



An appeal

- by -

Wallace & Carey Inc.
("W & C")

- 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 (as amended)

TRIBUNAL MEMBER: C.L. Roberts

FILE No.: 2005A/147

DATE OF DECISION: November 1, 2005

DECISION

SUBMISSIONS

Keith Mitchell, Harris & Company	on behalf of Wallace & Carey
Ted Mitchell	on behalf of the Director of Employment Standards
Peter Sherry	on his own behalf

OVERVIEW

1. This is an appeal by Wallace & Carey Inc. (“W & C”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued July 11, 2005.
2. Peter B. Sherry was employed by W & C, a food distribution company, from August 1, 1995 until he was terminated on December 2, 2004. Following his termination, Mr. Sherry filed a complaint alleging that he was owed compensation for length of service.
3. The Director’s delegate held a hearing into Mr. Sherry’s complaint on May 11, 2005. W & C was represented by its counsel, Mr. Mitchell, and Mr. Sherry appeared on his own behalf.
4. The delegate determined that W & C had terminated Mr. Sherry’s employment without cause, and in doing so, had contravened Section 63 of the *Employment Standards Act* in failing to pay Mr. Sherry compensation for length of service. He also found that Mr. Sherry was entitled to vacation pay and interest. The delegate also imposed a \$500 penalty on W & C for a contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. W & C appeals the Determination on the grounds that the delegate erred in law, and sought to have the Determination cancelled.
6. W & C sought an oral hearing on the basis that the employee’s credibility was a central issue on appeal. Having reviewed the Determination, the appeal and the material on file, I am satisfied that this matter can be decided based on the written submissions of the parties. W & C did not dispute the delegate’s evidentiary findings. Its appeal is based on the assertion that the delegate was acting on a view of the facts which could not reasonably be entertained, or arrived at the wrong conclusion based on the evidence. Given that the facts are not in dispute, there is no basis for an oral hearing.

ISSUE

7. At issue is whether the delegate erred in law in concluding that Mr. Sherry’s employment was terminated without cause, and was therefore entitled to compensation for length of service.

THE FACTS AND ARGUMENT

8. The following are the facts as found by the delegate.

9. Mr. Sherry began working for W & C on August 1, 1995. He held a series of progressively responsible positions, and at the time his employment was terminated, held the position of assembly manager.
10. On November 28, 2004, W & C flew Mr. Sherry and a co-worker, Mr. Dier, to W & C's head office in Calgary for a meeting on November 29, 2004 with a key client. There was a W & C staff meeting scheduled for the morning of November 29, followed by a meeting with the client in the afternoon.
11. On the evening of November 28, Mr. Sherry and other W & C employees attended a dinner at the hotel. At the dinner they were told by an officer of W & C to meet in the hotel lobby at 7:00 a.m. so that they could travel together to the office at 7:30 a.m. for an 8:00 a.m. meeting. Mr. Sherry acknowledged that he and Mr. Dier remained together after the dinner and consumed some alcohol.
12. Mr. Sherry and Mr. Dier were not in the lobby at 7:30 a.m. nor were they at the 8:00 a.m. meeting. A W & C official placed a telephone call to both Mr. Sherry and Mr. Dier's hotel rooms but was unsuccessful in contacting either of them. Mr. Sherry testified that he was not awakened by any telephone calls that morning. Between 10:30 and 10:45 a.m., Mr. Sherry attempted to place a telephone call to Mr. Parkinson's cell phone to advise him that he was on his way to the meeting. Mr. Sherry arrived at the meeting between 11:15 and 11:45 a.m. Mr. Dier arrived some time later. Mr. Sherry advised Mr. Parkinson, W & C's Vancouver branch manager, that he had been unable to sleep until 5:00 a.m. as a result of a severe asthma attack. Mr. Parkinson indicated that he and others noted "a strong presence of alcohol smell" on Mr. Sherry when he arrived at the meeting. Mr. Sherry was aware of the importance of the meeting.
13. By way of a December 1 email, Jack Houlihan, an officer with W & C, suggested to other senior officials that the time had come to terminate Mr. Sherry's employment as he was of the view that Mr. Sherry was "running his own show". One of those officials concurred, expressing the view that Mr. Sherry had ignored advice to show up on time for the meeting, demonstrated a "lack of respect" for "other people's time", and that Mr. Sherry was always going "in his own direction".
14. On December 2, Mr. Sherry was advised that his employment had been terminated for cause. In his December 2, termination letter, Mr. Parkinson gave his reasons as follows:

On Monday, November 29, 2004, you failed to show up for the 8:00 am CDC National Managers meeting in Calgary as scheduled, instead you showed up 3 hours late. We do not accept your reason for your lateness to be truthful and even if this reason was truthful, it would not justify your failure to contact us to advise of your lateness.

After reviewing this incident and your entire employee history, we have decided to terminate your employment effective immediately.
15. W & C disputed Mr. Sherry's claim that he had an asthma attack. It noted that, although Mr. Sherry had completed an Emergency Information Form ("EIF") indicating that he required an inhaler for asthma upon being hired, in an EIF dated January 14, 2003, Mr. Sherry made no mention of his asthma and indicated he required no medication. Mr. Sherry's evidence at the hearing was that he had missed or been late for work because of his asthma in 1999. He indicated that he had not indicated he required an inhaler in his 2003 EIF because he did not routinely require one at that time. Mr. Sherry also testified that he had not required medical assistance following the asthma attack in Calgary.
16. Although W & C contended that Mr. Sherry's dishonesty about the reason he was late for the meeting constituted just cause, at the hearing, the employer presented the delegate with documentary evidence

warning Mr. Sherry about his performance. All three were dated in 2002. Two dealt with Mr. Sherry's lack of attention to completion of staff paperwork and the third related to a complaint by another employee alleging that Mr. Sherry had worn nail polish to work. The latter email also made comments about Mr. Sherry's "method of self-presentation".

17. Mr. Sherry's evidence was that he was aware of the importance of the 8:00 a.m. meeting as well as his attendance at the meeting. However, he asserted that he had made every reasonable effort to attend the meeting, and had a *bona fide* reason for being late. He contended that the emails produced by the employer had not been raised with him as disciplinary matters, and that, in any case, he had responded positively. Mr. Sherry said that W & C had not previously indicated any serious concerns about his work, and that he had "regularly received commendation" for his performance.
18. The delegate set out the provisions of the *Act* relating to compensation in lieu of notice as well as Tribunal jurisprudence on what constituted just cause. The delegate found that there was no evidence the employer had unequivocally informed Mr. Sherry that "specific behaviours would guarantee termination of employment". The delegate also noted that W & C had not disputed Mr. Sherry's assertions that he had received commendations for his performance and been promoted during the course of his nine years of employment.
19. After applying the *Faryna v. Chorney* test for assessing credibility, the delegate concluded that W & C had not established, on a balance of probabilities, that Mr. Sherry had lied about the reason for his lateness. He noted that Mr. Sherry had a documented history of asthma and determined:

...there is no evidence that [Mr. Sherry] deliberately did not attend on time or that he knew late attendance to the employer meeting was frowned upon and set out to attend late anyway. In the absence of any evidence to demonstrate the employer's suspicions are founded in fact, I find it is a credible proposition that Sherry was trouble by an asthma attack sometime following the dinner on November 28, 2004 such that he slept in and was subsequently late in his attendance to the subject meeting. Furthermore, no evidence was presented that Sherry's lateness prejudiced the employer in its dealing with [the client] representatives during the afternoon portion of the meeting.
20. The delegate concluded that W & C's evidence was insufficient to establish just cause for termination, and determined that W & C had contravened section 63 of the *Act*.
21. Counsel for W & C submits that, by concluding that Mr. Sherry was entitled to compensation for length of service, the delegate was acting on a view of the facts which could not reasonably be entertained.
22. Counsel contends that the delegate did not place sufficient weight on Mr. Sherry's admission that he had consumed alcohol after the dinner on the 28th and Mr. Parkinson's evidence that he noted a strong smell of alcohol on Mr. Sherry the following morning. Counsel also submits that the delegate did not reference the undisputed evidence at the hearing that Mr. Sherry did not immediately offer an explanation for his lateness upon his arrival at the meeting. W & C submits that, when all of the facts are considered, the employer has clearly established, on a balance of probabilities, that Mr. Sherry was untruthful about the reason for his lateness.
23. W & C's counsel contends that the delegate accepted, as credible, Mr. Sherry's assertion that he was late for the meeting due to an asthma attack when the evidence in support of that claim was weak to non-existent. It submits that there was no evidence before the delegate that Mr. Sherry had been late or missed work at any time for the five years leading up to his termination. In his reply submissions, counsel

submits that the delegate either did not apply *Faryna v. Chorney*, or applied it improperly. He argues that the employer's view of the reason for Mr. Sherry's lateness was to be preferred to that of Mr. Sherry.

24. W & C submits that there was evidence before the delegate that Mr. Sherry's lateness prejudiced the employer. Counsel says that Mr. Sherry occupied a "central role in the Employer's operations in the Lower Mainland. It was imperative that the Employee attend the meeting in order to gain direction on how to best serve the client's locations in the region".
25. Finally, W & C says that Mr. Sherry occupied a position of responsibility and trust, that Mr. Sherry disregarded his responsibility on the evening of November 28 by consuming a quantity of alcohol which caused him to sleep in and arrive at the meeting three hours late, and subsequently breached the employer's trust by providing a false reason for his late arrival at the meeting. It also says that Mr. Sherry was aware of the importance of the meeting and his attendance at it, as well as the company's policy that being late for management meetings was unacceptable.
26. W & C says that the delegate was obliged to determine whether Mr. Sherry was being truthful, as a single act of dishonesty can amount to just cause for termination.
27. The delegate submitted the record before him at the hearing. He contends that he made an assessment of Mr. Sherry's credibility, and found him to be credible. The delegate says he relied on his lay understanding of asthma, and concluded that the potential causes of an asthma attack "preclude certainty that Sherry's claim was a falsehood and diminish the authority of a judgement that Sherry's claim was a single act of dishonesty worthy of termination with just cause".
28. W & C submits that the delegate improperly relied on the hypothetical potential causes of Mr. Sherry's asthma attack without any evidence as to their accuracy or applicability, and cannot take judicial notice of such "facts" unless they are so generally known and accepted that they cannot reasonably be questioned (*Regina v. Potts* (1982), 26 C.R. (3d) 252, leave to appeal to SCC refused [1982] S.C.R. xi). Further, counsel submits that the "certainty of falsehood" of Mr. Sherry's story is not the proper test.
29. Mr. Sherry contends that he was never dishonest, and in fact, the employer never questioned him about his use of alcohol until after his employment was terminated. Mr. Sherry says he never denied drinking and being awake later than other employees, and at all times offered his asthma attack as the reason for his lateness.

ANALYSIS AND DECISION

30. Section 112(1)(a) of the *Act* provides that a person may appeal a determination where the director erred in law.
31. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.
32. Where an employee has been dismissed summarily, the burden is on the employer to show that the employee has fundamentally breached, or repudiated, the employment relationship. (see *Re Grouse Mountain Resorts Ltd.* (BC EST #D143/96).

33. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

34. 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)

35. 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.

36. 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). A single act of dishonesty has also been held to fall within this category (*Helton Industries*, BC EST #D269/99).

37. W & C terminated Mr. Sherry's employment on December 2, 2004. The stated reasons were because he showed up 3 hours late for a meeting and it did not accept Mr. Sherry's reasons for his lateness, as well as his "entire employee history". At issue before the delegate was whether these reasons constituted just cause.

38. The delegate found no basis to conclude that Mr. Sherry's performance, other than the isolated incident, constituted just cause. I find no error in the delegate's reasons in this respect. Whatever warnings may have been given to Mr. Sherry, those warnings were dated, and W & C presented no evidence to dispute Mr. Sherry's contention that he had corrected whatever performance issues had been identified. Therefore, the sole issue was whether Mr. Sherry's reasons for his 3 hour lateness in attending a meeting constituted sufficient grounds to immediately terminate his employment.

39. The burden is on the employer to establish just cause. I am unable to find that the delegate erred in law in concluding that W & C had failed to provide sufficient evidence to establish that Mr. Sherry was dishonest, and thus justify termination for just cause (see *Baker Street Inn* BC EST #D248/03).

40. W & C contended that Mr. Sherry's lateness was not a result of a medical condition but because he had been out drinking. While Mr. Sherry acknowledged that he had been out drinking the night before the meeting, his stated reason for being late was the result of a medical condition.

41. The delegate concluded that Mr. Sherry was credible, and that his reasons for his lateness were plausible. He determined that W & C had not established that Mr. Sherry was dishonest.
42. Although the delegate applied his lay knowledge of causes of asthma to arrive at his findings on credibility, that “test” was not set out in the Determination; rather, it was set out in the delegate’s reply to the appeal submissions. It would have been preferable for the delegate to set out his reasons for finding Mr. Sherry’s evidence credible in the Determination itself. However, the delegate’s failure to set out the reasons for finding Mr. Sherry credible is not a basis for setting aside the Determination.
43. I find that the delegate could reasonably have arrived at the conclusion he did based on the evidence before him. The burden was on the employer to establish that Mr. Sherry was lying. Mr. Sherry had provided documentation about his medical condition, albeit at a very early point in his employment with W & C. The delegate drew on his lay knowledge of asthma to conclude that it was plausible that Mr. Sherry continued to experience asthma attacks on occasion even though he had indicated he no longer required an inhaler on a regular basis, and that he had suffered one the night before the meeting. As I understand his decision, he found it equally plausible that Mr. Sherry was late for the meeting as a result of an asthma attack as drinking, and in the absence of any evidence from the employer that Mr. Sherry was dishonest about his stated reasons, concluded that W & C had not discharged the burden of showing that Mr. Sherry had been dismissed for cause. In my view, simply because W & C did not believe that Mr. Sherry’s lateness could have been due to a medical condition is not sufficient evidence of dishonesty, and I am unable to find that the delegate’s conclusion was unreasonable.
44. The delegate also concluded there was no prejudice to W & C as a result of Mr. Sherry’s 3 hour delay in attending the meeting. W & C contends that the delegate erred in this conclusion, arguing that Mr. Sherry “occupied a central role in the Employer’s operations in the Lower Mainland” and that it was “imperative that the Employee attend the meeting in order to gain direction on how to best serve the client’s locations in the region”. While it may have been important for Mr. Sherry to attend the meeting, there is no evidence that Mr. Sherry’s 3 hour delay in attending the meeting prejudiced W & C’s relationship with the client/customer it met with that afternoon, or put the company’s personnel, business or assets at risk.
45. The appeal is denied.

ORDER

46. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 11, 2005, be confirmed in the amount of \$8,152.90, plus whatever interest might have accrued since the date of issuance.

C.L. Roberts
Member
Employment Standards Tribunal