

An appeal

- by -

Cameron Pomeroy
("Pomeroy")

- 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: Lorne D. Collingwood

FILE No.: 2001/6

DATE OF HEARING: April 9, 2001

DATE OF DECISION: May 4, 2001

DECISION

OVERVIEW

Cameron Pomeroy (who I will refer to as both “Pomeroy” and “the appellant”) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a November 30, 2000 Determination by a delegate of the Director of Employment Standards (“the Director”). Pomeroy is awarded vacation pay in the Determination but not compensation for length of service.

The delegate’s reason for not awarding length of service compensation is just cause. The delegate has concluded that Pomeroy was acting in conflict with his employer’s interests prior to being terminated, both because he was working to establish a business in direct competition with his employer, Concord Elevator (B.C.) Ltd. (“Concord” or “the employer”), and because he assisted in an attempt to lure a key employee away from Concord. That is denied by Pomeroy, on appeal. He is seeking a decision which overturns the decision of the delegate.

APPEARANCES:

Cameron Pomeroy	the appellant
Peter Rubin	counsel for Concord
Joanne Kembel	the Director’s delegate

ISSUES TO DECIDE

Pomeroy claims that the Determination reflects intimidation of the delegate by counsel for the employer.

The facts of this case are in dispute, both those surrounding the matter of whether Pomeroy was or was not in the process of setting up a competing business when he was terminated and the matter of whether he did or did not assist in an attempt to lure a key employee away from Concord. And in deciding matters, the delegate reaches conclusions in respect to the credibility of witnesses and, according to Pomeroy, her findings are wrong. What I must ultimately decide is whether it has or has not been shown that the Determination should be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or in law.

FACTS

Concord is a small company which is in the business of selling, installing and servicing elevators and lifts.

Cameron Pomeroy worked as a sales representative for Concord from October 21, 1991 to June 5, 2000. His sales formed a large and important part of Concord's business in 1999 and 2000.

At some point in the first two weeks of May, 2000, Pomeroy was approached by another of Concord's employees, "AB". AB outlined a plan to go into business in competition with Concord and he asked Pomeroy if he would join him as an employee.

On or about May 25, 2000, there was a meeting at Jake's Pub. Present were AB, Pomeroy and DS, Concord's chief mechanic. DS was at that meeting asked if he had any interest in going to work for the new business at an increase in pay. DS was at his point the only one of Concord's employees who was legally qualified to perform the installation, servicing and repairing of elevators and lifts. It is not clear that Pomeroy knew that exactly but I am satisfied that he did know that DS was the most important of Concord's mechanics.

DS decided that he would tell Gordon Smith, Concord's general manager, all about the meeting at Jake's Pub and he did so on the 30th of May. On hearing of the plan for a new business that would compete with Concord, Smith immediately flew to Penticton where AB and Pomeroy were getting ready for a trade show and, once there, he fired AB. Smith did not fire Pomeroy because it had been decided that some attempt should be made to retain his services. Smith took Pomeroy aside and he told him that he knew something of the plan to start a new company which would compete with Concord. Smith went on to suggest that it could be in Pomeroy's interest to remain as one of Concord's employees and he suggested that Pomeroy could earn stock options.

The next meeting between Smith and Pomeroy took place on the 5th of June. It is clear that the two had a discussion that went to conflict of interest. Pomeroy, in essence, said that it was his right to listen to any offer that might come his way, even those of a competitor. Hearing that, Smith fired him.

The delegate has decided that Pomeroy assisted AB in an attempt to lure DS away from Concord and she does so primarily on the basis of statements by DS and Pomeroy. The delegate has decided that DS is credible. She found him to be candid and forthright and his statements are found to be consistent with the known facts. DS is on record as having said that both Pomeroy and AB spoke of establishing a new company and that they did so as if they were partners. He also said that it was the two men, together, that asked him if he was interested in working for the new company, not just AB. Pomeroy, on the other hand, is said to have admitted, in essence, that he assisted in the attempt to lure DS away from Concord because he stated, on at least two different occasions, that part of the reason that he was at the meeting at Jake's Pub was so that he could "throw his weight behind (AB)".

If DS had quit Concord and joined the new company, that would have been Concord's loss and Western's gain. The loss to Concord would have been significant in that DS was a most important member of its staff. Western would not only have gained a mechanic with all of the qualifications which are necessary for entering the business of installing lifts but it would have managed to cripple its chief competitor in the process.

On appeal, Pomeroy claims that no great amount of weight should have been attached to what DS has to say as he works for Concord and has been promoted. DS is in fact an employee of Concord today and he has received a promotion of some sort.

It is an undisputed fact that Pomeroy, while employed by Concord, discussed buying Concord and going into business for himself. It is also an undisputed fact that Pomeroy was not happy in working for Concord.

It is clear that Pomeroy, before he was terminated, booked vacation time so that he could attend a seminar on lifts which was to be held by a company called “Bruno Independent Living Aids” (“Bruno”). The seminar (“the June seminar”) was set for Milwaukee on the 10th of June.

Pomeroy and AB did go into business together. They are partners in Western. They sell equipment made by Bruno. Western does operate in direct competition with Concord.

An application was made for Western’s incorporation on June 8, 2000, in other words, three days after Pomeroy’s termination. That application lists Pomeroy as one of Western’s two corporate officers.

It is a conclusion of the delegate that Pomeroy was actively working to establish what became Western prior to being terminated. That conclusion is based, in part, on an analysis of statements by EH, one of Bruno’s employees, DS, Pomeroy and AB. The delegate also attaches considerable importance to the fact that, when Pomeroy was interviewed on the 21st of June, he said he did not know what AB was going to do and he made no mention of his being a director/officer of Western. He in fact made no mention of Western at all on being interviewed on the 21st.

EH, on being interviewed by the delegate, said that AB, on arranging for two people to attend the June seminar, said that he had a partner. According to the delegate, she also said that it was within 48 hours of the June seminar that it was learned that “(AB’s) mysterious partner” was Pomeroy.

Pomeroy, on appeal, makes much of a December 8, 2000 letter. In the letter, EH writes to say that “we were under the assumption that Cam Pomeroy was an installation technician for AB, that “a potential employee” would attend the June seminar, and that “it was only through (the delegate’s) investigation that the relationship between Cam and (AB) was clarified to us”. That latter comment is inconsistent with saying that it was within 48 hours of the June seminar that it was discovered that AB’s partner was Pomeroy.

I am shown that the delegate is wrong on who paid for the tickets to attend the Milwaukee seminar. AB bought them on the 19th of May but he was reimbursed for the tickets by Bruno.

ARGUMENT

The position of the appellant is, in essence, that the delegate would have awarded him length of service compensation had it not been for a failure to consider certain key facts. Pomeroy claims that far too much weight has been attached to what DS had to say, given that he works for Concord and has been promoted. Pomeroy claims that his reason for attending the June seminar was that he wanted to learn more about the business that AB had in mind. Pomeroy claims that the reason that he made no mention of Western and his involvement with Western on the 21st of June was because he considered it to be of “no relevance to (his) termination”. Pomeroy argues that the letter from EH establishes that it was only after being terminated that EH learned that he was a partner in Western. And he alleges that he did not tell the delegate that he went to the meeting with DS in order to “throw his weight behind AB”. He claims that those are the delegate’s words. According to Pomeroy, the delegate, in asking him questions, asked if his attendance at the meeting with DS might not have made it look like he was “throwing his weight behind (AB)”.

Pomeroy, on appeal, claims that he signed nothing prior to being fired, that it was only on being fired that he decided to join AB in setting up a company called “Western”, and that it was not until July that financing for Western was secured and working for the company became a viable option for him.

Counsel for Concord argues that the Tribunal should not upset either of the delegate’s two findings of credibility in that the first decision maker has the benefit of hearing from witnesses in the first instance, before any decision is made, and is in a better position to assess the truthfulness of witnesses. It is also the position of the employer that the delegate’s decision should not be overturned because it is both reasonable and devoid of “critical error”.

ANALYSIS

Pomeroy alleges that the Determination reflects intimidation of the delegate by counsel for the employer but he has made no attempt to produce evidence of that. I find that this particular allegation is both frivolous and an unwarranted attack on a delegate. There is simply no evidence of any intimidation by either the employer or legal counsel for the employer.

I find that there is not, in this case, conclusive proof that the delegate is wrong in respect to either of her two main conclusions, that Pomeroy assisted in an attempt to lure DS away from Concord and that Pomeroy was working to establish Western prior to his termination. And I find that the appellant does not show a failure to consider important facts nor show that the delegate has made a critical error of some sort.

While the delegate is said to be wrong on the facts and that she failed to consider important facts, I am shown only that she is clearly wrong in respect to who paid for airline tickets to the June seminar. That is, however, not in any way relevant to the Determination.

I have not heard from EH directly but find that she appears to have changed her story in respect to when it was that she learned that Pomeroy was AB's partner. It remains unclear to me, however, which of her conflicting statements is correct. I will not, therefore, attach any great amount of weight to the December letter. It may be that she is no longer able to recall matters, that time and her employer's interest have affected her ability to remember events and statements made to the delegate. I note, moreover, that it is not as if EH is saying that she did not know that AB had a partner when arrangements were made for the June seminar. There has been no retraction of that statement. It is only that EH is now claiming that it was not until the investigation that it was discovered who the partner was.

Pomeroy tells me on appeal that he never said that he went to the meeting at Jake's Pub in order to throw his weight behind AB. And he is implying that EH did not make the statements that she is said to have made in the Determination. But he has not presented me with any reason why I should not believe the delegate. I am naturally inclined to believe the delegate as she is the one person in this whole affair who is truly independent of the parties.

I find that the important facts of this case are as set out by the delegate and the delegate has considered all of the facts. Pomeroy's disagreement with the Determination amounts to a disagreement with the Determination's conclusions. But it is not for me to second guess what amounts to findings of credibility. What I must decide is whether the conclusions of the delegate are reasonable given the evidence.

Deciding what is credible can be a very difficult task. There are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

The decision of the delegate is that Pomeroy did assist in the attempt to lure DS away from Concord and that, most likely, Pomeroy was working to establish Western before he was terminated. I find that there is evidence to support both of those conclusions. In my view, the first conclusion can be drawn from what DS and Pomeroy had to say. I am satisfied, moreover,

that the second of the delegate's two main conclusions is reasonable given the evidence which exists in this case. There is reason to believe that Pomeroy was in the process of establishing the new company prior to termination, the following included: DS's account of the meeting in Jake's Pub, the fact that Pomeroy arranged to travel to the June seminar before the 5th, the timing of both the termination and the application for Western's incorporation, the evidence which is that AB had a partner when he made the arrangements for two to attend the June seminar, Pomeroy's inexplicable failure to mention Western on the 21st or the fact that he was a director/officer of the company. There is evidence to the contrary but it is not conclusive proof that Pomeroy was not active in Western prior to the 5th, nor is it, I find, particularly persuasive.

In summary, it is alleged that the Determination reflects intimidation by legal counsel for the employer but the allegation is found to be frivolous and an unwarranted attack on a delegate. In regard to the main issue, I find that the appellant fails to produce conclusive proof that the Determination is wrong. I find that what are reached are findings of credibility that are reasonable in light of what is known to be fact.

The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 30, 2000 be confirmed.

LORNE D. COLLINGWOOD

**Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal**