Employment Standards TRIBUNAL

An appeal

- by -

Michael Wickson
("Wickson" or "Employee")

- 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: Paul E. Love

FILE No.: 2003A/223

DATE OF DECISION: December 10, 2003

DECISION

SUBMISSIONS

Michael Wickson	on behalf of himself
Donald Jordan, Q.C.	on behalf of West Fraser Mills Ltd.
Berhane Semere	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by an employee, Michael Wickson ("Wickson" or the "Employee"), from a Determination dated July 11, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). Wickson was terminated from his position with West Fraser Mills Ltd. ("West Fraser" or "Employer") on March 21, 2003. While the Employer advanced a number of reasons for dismissal, the Delegate found just cause based on Wickson writing a message on a blackboard in the staff lunch room. The Delegate concluded that this message was a slur to other employees and management. The Delegate determined that Wickson had been given a written warning in the past indicating that he could face termination for "conduct which was a slur to the reputation of others". Wickson appealed the Determination on the basis that he was denied natural justice, particularly that the Delegate failed to issue summonses for witnesses who would have assisted him in a "defence of truth". Wickson further alleged that the Delegate erred in considering journal entries made by an Employer witness. The Employee challenged the finding of just cause for dismissal.

In my view the Delegate correctly refused to issue a summons because the employee failed to demonstrate that the evidence sought from the witness would advance a relevant issue. It was apparent that Wickson did not deny writing the statement on the blackboard. The Employer had warned him concerning conduct which was a "slur to others". In writing the message, Wickson violated a clear standard of conduct set by the Employer. He was aware that such conduct could result in dismissal. In my view, the Delegate did not err in finding that the Employer had just cause for Wickson's dismissal. Wickson's reference to journal entries, related to evidence on another cause for dismissal advanced by the Employer, which was not accepted by the Delegate, and is therefore irrelevant to the outcome of the appeal. Given that Wickson established no error in the Determination, I confirmed the Determination.

ISSUE:

1. Did the Delegate breach natural justice by failing to issue summonses for witnesses Mr. Wickson wished to have give evidence at a hearing?

2. Did the Delegate err in concluding that the Employer established just cause for the dismissal of Mr. Wickson?

3. Did the Delegate err in considering the journals?

FACTS

This appeal proceeds by way of written submissions filed by Wickson, the Employer, and the Delegate. The process before the Delegate was an oral hearing, with examination and cross-examination of witnesses. The Employer was represented by counsel, and Wickson was unrepresented. The Delegate issued a lengthy, detailed and reasoned Determination.

Michael Wickson was employed as a forklift operator with West Fraser in Quesnel. He had been employed with the Employer for almost fifteen years. His employment was terminated on March 21, 2003. On or about March 21, 2003 Wickson wrote the following message on a blackboard located in the lunchroom:

> Cost Reduction Ideas:
>
> (1) Eliminate 1/4 Levels of management
> (2) Cut payroll & vacation fraud (sic)

The Employer's termination letter to Wickson, dated March 24, 2003 was as follows:

> I am writing to confirm the advice given to you by Ray Mayer on Friday March 21, 2003 that your employment was terminated effective that date. The basis for the termination of your employment is your continued inability to work cooperatively in the plant, your obvious inability to show up for scheduled work, your disparaging and insolent comments directed at management written on the blackboard in the lunchroom and your insubordinate behaviour in refusing to produce your drivers licence when requested.

Wickson alleged, in his complaint to the Branch, that he was terminated

> Employee was terminated after 15 years of service over a personality dispute with supervisor. Employer is using long standing illness and little else in order to settle dispute. Employer repeatedly refused to provide company policies.

For the purposes of this appeal it is unnecessary to consider any of the Employer's allegations other than the allegation relating to the "blackboard message", as the Delegate did not substantiate any other grounds for dismissal.

The Delegate considered a warning letter written to Wickson on January 24, 2003, from Bob Lebeck. The letter reads as follows:

> I am writing to follow up your complaint of January 20, 2004, alleging that you have been "harassed" by your fellow employees.
>
> At the outset, let me state that the investigation into this matter was rendered significantly more difficult by your refusal to identify the sources for certain of your allegations. For example, portions of your complaint are based upon your reliance upon statements from "an employee at an adjoining facility" and from "another source" that Shane Parker had used verbally derogatory language related to you. This letter will put you on notice that we will no longer accept complaints in which you do not identify, by name, the persons whom you rely upon for making the allegations, which are the substance of your complaint. It is simply unfair of you to expect that we can take a complaint seriously in circumstances where you fail to provide the information necessary for us to do an appropriate investigation.

> In any event of the above, we have now completed our investigation and are satisfied that you were not harassed or verbally abused in a manner in which you claim. Indeed, we are satisfied that the contrary is true: that it was you who was engaged in the verbal harassment of a fellow employee using abusive and threatening language.
>
> Our company both condemns and prohibits any form of harassment at our workplace, including verbal harassment and derogatory comments of all kinds. In the matter at hand, not only were you abusive to your fellow employees, you used the process of our in-house investigation procedures to make unwarranted slurs against others. For example, you seriously called into question the conduct and motives of certain employees and accused them of not being truthful in retaliation for your refusal to tolerate their conduct and the conduct of the "wood-stealing friends and visiting families".
>
> We will not tolerate conduct which slurs the reputation of others, or causes any of our employees to feel threatened. You are now on notice that any further incidents of the kind which occurred may result in the termination of your employment.
>
> In light of our concerns regarding your inability to get along with your fellow workers and to work cooperatively and courteously in our workplace, we are prepared to assist you in dealing with any problems you have which may underline your behaviour. This includes referral to some form of anger management or other type of counseling. We urge you to take a good look at your conduct and give serious consideration to the concerns which we have raised.

This matter proceeded before the Delegate by way of an oral hearing on June 19, 2003. The Delegate issued a lengthy and well reasoned Determination. At page 12 of the Determination the Delegate found that the Employer established that the comments written by Mr. Wickson on a blackboard in a lunch room, amounted to just cause. In particular, the Delegate reasoned (at page 12):

> It is therefore my view that the question comes down to whether or not the message on the blackboard and the incident during the confrontation with the superintendent constitute just cause for immediate dismissal. The related question that needs to be addressed also is, if there is, as the Employer's counsel argued, a relationship between this incident (the message on the blackboard and related phenomena) and the prior disciplinary record.
>
> The Employer's counsel argued that not only had the Complainant conveyed unsubstantiated message regarding fraud on the blackboard, but that he also made insolent comments against Mr. Mayer when he confronted him about the message by saying you are "fucking pathetic" and "everybody hates you". He argued that the insolent comments in themselves are grounds for immediate dismissal. The Employer's counsel also stated that this incident (the message) should be viewed in light of the prior documented warning, dated January 24, 2003, in which it was concluded that the Complainant made "unwarranted slurs against others" and that he "seriously called into question the conduct and motives of certain employees". The letter warned the Complainant that the Employer "will not tolerate conduct which further slurs the reputation of others" and that he was "on notice that any further incidents of the kind ... may result in termination" of his employment (see Exhibit 1).
>
> While Mr. Mayer's testimony pertaining to the insolent comments that were said to have been made by the Complainant may have some validity to them (and the Complainant agreed that such comments, if made, would constitute just cause for dismissal), I am not convinced about the timing thereof. Mr. Mayer at first said he fired Mr. Wickson after those comments were made; later he contradicted himself by saying that the comments were made after the Complainant was fired. The latter testimony about the sequence of events nullifies the argument pertaining to the

> insolent comments as just cause for dismissal, as the firing preceded the comments. Therefore, in my view, the question in the final analysis, comes down to whether or not the message on the blackboard constitutes just cause for discharge.
>
> There is no question that the Complainant wrote the message on the blackboard. Although he alleged that he knew that "fraud" was going on, he did not report this to management or bring it to the attention of the Mill Committee for further investigation; he simply wrote the message on the blackboard. The Complainant's witness, Mr. Staats, who is also a member of the Mill Committee, testified that he was not aware about any fraud and the first time he heard about it was as a result of the message on the board. He said that he was " surprised (about the message on the board and thought that) anybody who wrote that would be in trouble ... I would have my cards on the table before I fire that out".
>
> Thus, not only the manner in which the message was conveyed, in my view, was ill-advised and irresponsible, but the fact that this unsubstantiated message was directed at employees of West Fraser (including management) is tantamount to a slur of the reputation of others, an act which Mr. Wickson was previously warned, if repeated, may result in termination of his employment.
>
> It is therefore my decision that there was just cause for dismissal.

The Employee's grounds of appeal, which are set out below in the Employee's argument, relate to the failure of the Delegate to issue summonses for a number of witnesses. The Delegate scheduled a hearing for June 19, 2003. Wickson sought an adjournment of the hearing, a change in venue, and summons for witnesses on or about June 10, 2003, some 9 days before the scheduled date of the hearing. The Delegate held a pre-hearing conference on June 16, 2003. During the pre-hearing telephone conference, Wickson advised the Delegate that he had not approached any of the witnesses to verify whether they would be available to testify. During the telephone conference call, the Employer agreed that the witnesses could testify by telephone. The Delegate denied the request for a summons, and advised Wickson that it was his responsibility to ask the witnesses to testify. The Employer agreed to permit the witnesses time off work to testify. Wickson called one of his proposed witnesses, and the company provided that witness with a private office, and his evidence was given by telephone.

As Wickson has not alleged any error by the Delegate in the refusal to grant the adjournment, I have not set out any of the facts related to the request for the adjournment and the change of venue, and its denial.

Employee's Argument:

Wickson says that the Delegate erred in law or failed to observe a principal of natural justice in failing to issue a summons or hear witnesses who would confirm a fraud had taken place. Wickson further says that the Director accepted evidence from the employer piecemeal, not whole journal, and Wickson claims that the journal was filled in after the fact.

The Employee says that he complied with the procedure for seeking a summons set out in the hearing factsheet attached to the notice of hearing. The Employee says that if the Delegate had issued the summons, and if the persons had testified, there would have been evidence before the Delegate bearing on the issue, of whether what he wrote on the blackboard was "true" or "false". It appears that it was the Employee's belief that such evidence would have been helpful to the Delegate, particularly where the Delegate concluded that the Employee had been insubordinate in making unsubstantiated claims. Wickson says that the Delegate erred in principle and in conclusion that wages are owed.

Employer's Argument:

The Employer argued, that the Delegate did not err in failing to issue summonses for witnesses. The Employer says that Wickson was not diligent in seeking the summons. The Employer argued that the Delegate directed a method so that any witness who wished to give evidence could be heard. The Employer argues that Wickson failed to take the necessary steps to make potential witnesses available under the procedure adopted by the Delegate. The Employer says that the evidence sought to be tendered by Wickson was not relevant. The Employer says that Wickson was discharged for just cause**.** The Employer argues that while truth may be a defence to the tort of slander, it is inapplicable in the matter at hand.

Delegate's Argument:

The Delegate argued that Wickson did not deny writing the message on the blackboard, and that he had been warned previously about "slurring the reputation of others". The Delegate argues that he did not err in finding just cause for dismissal. The Delegate argues that he provided an alternative method of ensuring that Wickson's evidence would be before him, and therefore he did not err in the refusal to compel attendance of witnesses.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employee, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(b) of the *Act* provides for an appeal on grounds that:

(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.

I will deal with the issues raised by Wickson below.

Issue #1: Failure to Issue a Summons for Witnesses:

The Employee checked off the boxes in the appeal form alleging that the director erred in law and failed to observe a principle of natural justice. In substance, the Employee alleges that he was not able to make his case on the issue of "truth as a defence" because he was not permitted to call witnesses. He alleges that the Delegate failed to issue a summons for witnesses. This is essentially a natural justice ground for appeal.

I note that the Employee made application for summons, an adjournment of the hearing, and a change of venue of the hearing, which was dated on May 9, 2003, but received by the Delegate on June 11, 2003. The hearing was set to proceed in Prince George on June 19, 2003. The Delegate held a pre-hearing conference with the parties on June 16, 2003

A description of the pre-hearing procedure before the Delegate entitled Employment Standards Hearing Factsheet was sent to each party along with the notice of hearing. The salient portion of that factsheet relating to the attendance of witnesses is set out below:

> **Witnesses**
>
> Witnesses may appear at hearings on behalf of an employer or a complainant.
>
> Any request to the Branch to issue a summons for a witness to testify must be submitted in writing before the hearing, and must:
>
> a) Set out the name and address of the witness.
> b) Provide a summary of the evidence the witness is expected to produce.
> c) Describe any documents that the witnesses must bring to the hearing.
>
> The party requesting a summons is responsible for any witness fees.

I note that Wickson sought summonses for witnesses who were also employees of the Employer. It appears that he did not ask any of the witnesses to testify before seeking the summons. It appears that he did not have a resume of a witness's evidence before seeking the summons. He appears to have believed that he had a justification for calling the witnesses, and that justification was set out in a written document dated May 9, 2003 and received by the Delegate on June 11, 2003. I find that the request was received by the Delegate on June 11, 2003, some 8 days before the hearing. I have no information before me indicating when the Delegate gave notice of the hearing to Wickson. The witnesses were sought by Wickson to prove that "... he was treated differently than the rest of his co-workers and that they had knowledge about payment of wages for hours not worked."

In refusing to issue a summons and in deciding to direct that the hearing proceed the Delegate reasoned that:

- the Complainant had the responsibility to advise the witnesses and seems to have failed to do so;
- there was no convincing argument from the Complainant as to the relevance of their testimonies, or how their testimonies would contribute to the manner at hand;
- the Employer bears the burden of proof when it is alleged that the termination of an employee is with just cause.

I note that before a summons is issued, a person issuing a summons ought to be satisfied that the person for whom the summons is sought can give material evidence, that is evidence which advances or touches on a matter in issue. In my view, there is no obligation on a person seeking a summons to show that he asked the person to come to a hearing, and the person refused to attend. This is placing too high a standard on the person seeking a summons. If the Employee had demonstrated some relevancy in the evidence to be called, it appears that the Delegate would have erred in his refusal to issue the summonses for two reasons:

(a) in failing to issue a summons on the basis of insufficient notice;

(b) in refusing to issue a summons because there was an alternative proposal of the Employer making available those persons who wished to give evidence;

In my view, there was adequate time for the issuance of a summons. There are no time limits set out in the hearing factsheet. There was no evidence before me, particularly a notice of hearing, which provides when Wickson received a notice of hearing. Generally a summons can be issued and served speedily.

One of the purposes for obtaining a subpoena is to ensure that a person attends, who may not wish to give evidence. The Delegate's approach of facilitating the giving of evidence by those persons who chose to give evidence was not an adequate method of providing a party with the opportunity to advance his or its case. The Delegate's method did not deal with the very real problem of witnesses who were reluctant to testify. In his submission of September 24, 2003, Wickson points out problems with reluctant witnesses.

I have, however reviewed the request made by Wickson for the summonses, and find that none of the proposed witnesses were being called to advance any relevant issue related to the termination. Counsel for the Employer at the pre-hearing conference identified correctly that none of the issues for which the Wickson sought the summons were:

> related to the reason for the termination of his employment; according to Ms. Vellins the precipitating factor for the dismissal was what Mr. Wickson wrote on the blackboard in the lunchroom and particularly the manner in which he portrayed this unsubstantiated message.

While the Delegate was not justified in refusing a summons because of timing issues, or alternative methods of facilitating the evidence of those employees who wished to give evidence, the summons should not have been issued because the evidence of the proposed witness was not relevant. The Delegate was correct in refusing to issue a summons on the basis that Wickson had not demonstrating the relevancy of the testimony, or how the testimony would contribute to a resolution of the matters in issue. I therefore dismiss the grounds of appeal related to the refusal to issue a summons.

Issue #2 Error of Law in finding Just Cause:

Wickson argues that he was not able to make his case based on a "defence of truth", and argues that this is an error of law. I accept the Employer's argument that the "defence of truth" while important in a libel case, is not important in this termination case. It is clear that Wickson was warned against making unsubstantiated allegations. The messages on the blackboard did not contain any substantiation for the allegation. Whether Wickson's message was "true or not", the manner of the message writing the message on a blackboard in the lunchroom, and the content of the message violated the standards set by the West Fraser for conduct in the workplace. The Employer had set certain limits on communication or conduct in the workplace. This standard was set in its warning of termination to Wickson:

> We will not tolerate conduct which slurs the reputation of others, or causes any of our employees to feel threatened. You are now on notice that any further incidents of the kind which occurred may result in the termination of your employment.

Wickson violated that standard of conduct. The conduct appears to have been wilful or deliberate. Wickson had a previous warning. In my view, the Employer did have just cause to terminate Wickson. I am not satisfied that the Delegate erred in finding that there was just cause for dismissal.

Issue #3: The Journal:

Wickson further alleges that the Delegate erred in accepting "evidence from the employer piecemeal, not whole journal". Wickson claims that the journal was filled in after the fact**.** It is uncertain what the Employee means by this comment. I note from a review of the Employer's submission it appears that at the hearing before the Delegate, the Employer advanced the refusal to produce a driver's licence by Wickson as grounds for dismissal. It appears that records related to the refusal were noted by an employer witness in a journal. The Employer noted that the Delegate had not found just cause based on a refusal to produce a driver's licence. The Employee's point appears to relate to a factual finding, unrelated to the Delegate's finding of just cause. I therefore decline to consider this ground further.

I note that an Employer is not required to pay compensation for length of service where an Employer establishes just cause for dismissal: section 63(3)(c) of the *Act*. The Delegate found correctly that the Employer had just cause for dismissal. I am not satisfied that Wickson has shown any error in the Determination. For all the above reasons, I dismiss the appeal of Wickson.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated July 11, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal