

An appeal

- by -

Bruce Lawson

- 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:** Carol L. Roberts

**FILE No.:** 2003A/205

**DATE OF DECISION:** September 3, 2003

## DECISION

### OVERVIEW

This is an appeal by Bruce Lawson, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued June 6, 2003.

Mr. Lawson filed a complaint with the Director alleging that Gremallen Enterprises Limited operating as Green Timbers Pub ("Green Timbers") owed him regular wages, vacation pay and compensation for length of service.

In a decision dated June 6, 2003, the Director's delegate found that the Act had not been contravened, and decided that no further action would be taken

Mr. Lawson contends that the delegate failed to observe the principles of natural justice in making the Determination, and seeks to have the Determination varied or cancelled.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

This decision is based on written submissions by Mr. Lawson, Pat Douglas on behalf of the Director of Employment Standards, and by Len Tennant of Green Timbers.

### ISSUES TO BE DECIDED

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- a) the director erred in law
- b) the director failed to observe the principles of natural justice in making the determination; or
- c) evidence has become available that was not available at the time the determination was being made

The grounds for Mr. Lawson's appeal are that the delegate failed to observe the principles of natural justice. However, nothing in his submission relates to that issue.

Principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker. There is no dispute that Mr. Lawson participated in an oral hearing conducted by the delegate, had the opportunity to present his case, question witnesses, and reply to the evidence given by Green Timbers. Nothing in Mr. Lawson's submission suggests that he was not given a fair opportunity to be heard.

As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the Act, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal member expressed the view that the Tribunal should not "mechanically adjudicate an appeal based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off."

The Tribunal member also expressed the view that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied, cancelled or returned to the Director. I share that view.

Having regard to Mr. Lawson's submission, the grounds for his appeal are, in my view, more accurately characterized as an allegation that the delegate erred in law. In his letter of appeal, Mr. Lawson sets out 7 points which contain responses to the facts as set out by the delegate, and attempt to clarify, restate or refute the evidence. Because errors of law may arise out of errors of fact, I have considered the appeal on this ground.

At issue therefore, is whether the Director's delegate erred in law.

## **FACTS**

On December 23, 2002, Mr. Lawson filed a complaint alleging that Green Timbers owed him regular wages, vacation pay and compensation pay for length of service. He alleged that his employment had been terminated without just cause.

On April 7, 2003, the parties arrived at an "agreed statement of facts", which in reality consisted of nothing more than a brief statement of Mr. Lawson's allegations and Green Timber's responses. On April 25, 2003, the delegate held an oral hearing at which the parties gave evidence.

At the hearing, Green Timber did not dispute that it owed Mr. Lawson regular wages, and provided Mr. Lawson with a cheque for those wages. The delegate considered that issue resolved. Mr. Lawson then withdrew his claim for vacation pay.

The sole issue remaining before the delegate was whether Mr. Lawson was entitled to compensation for length of service.

The delegate heard evidence from Green Timber's owner, Mr. Tennant, about why he fired Mr. Lawson. In essence, those reasons were that Mr. Lawson failed to follow company policy, stole money from the charity meat raffle, and cheated on a football pool. The delegate heard Mr. Tennant's evidence as well as that of two witnesses on behalf of Green Timbers.

Mr. Lawson denied Green Timber's allegations, and responded to the evidence given against him.

Mr. Lawson also called two witnesses on his behalf.

The delegate set out the evidence of the parties, and concluded that Mr. Lawson had been fired for cause. She concluded that she did not have to decide whether Mr. Lawson stole money. She found that Mr. Lawson managed Green Timbers' money and the customers' pool money in

"a careless, lackadaisical fashion, and not in accordance with company policy or common sense. A critical part of his job as manager was to handle funds, and failure to do this properly was just cause to terminate him."

## ARGUMENT

Mr. Lawson argues that the delegate's factual findings are in error. His appeal letter refutes many of the findings of fact.

Mr. Tennant's submission also states that he noted "a few errors in the Director's report", but suggests that he did not file an appeal because he was of the view that these errors do not go to the substance of the Determination. He seeks to have the Determination upheld.

Both Mr. Lawson and Mr. Tennant agree that the delegate's finding that Mr. Lawson wrote himself a cheque for \$2,500 from the company's account is incorrect. Mr. Tennant says that Mr. Lawson "cashed \$2,500 in personal cheques that he wrote to himself from his own account and cashed from company funds."

Both Mr. Lawson and Mr. Tennant say the delegate's finding that Mr. Lawson was responsible for counting cash remitted by bartender staff was in error.

The delegate's submission consists of a number of documents, including the complaint, the Determination, the list of exhibits, and the Notice of Complaint hearing. It contains no submissions relating to the grounds of appeal.

## ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. (*Natalie Garbuzova* BC EST #D684/01) On the evidence presented, I find that burden has been met.

Given that the delegate rested her conclusion that Mr. Lawson's employment had been terminated for just cause on facts that were incorrect, I find that the delegate erred in law, and would, on this basis alone, refer it back to the Director. The employer and the employee agree that the delegate erred in factual findings that appear to be, in part, fundamental to the delegate's conclusion. While the delegate does not make express findings of fact, it appears that the conclusion she arrived at was based, in part, on a finding that Mr. Lawson wrote himself a cheque for \$2,500 from the company's account. Her conclusion that Mr. Lawson failed to handle funds "properly" seems to be based, in part on her assumption that Mr. Lawson was responsible for counting cash remitted by bartender staff.

The delegate's conclusion is based on errors of fact, which, in this case, lead to a Determination that cannot be sustained.

However, I also conclude that the delegate erred in law in failing to apply the law of dismissal to the facts.

Section 63 of the Act provides that an employer may be discharged from liability to pay length of service compensation where the employer is able to establish that the employee is dismissed for just cause. What constitutes just cause has been addressed by the Tribunal on many occasions.

In arriving at her conclusion, the delegate made no reference to any of the legal principles of dismissal, and in particular, did not consider whether Green Timbers met the four part test set out by Tribunal for unsatisfactory conduct (see, for example *Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97) or

whether there was a single act of misconduct justifying Mr. Lawson's dismissal without the requirement of a warning. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

The conclusion that Mr. Lawson managed money in "a lackadaisical fashion" and "not in accordance with common sense" does not constitute grounds for dismissal under either of these tests, nor does a failure to handle funds "properly".

I find that there is a complete absence of any analysis of the principles of dismissal or their application to the facts. I also conclude that the delegate made factual errors on which her conclusion is based. Therefore, I allow the appeal.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination dated June 6, 2003 be set aside. The matter is referred back to the Director for reconsideration.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**