTPC Corrugated Company operating as Crown Packaging ("Crown"), a packaging production business, from July 1, 2001 to October 2004. Mr. Dang filed a complaint alleging that he was owed overtime wages and compensation for length of service.
3. The Director's delegate held a hearing into Mr. Dang's complaint on February 25 and March 3, 2005. Mr. Dang appeared on his own behalf. Crown was represented by its counsel, Thora Sigurdson.
4. Following the hearing, the delegate determined that Mr. Dang was a manager, and was therefore excluded from the overtime provisions of Part 4 of the *Employment Standards Act*. The delegate also found that Mr. Dang's employment had been terminated for just cause, and that he was not therefore entitled to compensation for length of service. The delegate concluded that the Act had not been contravened and that no further wages were owed.
5. Mr. Dang contends that the delegate erred in law in finding that he was a manager and not entitled to compensation for length of service. He also contends that the delegate failed to observe the principles of natural justice in making the Determination.
6. Although Mr. Dang sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

7. Did the delegate err in law in concluding that Mr. Dang was a manager, and thus not entitled to overtime wages?
8. Did the delegate err in law in concluding that Mr. Dang's employment had been terminated for cause?
9. Did the delegate fail to observe the principles of natural justice

THE FACTS AND ARGUMENT

10. The relevant facts as found by the delegate are as follows.
11. Mr. Dang was employed by Crown as one of three Production Supervisors in the Finishing Products Department. His duties included the supervision of unionized production employees. The evidence was that the crew ranged from a minimum of eight employees to a maximum of 23. The production supervisor positions were excluded from the bargaining unit employees whom they supervised. Mr. Dang himself was supervised by three individuals, one of whom, Alan Smith, was called as a witness for Crown.
12. Mr. Dang contended that he was not a manager and had no authority. He gave evidence as to the nature and extent of his duties and responsibilities, and called four witnesses, two of whom were also production supervisors. Crown contended that Mr. Dang was a manager as that was defined in the *Act*, and called two witnesses, one of them being Mr. Smith, a production manager who had been promoted to production superintendent, the other being David Ainsley, formerly a production manager, now the technical manager. The evidence before the delegate may be summarized as follows:
13. Mr. Dang's evidence:
 - He could not order work shirts or business cards without authorization
 - He could not hire but could recommend individuals for hiring
 - He did not do employee evaluations
 - He was not involved in budgeting
 - He did not order materials used in the production process
 - There were other managers above him
 - He had authority to terminate employees for gross misconduct
 - He scheduled overtime work and signed off time cards
 - He was responsible for the hours of work of the crew and monitored lunch and coffee breaks
 - He was responsible for his crew's production
14. Crown's evidence:
 - Mr. Dang was fully responsible for his team and the machinery that his team was operating. This included providing leadership, recording attendance, ensuring sufficient levels of staffing, authorizing overtime, taking corrective measures, and providing discipline up to and including termination
 - Production quotas and production quality were Mr. Dang's responsibility.
 - Crew safety and training were Mr. Dang's responsibility
 - Mr. Dang was privy to management discussions regarding Crown's operation that were not to be shared with bargaining unit personnel

- Mr. Dang attended a management training course that covered the administration of the collective agreement, overall business issues, flow of materials and teamwork.

15. After hearing and considering all the evidence, the delegate found that Mr. Dang was a manager. The delegate reviewed the relevant provisions of the *Act*, including the definition of a manager, and Tribunal decisions on the issue. He determined that the true test of whether Mr. Dang was a manager was the actual authority he exercised rather than that which might be set out in his position description. He placed the burden of demonstrating that Mr. Dang was not a manager on Crown.

16. The delegate examined whether Mr. Dang's "principal employment responsibilities" consisted of "supervising or directing human or other resources". The delegate noted that, although the statutory definition of manager had changed in December 2001, he would have found Mr. Dang to be a manager under either definition. He determined that Mr. Dang had actual authority to independently manage all aspects of shift operation, supervising and directing the unionized team members, and had responsibility for the production machinery. He therefore concluded that Mr. Dang was a manager for the entire length of his employment. The delegate found that, by operation of section 34(1)(f) of the *Employment Standards Regulations*, Mr. Dang was not entitled to overtime.

17. Although Mr. Dang argues that the delegate erred in law in this conclusion, I had difficulty discerning his arguments in this regard. Mr. Dang's submission focuses largely on some evidence given at the hearing, much of which goes to the issue of whether his employment was terminated for just cause. The balance of the submission on this issue relate to his rate of pay and the rate of pay made by supervisors and managers and the fairness of his compensation package.

18. On the issue of whether Mr. Dang is entitled to compensation for length of service, the delegate heard the following evidence:

- Mr. Dang was called into Crown's office on October 15, 2005 and his employment was terminated. As he had previously had three successful performance reviews, he was confused as to why he had been terminated for just cause.
- Mr. Dang acknowledged that he had his own management style, and contended that his team was one of Crown's best producers.
- Mr. Dang said he was a team player who performed to the best of his abilities.
- Mr. Dang's witnesses said that Mr. Dang did not perform bargaining unit work, that he was regarded as a supervisor, and that Mr. Dang and other production supervisors were expected to be available one half hour before their shifts.

19. Crown's evidence was as follows:

20. Mr. Smith:

- Mr. Dang's loyalties appeared to be divided, which presented an issue of trust.
- Mr. Dang did not always know what was going on with his shift
- Mr. Dang demonstrated a lack of attention to detail resulting in a \$20,000 loss of preprint production on one occasion. Mr. Dang was given a three day suspension for this incident.

- Mr. Dang's performance continued to decline

21. Mr. Ainsley:

- Mr. Dang was not performing adequately. Rather than supervising his crew, he was being a “good guy” to his team. He said that he spoke to Mr. Dang about these concerns at one point and was denied a merit increase. Mr. Dang responded with a March 31, 2003 letter to Mr. Ainsley, Mr. Smith and one other supervisor which addressed the areas of concern his supervisors had brought to his attention. Mr. Ainsley met with Mr. Dang about the letter since his views were radically different. Mr. Ainsley testified that Crown had concerns relating to start and stop times, inability to follow instructions, lack of awareness on the floor, lack of follow up and working on a letter when the corrugator was not operating correctly.
- Mr. Dang had been moved to the corrugator with a smaller crew as he had appeared to be overwhelmed by his previous work area, and to give him another chance.
- Mr. Dang had been warned on a number of occasions about his performance, and Mr. Dang did not respond to Crown's concerns.

22. The delegate placed the burden on Crown to show just cause existed for Mr. Dang's termination. He considered the principles outlined in Tribunal's decision in *Silverline Security Locksmith Ltd.* (BC EST #D207/96) and concluded that Crown had set reasonable standards, given Mr. Dang a reasonable period of time to meet such standards, and that Mr. Dang had not done so. It appears that Mr. Dang's position at the hearing was that he was not responsible for the problems cited in Crown's warning letters, and that the warnings were not justified. In order to assess whether they were justified, the delegate assessed the credibility of the witnesses and preferred the evidence of Crown's witnesses over those for Mr. Dang. The delegate ultimately agreed with Crown that Mr. Dang's performance had not improved in spite of the warnings, and that Crown had discharged its burden.

23. He concluded that Crown had not contravened section 63 of the Act.

24. As noted above, Mr. Dang's arguments on how the delegate erred in law on this issue are difficult to discern. However, he does contend that the delegate ignored certain evidence in his favour, and argues that he was not given any warnings or progressive discipline.

25. The delegate submitted the record before him. He argues that Mr. Dang's appeal is an attempt to have the Tribunal re-hear his case, and contends that the appeal should be dismissed.

ANALYSIS AND DECISION

26. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

27. The burden is on an appellant, in this case Mr. Dang, to provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate. All of the alleged errors of law must be set out in the appeal document at the outset.

Error of law

28. As noted above, Mr. Dang's appeal submissions do not say how the delegate erred in law. Rather, his submissions appear to re-argue the case that was heard by the delegate. Nevertheless, I have reviewed the decision and the record in an effort to assess whether the delegate erred in his conclusions.
29. In my view, the delegate applied the correct legal tests to the facts. He appropriately placed the burden on Crown to demonstrate both that Mr. Dang was excluded from the overtime provisions as well as that his employment was terminated for cause.
30. The delegate analyzed Mr. Dang's employment duties in light of the statutory definition of manager. I am unable to find any basis for concluding that the delegate erred in finding that Mr. Dang's principal employment responsibilities" consisted of "supervising or directing human or other resources", and having reviewed the record, I am unable to find any such error exists. In the absence of any evidence that it was, I find no basis to allow the appeal in this respect.
31. Although Mr. Dang also argues that the delegate erred in concluding that he had been terminated for cause, he does not say how he did so, other than re-state arguments he made before the delegate. While I find the delegate's analysis on this issue lacking in clarity, I have reviewed the record and am again unable to find that his conclusion is in error. The record shows that Mr. Dang was warned on many occasions about his performance. Mr. Dang's performance evaluations had many areas of his performance rated "unacceptable", and, with the "problem solving, decision making" criteria unacceptable in all three years. The record contains Mr. Dang's March 31, 2003 letter regarding his March 25th discussions with Mr. Ainsley on the issues of quality, production speed, discipline, shifts and overtime, an email dated April 2, 2003, regarding giving Mr. Dang a "second chance" and his failure to get a merit increase, a discussion on December 22, 2003 regarding his performance, the January 6, 2004 letter of three days disciplinary suspension which clearly advised Mr. Dang that his performance was unacceptable and warned him that his employment was in jeopardy, the March 18, 2004 "last chance warning" also indicating that any further issues would result in his dismissal for cause. Crown's termination letter of October 15, 2004 outlined six subsequent incidents after March 2004 that it said justified its action in terminating Mr. Dang's dismissal.
32. There being no persuasive or compelling evidence that the delegate's conclusion was in error, I dismiss the appeal on this ground.

Failure to observe the principles of natural justice

33. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias).

34. Mr. Dang argues that the delegate was “biased from the beginning of the hearing right up to his conclusions in the determination”.

35. An allegation of bias against a decision maker is serious and should not be made speculatively:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))

To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.) September 28, 1999)

36. Mr. Dang presents no evidence to support his allegation that the delegate was biased, and I find no merit to this ground of appeal.

37. The appeal is dismissed.

ORDER

38. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 1, 2005, be confirmed.

C.L. Roberts
Member
Employment Standards Tribunal