

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Grouse Mountain Resorts Ltd.
("Grouse Mountain")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/264

DATE OF HEARING: June 12, 1996

DATE OF DECISION: July 4, 1996

DECISION

APPEARANCES

Andrea A. Rayment	on behalf of	Grouse Mountain Resorts Ltd.
John Caldwell		Bill Bissonnette
Donna Cummings		Director of Employment Standards

OVERVIEW

This is an appeal by Grouse Mountain Resorts Ltd. (“Grouse Mountain”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination CDET# 001718. The Determination was issued by a delegate of the Director of Employment Standards on March 25, 1996. Grouse Mountain’s appeal dated April 17, 1996 alleges that it terminated Bill Bissonnette’s employment for just cause and, therefore, has discharged any liability to pay compensation for length of service under Section 63 of the *Act*.

There are two main grounds for Grouse Mountain’s appeal:

- the Determination contains significant errors of fact; and
- the Determination erred in finding that there was not just cause for dismissing Bissonnette.

ISSUE TO BE DECIDED

The issue to be decided by the Tribunal is whether Grouse Mountain had just cause to terminate Bissonnette’s employment.

FACTS

Bissonnette was employed by Grouse Mountain as a Night Controller from September 7, 1988 to October 2, 1995. His responsibilities included janitorial and security duties. He possessed keys to all buildings at “base operations” and worked alone, without direct supervision, during most of his working hours. Bissonnette was scheduled to work from 10:00 p.m. to 8:00 a.m., four days/week.

The Determination sets out the following findings and reasons to establish a contravention of Section 63 of the *Act*:

1. Mr. Bissonnette's employment was terminated effective September 30, 1995 - no written notice or payment in lieu of notice was given by the employer to Mr. Bissonnette as required by the *Employment Standards Act*.
2. The complainant phoned in sick on September 25, 1995. He went to his doctor and was given a medical certificate indicating he would be off work 1-5 days due to acute gastroenteritis.
3. The employer called Mr. Bissonnette on September 26, 1995 to ascertain if he would be in to work. Mr. Bissonnette stated he was still sick and would not be in. A friend of Mr. Bissonnette's was present during this conversation and indicates Mr. Bissonnette told John Kummer he had been to the doctor and had a note saying he would be away due to his sickness approximately 4 days.
4. John Kummer of the employer called back approximately 15 minutes later advising Mr. Bissonnette he had an appointment with Louise Adams, Guest Services/Skyride Manager at 1:00 p.m. September 27, 1995. Mr. Bissonnette states he left Ms. Adams a message on her voice mail indicating he was too sick to attend the meeting.
5. The employee's personnel file contained the following documents:
 - a) November 18, 1994 warning - flagrant insubordination.
 - b) September 22, 1995 Bissonnette questioned about a situation involving the use of the company van.
 - c) September 26, 1995 the employee did not call in and was considered "no show".
 - d) No indication the employee had seen any of the comments on his file.
6. Bill Bissonnette had been on Workers Compensation between December 26, 1994 to July 2, 1995. Prior to September 30, 1995 the next notation on the file is November 18, 1994. The employer has not properly applied progressive discipline and has not demonstrated just cause for dismissal.

EVIDENCE

September 21, 1995 Van Incident

Louise Adams, Base Operations Manager at Grouse Mountain, gave evidence concerning the decision to terminate Bissonnette's employment. Her evidence was that she received a voice mail message from John Kummer (Bissonnette's supervisor) that Bissonnette had taken the keys to a company van from a drawer in Adam's office and had driven the van without permission. This was confirmed in an "Employee Action" (known as an EM-6) which was completed and signed by Kummer on September 21, 1995. The EM-6 contained the following:

I, John Kummer, advised Bill that company vehicles are off limits to them. He responded with "That's Bullshit." Few minutes later I saw Bill drive the van through the parking lot. Don't know where he got the keys.

Adams also gave evidence that she spoke to Bissonnette on September 22, 1995 to express her concern. She said that when she asked him where he got the keys for the van he did not answer directly at first but later he admitted he took the keys from Adams' desk. Adams stated that she told Bissonnette that she was "very upset" and that "... this was very bad... and a major fault." This conversation was recorded in an EM-6 which was completed and signed by Adams on September 22, 1995. Adams testified that she was very angry about the intrusion into her office and, as a result, lost confidence in Bissonnette's ability to be trusted with the keys to Base Operations buildings.

Adams gave evidence that Grouse Mountain changed its policy concerning the use of company vehicles a few days prior to the incident with Bissonnette. The new policy was communicated verbally to employees and vehicle keys were placed in a locked box in shipping and receiving. Under cross examination, Adams stated that after Bissonnette admitted taking the keys he agreed that he would not use the van again. When asked under cross examination if she told Bissonnette that he would be terminated for any future incidents, Adams stated that she told him that "... this was a major fault."

John Kummer (Base Operations Supervisor) gave evidence that the company van could be used by employees (other than the courier) with a supervisor's permission. Kummer's evidence was that when Bissonnette asked to use the company van on September 21, 1995 he told him that he was not allowed to use it due to company policy. Kummer also stated that Bissonnette was upset about this new policy, and soon after, he saw Bissonnette driving the van through the upper parking lot. Kummer testified that he confronted Bissonnette near the lower trailers to ask him why he was driving the van and where he got the keys. According to Kummer's evidence, Bissonnette was "a little worked up" and "not cooperative" and told Kummer to "go fuck yourself." At that point Kummer's evidence is that he returned to his office to prepare an EM-6 and to leave a voice mail message for Louise Adams.

When asked, under cross examination, how he knew where Bissonnette obtained the keys from to the van, Kummer stated that the keys in the ignition had a leather tag and the only

keys with such a tag were those in Adams' office desk. He reiterated that he did not give Bissonnette permission to use the van

Bissonnette admitted in his evidence that he did use the van on September 21, 1995. However, he stated that he used it with Kummer's permission for approximately one hour and then returned the keys to Kummer. He also stated that Kummer told him that the keys were in Adam's desk drawer and he should return them to the same spot. Bissonnette recalled the conversation with Adams on September 22, 1995 and stated that he told Adams that Kummer had given him permission to use the van. Under cross examination he agreed that he knew company policy required him to get a supervisor's permission to use the van. Also under cross examination, Bissonnette denied directing any profanity at Kummer.

Absence due to illness

There is no dispute about the fact that Bissonnette was scheduled to work on September 25, 1995 and did not work that shift because he was ill. However, there are significant differences in the parties' evidence concerning what happened between September 25, 1995 and October 2, 1995.

Kummer gave evidence that he telephoned Bissonnette at approximately 9:15 p.m on September 25, 1995 because Bissonnette had not arrived at work by that time. Kummer's evidence was that he asked Bissonnette if he would be coming to work that night and Bissonnette said he would not because he was still sick. Kummer stated that he then asked Bissonnette why he had not called in and Bissonnette told him "it's not my responsibility, you should be calling me." Kummer also gave evidence that when he told Bissonnette "...that's not good enough," Bissonnette replied "that's bullshit...don't bother me at home." Kummer stated that he then called Louise Adams at home to report that Bissonnette was a "no show" and Adams asked him to call Bissonnette to make an appointment for Bissonnette meet with her. Kummer's evidence was that he did not recall Bissonnette saying anything about a doctor's visit or a doctor's note during their telephone conversation. Kummer prepared an EM-6 which was signed and dated by him on September 27, 1995. It contains the following statement:

*Bill did not call to let us know that he would not be coming to work. This is considered a no show. During our phone conversation he told me "not to fucking bother him at home about this bullshit."
Then he hung up on me.*

Under cross examination, Kummer stated that he was unaware that a doctor's note existed until a few days before the Tribunal hearing.

Adams gave evidence that she tried to telephone Bissonnette during the morning of September 29, 1995 but there was no answer. According to her notes, she called again that afternoon at 3:30 p.m and spoke to Bissonnette. Her evidence was that when she asked Bissonnette why he did not come to work the previous night (Tuesday) he said that he was

ill and had called in sick on Monday night. Adams stated that when she told Bissonnette it was unacceptable for him to use foul language with Kummer. When she asked Bissonnette to meet with her, Adams stated that Bissonnette responded: "You want to fire me for being sick." Adams' evidence was that she replied: "I want to fire you because of your attitude."

Bissonnette's evidence concerning what transpired between September 25, 1995 and October 2, 1995 can be summarized as follows:

Monday (September, 25) :

- ◆ phoned supervisor (Craig Bolt) around 12:30 or 12:45 to tell him that I was sick and would not be at work
- ◆ Adams phoned at approximately 1:45 p.m and I told her about my doctor's appointment at 4:00 p.m
- ◆ Saw Doctor Lerner and called back. Louise was not around. Spoke to a girl in Guest Services. Left message - off work 1 to 5 days.
- ◆ At home watching TV when Kummer phoned about 9:00 p.m and asked me why I was not at work. I told him I was sick. Kummer was cursing and swearing so I said good-bye and hung up.
- ◆ Kummer called back 15 minutes later to arrange a meeting with Louise Adams for 1:00 o'clock. I phoned back and left a message for Louise Adams.

Wednesday (September, 27):

- ◆ Phoned in sick.

Thursday (September , 28):

- ◆ Phoned in sick.

October 2 :

- ◆ Phone call from Louise Adams telling me : don't come back to work...we've replaced you...you're fired."

- ◆ Told Adams fired for wrongful dismissal - filing complaint with Employment Standards.

Under cross examination, Bissonnette was referred to copies of notes he had written in a journal. These notes make it clear that the telephone conversation between Kummer and Bissonnette took place at approximately 9:00 p.m. on September 26, 1995. Bissonnette's journal notes also confirms that he told Kummer: "why didn't you call to see if I was feeling O.K.?"

When asked about his evidence about being off work for 1 to 5 days, Bissonnette replied that he left a message for Louise that he would be off for 1 to 3 days. He then stated that he phoned back on Wednesday morning (September 27) to advise he would be off work for another few days. When asked about the telephone conversation with Adams on September 27, Bissonnette stated that Adams did not call him on Wednesday and his only conversation with Adams had been on Monday. He insisted that he phoned on Wednesday September 27 but could not recall to whom he spoke. He also confirmed that "Grouse Mountain told me to phone each day and provide a doctor's note." When asked why he did not phone on Tuesday night, Bissonnette replied "I left a message at front desk. Front desk people are incompetent. They already knew I would be away for 1 to 3 days."

In cross examination Bissonnette denied being upset during his phone conversation with Kummer. He also stated that Adams' evidence and written notes about their conversation were incorrect. When asked why he called on September 27 (Wednesday) before seeing Dr. Lermer a second time, he stated that he was still feeling ill and, while the doctor's note had originally stated "off work for 1-3 days", it was subsequently changed to read "off work for 1-5 days."

Kathy Bekart gave evidence that she was a friend of Bissonnette and was watching TV with him when Kummer called.

ANALYSIS

Section 63 of the *Act* creates a liability for employers to pay compensation to employees based on the length of their employment. Section 63(3) states that this liability is deemed to be discharged if an employee is given written notice of termination or if the employee resigns, retires or is "...dismissed for just cause."

Grouse Mountain argues that it had just cause to dismiss Bissonnette.

The Director's delegate concluded that Bissonnette's employment was terminated without just cause.

As the appellant in this appeal, Grouse Mountain bears the onus of proving that it had just cause to dismiss Bissonnette.

Grouse Mountain argues that Bissonnette's use of the company van on September 21 was known by him to be unauthorized and that incident alone constitutes "just cause" for dismissal as it was willful disobedience or misconduct on his part.

Counsel for Bissonnette argues that there is no cause for dismissal because the alleged misconduct did not occur and, if it did, it did not prejudice Grouse Mountain's business interests.

In **Stein v. British Columbia Housing Management Commission** [(1992) 65 BCLR (2d) 181] the BC Court of Appeal described the common law test for just cause in the following terms at p.183:

Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

In the same case, the Court of Appeal case adopted the following passage from **Laws v. London Chronicle Ltd.** [(1959) 2 All E.R. 285 (C.A.)] as a generally accepted statement of the law on this point:

It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is so to speak, struck at fundamentally...

I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that disobedience must at least have the quality that it is "willful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.

Madame Justice Southin, writing for the Court, in the **Stein** case, went on to state at page 185:

I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures

he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it" (emphases added).

A central issue in deciding this appeal is the credibility of the evidence given by Bissonnette. A number of factors must be considered in assessing the credibility of a witness: demeanor; opportunities for knowledge; powers of observation; judgment and memory; ability to describe clearly what has been seen and heard; the probability of the event happening in the manner suggested [**Farnya v. Chorny** (1952) 2 DLR 354 (BCCA)].

On balance, I find it improbable that events occurred as Bissonnette described them. His memory was not clear on several key points of his evidence. I can think of no reason why I should not accept the oral evidence given by Adams and Kummer corroborated by their written descriptions of what occurred at the time of the two incidents.

I also find that I can attach little if any, weight to the evidence given by Bekart. Much of her testimony was based on assumptions which she acknowledged in cross examination. Also, key points in her oral evidence about the telephone conversation between Kummer and Bissonnette inconsistent with the evidence given by Bissonnette and Kummer. Her evidence was unreliable, on her own admission, because she "...didn't hear the conversation word for word."

My analysis of the oral and documentary evidence in this appeal leads me to conclude that Grouse Mountain had just cause to terminate Bissonnette's employment. I come to that conclusion for several reasons. I find that Bissonnette willfully disobeyed a clear instruction from his supervisor (John Kummer) and a clear company policy (of which he was fully aware, by his own evidence) that he was not to drive the van. I also find that his conversation with Kummer on September 26, 1995 was insubordinate. In reaching this conclusion I prefer the evidence given by Adams and Kummer to that given by Bissonnette. I do not accept Bissonnette's evidence that he had received permission from Kummer to use the van.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination CDET# 001718 be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sf