

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Randy Shaw operating as Andreas Catering
(" Andreas ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE No: 1999/679

DATE OF HEARING: January 10, 2000

DATE OF DECISION: March 8, 2000

DECISION

APPEARANCES:

Randy Shaw	representing Andreas Catering
John “Wesley” Shaw	representing himself
Jason Lauscher	representing John “Wesley” Shaw
Myron Wallace	representing the Director

OVERVIEW

This is an appeal by Randy Shaw (“Randy”) operating as Andreas Catering (“Andreas”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination issued by the Director of Employment Standards on October 19, 1999. The Determination found Andreas had violated Section 63(2) of the *Act* and ordered Andreas to pay John “Wesley” Shaw (Wesley) \$533.07. A penalty of \$0.00 was also assessed.

Andreas claims there is an error in fact in the Determination. The Determination found Wesley was only guilty of one of the offences on the warning letter. Andreas claims Wesley was guilty of several offences, which were listed on the Record of Employment.

ISSUE TO BE DECIDED

Does Andreas owe Wesley any money as compensation for length of service?

FACTS

Wesley was employed as a driver/salesperson by Andreas from June 5, 1998 to September 2, 1999. Andreas Catering is a mobile catering company, which is owned by Randy Shaw who is Wesley’s father.

Wesley was terminated on September 2, 1999. His Record of Employment stated the reason for termination was:

- | | |
|--------------------------|------------------------|
| Constantly late for work | Not doing route |
| Would not follow orders | Cheating on time cards |
| Attitude | Sleeping on job |
| Cleanliness | |

Randy claims that Wesley did not follow orders. He would ignore direction from the manager, Kent; therefore Randy took over the position of manager.

Wesley argues Randy took over the position because the business was running poorly. He claims he would see Kent in the morning, however, as it was so busy they had no chance to talk. At the end of the day each employee arrived at a different time so he would not see Kent. When the business moved to Ladysmith on July 1, 1999 Wesley no longer returned the truck to the warehouse at the end of the shift therefore he did not see Kent. Wesley further states most of the business direction came from letters that Randy issued. The orders would often get confusing as Randy would at times give directives as the employer and at other times as a father, changing and mixing roles.

Randy claims on one occasion, he came to Wesley's house in the evening to do an inspection and found food that should have been refrigerated left in the truck. This food had to be disposed of. He claims he paid for a "Food Safe Course" for Wesley when he first hired him.

Wesley admits that food was left in his truck each night. It was "waste" and identified on his cash out sheet, which had to be witnessed and signed by another employee. On the night in question, he claims Randy had been drinking and came to his house about 10:00 pm, opened his truck and saw the food and blew up before he had a chance to explain it was waste. All items that were still good were put into cold storage in Nanaimo. Further, Randy was aware it was customary to leave food in the trucks in cold weather. Wesley did not return the truck to Ladysmith each night but waited until the following morning for emptying the garbage and re-stocking the supplies for that day. Wesley claims he did this to save fuel cost.

Randy stated Wesley's truck had to be cleaned by Kent on many occasions and on other times they would trade trucks with Wesley in order to get his truck cleaned. When he was terminated, his truck was a total disaster with maggots in the garbage container. This was to be emptied daily. Randy claims the cab of the truck was dirty, the area behind the seat had to be cleaned out and they had to throw away Wesley's pillow. The replacement for Wesley was hired the next day and nearly got ill trying to clean Wesley's truck. A letter from Kent indicated he had to assist the person in cleaning the truck.

Wesley admits he got behind in his cleaning duties as he was doing two routes, and he would ask Kent for help. Randy did not want to pay overtime and they were expected to clean the trucks on their own time at home. On the day he was terminated he had many calls, and was told to return the truck, cash out and leave without having an opportunity to empty the garbage. Wesley claims the interior area of the truck was clean and needed only minor work. He takes the position the truck may have sat for some time before being cleaned and that could be the cause of the maggots. He claims the pillow belonged to another employee who needed it as a boost to see over the steering wheel.

Randy complained about Wesley always wearing black clothes, which were covered in cat hair, not shaving regularly, and wearing a hat. Wesley admits to wearing dark colours because it did not show the food stains as badly. He tried to remove the cat hair but it was possible some would remain on his clothing. He also admits to wearing a hat but claims other employees wore hats

and dark coloured clothes and were not disciplined. Wesley admits there were times he would not be clean-shaven, as he would be growing facial hair but would shave the remainder of his face.

Randy claims Wesley consistently had dirty fingernails and hands and would be touching food. The food was handled when it was being divided up and loaded in the morning at the warehouse. Randy said soap and water was available on the trucks for the employees to wash their hands. Wesley admits touching food in the morning but claims his hands were clean at that time, they got dirty during the day and there was no way to clean them. The only water on the truck was too hot to wash with and no soap was provided. The trucks had paper towels and glass cleaner. Wesley also claims the customers were the only people who touched the food in the field. A napkin would be given to the customer and they would pick out their own food from the trays.

Randy claims Wesley was constantly late for work and filed letters from other employees supporting this position. Wesley admits being late on occasion and had evidence other employees were late without discipline. Wesley states this was not an issue until the trucks moved to Ladysmith. As a result of highway construction work, it was not always possible to be on time. Randy countered that he drove the same road without being late as he allowed for the construction delays.

Randy claims Wesley did not finish his routes. He was seen three days in a row hanging around a pet store between 12:30 and 1:00 pm, which made it impossible for Wesley to be in Cedar, his next scheduled stop. Randy states Wesley was ending his shift there and falsifying his time cards to show he finished at 3:30 pm. Wesley also put down his start time as 8:00 am regardless of when he actually started work. Randy believes Wesley had made arrangements to quit without warning and go to work at the pet store. This would make it impossible for Randy to hire and train a replacement. A letter from the former manager of the pet store submitted by Wesley denies any prior arrangement made to hire Wesley although the question of his going to work there had been discussed.

Wesley admits to stopping at the pet store claiming he had unscheduled time between refilling his propane tank and his next scheduled customer. Wesley filed two letters supporting his position that he was not at the pet store at the time claimed by Randy. The first letter indicates he was at their plant between 12:45 and 1:00 pm each day. The second letter, signed by seven employees, states he was at their location at 2:00 pm each day. He claims his last route finished at 3:00 pm giving him just 30 minutes to take his food to cold storage, cash out and clean and organize his truck.

Randy submitted a daily record of sales for the two routes to show a decline in sales over the one-month period. He also submitted the daily record sales for the same two routes when a different driver was doing it prior to Wesley. It shows a marked loss in sales during the time Wesley was doing the routes.

In response to the loss in sales, Wesley states a variety of reasons such as weather, paydays, and the return of children to school can result in a drop in sales. The person who Randy used to

compare the sales records was female and Wesley stated females had better sales records than males.

Randy claims a customer complained that Wesley's truck was not at their shop on time and Wesley was observed sleeping in the truck at the Hydro parking lot. Wesley did admit to sleeping during his lunch break when he was doing one route but denies he ever slept during working hours. He also claims there was no time to sleep when he was doing two routes.

A letter from Kent, the former manager, supports Randy's claim that Wesley did not follow orders, was constantly late, had a poor attitude, had dirty finger nails, did not keep his truck clean, including the work areas, and did not do a call if he did not feel like it. Calls came in asking where the truck was and then the customer would say Wesley was seen sleeping. There was also another letter from an employee of Andreas supporting Randy's action in terminating Wesley.

Wesley submitted several letters from former customers indicating they were satisfied with the level of service provided by him. A letter from the person who allegedly made the complaint to Andreas about Wesley sleeping denies he made the accusation.

Randy issued Wesley a warning letter dated February 26, 1999. It listed a number of rules and indicated if any of these rules were not followed exactly Wesley would be dismissed. That letter had a "sunset clause" which terminated it in 90 days, in this case, May 27, 1999. The reference in the letter to the termination in 90 days was crossed out in the material supplied to the delegate and to the Tribunal. Wesley said it was not crossed out when he signed the letter on February 26, 1999. Randy admits it was not crossed out when Wesley signed the letter.

Included in the appeal is a copy of a memo to all staff dated March 7, 1999. It sets out a very comprehensive set of new rules to be followed by the employees. It instructed the employees to log virtually every minute of their time during their shift. There was no room on the time card for such detail and no supplementary sheets were presented to explain how this was to be done. It also specifically indicated a change in routes for Kent and Wesley and the fact the operation would be moving to Ladysmith at some point in the future.

Randy claims he did not give notice of termination to Wesley as he had bad experiences with giving employees notice of layoff. He cited a case where an employee was given notice for illegally selling liquor from the truck and the employee went to all her customers, indicated she had been terminated and asking them not to buy from Andreas. Andreas lost a considerable amount of business from that action and the former employee is now in competition with Andreas.

The delegate pointed out in that case the employee was not given notice but was fired and Andreas successfully defended their action before the Branch.

Finally, Randy states, after being terminated, Wesley telephoned customers on his routes and attempted to convince them not to purchase food from Andreas. Wesley said he only telephoned

the customers to inform them there may not be a food truck at their location as he had been terminated.

The Determination found:

The only rule that the employee seems to have broken on the warning letter is the rule about cleanliness, no other rule as shown on that letter was contravened according to the R.O.E., and the employer stated that the employee broke all the rules at various times. If the undated (I believe it was dated February 26, 1999) warning letter of dismissal was to be the final warning as the letter indicates, then the employer should have terminated the employee when anyone (sic) of the rules were broken, but he chose not to do so, thereby making the written warning letter of dismissal, null and void.

Further, the Determination found:

There appears to be some internal conflict between father and son with the number of terminations and rehiring (sic) throughout the entire employee/employer relationship. Randy Shaw seems to use the words “you’re fired” as a form of discipline with his son. He then “rehires” shortly there after and writes the company policies to cover the situation.

At the time the Determination was issued the delegate was not aware the “sunset clause” had been crossed out after Wesley had signed the letter and therefore it had expired on May 27, 1999.

ANALYSIS

There were two warning letters issued to Wesley by Randy. The delegate did not find the first letter, which was undated, and we do not know its contents. The second letter dealt with a number of issues. It was headed:

Regarding warning letter of dismissal. Date February 26/99.

It further stated in part:

This is your last warning: I am now your boss again as Kent has been dismissed of his management authority as of February 26/99. These rules are to be followed exactly. If any of these rules are not followed you will be dismissed.

It ended by stating:

This is a formal warning and I require a signature on this form. It will be held for 90 days and then destroyed.

The copy that was supplied to the delegate and to the Tribunal had the portion regarding the 90 days crossed out. At the hearing, Randy agreed it had not been crossed out at the time Wesley

signed it. The letter expired on May 27, 1999 and could not be used at the time of Wesley's termination.

The Record of Employment completed by Randy lists seven reasons for terminating Wesley. According to Randy, the violations of the company policies continued and no action was taken until September 2, 1999 when Wesley was terminated for taking time off work to visit the pet store over a three-day period. It should be noted; Randy took no action on either the first or second day but waited until the third day to terminate Wesley. Randy believed Wesley was ending his day at the pet store and not finishing his routes. Further, he would falsify his time card to show he worked until 3:30 pm. Randy did not supply any evidence to prove Wesley did not complete his routes. The letters supplied by Wesley from the two customers that he visited early in the afternoon indicated he was completing his route and not staying at the pet store. Wesley stated he stopped at the pet store on the last day at 2:30 pm after fuelling his truck. He still had some local calls to make but Randy fired him on the spot. He claimed he did not falsify his time cards and in fact worked more hours than reported because Randy did not approve of overtime.

Wesley was not terminated for violation of any of the reasons in the warning letter of February 26, 1999, even if it had been in effect. He was terminated for allegedly not completing his routes and for falsifying his time cards, both of which were listed in the reason for terminating Wesley on the ROE.

The delegate, at the time of his investigation, was not aware the letter of February 26, 1999 was no longer in effect and therefore the Determination makes reference to the rules contained therein. The Determination erred in reference to the letter however the final ruling is correct.

The fact Wesley was the son of the owner might explain the reluctance to take disciplinary action, however other employees were guilty of similar offences without being disciplined.

Wesley was not a model employee and much of what Randy claims I believe did happen at one time or another. The repeated violation of one or all of the rules by Wesley could have been reason for dismissal. Randy admits he gave "Wesley too many chances because he was my son but not guilty of firing for just cause".

A practice, even an undesirable one, which is allowed to continue with the knowledge of management, becomes acceptable. In B.C.EST #D580/97, a reconsideration of D282/97, the Tribunal found:

"By allowing the employee to continually defy company policy, the employer undermined the seriousness of the conduct and demonstrated a lack of consistency".

There have been prior decisions of the Tribunal which support the position that an employer may have had the right to terminate an employee for cause but by failing to do so has waived that right.

Therein lies the problem for Randy. He had several opportunities to enforce his rules of conduct on all employees, including Wesley. We have; however, no evidence before us that indicates anyone was disciplined for violation of these rules.

Further, though I believe Andreas may have had the right to terminate Wesley for the violation of several offences, in this case he failed to do so in accordance with the *Act*. Had Randy supplied the delegate with both proper and correct information the Determination may have been different. For example, if Randy had provided information from the customers confirming Wesley was not visiting them on the afternoons when he was at the pet store it would prove his action was justified.

The onus is on the appellant to convince the Tribunal the Determination was wrong and I find Andreas has failed to do so.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination dated October 19, 1999. Interest was not addressed in the Determination therefore interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal