Employment Standards TRIBUNAL

An appeal

- by -

Arbutus Tree Service Ltd.
("Arbutus")

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2003A/101

DATE OF DECISION: June 9, 2003

DECISION

OVERVIEW

This is an appeal by Arbutus Tree Service Ltd. ("Arbutus"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 26, 2003.

Seth Mennie filed a complaint with the Director alleging that he was owed overtime wages and compensation for length of service. Following an investigation, the Director found that Arbutus contravened Section 63 of the *Act*, and Ordered that it pay $3,308.45 in wages and interest to the Director on Mr. Mennie's behalf. Arbutus alleges that the delegate failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions by Norm Oberson, a Director of Arbutus, Seth Mennie, and Ken McLean on behalf of the Director of Employment Standards.

ISSUE TO BE DECIDED

1. Whether the Director failed to observe the principles of justice in making the determination; and

2. Whether new evidence has become available that was not available at the time the Determination was being made that would have led the delegate to conclude that Mr. Mennie was terminated for cause and not owed overtime wages.

FACTS

Mr. Mennie worked as an arborist for Abutus, a tree care business, from April 1999 to January 23, 2002.

Overtime

Mr. Mennie provided the delegate with a calendar of his hours of work that he stated he recorded on a daily basis for 2000, 2001, and January 2002. Arbutus did not dispute that Mr. Mennie kept track of his own hours of work, and presented the total hours for payment on a monthly basis. Arbutus also acknowledged it paid Mr. Mennie for all the hours he recorded as having worked, and did not ask to see his calendar. Arbutus further acknowledged that it did not maintain its own records as required under section 28 of the Act.

Arbutus argued that Mr. Mennie claimed at least one half hour each day in addition to the time he worked, in addition to other time reporting discrepancies.

The delegate found Mr. Mennie's records to be the best evidence of hours he worked in the absence of any employer records and the fact that it paid Mr. Mennie each pay period without questioning his hours

of work. The delegate determined that Mr. Mennie worked overtime hours as recorded, and that he was entitled to overtime wages as required by s. 34 of the Act.

Compensation for length of service

Arbutus advised the delegate that Mr. Mennie was dismissed for just cause when he chose to leave the worksite on January 23, 2002. Mr. Oberson claimed that Mr. Mennie left with a truck and equipment when other employees wanted to continue to work, and that he had to pick up the truck at Mr. Mennie's home so that other employees could return to work. Mr. Oberson said that he suspended Mr. Mennie for thirty days, and that, when he requested medical information from him before he could return to work, that information was not provided.

Mr. Oberson also contended that he learned that Mr. Mennie quit work two days prior to January 23, 2002 without his knowledge and consent, yet claimed he had worked that day.

Mr. Oberson advised the delegate that Mr. Mennie had a history of failing to report to work, or not working, which interfered with the ability of other employees to perform their jobs. Mr. Oberson terminated Mr. Mennie's employment on March 10.

Mr. Mennie contended that the work crew unanimously decided to leave the worksite on January 23 due to weather conditions, and that he obtained Mr. Oberson's consent to do so. Mr. Mennie advised the delegate that, on February 5, 2002, Mr. Oberson told him that he was temporarily laid off, and on February 5, told him he received a thirty day suspension. On March 1, 2002, Mr. Oberson gave Mr. Mennie a letter indicating that his suspension was complete. Mr. Mennie alleged that, on March 10, Mr. Oberson told him that he was "letting him go until further notice", and accused him of making false statements.

The delegate reviewed a written statement from one of Mr. Mennie's co-workers who indicated that the crew unanimously decided not to finish work on January 23 because the road was too hazardous.

The delegate concluded that Arbutus had not established just cause to terminate Mr. Mennie's employment. She found no evidence of progressive discipline, communication of standards of performance or warnings that his performance was not satisfactory. She also found no evidence of time theft. The delegate concluded that Mr. Mennie was entitled to compensation for length of service.

ARGUMENT

Arbutus contended that the delegate failed to observe the principles of natural justice in making the determination. He argued that he was told that "all Mr. Mennie's evidence would be accepted at face value", and that "credibility was not an issue". He further submitted that the delegate advised him that she would not accept WCB evidence or other evidence "unless it was directly related to the issues of dismissal and time theft". Mr. Oberson argued that he had "evidence" that Mr. Mennie lied to WCB, ICBC, to him, and to Employment Standards, on many occasions

Mr.Oberson submitted that, on January 23, 2002, he informed three other employees that Mr. Mennie was being suspended for 30 days because he had "disrupted the work day" and caused "other workers to quit". Mr. Oberson stated that he terminated Mr. Mennie's employment "because he would not come back to work". Mr. Oberson suggests that Mr. Mennie fabricated the "layoff story", and that he has other employees that should be "called or subpoenaed as witnesses or statements taken to establish the truth".

Mr. Oberson made a number of other allegations against Mr. Mennie that are unrelated to his grounds of appeal and need not be addressed here.

Mr. Oberson attached a number of documents with his letter of appeal that include a WCB decision, letters between Mr. Mennie and Arbutus, and two copied pages of a diary and work record. Mr. Oberson does not indicate how these documents relate to his appeal, nor does he indicate what the new evidence consists of.

The delegate contended that Abutus had not disclosed any grounds in support of the appeal, and argued that the Determination should stand.

Mr. Mennie submitted that none of the information provided by Arbutus was new or relevant. He said that Mr. Oberson provided all the information to the delegate, and that it was scrutinized by her in arriving at her decision.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

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

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Nothing in Arbutus' submission relates to a denial of Mr. Oberson's right to know the case against him, his right to respond, or any other principle of natural justice. I infer from Mr. Oberson's submission that he is of the view that the delegate was closed minded about his evidence. He argues that she advised him that "credibility was not an issue", that she "would not accept WCB evidence or other evidence unless it was directly related to the issues of dismissal and time theft".

Mr. Oberson also claims that he has new evidence from an employee who could say that Mr. Mennie was suspended for 30 days, not laid off, and that Mr. Mennie "coached" the employee to lie to a WCB investigator.

Mr. Oberson says that the WCB material is relevant to Mr. Mennie's dismissal. He contends that, after Mr. Mennie's suspension was almost over, he requested that Mr. Mennie provide him with a doctor's note about his condition. He claims that Mr. Mennie did not did not show up for work or provide him with a doctor's note. He also says that Mr. Mennie did not return calls or reply to his letter until March 7. Mr. Oberson alleges that Mr. Mennie waited until March 7 to return to work because that was the day WCB denied his claim for wage loss. Mr. Oberson says that "At that point I decided I had had enough of Mr. Mennie and it was time for him to be let go".

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 is dismissed for just cause. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

To substantiate just cause for this first category, an employer must meet a four part test:

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.

(see: *Silverline,* BCEST #D207/96 and *Kruger* BC EST #D003/97*)*

The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

In *Stein*, the court said as follows:

> …if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard- of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally. …I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think…that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract…the disobedience must have the quality that it is "wilful": it does... connote a deliberate flouting of the essential contractual conditions. (at p. 183-184)

Mr. Oberson's submission does not support his contention that the delegate had a closed mind, or refused to consider evidence relevant to the issue of dismissal. Mr. Oberson's submission on this point is simply an attempt to re-argue the claim. Much of his appeal submission relates to issues regarding a WCB claim and Mr. Mennie's alleged misrepresentation. Even if the delegate denied Mr. Oberson the opportunity to present his case, his appeal documents do not disclose any information that would lead me to conclude that the determination was incorrect. In fact, Arbutus' submissions are inconsistent and conflicting. While

Mr. Oberson alleged that he had grounds to terminate Mr. Mennie's employment and that he applied progressive discipline, he also submitted that he had "had enough" of Mr. Mennie and decided to let him go. In a reply submission he alleges that Mr. Mennie was terminated because "he quit the company without giving notice".

There is no evidence either that Arbutus applied progressive discipline, or that Mr. Mennie's actions constituted misconduct justifying immediate dismissal. The delegate considered the evidence relevant to the four part test, and found that Arbutus did not meet it. I am unable to conclude that the delegate failed to observe the principles of natural justice.

Mr. Oberson also claims that he has new evidence.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. 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.

What Arbutus' new evidence is, is not made clear in the submission. However, Arbutus claims that a former employee is returning to Canada, and that his evidence ought to be considered. There is no indication what that evidence is, how it might be relevant to the issues in the Determination or why it could not have been obtained during the investigative process with due diligence. The burden is on the appellant to obtain that information and place it before the delegate in the first instance. This ground of appeal is not an opportunity to have the Tribunal seek new evidence that may or may not be helpful to a dissatisfied party.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated February 26, 2003 be confirmed in the amount of $3,308.45, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal