

An appeal

- by -

Bodycraft Collision Ltd.
("Bodycraft")

- 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: C. L. Roberts

FILE No.: 2000/847

DATE OF HEARING: February 27, 2001

DATE OF DECISION: March 5, 2001

DECISION

APPEARANCES:

For Bodycraft:	L. Barbati
For the Director:	Written submissions only
On his own behalf:	C. Cochrane

OVERVIEW

This is an appeal by Bodycraft Collision Ltd. ("Bodycraft"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 21, 2000. The Director's delegate found that Bodycraft contravened Section 63(2) of the Act in terminating Craig Cochrane's ("Cochrane") employment, and Ordered that Bodycraft pay \$2,419.59 to the Director on Cochrane's behalf.

Bodycraft claims that Mr.Cochrane was terminated only after a serious act of insubordination, consisting of shouting profanity at Lawrence Barbati, the President of Bodycraft, for several minutes.

ISSUE TO BE DECIDED

Whether the Director correctly determined that Mr.Cochrane was dismissed without cause and is entitled to compensation for length of service.

FACTS

The material facts as found by the Director's delegate were not disputed.

Mr. Cochrane worked for Bodycraft as a technician from February 1996 to May 12, 2000.

On May 12, there was an incident between Mr. Barbati and Mr.Cochrane. Mr. Barbati assumed that Mr. Cochrane had slammed a car door, and told him that he had potentially damaged the vehicle. Mr. Cochrane stated that he had to use some effort to close the door because it was poorly aligned. At the hearing, Mr. Cochrane acknowledged that he had slammed the door.

Mr. Barbati became annoyed with Mr. Cochrane for doing so, and asked him to leave for the day.

Mr. Cochrane attempted to explain his actions to Mr. Barbati, and became angry because he felt Mr. Barbati was not listening to his explanation. Mr. Cochrane continued to argue with Mr. Barbati because he felt Mr. Barbati was being unreasonable. Mr. Cochrane agreed that he was angry and swore at Mr. Barbati in front of two other staff members. At the hearing, Mr. Cochrane acknowledged "verbally abusing" Mr. Barbati. Mr. Barbati's evidence, which Mr. Cochrane did not deny, was that the verbal abuse consisted of "you are a f.. asshole" as well "as lot of f... words, a lot of "assholes", and many "jerks"". It was sufficiently loud so that other employees heard it. Had any customers been in the shop, they would also have heard Mr. Cochrane's outburst. Mr. Barbati's evidence is that this abuse continued for 3 to 5 minutes without stopping, as he had no opportunity to say anything. Mr. Cochrane testified that the abuse lasted more like 2 minutes.

Mr. Barbati decided that Mr. Cochrane had "crossed the line" and told him to leave and "have a nice life, goodbye". Although he stated that he had no intention of firing Mr. Cochrane, and never used the words "you're fired", he felt that Mr. Cochrane's actions warranted dismissal.

Mr. Barbati told the Director's delegate that, if Mr. Cochrane had just gone home and cooled off when he was told to, Mr. Cochrane would still be employed. Mr. Barbati said that, after Mr. Cochrane's outburst, he had to fire him to retain the respect of the other staff.

The delegate spoke to the other two staff members who witnessed the incident. They both confirmed Mr. Barbati's evidence. Mr. Cochrane was not comfortable with the witness statements, and suggested to the delegate that they were agreeing with Mr. Barbati in order to preserve their employment. The delegate accepted Mr. Barbati's version of the incident.

There is no dispute that this was the first incident of its kind in Mr. Cochrane's employment history. Mr. Barbati testified that while Mr. Cochrane could be moody, he considered him a good employee and had recently put him through a training program at Bodycraft's expense.

The delegate reviewed the incident and considered other factors, including the length of service of the employee, the nature of the offence, whether provocation was involved, whether there had been any previous disciplinary offence, and the usual behaviour pattern of the employee.

The delegate found that Mr. Cochrane had 4 years of service without a pattern of insubordinate behaviour or disciplinary history. The delegate reviewed some arbitral decisions regarding the use of profanity in the workplace and contemptuous behaviour towards employers, and concluded that, while some discipline was warranted, dismissal was excessive punishment.

ARGUMENT

Mr. Barbati argues that Mr. Cochrane chose to terminate his own employment as a result of his continued swearing and verbal abuse after Mr. Barbati asked him to leave following the first

incident. He contends that it is necessary to have the respect of his staff in order to operate the business successfully, and that, if he was to tolerate this behaviour, "where do I draw the line?".

Mr. Cochrane argued that this was an isolated incident that got out of control, when all he wanted was an opportunity for Mr. Barbati to hear his side of the story. He contends that he was provoked into his behaviour, and that he was justified in attempting to defend himself.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

Whether an employer has just cause to dismiss an employee has been the subject of many Tribunal decisions. In each case, the Tribunal has held that the burden of proving that the conduct of the employee justifies dismissal is on the employer.

Most employment offences are minor instances of misconduct by the employee, which, on their own, are insufficient to justify dismissal.

In exceptional circumstances, a single act of misconduct may be sufficiently serious to justify a summary dismissal without the requirement of a warning. (see *Kruger* BCEST #D003/97, *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas* BCEST #D374/97)

Insolence or inubordinate conduct has been recognized as cause for dismissal, although a single act of insolent conduct does not usually justify termination. Isolated outbursts, unprovoked words and actions that are insolent and insubordinate may be cause for dismissal where that conduct is incompatible with the continuation of an employment relationship. (*Scott Doherty* BCEST #D098/00)

The question of whether insolence or insubordination constitutes cause is one of degree. An unwarranted and brutal verbal assault on an employee's supervisor was held to constitute conduct repudiating the employer/employee relationship in *Clare v. Moore Corp. Ltd.* (1989), 29 C.C.E.L. 41 (Ont. Dist. Ct.). Insubordination that involves the use of profanity, the refusal to carry out an order, and physical threats also fall within that category of conduct.

In *Vatri v. Delco Wire & Cable Ltd.* (1983), 19 A.C.W.S. (2d) 209 (Ont. Co.Ct.) the plaintiff was involved in a confrontation with the vice-president of the defendant company. The plaintiff became very angry and lost his temper in a dispute with the vice-president, which was brought about as a result of a mistake the plaintiff made. The plaintiff stormed out of the office and sped away, returning an hour later. The vice-president asked the plaintiff to come into his office to discuss the dispute in private. The plaintiff was defiant, and loudly refused, telling the vice-president that he did not have to obey company rules and procedures. He also used a "disgusting expression" about the vice-president, which was heard by several other employees. The judge

held that "this was...conduct that no employer who has any concern for running a well-disciplined company could possibly tolerate."

Mr. Cochrane contended that he was provoked. I find no basis for this argument. The most Mr. Barbati did was refuse, at that time, to listen to Mr. Cochrane's explanation for why he slammed the car door. Mr. Cochrane could have left when he was asked, and tried to approach Mr. Barbati the following day. There was no evidence Mr. Barbati would not have listened to him then.

I find that Mr. Cochrane's conduct was incompatible with the continuation of the employment relationship. Although Mr. Cochrane had never had prior difficulties with Mr. Barbati, and Mr. Cochrane had, to all accounts, been a satisfactory employee for many years, the verbal barrage Mr. Cochrane exhibited is not one Mr. Barbati, or any employer, should be expected to tolerate.

Mr. Cochrane's behaviour, after he was asked to go home, was completely lacking in respect and civility. Not only was Mr. Barbati personally subjected to a loud barrage of profanity, I find that his concern about operating a respectful and disciplined workplace was a legitimate one. I find that he was justified in terminating Mr. Cochrane's employment.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 21, 2000, be cancelled.

C. L. ROBERTS

C. L. Roberts
Adjudicator
Employment Standards Tribunal