Citation: West Fraser Mills Ltd. (Re)
2024 BCEST 95

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

West Fraser Mills Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	Stephanie A. Vellins, legal counsel for West Fraser Mills Ltd. Jake Kislock, delegate of the Director of Employment Standards Cam Astleford, on his own behalf
FILE NUMBER:	2024/049
DATE OF DECISION:	October 18, 2024

DECISION

OVERVIEW

1. Under section 63 of the *Employment Standards Act* (*ESA*), employers have the right to terminate an employee without "just cause" provided they either pay compensation for length of service, or give the employee written notice of termination, or provide some combination of the two. The amount of compensation or written notice required is determined by the employee's period of consecutive service and is capped at 8 weeks' wages/notice. If the employer has "just cause" to terminate an employee, the employer is not required to pay any compensation or provide any written notice to the dismissed employee (see section 63(3)(c) of the *ESA*).

2. What constitutes "just cause" is not defined in the *ESA*. However, the concept of "just cause" (essentially, a repudiatory breach of the employment contract by the employee) is well understood in the common law, and these common law principles guide the Director of Employment Standards and the Employment Standards Tribunal in alleged "wrongful termination" cases.

3. In this appeal, the appellant, West Fraser Mills Ltd. ("employer"), maintains that it had just cause to dismiss an employee ("complainant"). Jake Kislock, the delegate of the Director of Employment Standards who issued the Determination, dated March 25, 2024, now under appeal ("delegate"), held that the employer did not have just cause. Accordingly, the delegate awarded the complainant the equivalent of four weeks' wages ($4,617.60) as section 63 compensation for length of service. The delegate also awarded the complainant 4% vacation pay on this latter amount ($184.70) and section 88 interest ($479.66) thus bringing the total award to $5,281.96.

4. In addition to the compensatory award issued in favour of the complainant, the delegate levied a single $500 monetary penalty (see section 98 of the *ESA*) against the employer based on its section 63 contravention. Thus, the employer's total liability under the Determination is $5,781.96. The full amount of the Determination (with no deductions for any statutory remittances otherwise required) was deposited into the Director of Employment Standards' trust account on April 3, 2024, and is being held in that account pending the outcome of this appeal.

5. In my view, the Determination must be cancelled and this matter returned to the Director of Employment Standards for the purposes of conducting a fresh investigation. My reasons for reaching that conclusion now follow.

THE EMPLOYER'S APPEAL

6. The employer says that the delegate erred in law in determining that it did not have just cause to dismiss the complainant (see section 112(1)(a) of the *ESA*). The employer also says that there was a breach of the principles of natural justice regarding the investigation and determination of the complaint (see section 112(1)(b) of the *ESA*).

7. I will address the employer's substantive arguments in greater detail, below. Briefly, and among other things, the employer says that the delegate did not apply the proper standard of proof, and otherwise failed to conduct a proper contextual analysis and assessment of the evidence, in

determining that there was no just cause for dismissal. With respect to the natural justice ground of appeal, the employer says that the delegate "fail[ed] to put the material evidence from the [complainant] to the Employer witnesses for their response and…fail[ed] to do conduct [*sic*] a credibility assessment, where much of the evidence in this case was in dispute."

8. The employer "requests an oral hearing at the Tribunal." The employer says that "procedural fairness requires cross-examination at an oral hearing in certain circumstances," and that a "cross-examination of the [complainant] is warranted" so that his evidence can be effectively challenged. By way of remedy, the employer seeks an order cancelling the Determination. Alternatively, and in the event the Tribunal refers this matter back to the Director of Employment Standards, the employer says that the Tribunal should direct that an oral hearing be held before a new delegate.

9. The employer does not challenge the delegate's calculation of the complainant's section 63 award, assuming that the complainant is entitled to compensation for length of service.

EVENTS PRECIPITATING THE COMPLAINANT'S DISMISSAL

10. The complainant was employed as a "lumber grader" at the employer's Chetwynd lumber mill from May 2018 to September 2022. He was employed by "Chetywnd Forest Industries" (CFI), a division within the employer's corporate structure. The complainant's hourly wage was $38.29 at the point of his dismissal.

11. The employer's complex covers an expansive area including a "planer" facility where the complainant worked, and a "lumber yard" area where cut lumber and other material was stored. The lumber yard supervisor stated that, for safety reasons, access to the lumber yard is restricted and that employees who do not regularly work in the yard, such as the complainant, must first obtain a permit to enter that area.

12. CFI employees are apparently offered the opportunity to purchase low-grade "junk" lumber that otherwise has little or no commercial value. The complainant said that he had made three such purchases prior to the purchase in question here. On July 20, 2022, the complainant says that he made an oral agreement to purchase approximately 2,000 board feet of "junk" lumber but, due to various circumstances, he did not remove the lumber at that time, and the lumber was still in the lumber yard as of the end of August 2022.

13. According to the employer, a supervisor noticed that some of the bundles that the complainant was intending to purchase contained high quality lumber and this, in turn, precipitated an investigation into the matter. The complainant admitted to restacking the bundles he had set aside for himself while on "company time." The employer says the complainant admitted to: (1) deceiving his foreman about having been given permission to go into the yard to set aside "junk" lumber (also known as "planer throw outs"), and failing to advise his employer that he was attending to personal matters when he was observed in the yard; (2) disobeying direct instructions not to go the yard; (3) taking and driving a forklift into the yard without permission, contrary to the employer's workplace policies; and (4) stacking his bundles with planer lather and banding. The employer concluded that the complainant had surreptitiously placed valuable lumber in the junk piles he was intending to purchase and, accordingly, terminated his employment.

14. The employer's one-page dismissal letter dated September 2, 2022, and signed by CFI's General Manager, stated that the complainant's employment was being terminated, effective immediately, "for cause." The reason for the dismissal was particularized as follows:

> You recently entered into a transaction with CFI to purchase discarded lumber to use as firewood. You had previously bundled this lumber for loading purposes. Upon the examination of the loads which you prepared, we observed that, on the inside of the loads, you had included marketable lumber which was clearly not discarded. The manner in which this lumber was bundled satisfies us that it was your intention to remove it from the mill site without approval or further payment to us. In addition, your behaviour leading up to your attempt to remove the lumber from the site was deceitful, insubordinate, and disrespectful.
>
> Having considered all of the relevant factors, including your length of service and your work discipline history, we have decided that these acts have permanently damaged our working relationship with you. As a result, we have concluded that there is no basis for an ongoing employment relationship based on mutual trust and respect.

THE DIRECTOR'S INVESTIGATION OF THE COMPLAINT

15. On October 15, 2022, the complainant filed a complaint asserting that he was "fired…and accused of attempting to steal product." In his complaint, he alleged that he did not attempt to steal any lumber, and that the employer had "no proof only speculation."

16. It appears from the section 112(5) record in this matter that an Employment Standards Branch (ESB) officer first attempted to contact the complainant in mid-April 2023 (about 7 months after the complaint was filed), and the officer first spoke with the complainant, by telephone, on May 12, 2023. The ESB officer first spoke with the employer's general manager, also by telephone, on May 23, 2023.

17. In the months that followed, the ESB officer obtained the complainant's and employer's evidence with respect to the complainant's "wrongful dismissal" claim. In particular, the section 112(5) record shows that the officer had at least six substantive telephone conversations with the complainant, and further substantive telephone conversations with the employer's five witnesses. In addition, the employer submitted four witness statements (two separate statements from one witness) and a lengthy submission from its legal counsel.

18. On December 28, 2023, the ESB officer issued an Investigation Report ("Officer's Report") summarizing the parties' positions regarding the complainant's claim for section 63 compensation. It should be stressed that the officer did not make any findings of fact but, rather, simply summarized the parties' evidence (much of which was in conflict). Despite the obvious conflict in the parties' statements, the delegate did not make any relative credibility findings. Both parties were invited to respond to the Officer's Report; the employer provided a short response, and the complainant did not submit any substantive response to the report.

THE DETERMINATION AND THE DELEGATE'S REASONS

19. The delegate had access to all the evidence that was gathered by the officer charged with undertaking the investigation into the complaint, including the Officer's Report. The delegate did not conduct any further investigation into the matter. Rather, his Determination and his reasons were based solely on the information already in the ESB's files. Despite the parties' obviously conflicting

evidence, the delegate did not make any credibility findings and given the state of the evidence before him, it would have been challenging for him to have done so.

20. The delegate held that the employer failed to prove that it had just cause to terminate the complainant. That being the case, the delegate awarded the complainant the equivalent of four weeks' wages as section 63 compensation for length of service, together with concomitant vacation pay and section 88 interest.

21. The complainant's dismissal, as set out in the employer's September 2, 2022, termination letter, was principally predicated on the complainant's alleged dishonest conduct in relation to the purchase of "discarded" or "junk" lumber. The delegate, at page R16 of his reasons, noted that the lumber in question was never removed from the employer's premises. Thus, "the question is whether there was some attempted theft by the Complainant or some activities in advance of an intended theft that amounted to major misconduct." However, on the facts alleged by the employer – namely, that the complainant secreted within a stack of "rough wood" (that he was intending to purchase for $500) several boards of high-quality lumber valued at over $5,000 – the complainant's conduct would appear to constitute "theft" as defined in sections 322(1)(a) and (2) of the *Criminal Code*. In particular, section 322(2) states: "A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable."

22. The delegate, although acknowledging that the employer "provided significant witness testimony in relation to this investigation," nevertheless, stressed the fact that "none of the five witnesses stated that they saw the Complainant adding higher grade wood into his assigned pile as alleged." The delegate found that while the employer may have had just cause to discipline the complainant, it did not have just cause for dismissal (page R18):

> Counsel [for the employer] notes that the Complainant ignored instructions to not go into the yard, he spent three hours of his paid shift doing work in the yard for personal gain and he was not truthful with the [employer]. In analyzing these separate instances, I find that they were likely worthy of some response or discipline from the [employer], however, they do not appear inconsistent with the continuation of the employment contract or the proper discharge of the employee's duties. I find that these instances are not serious enough to have fundamentally breached the employment contract. I find that they all fall into the category of minor misconduct. Single incidents of minor misconduct are not grounds for a just cause termination.
>
> Ultimately, while the [employer] has provided evidence of a growing pile of wood in the lumberyard, the Complainant has disputed any involvement in this and there does not appear to be any direct evidence of who may have been responsible for this. I find it to be speculative on the part of the [employer] to assert that the Complainant was responsible for this. The image presented and evidence from the parties indicates that the lumberyard is a large area with a significant amount of lumber, that is accessible by numerous people. Based on the circumstantial evidence provided, I cannot find that the [employer] has made out an instance of major misconduct on behalf of the Complainant or that they have established just cause in this case.

23. In essence, the delegate held that although the employer may have had just cause to issue some disciplinary sanction, the employer did not have just cause for dismissal. The delegate never affirmatively determined that the complainant's alleged conduct, if proven, would have constituted

just cause for dismissal. Rather, the delegate seemingly rested his decision on a finding that the employer failed to prove the complainant committed an "attempted theft" because there was no "direct evidence," only circumstantial evidence, showing that the complainant intended to deprive the employer of its property. Further, it was "speculative" to conclude that the complainant had intended to deprive the employer of its property as was alleged (page R18).

24. Having concluded that there was no just cause for dismissal, the delegate awarded the complainant four weeks' wages as compensation for length of service together with vacation pay and interest. The employer has not challenged the delegate's calculation of the complainant's section 63 entitlement.

PROVING JUST CAUSE: THE GOVERNING LEGAL PRINCIPLES

25. Since the employer's appeal is predicated, in large measure, on assertions that the delegate failed to properly instruct himself regarding the applicable burden of proof and otherwise failed to conduct a proper "contextual analysis" of the evidence, I will first outline the relevant governing legal principles regarding these matters in a civil "wrongful dismissal" action.

Just Cause, the Burden of Proof, and the Requirement for a "Contextual Analysis"

26. In a "wrongful dismissal" action where just cause is alleged, the burden of proving just cause lies on the employer. Although the central allegation against the complainant was that he had committed a "theft" of the employer's property, it must be stressed that this is not a criminal matter where the Crown must prove the accused had both an intention to commit (the *mens rea*), and actually committed (the *actus reus*), the criminal act charged. The Crown must prove both elements "beyond a reasonable doubt" – a very high standard of proof. The Supreme Court of Canada has stated that proof "beyond a reasonable doubt" must not be equated with proof to an absolute certainly, but the standard does require evidence of the accused's guilt that goes well beyond the ordinary civil "balance of probabilities" standard (see, e.g., *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. Avetysan*, [2000] 2 S.C.R. 745).

27. As noted above, although the allegation against the complainant has criminal overtones, this proceeding is a *civil* proceeding where the governing standard is proof based on a balance of probabilities (sometimes called the "preponderance of evidence" standard). At one time, some decision-makers held the view that in a civil case involving allegations of "moral turpitude" or criminal or quasi-criminal behaviour, an intermediate standard of proof (commonly referred to as "clear and convincing evidence" or "clear and cogent evidence") should be applied. In *F.H. v. McDougall*, [2008] 3 S.C.R. 41, the Supreme Court of Canada unequivocally rejected that view, stating (at para. 40):

> I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

28. In a civil case, there is no presumption of innocence (*McDougall*, *supra* at para 42). The party bearing the civil burden of proof must simply prove "whether the evidence establishes that it is more likely than not that the event occurred" (*McDougall*, *supra* at para. 48; see also para. 49). In the context of

a wrongful dismissal case where just cause is alleged, the "event" that must be proved is the employee's improper conduct. However, proof that the conduct occurred is not, of itself, proof that the employer had "just cause" to dismiss the employee – the employer must *also* show that the conduct amounts to the employee's repudiation of the employment contract (see *Smith v. Pacific Coast Terminals Co. Ltd.*, 2017 BCCA 197). Thus, in some cases, the employer may have sufficient justification to sanction the employee, but not to summarily terminate the employee without providing notice or compensation (see *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at para. 52).

29. In determining whether the employee's misconduct is sufficiently serious to justify summary dismissal, the decision-maker must consider the context within which the misconduct occurred and, in particular, assess whether the employee's conduct violates an essential condition of the employment contract, or breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to their employer (see *McKinley*, *supra* at para. 48). Although the misconduct at issue in *McKinley* concerned an employee's alleged dishonesty, later decisions have confirmed that the *McKinley* framework applies to all forms of alleged misconduct (see, for example, *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (Ont. C.A.); *Henry v. Foxco Ltd.*, 2004 NBCA 22; *Payne v. Bank of Montreal*, 2013 FCA 33; and *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, application for leave to appeal to the Supreme Court of Canada dismissed: *Susan Steel v. Coast Capital Savings Credit Union*, 2015 CanLII 58373).

30. Whether an employer has "just cause" to summarily dismiss an employee is a question of mixed fact and law in the sense that the decision-maker must apply a legal standard to a set of facts. On appeal, the original decision must not set aside a finding on a question of mixed fact and law unless it is tainted by a "palpable and overriding error" (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

THE EVIDENCE BEFORE THE DIRECTOR OF EMPLOYMENT STANDARDS

31. Having outlined the applicable legal principles, I now turn to the evidence that was before the delegate. At this juncture, it is important to stress that neither the ESB officer (who gathered and summarized the parties' evidence in a report), nor the delegate, made any specific findings of fact or undertook any analysis regarding the complainant's credibility, or that of any the employer's five witnesses. The delegate was in no better position than I am in terms of evaluating the parties' evidence as recorded in the Officer's Report.

