An appeal

\- by -

Earl Leer
("Leer")

\- 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:	Ib S. Petersen
FILE No.:	2003A/124
DATE OF DECISION:	July 10, 2003

DECISION

OVERVIEW

This is an appeal by Mr. Leer, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on December 10, 2002. The Determination concluded that Mr. Leer was terminated for cause by his employer, Canadian Natural Resources Inc. (the "Employer"). In the result, he was not owed compensation for length of service.

The Employer is in the oil and gas business. Mr. Leer's employment commenced on November 1, 1997. He was an operator at the rate of $26.75. He was terminated on November 6, 2001.

Based on his analysis of the facts and the legal principles, the Delegate accepted that the Employer had cause to terminate Mr. Leer. While the Employer's termination letter referred to performance concerns, the ground for termination was wilful disobedience and dishonesty. The Delegate found that Mr. Leer left the work place without permission on October 28, 2001, in fact, having been expressly denied time off on that day, and completed his time sheet for that days as if he had worked the entire day. The Delegate rejected Mr. Leer's claim that he had an agreement with his supervisor to take the time off (on October 28), and that he had some "banked" overtime and did not charge all time worked on October 31. He was of the view that his supervisor went back on his word. The Employer did not accept his explanation and terminated him. The Delegate also noted that Mr. Leer had been warned the previous year about his performance and, as well, specifically, about completing time cards properly. In short, the Delegate upheld the termination and dismissed Mr. Leer's claim for compensation for length of service.

FACTS AND ANALYSIS

The onus is on the Appellant, in this case, Mr. Leer, to satisfy me that the Delegate erred in her Determination.

Section 112 of the *Act* provides:

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

In a recent case, *J.C. Creations Ltd. o/a Heavenly bodies Sport*, BCEST #D132/03, the Tribunal made some observations that are pertinent to the instant case:

> "....Recent cases from the Supreme Court of Canada have confirmed that the standard of review for error of law is 'correctness'. (*Housen v. Nikolaisen*, [2002] S.C.J. No. 31; 2002 SCC 33; *Law Society of New Brunswick v. Ryan*, [2003] S.C.J. No. 17; 2003 SCC 20; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18. In those cases, the Court did not examine the standard of 'correctness' in the context of an alleged error relating to findings of

> facts. It is instructive to look at the decision of the B.C. Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No 2275 (C.A.). In that case, the Court of Appeal gave specific consideration to the elements of 'error of law', which I set out as follows:
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> (a) a misinterpretation or misapplication of a section of the Act;
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> (b) a misapplication of an applicable principle of general law;
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> (c) acting without any evidence;
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> (d) acting on a view of the facts which could not reasonably be entertained; and
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> (e) exercising discretion in a fashion that is wrong in principle.
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> Accordingly, there may be some instances when errors of fact may give rise to errors of law. However, an appeal to the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. The Tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on HBS to demonstrate that there are grounds for dismissing or varying the determination."

While Mr. Leer relies on Section 112(1)(b) and says that the Delegate failed to observe principles of natural justice, it is readily apparent that he generally disagrees with the Delegate's Determination and the factual findings. There is little, in my view, that supports an allegation that the Delegate contravened principles of natural justice. There are no particulars of such alleged violations. If principles of natural justice were somehow violated, it is certainly far from obvious. On the appeal form Mr. Leer stated that "the Director failed to deal with the letter of dismissal but dwelled on other subjects."

In his appeal, Mr. Leer reiterates that he had an agreement with his supervisor that he could take off part of October 28, 2001, and that the supervisor went back on his word. He says, on his appeal form, that documentation shows that he properly completed his time sheets.

The Employer's evidence, supported by witnesses, accepted by the Delegate, was that such "banking" of time was not permitted. Mr. Leer says that the company owed him overtime hours for work done on September 5, 2001. In his view, this was noted in a log book, a copy of the relevant page is attached to the appeal. There is, however, nothing on the face of that document to support an allegation that he worked a certain number of hours on September 5. The notation simply states "Earl showing Darren around North." Even if I were to consider this document, which appears not to have been produced to the Delegate, I do not find it to provide much assistance to Mr. Leer's case.

Moreover, a memo, dated July 10, 1998, from the Employer's foreman which, on a cursory reading, appears to suggest that "trading" of hours among employees was permitted, actually says that such "trades" require written approval from the employee's supervisor. That clearly did not happen here. In fact, according to the Determination, one of the employer's witnesses states that "Mr. Leer told himself and other operators that he was going to leave whether he got permission or not."

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). An employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)). The principles consistently applied by the Tribunal have been summarized as follows (*Kruger,* BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offenses 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 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 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."

There is no dispute that Mr. Leer's request for vacation time on October 28 had been refused. There is no dispute that Mr. Leer took off from work part of October 28, 2001, and that his time sheet indicates that he charged the company for the full shift for that day. There is also no dispute that he was warned earlier, specifically with respect to properly completing time sheets (December 5, 2000):

> "On November 25/00 .... You charged 5 hours overtime on your time sheet .... This overtime is totally manufactured and completely unacceptable .... In the future, I expect you to charge appropriately for actual justified hours of work only. Falsely charged overtime is in fact grounds for immediate termination."

Overall, from a plain reading of the Determination, and the material on file, it is apparent that the Delegate properly considered the merits of the dispute--namely whether there was cause for termination--the positions of the parties, the written evidence provided by them, including the dismissal letter, and interviewed witnesses. From my review of the file, the Delegate did not accept Mr. Leer's assertions--that he took time off with permission and that he was entitled to "bank" the overtime--based on his assessment of the evidence and the contradictory statements of the witnesses. There was, as noted earlier, evidence from one Employer witness to the effect that "Mr. Leer told himself [the witness] and other operators that he was going to leave whether he got permission or not." I do not see that there is any palpable or overriding error in those factual findings.

While Mr. Leer seeks to go behind the December 5, 2000 letter with respect to performance issues, in particular, I accept the Delegate's analysis, and her conclusion, that Mr. Leer was willfully absent from work and that he improperly completed his time sheet to show time worked which, in fact, was not worked. These are very serious matters. In the circumstances, I am not satisfied that the Delegate erred in his application of the relevant legal principles.

I would dismiss the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 10, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal