

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 -

Christopher Whalley
("Whalley")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 1999/70

DATE OF HEARING: May 6, 1999

DATE OF DECISION: May 31, 1999

DECISION

APPEARANCES

| | |
|------------------------------------|---------------|
| for the individual | in person |
| for Cambium Forest Management Ltd. | Gordon Murray |

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Mr. Christopher Whalley (“Whalley”) of a Determination which was issued on January 18, 1999 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director denied a claim by Whalley for length of service compensation from his former employer, Cambium Forest Management Ltd. (“Cambium”). The Director found that Cambium had met the burden of establishing just cause for the dismissal of Whalley and was, pursuant to subsection 63(3) of the *Act*, deemed to be discharged from its statutory liability to pay him length of service compensation.

The Determination identifies the basis for the action taken by Murray in the following statement:

The just cause relied on by the employer was due to the allegation that Mr. Whalley had released company records to the company’s competitor.

After briefly outlining the facts, the Determination states:

Mr. Whalley was in a position of responsibility and trust. Employees have a duty to serve their employer faithfully, to the best of their skill and ability and to accept proper supervision and direction. In fact, the higher the employee’s level in the company, the greater their duty of fidelity.

Additionally, concealing facts of which the employer should have been advised constitutes cause for dismissal. If the employer is to have any chance of viability there must be a relationship of complete trust and frankness. The employer must not be expected to ask the right questions in order to get full disclosure of information.

For the above reasons I conclude the employer did have just cause to terminate

Whalley says the conclusion of the Director is wrong. I heard the evidence of seven witnesses, including the two principal protagonists, Whalley and Mr. Gordon Murray (“Murray”), the president of Cambium.

ISSUE TO BE DECIDED

The issue is whether Whalley has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law.

FACTS

Cambium is a forest management company. It performs services in the area of woodlands management, which, generally, involves developing forest management plans under contract for private companies and

government agencies and ministries. The principal aspect of the business is collecting, assembling and recording data for clients. In February, 1996, Cambium contracted with Downie Timber Ltd. ("Downie Timber") to develop a forest management plan in the Soards Creek area. The work involved creating a base contour map, performing field work to determine the extent of marketable timber in the area, planning and designing road access, designing cutting blocks, preparing a harvesting plan and silviculture prescriptions and preparing a cutting permit application. Through 1996 and early 1997, Cambium field engineers worked collecting data related to the contract. In May, 1997, Cambium began to consolidate the information collected and to transfer it to a digital base map of the area which had been prepared for them by another company.

Whalley commenced his employment with Cambium on June 21, 1993. His job title at the time of his termination was Forestry Technical Supervisor and was a position of responsibility and authority. Generally, he was in charge of the computer department for Cambium and, more specifically, was in charge of assembling and transferring the data accumulated by the field crews on the Soards Creek contract into a computerized digital mapping file. One witness referred to him as Cambium's "computer guru".

Downie Timber was slow in paying for the work that Cambium had done and the evidence indicated that by late 1997 the relationship between Cambium and Downie Timber on this contract had become strained. Several meetings took place between Cambium and Downie Timber and by the end of 1997, Downie Timber had paid all but approximately \$10,000 of the contract. Whalley called a former employee of Cambium, Martin LaBelle, to give evidence in the appeal hearing. Mr. LaBelle had been employed by Cambium as a part of the field crew that collected the information on the Soards Creek contract. He was laid off by Cambium in late December, 1997 and later went to work for Control Point Consulting Ltd. ("Control Point"), a competitor of Cambium. Prior to his layoff he was involved with Murray in meeting with Downie Timber to discuss payment on the contract and it was clear to him up to that time that Downie Timber was not going to pay the last amounts owing on the contract. He agrees being told by Murray, before his layoff, that no data on the contract was to be released to Downie Timber without his permission.

In early 1998, Cambium continued to press Downie Timber for full payment of the contract. On January 21, 1998, Cambium delivered several items related to the Soards Creek contract to Downie Timber. In a letter accompanying the delivery, the items are identified as:

1. Field note book containing *original* field notes for deflection lines run in blocks 1 to 6.
2. Field note book containing *original* field notes for road traverses.
3. Field note book containing *original* field notes for area profiles and vectors.
4. *Original* SP data field cards for blocks 1 and 2.
5. Binder containing our analysis of area profiles and block specific d-lines.
6. An engineering map illustrating the proposed development for CP 106.
7. A tape containing all the digital mapping files for Soards Creek.

Although the cutting permit is not yet complete, we have completed the steps you have authorised. No further work was authorised.

The tape referred to in point 7 is the digital mapping file that Whalley was responsible for creating. Murray says this delivery was an effort to garner some goodwill with Downie Timber in his continuing effort to get paid the amount outstanding on the contract.

Cambium waited for Downie Timber to instruct them to recommence work on the contract. While Murray testified he had no firm knowledge that Downie Timber had pulled the Soards Creek contract until April 13, 1998, it is probable he had some idea that things were leaning that way. This is consistent with a statement made by Whalley, in a submission attached to his complaint, that:

In December, 1997, Downie requested all primary data collected by Cambium for Soards. . . . such an order is usually interpreted as indication that the contractor has been taken off the job, which will probably then pass to a competitor. There was no specific indication from Downie that we were being dropped, but in view of how strained the relationship had been all through the late summer and fall of 1997, it was the obvious interpretation and one which we tentatively adopted.

The evidence, while somewhat vague, indicates Control Point was communicating in March with Downie Timber about taking over the Soards Creek contract and in late March were allowed by Downie Timber to view the information that had been delivered by Cambium to Downie Timber on January 21. Mr. Joe Talbot, the owner of Control Point, testified that some of this information, specifically the digital mapping file, did not appear to be "cohesive" and he assumed there was "something more". He said the information he saw "was not useful to me" and that "I was looking for a complete set of data". He asked Mr. LaBelle, who he knew to be a former employee of Cambium and a friend of Whalley, to call Whalley and find out if Cambium had more data than what had been delivered to Downie Timber.

Like Mr. Talbot, Mr. LaBelle had reviewed the data that Downie Timber had been given by Cambium and said it looked different from what Cambium had; he said, "there was no pattern". He called Whalley and asked whether the digital mapping file was complete, but did not obtain any clear answer from him.

Mr. Talbot also testified that the first work performed by Control Point on the Soards Creek contract was April 2, 1998 and he introduced an invoice from Control Point to Downie Timber for a period from April 1 to April 30, 1998 to confirm that evidence. The invoice is particularly relevant in the context of what occurred on April 9, 1998 and which led to the termination of Whalley by Murray.

Chuck Blackie, another former employee of Cambium who, like Mr. LaBelle, had been laid off from Cambium in December, 1997 and had gone to work for Control Point, testified about being asked by Mr. Talbot to obtain the digital mapping file from Whalley. Mr. Talbot told him he wanted to see what Cambium had done. He said he thought he could have acquired the same information from Downie Timber and believed he was just facilitating a simpler and quicker delivery of the digital mapping file by asking Whalley for it directly. His comment in his evidence was: "we just would have had to hassle with Downie Timber for it". While Mr. Blackie did not say it directly, I was left to infer from his evidence, a theme that was revisited by Whalley when he testified, that there was some urgency that compelled Control Point to seek the information directly and immediately from Whalley, rather than to make a request to Downie Timber for it. I reject that suggestion. There is no support for finding there was any urgency involved in the transaction that led to Whalley's dismissal. In fact, Mr. Blackie had no idea whether Downie Timber had the information he was asking Whalley to give to him, since he never asked, nor was he instructed to ask, Downie Timber for it. He said only that: "I understood we could have received the same material from Downie Timber". Obviously no one told Mr. Blackie that Control Point had already received what Downie Timber had and were, in fact, looking for more.

As for Whalley, he had already talked to Mr. LaBelle and had been told that Control Point believed the digital mapping file received from Downie Timber was different and possibly incomplete. Whalley stated in his evidence: "they thought if they got a fresh copy from me it would clear things up".

On April 9, 1998, Mr. Blackie phoned Whalley to ask for a copy of the digital mapping file. Whalley says he viewed this request as normal and legitimate and that it was the kind of favour that is typically sought or given in the business. He says he knew Control Point had the digital mapping file that had been given to Downie Timber and did not believe there was any significant benefit that would be realized by Control Point if he met the request made by Mr. Blackie. He echoed what Mr. Blackie had said about simply expediting access to what Control Point would in any event "be entitled to" if they sought it through Downie Timber. He made no record of the file transfer. He said in evidence that the company policy relating to transmitting digital files was not generally followed. He did acknowledge that the company

policy relating to the transferring digital files is as stated at the bottom of the Digital File Transmittal form, which reads:

This transmittal form accompanies data sent from Cambium/Nova offices. A copy is to be kept on record together with the client authorization. No client data is released without express authorization from the client.

He says he never contacted Downie Timber about the request from Control Point because he perceived it to be “a mere formality”. When asked in cross-examination why the file was given to Control Point without at least a formal request being made by them, he replied “because time was an issue”. As I said earlier, I do not accept that time was an issue.

Whalley consciously decided not to tell Murray that he had provided Control Point with the digital mapping file and, in my opinion, consciously decided not to make a record of the transfer. In his submission to the Director, in his appeal submission and in his evidence, he said that a comment attributed to him to the effect it “would be too uncomfortable” to tell Murray about it was taken out of context and referred to former Cambium employees working for a competitor, not to the delivery of the digital mapping file. The Director concluded that this statement impacted negatively on the question of Whalley’s trustworthiness as an employee, stating:

Mr. Whalley was in a position of responsibility and trust. Employees have a duty to serve their employers faithfully, to the best of their skill and ability and to accept proper supervision and direction. . . . concealing facts of which the employer should have been advised constitutes cause for dismissal.

Whalley says the conclusion that he concealed the fact of the digital mapping file transfer is wrong. However, on analysis, Whalley’s position on this point has not been consistent. In his submission to the Director that accompanied the complaint, he states:

He first asked me whether I knew that ex-Cambium employees were working on our former project. My answer was a defensive yes. Evidently he had also just heard that Chuck Blackie, one of the ex-employees working on this project, had been in the office the previous week, *because that is what he asked about next*. Realizing there would be some sensitivity, but not thinking there was a serious issue involved, I told him that Chuck had requested some RoadEng files (digital road survey data) and that I had brought him into the office, and delivered them to him.

Somewhere in the midst of the conversation that *ensued* (actually more of a tirade), Mr. Murray asked me if was ever intending to tell him about *any* of this. I answered no, that would be too uncomfortable. I meant that I expected him to react the way he had actually just reacted. We were talking about the presence of ex-Cambium employees on our previous project, and that is what I was referring to, not to the delivery of data to Chuck.

(emphasis added)

In his appeal submission, addressing disputed facts, Whalley states, in part, under the topic, “that I never intended to tell my employer about my actions”:

- a) It is true that I responded with something like, “No, that would be too uncomfortable”, but this remark is taken out of context, which makes the above statement false. The specific topic under discussion was the earlier rumour that Control Point had been awarded the cutting permit, and I was referring to that, not to the recent delivery of data to Chuck Blackie.

- b) There was an additional misunderstanding of that same remark which makes the above statement false. My meaning was that I doubted that I would offer this information on my own initiative, because I would naturally shy away from Mr. Murray's anticipated anger. It is self evident that I was willing to tell him about it when the topic came up, because that is what was happening as we spoke. Ultimately, I would have waited for favourably neutral circumstances to broach this topic.
- c) I knew that Mr. Murray had misunderstood my remark, by his very strong reaction to a somewhat troubling, but nonetheless relatively innocuous remark, but I was never given a chance to correct that perception, for he turned away in anger, and those were the last words to Mr. Murray before my firing.
- d) There had been absolutely no opportunity for me to tell Mr. Murray about the delivery of data to Chuck Blackie. Mr. Murray confronted me the very first instance we had been together since the delivery of the data.
- e) Mr. Murray is basing a very serious allegation on the interpretation of a single phrase, when he was upset; the meaning of the phrase was evidently unclear to him, and he was in a closed state of mind. He is applying his interpretation as if it were fact, when it is not fact, and it is not true.
- f) Yielding information under questioning does not equate to concealing information; the intent to hide is absent and the failure to present information is not in itself deceitful. In its analysis, the determination treats them as equally culpable, but they are not.

In his evidence, Whalley reiterated that he stated to Murray he wasn't planning to tell him because it was too uncomfortable, adding that he was going to discuss it "when it came up, and if it didn't [come up], I would decide when to raise it".

The above chronicle of the various positions taken by Whalley at different times displays a theme that is played out in respect of other issues of fact detailed below, which is to gradually back away from and obfuscate facts which have been used or relied on by the Director to his detriment.

I conclude, as did the Director, that the comment was directly related to Whalley's transfer of the digital mapping file to Mr. Blackie. The comment cannot be removed from the context of the discussion that was taking place. There is nothing in the facts that indicates Whalley and Murray were talking about "ex-Cambium employees on an ex-Cambium project" when the comment was made. The "tirade" referred to by Whalley, that "ensued" followed disclosure that Whalley had given the digital mapping file to Mr. Blackie. Whalley and Murray were talking about Whalley releasing the digital mapping file to Mr. Blackie. Additionally, both the comment, and the discussion surrounding it, cannot be isolated from the evidence of Mr. Blackie, who said that he and Whalley talked in the Cambium office about whether Murray would be upset by Whalley giving the digital mapping file to an ex-employee working for a competitor and both agreed he would. I accept that Whalley would wish to avoid a confrontation with Murray, but I find the confrontation he was seeking to avoid related to the transfer of the digital mapping file to Control Point, and not to the loss of the Soards Creek contract to Control Point.

I do not accept that Murray's apparent display of anger on the morning of April 13 related to finding out that Control Point had been awarded the balance of the contract. After all, as Whalley pointed out in his complaint submission, Cambium had already interpreted events as indicating they had lost the Soards Creek contract and while Murray would undoubtedly have been disappointed by confirmation of that, I accept his evidence that his anger with Whalley was the result of being told by Jeff Sorrenson that Whalley had given the files to Mr. Blackie.

Marcy Prunkle, the Operations Manager for Cambium, gave evidence. She was clear about two points: first, Murray told employees at the staff meetings that occurred during January, February and March, 1998 not to give any information to Downie Timber, that he would handle it; and second, that even if the Digital

File Transmittal form is not used, no digital files are to be transferred from the office without that transfer being documented. I accept her evidence on both points.

Another important factual element in this appeal is contained in the first point of Ms. Prunkle's evidence and was also raised in the letter of termination given to Whalley on April 13, 1998, in the following paragraph:

On Thursday April 9, 1998, you gave Roadeng files that are the property of Cambium Forest Management Ltd. to Chuck Blackie, our ex-employee. Mr. Blackie is now a competitor of ours. You did this despite warnings that these files are Cambium's property and that you were not to share the data with anyone. These warnings were given to you by me personally and by Marcy Prunkle.

Whalley challenges the suggestion that he was told or warned not to share Cambium's data with anyone, or more specifically, that he was told not to release any files relating to the Soards creek contract without permission from Murray. In his complaint submission, Whalley approaches that assertion by stating:

I have no specific recollection of being categorically prohibited from delivering any data to anyone. For the sake of argument, I will allow that I might have received such instructions. It is not important for my argument, because I maintain that I am justified in defying such instructions, on the grounds that they are incorrect and unethical.

Later in the same submission, addressing the assertion that Ms. Prunkle had corroborated the assertion that he had received instructions not to deliver any data, he says:

Mr. Murray asked her [Ms. Prunkle] to corroborate his story that I had been specifically instructed not to release any data. *Like me*, she had vague recollections of something like that being said, but her own assertion could not have been as definite as the one that Mr. Murray ascribes to her.
(emphasis added)

I reiterate that before me Ms. Prunkle was not vague at all in her recollections of being told, at least, that no data was to be given to Downie Timber without Murray's approval. In his appeal, Whalley states, under point 4 of his rebuttal to Cambium's claim of just cause:

- 4) That I had been specifically instructed not to share data with anyone.
 - a) This is emphatically false. I was under no such instructions that would curtail my normal function of delivering data.
 - b) The instruction is absurd, and could not stand if it had been issued. I could not do my job under this constraint, and if I ever received such an instruction, I would have to question it immediately. I would assume an error in understanding and seek to have it corrected, or else I would have to object to it.
 - c) The greatest latitude that could be granted this statement is that the message did not get through. However, I doubt that even Mr. Murray believes he gave this order. His statement is a falsehood fabricated from the flimsiest components, with the specific intent of providing justification where none exists.

In his evidence, Whalley "categorically denied" he was ever told not to release information without permission. In cross examination, he was asked whether he was ever told not to give anything to Downie Timber without Murray's express permission and he replied, "I don't recall that". In another part of his evidence he acknowledged a recollection of something of that sort, which he described as "a personal,

indistinct expression of dissatisfaction with Downie Timber” from Murray that he “paid no attention to”. The inconsistencies in his evidence are obvious from the above analysis.

This chronicle of the submissions and evidence of Whalley on this point again demonstrates his backing away from and obfuscating a reasonable basis of fact for the conclusion reached by the Director. I reject his attempts to back away from his original submission that acknowledged a recollection of being told not to release any data. Also, when I consider the evidence of Ms. Prunkle and the inconsistencies in Whalley’s evidence, I am unable to accept Whalley’s contention that such recollection was a “vague recollection”. I conclude that Whalley was told, along with all other employees, not to release any information on the Soards Creek contract to Downie Timber and, in the circumstances, giving the file to Mr. Blackie was a wilful or negligent contravention of that instruction.

Whalley conceded in his evidence that he transferred a digital mapping file to an employee of a competitor, Control Point, without permission from either Murray or the client on whose behalf the file was created, Downie Timber. He adds, however, that he was justified in doing so because the file belonged to the client, Downie Timber, not to Cambium, and it was normal practice in the industry to pass any data created on behalf of a client to any other person, including a competitor. In support of that proposition, several witnesses were asked to comment on the matter of ownership and transfer of data created on behalf of a client. Mr. Talbot said, it is “commonly recognized” that the client owns the data. Derek Milsop, owner of Azimuth Forest & Mapping Solutions, a former employee of Cambium and current employer of Whalley, said that if the client has paid for the data, they own it and would be entitled to provide that data to any other contractor with whom they dealt. He also said it was normal for one company to pass on data to another company if “satisfied the other company is entitled to it”. Mr. Blackie expressed his understanding of the “normal practice” to be that the client is entitled to pass on any data that the client is entitled to receive from the consultant. The relevance of any of the evidence is questionable in light of the fact that Whalley neither sought the permission of Downie Timber to transfer the data, which he rationalized by saying it was a “mere formality” in any event, nor confirmed with Murray that Downie Timber was entitled to require Cambium to make such a transfer.

I do not accept that Whalley could have thought he was simply transferring data that Downie Timber, as the client, had already received and which Control Point could have acquired from them. Mr. LaBelle told him when they talked in late March that Control Point had received the file from Downie Timber and that he was being approached because Control Point did not think they had a complete file from Downie Timber. The very clear inference to be drawn from the all of the evidence is that, at least, Whalley was giving Control Point the file for the purpose of comparing the data Cambium had on file with that given to Control Point by Downie Timber. He knew his employer would be upset by this and he intended and attempted to conceal the fact of the file transfer from his employer.

ANALYSIS

The following comments are found in *Kenneth Kruger*, BC EST #D003/97:

The Tribunal has addressed the question of dismissal for cause on many occasions. The following principles may be gleaned from those decisions:

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 minor instances of 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 available employee to another available position within the capabilities of the employee.
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.

In dealing with whether a single act of misconduct justifies dismissal, the objective of any analysis is to determine whether an essential aspect the employment relationship has been undermined by the conduct of the employee.

Whalley has not overcome the burden on him to show that the conclusions of fact and/or law made in the Determination are wrong. I agree with the Director that Whalley owed an duty of fidelity to Cambium and he breached that duty. That duty included protecting any interests Cambium had in the digital mapping file and existed even in the absence any specific instruction not to transfer the file to anyone. If, in addition, Whalley delivered the data in the face of instructions prohibiting him from doing that, which he concedes he might have and I find he did, then he committed an act of insubordination as well as breaching his duty of fidelity. I do not accept that the data compiled by Cambium and retained by Cambium in their records "belongs" to the client. Downie Timber seems to have received all that it was entitled to, and perhaps more. It follows that I do not accept Whalley was justified in passing Cambium's file to Control Point. The seriousness of his conduct was compounded by his failure to record the digital mapping file transfer and his intention to avoid telling his employer it had been done until and unless it was necessary.

The facts of this case support a conclusion that the conduct of Whalley undermined his employment relationship with Cambium and justified his summary dismissal. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 18, 1999 be confirmed.

David Stevenson
Adjudicator,
Employment Standards Tribunal