32. I have prepared the following synopsis of the parties' evidence as it was chronicled in the section 112(5) record. This synopsis is based on the summaries of telephone calls made by the investigating officer to several individuals, as set out in the record, as well as the written statements from the employer's witnesses. The complainant does not appear to have provided a written statement beyond that set out in his original complaint.

The complainant's evidence

33. The complainant says he entered into an agreement in July 2022 to purchase lumber but that the agreement was never completed. The complainant says he had received permission from his foreman to organize lumber that he had agreed to purchase (2,000 board feet, about "3 to 4 trailer loads") for $500 and had "most of it prepped" when he was dismissed. He says that the employer

was aware that the lumber he intended to purchase included "good lumber." He says he never added "good lumber" to the bundles that he was purchasing, suggesting (even though he had no proof) that the "weekend crew" may have added good lumber to the piles of lumber he was intending to purchase.

34. With respect to the critical point regarding the presence of high value lumber in bundles of lumber the complainant was purchasing, the complainant's evidence (as recorded by the investigating officer) was follows:

> Q - Did you take the wood?
>
> A - I did not know it was there until the night that I made the bundle. Reason I didn't take it out is that was in the pile. Quantity and quality wasn't known so why would he take anything he found out? Everyone who knew that said they didn't know anything about it because they wanted to save their own butts. Bob [the mill superintendent] and Erin [his supervisor] both knew there was good wood in there but at last minute they feigned ignorance. Pat [the mill's general manager] didn't know at all and they were worried about their jobs so they changed their tune and left him to take all the blame. It's their word against his for everything. If their word is good enough to fire him then his word is good enough to get CLOSS. Everything was a hand shake agreement between me Erin and Bob.
>
> Q - you were a grader why didn't you take the good wood out?
>
> A - because it was in the pile that he agreed to purchase, Bob and Erin knew.
>
> Q - were you the only one that purchased pile of wood?
>
> A - no, other people also purchased. This is 3rd or 4th time he purchased lumber, this isn't a new thing. In previous bundles that he bought at least 10% was good wood. Which again is why he didn't think anything of it.

35. With respect to the employer's allegation that he had spent several hours preparing the bundles of wood that he intended to purchase, the complainant provided the following statement to the investigating officer:

> The size of the pile had not changed at all over the month. The only thing that changed from the 4 hours that I was there was that it changed from a disheveled mess to a neatly stacked pile. I wanted to avoid being pulled over by CVSE agent if I was transporting pile of lumber. I stacked it neatly in order of the mess that it was in. Also in the searching for wood there was no retrim or reentry for me to take, it was gone, it was already re-packaged. I would have had to reopen brand new piles of lumber…

36. Finally, with respect to the employer's allegation that the complainant did not have permission to enter the lumber yard to restack or rebundle the piles of wood he intended to purchase, the complaint's statement to the investigating officer was as follows:

> Q – Did Bob Lauder [the mill superintendent] give you permission to go out into yard?
>
> A – He never gave permission and never denied, always used vague permission. I was not allowed to use company equipment while I wasn't on the clock. Both Bob and Erin Dyer [the complainant's supervisor] knew that there was good graded lumber in the pile, but they were already there. They removed some of this good wood from his piles that he had agreed to purchase. For some reason the [employer] didn't want to sell that lumber, he

> doesn't know the reason but there wasn't enough lumber there even to build a shed with. I wasn't gaining anything, didn't have enough to resell it. My last year of employment I made 97K, I had nothing to gain from a $500 score. The reason they fired me is that they could replace him with a cheaper [employee]. They offer OT but they don't actually want anyone to work it. I was higher paid [employee] and was making 20K per year in extra OT pay. It was a bottom line cut. It was an easy way to get rid of higher paid [employee]. I have a labour lawyer waiting in Vancouver to take my case. I'm willing to not take them to court if [employer] pays me severance.

The employer's evidence

37. The employer submitted four written statements from three separate individuals. The superintendent of the planer facility stated that the complainant very angrily came to his office on August 25, 2022, complaining about not being able to load the lumber that he had arranged to purchase. When the complainant stated that he planned to load the lumber himself, the planer superintendent told the complainant that he was "to stay out of the yard, and under no circumstances is he to go out there." The complainant "then stormed out of the board room, I called him to come back in and he ignored me and left." On August 26, 2022, the planer superintendent stated that he received a call from the supervisor of the lumber yard asking him to come to the yard area. The statement continues:

> When I arrived I was surprised to see 4-5 bundles in the row that were not there the day before. These bundles were neatly stacked using planer lathe and banding. This new lumber included 2x6 & 2x10 with #2 & Hiline in it. I let [the general manager] know we were starting an investigation. [The complainant's supervisor] and I immediately started investigating who moved this lumber into this row. We talked to the day shift forklift drivers, none of them knew how it got there. I then phoned [the planer supervisor] to ask if he had any knowledge of anyone going out to stack lumber in the re-trim yard [who] said "Yes, Cameron [the complainant] said there were some spilled bundles that you asked him to get re-piled".

38. Sometime later, also on August 26, 2022, the planer superintendent (and the complainant's foreman) met with the complainant where the following transpired according to the former individual):

> I asked [the complainant] if he had re-stacked lumber for himself on company time, he admitted that he did. [The planer supervisor] looked shocked and said he had no idea [the complainant] was going out to pile personal lumber. I then said [to the complainant] "I told you not to go out into the yard, what were you doing out there." He had no reply. I pressed him on how those bundles got there and he admitted to stacking them with the planer lathe and banding. I then told him to go home pending an investigation for deceiving his foreman and disobeying my direction to stay out of the yard and that I'd call him on Monday…I phoned him Monday and told him to stay home because we were still investigating. On Tuesday August 30, 2022 I phoned [the complainant] to have him come in to meet with [the general manager], Donna (Employee Rep) and I to discuss the situation. During that conversation he admitted to deceiving his foreman (Steve) and to disobeying me and that he had taken the small Toyota sawmill forklift out there.

39. The planer superintendent also provided a second written statement (undated) which reads as follows:

> In August of 2022, we were cleaning up the lumber yard and I had decided that there were numerous loose boards and planer throw outs that were considerably aged and were not going to be used for packaged bundles or re-entered to the mill. After discussions with [the general manager], I was able to put together some piles and small lifts of non-marketable lumber. There were at least 6 lifts that were made available to all CFI employees. I would be contacted by someone, and they were able to be toured to the back end of the Lumberyard and shown what was for sale. I even toured [the general manager] as he was interested in some for firewood. This part of the yard was toured 2 or 3 times daily, I knew what was available to sell. Four lifts of lumber had already been sold. In dealings with [the complainant], he had wanted a pile and he had decided which one he was going to purchase. After a few days of trying to schedule a time to pick up his lumber. I had noticed that the size of the pile and quality of wood that was now in his pile was unacceptable. It was obvious that good 2+btr and Hi line boards had been added to this pile and not by me, the lumberyard supervisor or chargehand. After further investigation it was deemed that wood had been added and by [the complainant].

40. The planer supervisor (the complainant's direct supervisor) provided a statement, dated August 26, 2022, the key elements of which are reproduced, below:

> Last night during shift [the complainant] asked me if he could head out to the lumber yard once things were good after lunch…He said that he had talked to [the superintendent] and [the lumber yard supervisor], and they had said it was ok for him to go out to re-pile and fix some bundles that were messed up…I asked him to be back in about an hour, which he said was fine. [The complainant] went out around 8:30 PM and did not make it back until 10:40 pm…He then went for his break and spent his last 50 minutes out there as well. The only reason he was allowed out there was because he said that he had talked to [the lumber yard supervisor] and [the superintendent], and they had given him permission. I found out the next day that this was not true. I had given [the complainant] the benefit of the doubt and he had lied to me. He had never received permission, in fact just the opposite. He was told that he was not to go out to the lumber yard and to just wait until the guys had a chance to take care of it.

41. CFI's lumber yard supervisor provided a written statement (undated), the key portions of which are reproduced, below:

> On or about the end of July or beginning of August [the complainant] approached me about the availability of what he called Planer throw outs. I explained to [the complainant] that the only wood we had available was very old waste wood that could not be brought back into the Planer. There was one short row of it left after the clean up of the old retrim yard. The price I quoted [to the complainant] was $500 for the row…[the complainant] asked if he could go out and look at the wood and I told him at that time that the only way he can go out there is if I drive him…I told [the complainant] that I would find him when I had a spare moment. Prior to [the complainant's] afternoon shift the next week I found him and took him out to look at the wood. He asked when he could load it up and I told him that would totally depend on rail car loading and forklift availability. [The complainant] over the next days started asking about loading the wood to either myself or [the superintendent] on a daily basis. [The complainant] then stated to [the superintendent] and I at one meeting that he would go out and load it himself to which [the superintendent] answered under no circumstances was he to enter the

> yard. It was also made clear at that meeting that we would contact him and that we were not interested in talking about this waste wood every day…Over the next two weeks other attempts were made by [the complainant] to talk to [the superintendent] or myself bout [*sic*] re-piling the lumber for ease of loading, and we continued to remind him that he was not permitted to go into the yard…On August 26th we also noted that there were 4 new bundles in the row some with new looking highline stacked under a bunch of grey waste wood. It was evident that [the complainant] had gone into the yard and spent a few hours hand piling bundles. At this time [the superintendent] was notified and [the superintendent] started an investigation.

42. In addition to obtaining written statements from the employer, the investigating ESB officer conducted six telephone interviews with witnesses on behalf of the employer.

43. The employer's general manager told the ESB officer that the employer sometimes sold "rough board" to its employees to be used as firewood. The complainant had "snuck out to get forklift [which he was not authorized to use] and got good wood and put in the middle of the pile [of boards]" that he was planning to purchase. The general manager said he cut the bands holding the wood pile in place "and found several pieces of good lumber stacked in the middle." The complainant "admitted to getting good wood and putting it in the pile." The complainant also "admitted to leaving [his] job in mill and piling lumber to take home". The general manager also advised the ESB officer that the complainant had a disciplinary history involving five prior incidents.

44. The investigating officer spoke with a forklift operator at the mill. This individual stated that the complainant had concocted a "grand scheme" whereby he "had stacked lumber himself and surrounded it with garbage wood to make it look like a garbage pile and then proceeded to wrap it himself and bring it to back." He stated that on the night in question the complainant was "moving wood that night but he kept coming in and out of yard with pick-up and small forklift [and] kept going to back yard and said he was stacking them." This witness said that this was unusual behaviour since the complainant did not work in the yard.

45. The officer spoke with the lumber yard supervisor who stated that the complainant "added lumber to pile [and] he did it during nightshift when he was working." He stated that the piles of lumber the complainant was intending to purchase had "grown in size" and this "was noticed by several people" including himself. Finally, the yard supervisor said that the complainant "took off the straps and added to them again" and "had means to go to pile and cut bands" although he "didn't see [the complainant] doing it but he did notice that the pile of lumber that [the complainant] had bought had increased in size."

46. The officer spoke with another yard supervisor who provided information regarding how employees who are not assigned to the yard area obtain permission to enter the yard. This yard supervisor stated:

> There was one row with 12 bundles in it, [the complainant] had sprayed his name on it to mark that he wanted to buy it. [The complainant] had said that [the planer supervisor] told him to tidy up the bundles in the row. The night after that happened there was more wood in the row…There was only one or two rows left and [the complainant] moved the bundles into one row that he wanted. He didn't have permission to do that. The wood that was in there was fresh, very high quality wood. Three half row bundles were worth $7500. You could see

> that the wood wasn't supposed to be in there from 50 ft away. Good lumber was in the piles that was from totally different area of the yard…[the complainant] was a planer so he would have had no business being in the yard. Unless there was down time.

47. Apart from the two written statements he provided, the planer superintendent was also interviewed. The superintendent provided the following information regarding the events that precipitated the complainant's dismissal:

> [The complainant] was taken out on a truck to look at lumber at end of August by Erin Dyer and his name would be put on a pile. As soon as [the employer] was able to arrange forklift to put wood into his vehicle they would do that… Cameron eventually selected 10 piles of wood and his name got put on the wood. Wood had been aged by the sun and twisted, it was old wood. Cameron picked out enough piles that he was bringing a semi-truck that the wood was going to be put on. During this time there were few days that Cameron wanted to bring the semi-trick to pick up the wood but [the employer] was too busy to load at that time…Cameron was getting upset that it was taking so long to get his wood. Eventually Cameron had a freak out, he texted Erin Dyer and accused him of doing it purposely…I went on tour with Erin at 8am and saw that piles of wood had increased in size and the grade of wood had changed dramatically. This was no longer the wood that Cameron had agreed to buy (junk wood) now his loads were full of premium boards. This was when lumber was really expensive. The lumber that he originally had was valued at $300 but once Bob saw the piles that Cameron had put his name on the wood in the piles was much more expensive, worth $6000 or more, quite a bit of difference.

48. The ESB officer also interviewed the complainant's direct supervisor who provided the following information about the events in question:

> [The complainant] worked in the planer so it was out of ordinary to go into lumber yard…His job was to look at lumber and grade lumber
>
> Q – as a grader is he supposed to stay in the building?
>
> A – yes
>
> Q – are there specific requirements involved to go outside the planer?
>
> A – yes, [employees] need a permit to go outside the planer … [that they obtain] from me, or any other supervisor.
>
> Q – So [the complainant] had told you that he had obtained permission to go outside the planer if he could be spared.
>
> A – yes.
>
> Q – Did he have a permit?
>
> A – no, but I did not ask for proof of permission from him
>
> Q – why not?
>
> A – because I assumed he was telling me the truth, he was a longer term [employee]. It is a safety thing, not a permission thing. [The complainant's foreman] filled the permit out for [the complainant] to be in the lumber yard.

> Q – So [the complainant] threatened to quit when [the employer] asked him questions about the wood piles and [the complainant] wasn't getting his way?
>
> A – yes
>
> Q – what wasn't he getting his way about?
>
> A – he did not have permission to go in the lumber yard. He was told not to go into the lumber yard but he told me that he was allowed.

Summary of the parties' evidence

49. The employer did not provide any direct eyewitness testimony showing that the complainant was observed placing high quality lumber in the bundles he had set aside to purchase. The employer's evidence in this regard is largely circumstantial.

50. However, several points are not in dispute. The complainant did not have authority to be in the yard area and misled his supervisors about that matter. The complainant spent a considerable amount of time in the yard attending to "his" piles. The piles of lumber the complainant had set aside to purchase increased in size over time, and these piles did contain some high-quality lumber. The complainant acknowledged that there was "good wood" in his wood piles, but he did not remove that lumber, nor did he draw that fact to the attention of his supervisors. He suggested, at different points, that the "weekend crew" must have added good lumber to his piles and/or that CFI's managerial personnel were fully aware that his bundles included high quality lumber. He also said that his previous purchases of discarded lumber included about "10%" high quality lumber so it did not concern him that there was high quality lumber in the bundles he was purchasing. The complainant also had a relatively poor disciplinary history with at least five incidents recorded in his approximate 4.5-year tenure.

THE RESPONDENTS' SUBMISSIONS AND THE EMPLOYER'S REPLY

51. The complainant filed a brief submission in which he simply stated that "everything that I can contribute to the case has been submitted already."

52. In his submission, the delegate maintained that he applied the proper burden of proof – the balance of probabilities – and that he appropriately applied a "contextual analysis" in finding that while there was proof of "minor misconduct," there was no proof of "major misconduct." With respect to any evidence that was not specifically referenced in his reasons, the delegate says that "while every piece of evidence may not have been referred to directly…it was considered as part of the findings and analysis."

53. With respect to the employer's argument that the delegate failed to conduct a proper analysis of the various witnesses' relative credibility, the delegate says that his reasons:

> …included a credibility assessment of both parties' evidence in reaching a finding. Page R16 and R17 contain an analysis of the witness testimony advanced by the [employer] and reasons for accepting or discounting it and page R18 contains an analysis regarding the [complainant's] evidence. This included an adverse finding against the [complainant] that

> some of his actions had amounted to minor misconduct. In light of this assessment, I submit that there was no breach of the principles of natural justice.

54. As noted above, the employer contends that statements made by the complainant regarding comments allegedly made to him by the employer's witnesses were never put to the employer's witnesses during the investigation. The employer says that this failure constituted a breach of natural justice. By way of response to this allegation, the delegate says:

> Counsel for the [employer] indicates some evidence was not disclosed to the [employer's] managerial witnesses for response. However, Counsel also indicates that the evidence in question was included in the investigation report. I would note that the investigation report was sent to the [employer] on December 28, 2023, and they were provided until January 11, 2024, to provide any response or further evidence at that time. I submit that this two-week period was ample time for the [employer] to provide any response to the included evidence.
>
> I would submit that the [employer] was or should have been aware of the [complainant's] evidence but chose not to address it. Considering evidence that was unchallenged was not, I submit, a breach of the principles of natural justice.

55. In her reply submission, counsel for the employer reiterated her position that although the delegate mentioned the "balance of probabilities" standard in his reasons, he did not actually apply the standard. Counsel asserts that the delegate failed to undertake any meaningful credibility assessment in the face of clearly conflicting evidence. Counsel says that the delegate inappropriately focused on the lack of "direct" evidence relating to the alleged theft, and failed to adequately weigh the circumstantial evidence relating to that matter. Further counsel says that the delegate failed to address several points in the evidence that credibly showed that the complainant placed high quality lumber in the piles that he intended to purchase. Finally, counsel reiterates her position that the ESB complaint process was fundamentally flawed because key evidence was not put to the employer's witnesses so that they could effectively respond to it.

ANALSYSIS AND FINDINGS

56. There are several issues to be addressed. I will first address the employer's request for an oral hearing.

The employer's request for an oral hearing

57. The Tribunal is an appeal body, not one that makes initial findings of fact. If I were to conduct an oral hearing at which the employer could cross-examine the complainant for the purposes of determining his credibility that would, in my view, undermine the dispute resolution process inherent in the *ESA*. Fundamental fairness dictates that if an oral hearing were held to permit the complainant to be cross-examined, the complainant would also have to be afforded an equal opportunity to cross-examine the employer's witnesses. In such circumstances, the Tribunal would, in effect, be conducting a *de novo* hearing. Under the *ESA*, the ESB is tasked with making findings of fact and applying the *ESA* to those facts. The Tribunal's function is to review the ESB's findings of fact to ensure they are properly grounded in the evidence, to determine if any legal errors were made by the ESB, to determine if the ESB decision-making process was fundamentally fair and, finally, to assess whether "new evidence" should be considered.

58. I consider that my task in this appeal is limited to reviewing the delegate's reasons, given the evidentiary record before him, to determine if he made any legal errors, and to otherwise determine if the complaint investigation and determination process at the ESB was tainted by a breach of the principles of natural justice.

The delegate's assessment of the evidence

59. As noted above, an ESB officer gathered evidence from the parties and then summarized this evidence in an Investigation Report dated December 28, 2023. Although there was a stark conflict in the evidence as between the employer's witnesses and the complainant, the delegate did not undertake any sort of assessment of their relative credibility. The delegate, in his reasons, largely reproduced the investigating officer's evidentiary summary, and he did not make any credibility assessment. As I read his reasons, the delegate particularly focussed on the following facts:

- "none of the five [employer] witnesses stated that they saw the Complainant adding higher grade wood into his assigned pile" (page R16);
- although the complainant committed "minor misconduct" that likely justified "some response or discipline", that misconduct did not justify the summary dismissal of the complainant for just cause (page R18); and
- "while the [employer] has provided evidence of a growing pile of wood in the lumberyard, the Complainant has disputed any involvement in this and there does not appear to be any direct evidence of who may have been responsible for this [and] I find it to be speculative on the part of the [employer] to assert that the Complainant was responsible for this" (page R18)

60. The delegate ultimately concluded: "Based on the circumstantial evidence provided, I cannot find that the [employer] has made out an instance of major misconduct on behalf of the Complainant or that they have established just cause in this case" (page R18).

61. In my view, the delegate erred in unduly emphasizing the lack of "direct evidence" that the complainant was responsible for placing high value lumber into the piles that he intended to purchase. Conclusions can be drawn in the absence of direct evidence. For example, if an accused thief (say, regarding a break-in and theft at a warehouse) was seen near the warehouse at the time of break-in, was found to be in possession of goods from the warehouse, and their fingerprints were found at the scene of the crime, one could reasonably conclude that the individual in question *probably* was the thief, even if no one actually saw the individual enter the warehouse and remove goods from it (indeed, in such a case, one might even conclude that there was proof of the *actus resus* beyond a reasonable doubt). In a civil case, the decision-maker must assess the inherent probabilities of the conflicting evidence.

62. The employer's evidence, if believed, showed the following:

- the complainant entered the lumber yard without express permission and in violation of a specific direction not to enter the yard without first obtaining permission;
- the lumber piles that the complainant had set aside for himself contained high value lumber (variously valued between $5,000 and $7,500) even though the intended purchase price was only $500;

- the complainant stacked the piles of lumber while on "company time" (that action being a form of wage theft);
- the complainant used a forklift on several occasions, that he was not authorized to use, to move the lumber in question;
- on the night in question, the complainant was observed to be "moving wood that night [and] kept coming in and out of the yard with a pick-up and a small forklift", and that as an "inside worker", it was unusual to see the complainant in the lumber yard (page R12);
- although employees are required to "sign out" a forklift when using one, the complainant did not do so on the night in question (page R14);
- the complainant falsely claimed he had express permission to be in the lumber yard;
- the original piles of lumber the complainant agreed to purchase significantly expanded over the course of several weeks;
- the complainant had spray-painted his name of the lumber piles he intended to purchase and the piles "were full of premium boards" (page R13);
- the complainant acknowledged that he had "re-stacked" the piles of lumber in question and admitted to "stacking the bundles with planer lather and banding" (page R9); and
- the lumber piles included high value lumber that had been inserted into the piles in such a manner as to make their presence in the pile less obvious.

63. Neither the original ESB officer, nor the delegate, turned their minds to whether this evidence, on a balance of probabilities, was credible. I am of the view that if the employer's evidence were believed it would show, on the balance of probabilities, that the complainant was responsible for placing high value lumber in the piles he intended to purchase. Further, I would also conclude that this behaviour justified the complainant's summary dismissal for cause.

64. The delegate seemingly accepted (although this is not clear), at page R18 of his reasons, that the complainant "ignored instructions not to go into the yard…spent three hours of his paid shift doing work in the yard for personal gain and he was not truthful with the [employer]" (page R18). However, the delegate then concluded that this behaviour constituted only "minor misconduct" that fell short of providing "just cause" for dismissal. For my part, I consider that being insubordinate, engaging in wage theft, and lying to one's employer to hardly be a "minor" matter. The delegate did not explain why he found, if he actually did find, these elements of the employer's evidence to be credible, but not the other evidence submitted by the employer. Further, in relation to this other evidence, the delegate never conducted an assessment of any kind with respect to its inherent credibility.

65. Insofar as the complainant's evidence is concerned, he maintained that any high value lumber found in his piles must have been placed there by the "weekend crew." Why any member of the weekend crew would do such a thing is wholly unexplained. For my part, I find this assertion to be inherently unlikely. The complainant also admitted that he knew there was high value lumber in the piles he had set aside, but that company officials were aware of that fact (and later denied such knowledge "to save their own butts"). The complainant never removed the high value lumber or specifically drew its presence to the attention of company officials.

66. If one combines the complainant's admissions with the evidence of "minor misconduct" that the delegate seemingly accepted as credible, one might conclude, on a balance of probabilities, that just cause for dismissal was proven. However, I am in no better position than the delegate to assess the inherent credibility of the totality of the evidence. This credibility assessment should have been undertaken by the investigating officer and the failure to do so, in my view, wholly compromised the integrity of the entire complaint investigation process.

67. In my view, while the delegate did refer, at various points in his reasons, to the balance of probabilities standard, he did not assess the evidence to determine whether, on the balance of probabilities, the employer's or the complainant's evidence was credible. Indeed, given that the investigating officer never made any credibility findings, the delegate was not in a position to do so, and neither am I. Only after the disputed facts were settled, would it possible to then consider whether just cause had been made out. I find that the delegate erred in law in his approach to the assessment of the evidence.

Natural justice

68. It follows from the foregoing analysis that I consider the original investigation to be flawed and incomplete. Both parties were entitled to a fair opportunity to challenge the evidence of the other and no such effort was ever made to allow that to occur. This is particularly problematic since the parties' respective statements were so obviously incompatible. Rather, the investigating officer simply gathered the parties' statements, provided no effective opportunity to allow each party's evidence to be challenged, and then uncritically summarized the parties' evidence in the Investigation Report. In my view, both parties were denied a fair opportunity to respond to each other's evidence.

ORDER

69. Pursuant to section 115(1)(a) of the *ESA*, the Determination is cancelled.

70. Pursuant to section 115(1(b) of the *ESA*, this matter is referred back to the Director of Employment Standards. Although the employer requested an order that any referral back order include a direction that the matter be referred to a new delegate, I will leave it to the Director of Employment Standards to make an appropriate assignment. The employer is, of course, entitled to make submissions to the Director with respect to whether it would be appropriate for the same delegate to hear and decide the matter and/or whether the matter should be the subject of an oral hearing.

71. Given that the Determination is now cancelled, it follows that the monies currently being held in the Director of Employment Standards' trust account, representing the employer's total liability under the cancelled Determination, should be returned to the employer.

/s/ Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal