

An appeal

- by -

Bruce Lawson

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2003A/312

DATE OF DECISION: February 10, 2004

DECISION

SUBMISSIONS

Bruce Lawson: On his own behalf
Len Tennant: On behalf of Green Timbers.

OVERVIEW

This is an appeal by Bruce Lawson, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 8, 2003.

Mr. Lawson filed a complaint with the Director alleging that Gremallen Enterprises Limited operating as Green Timbers Pub ("Green Timbers") owed him regular wages, vacation pay and compensation for length of service. The delegate concluded that Green Timbers had terminated Mr. Lawson's employment for cause, and that the *Act* had not been contravened.

Mr. Lawson appealed the Determination. I concluded that the delegate had arrived at her decision without any analysis. I also concluded that she had erred in law, and I referred the matter back to the delegate. (*Lawson* BC EST #D269/03)

In a decision dated December 8, 2003, after setting out the principles underlying the law of dismissal for cause, the delegate concluded that Mr. Lawson's misconduct with respect to a football pool incident undermined an essential aspect of the employment relationship, and that his termination for cause was justified.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

ISSUES TO BE DECIDED

At issue is whether the delegate erred in law in concluding that Mr. Lawson's employment had been terminated for cause.

FACTS

On December 23, 2002, Mr. Lawson filed a complaint alleging that Green Timbers owed him regular wages, vacation pay and compensation pay for length of service, alleging that his employment had been terminated without just cause. The parties resolved the issues of wages and vacation pay, leaving at issue whether Mr. Lawson was entitled to compensation for length of service.

On the referral back, the delegate noted that the employer had the burden of establishing that Mr. Lawson had been dismissed for cause, and set out the test for determining whether the employer had established just cause. The reasons provided by Green Timbers were that Mr. Lawson failed to follow company policy regarding the handling of money, stole money from the charity meat raffle, and cheated on a football pool.

The delegate analyzed Green Timbers' evidence on those issues, and concluded that, with respect to the first issue, the employer had condoned Mr. Lawson's breach of company policy, and that it could not rely on this incident as grounds for dismissal. She further found that two other incidents of failing to follow company policy were insufficient to warrant termination for just cause.

Next, the delegate analyzed whether Mr. Lawson had stolen money from the charity meat raffle, and concluded that there was insufficient evidence to establish that he had.

Finally, the delegate analyzed whether Mr. Lawson cheated on the football pool, resulting in him winning money unfairly. Green Timbers alleged that Mr. Lawson did not follow normal procedure and cheated. The employer's evidence was that Mr. Lawson had changed his picks for the December 8th, 2002 pool. According to the delegate, Mr. Tennant testified that he had discovered only one sheet with Mr. Lawson's picks the following Sunday morning where there ought to have been two if he had changed his picks. Mr. Lawson denied cheating, indicating that he did not remove his first picks. Mr. Lawson's witness corroborated Mr. Lawson's evidence. The delegate stated that she had given some weight to the witness's evidence. The delegate then stated "I have reviewed the evidence and applied the relevant tests and have determined that on the balance of probabilities there was just cause to terminate the complainant." She went on to say that "This was a serious breach of company policy that would have resulted in the complainant winning a large amount of money if the breach had not been recognized."

She determined that Mr. Lawson's misconduct gave rise to grounds to terminate his employment for cause.

ARGUMENT

Mr. Lawson contends that the delegate continued to make errors of fact. He further argued that his conduct relating to the football pool did not justify summary dismissal without the requirement of a warning.

The alleged factual error in the delegate's determination relevant to the ultimate conclusion was that members of the pool could not remove their first picks for the pool. Mr. Lawson contends that the correct procedure was to submit a second sheet. Mr. Lawson submitted Green Timber Pub NFL Club and Pool Rules for 2001 in support of this position. Mr. Lawson stated that the rules did not change from year to year.

Mr. Lawson submitted statements from two of the pool members who confirmed Mr. Lawson's evidence. The first is from Mr. O'Flynn, who acknowledges that he has been Mr. Lawson's friend for some time. He states that Mr. Lawson administered the pool for four years, and did not win any money during that period. He further stated that he was at the pub on the day in question, and saw Mr. Lawson's picks. Mr. O'Flynn indicated that it would have been virtually impossible for Mr. Lawson to cheat, since there were a large number of variables yet to be determined at that time.

Mr. O'Flynn wrote that, while Mr. Tennant told the other pool members that there was no second pick sheet in the file, only Mr. Tennant had access to the file. Further, Mr. O'Flynn stated that Mr. Tennant was not familiar with the running of the football pool.

Mr. Lawson relied on the Tribunal's decision in *Hamilton & Spill Ltd. V. Salim Rehmtulla* (BC EST #D189/02)

Mr. Lawson contends that, given the length of his employment and his relationship with the owner, he ought to have been given an opportunity to discuss Mr. Tennant's concerns with him. Further, he contends that, had he thought his employment was in jeopardy, he would have returned the money he won in the pool.

Although Mr. Tennant agreed with the delegate's conclusion, he disagreed with some of her findings. He conceded that Mr. Lawson's borrowing of petty cash contrary to company policy did not constitute grounds for dismissal. He appears also to concede that he could not prove that Mr. Lawson stole meat raffle money. He does agree with the delegate's conclusion that Mr. Lawson cheated on the football pool. Mr. Tennant submits that the delegate did not take into account the pattern of conduct displayed by Mr. Lawson, which, in his opinion, supported his view that Mr. Lawson stole to support a growing gambling addiction.

ANALYSIS

Section 63 of the Act provides that an employer may be discharged from liability to pay length of service compensation where the employer is able to establish that the employee is dismissed for just cause. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

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

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

1. A reasonable standard of performance was established and communicated to the employee;
2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

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

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

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

The delegate concluded that Mr. Lawson's actions with respect to the football pool constituted a single act of misconduct justifying his dismissal without the requirement of a warning. I am unable to agree.

The evidence is that the football pool was managed by Mr. Lawson for the members of the pool. The only evidence referred to by the delegate regarding company policy with respect to football money was that prize winnings were to be paid by cheque from Green Timbers' account. Although Mr. Lawson apparently agreed that he kept pool money as cash and paid prize money out of his pocket, the delegate found there was insufficient evidence that Mr. Lawson kept any money for himself. The delegate concluded that "[t]his was a serious breach of company policy that would have resulted in the complainant winning a large amount of money if the breach had not been recognized." (my emphasis) It is not clear what policy was breached, or how. The employer's evidence was that Mr. Lawson had not followed "normal procedure". A procedure is distinct from a policy, and there is no indication in the delegate's decision what the "normal procedure" was or how Mr. Lawson had failed to follow it.

There is some evidence that Mr. Tennant was not familiar with the operation of the pool, or the ways picks were recorded. The delegate also states that she gave "some weight" to the evidence of a witness for Mr. Lawson who corroborated Mr. Lawson's evidence that he had not removed his first picks. There is no explanation for why the delegate gave more weight to Mr. Tennant's evidence than Mr. Lawson's corroborated evidence.

The evidence and submissions demonstrate that Mr. Tennant holds a strong belief that Mr. Lawson has a gambling addiction. The evidence also demonstrates that Mr. Tennant drew a conclusion that Mr. Lawson cheated and stole money without giving Mr. Lawson an opportunity to explain how his conclusion might be flawed. Mr. Tennant's conclusion must be substantiated by clear and compelling evidence.

In my review of the documents, I find no clear and convincing evidence that Mr. Lawson stole money from the football pool, or “rigged” the result. Furthermore, the record discloses no evidence from which the delegate could conclude that there was a fundamental breach of the employment relationship. There is no evidence of a policy with respect to the football pool, and no evidence that, if there was such a policy, how Mr. Lawson’s conduct constituted a significant breach of that policy.

In my view, Mr. Lawson showed bad judgement in participating in a pool that he was responsible for administering. However, the evidence is that Mr. Lawson worked for Green Timbers for over 5 years. During that time, Mr. Tennant developed a personal relationship with Mr. Lawson, and attended his wedding. Mr. Lawson had no prior written or verbal warnings about his conduct. At most, this incident gave rise to a minor instance of misconduct which warranted a warning and the establishment of performance standards that Mr. Lawson was expected to comply with. There is no evidence that was done.

Therefore, I allow the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated December 8, 2003 be varied to indicate Mr. Lawson is owed compensation for length of service. The amount of compensation is referred back to the delegate for calculation.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal