

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 -

Interior Pacific Litho Inc.
("Interior Pacific")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson
FILE NO.: 97/796
DATE OF HEARING: February 13, 1998
DATE OF DECISION: March 3, 1998

DECISION

APPEARANCES

for Interior Pacific:	Kim McKnight
for Robert Sischy:	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Interior Pacific Litho Inc. (“Interior Pacific”) of a Determination of a delegate of the Director of Employment Standards (the “Director”) dated October 10, 1997. In that Determination, the Director concluded Interior Pacific had contravened Section 63 of the *Act* and ordered Interior Pacific to cease contravening the *Act* and to pay an amount of \$5018.00 in respect of the termination of employment of Robert Sischy (“Sischy”).

Interior Pacific says their obligation to pay Sischy length of service compensation was discharged because Sischy had given just cause for termination.

ISSUE TO BE DECIDED

The issue is whether Interior Pacific has established it had just cause to terminate Sischy’s employment.

FACTS

Sischy was employed by Interior Pacific for a period commencing October 1, 1991 and ending November 15, 1997. Sischy’s employment was terminated without notice or compensation. Interior Pacific says they were not required to give either notice or compensation as Sischy had discharged them from that obligation by giving just cause for termination.

Interior Pacific provides a printing service in the Okanagan Valley. It owns a number of pieces of equipment that allow it to perform this service effectively and efficiently, including a Hell 380 Scanner, which, simply put, is a computer driven electronic scanning machine, which “reads” the colours of an original image and breaks them down into four “groups”, one for each of the three primary colours and one for black. The results can then be used to produce photographic negatives or prepare printing plates. The computer operates from a colour separation program containing an original set of “values” for each of the groups. As I understood the evidence, the program also includes colour correction

presettings that allow an operator to modify or correct the original settings. These modifications or corrections were referred to in the evidence as “setups”. Once a “setup” is done, it can be saved, either in the hard drive of the computer or on a “floppy disc”. When Sischy commenced his employment with Interior Pacific, he brought some setups with him, which he inputted onto the hard drive of the Hell 380 Scanner. As well, during his employment, he created and saved other setups on the scanner. All this information was placed on the hard drive of the scanner as well. Events relating to that information, and which occurred between November 8, 1996 and November 15, 1996, are central to the termination of Sischy and to this appeal.

In September, 1996, Sischy became aware Interior Pacific was being sold to another printing company. Sischy was offered, and declined, employment with the purchaser. He was told his employment would end December 31, 1996. In early November, he asked for a letter of recommendation, indicating he was actively seeking other employment. He perceived the “setups” to be his work and did not intend to leave them in the scanner. Sometime before November 8 he downloaded all the “setups”, including, it appears, the original colour correction presettings, onto a floppy disc. In other words, the information on the “setups” was no longer available by accessing the hard drive. Apparently, following the downloading, the only persons with the information were Sischy and another employee who was, at the time, the full time scanner operator and this information was available only on floppy disc. From the evidence given by Sischy, there was some understanding between he and the scanner operator to run the “setups” from floppy disc.

On November 8, Sischy and another employee were sent to a training seminar by the company. On November 9, a part time employee of Interior Pacific was called in to work on the Hell 380 Scanner. He had no access to the floppy discs and, because the “setups” had been removed from the hard drive, could not find the settings he required to perform the necessary work. Nor could he find any floppy discs. The work was not done.

On November 14, Sischy returned. He was confronted by Mr. Kim McKnight, the owner/manager of Interior Pacific, about whether he knew there was a problem with the Hell 380 Scanner. During the discussion, Sischy acknowledged he had removed the “setups”. Mr. McKnight asked him to return them. Sischy refused, indicating they belonged to him. When he was asked again and continued to refuse, he was told by Mr. McKnight to leave and to reconsider whether he would return the “setups”. Sischy came back the following day with the “setups” and, in a meeting of the staff, returned the “setups” to Mr. McKnight. A copy of the “setups” was made and the discs brought in by Sischy were returned to him. On the same day his termination was confirmed by Mr. McKnight.

As well as being an employee of Interior Pacific, Sischy was also a shareholder. He said in his evidence that he felt his position on the “setups” was supported by a provision in the Shareholder’s Agreement which prohibited Mr. McKnight, or any other shareholder, from communicating any “secrets” acquired in connection with the company.

ANALYSIS

The principles applied by the Tribunal where the issue is termination for “just cause” have been summarized in the following excerpt from *Kenneth Kruger*, BC EST #D003/97:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 1. A reasonable standard of performance was established and communicated to the employee;
 2. The employee was given a sufficient period of time to meet the required standard of performance and 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.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee; and
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

(at pages 3-4)

The burden in this case lies with Interior Pacific. They must persuade me the Determination was wrong when it concluded just cause to terminate Sischy had not been

established on the facts. Whether just cause exists is a matter of fact taking into account all the circumstances and relevant factors present in each case.

There is no issue that the termination was not related to a cumulation of incidents of minor misconduct nor to an inability on the part of Sischy to meet the requirements of his job. Interior Pacific says this is one of those cases where a single act of misconduct justifies the termination. That single act of misconduct relates to the events occurring between November 8 and November 15 and are characterized by Interior Pacific as “equipment sabotage” - a deliberate act intended to dismantle a major piece of equipment - compounded by the refusal by Sischy to return the setups to the scanner when asked to do so on November 14.

The first part of the analysis is to determine whether Interior Pacific have proven that the act of removing the “setups” is properly characterized as “sabotage” and that the refusal to return the “setups” constituted a further element of the misconduct and additional support for a conclusion that summary dismissal was an appropriate response. The reason for this requirement is that misconduct which can be identified as “sabotage” and “uncooperative behaviour” is, absent other relevant factors, sufficiently serious to justify summary dismissal. The second part is to determine whether that conduct, even if proven, justifies summary dismissal in all the circumstances. In this case, I do not need to proceed to the second part of the analysis as Interior Pacific has not established the conduct of Sischy can be characterized as “sabotage” and “uncooperative behaviour”.

The essential elements of “sabotage” are an intentional or wilful inflicting of damage on the property of the employer. Interior Pacific has not proven either damage to property or that Sischy, in removing the “setups” intended to inflict damage on the company. It is clear that his conduct was driven by a belief that he had a right to remove the “setups” he brought or created. The position of Interior Pacific was that the removal of the “setups” and some charts was surreptitious, and confirmed Sischy’s motivation was to inflict damage. In the appeal, Mr. McKnight, on behalf of Interior Pacific, asks:

As an employee of Interior Pacific Litho Inc. why did he come to the offices of Interior Pacific Litho Inc. on November 8th, 1996 after hours, to remove the setups and charts from the scanner without telling any one?

No evidence was presented that Sischy did what is suggested in that question and, in responding to it during his evidence, Sischy said the “setups” had been downloaded to floppy disc three weeks before November 8. He says the other scanner operator knew of it and had been performing the “setups” from floppy disc since the downloading.

Similarly, the refusal to re-install the “setups” cannot, in all the circumstances be viewed as an open defiance or resistance to the authority of the employer. It was an expression of Sischy’s belief and claim that the information on the floppy discs belonged to him. This conclusion is reinforced in the evidence of both Sischy and Mr. McKnight, which was that Sischy said the reason he refused to re-install the information was that he had brought

that information with him to Interior Pacific when he first came and believed it to be his personal property.

I want to be clear that I am not concluding there was no misconduct on the part of Sischy, only that Interior Pacific has not met its burden to show the misconduct was sufficiently serious to justify, as a single act, summary dismissal under the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated October 10, 1997 in the amount of \$5018.00 is confirmed. Interest will accrue on that amount in accordance with Section 88 of the *Act*, from the date of termination to the date of payment.

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David Stevenson
Adjudicator
Employment Standards Tribunal