BC EST #D269/99

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 -

Helton Industries Ltd.
operating as Westgate Door Industries-A Division of Helton Industries Ltd.
("Helton Industries" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/161
HEARING DATE:	June 4, 1999
DECISION DATE:	July 20, 1999

DECISION

APPEARANCES

Mr. Russ Puchalski	on behalf of Helton Industries
Mr. Paul R. Jutras	on behalf of himself
Ms.Andrea L. Jutras	on behalf of herself

OVERVIEW

This is an appeal by the Employer, Helton Industries, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on February 23, 1999. In the Determination, the Director's delegate found that the Employer had terminated Mr. and Ms. Jutras' employment without "just cause". The delegate determined that they were entitled to $1,934.90 on account of compensation for length of service. The Determination, as well, contains a "$0.00" penalty on the Employer for a contravention of Section 63.

The Employer appeals the Determination and maintains that Mr. and Ms. Jutras were terminated for "just cause". The Employer based its decision to terminate the Jutras' employment on breach of trust. The Employer was of the view that Mr. Jutras took certain money belonging to the Employer, lied about, and that Ms. Jutras helped him by lying about the disappearance of the money. Accordingly, the main issue to be decided in this appeal is whether the Employer had just cause to terminate the employment of Mr. and Ms. Jutras.

FACTS

Mr. Jutras was employed as a driver with the Employer until his termination on August 31, 1998. He was employed there since October 1, 1996. Ms. Jutras also worked for the Employer, in the warehouse, at its facility in Abbotsford, British Columbia. As I understand it, the Employer also has an outlet in Nanaimo, British Columbia. Mr. Jutras drove truck between the Employer's two operations in Abbotsford and Nanaimo.

On Wednesday August 26, 1998, Mr. Jutras returned from a trip to Nanaimo. He brought a sealed large brown envelope containing invoices, cheques and cash ($1,379.19). Mr. Jutras did not bring the envelope to the Employer that day. The Employer asked him about the envelope and he said that he had forgotten it and would bring it in the next day. The following day, Thursday, he was asked again about the envelope and said that he had forgotten it again. Mr. Puchalski said he saw Mr. Jutras put a yellow "sticky note" on his time card to remind himself to bring the envelope in.

On the Friday, Mr. Jutras did not bring in the envelope and was told that it was imperative that he bring in the envelope on the following Monday. The Employer's operations manager, Mr. Puchalski, testified that the Employer was becoming increasingly suspicious and concerned that Mr. Jutras was ignoring its directions to bring the envelope.

On the Monday, August 31, 1998, Mr. Jutras brought the remains of a burnt envelope and its content to work. Mr. Puchalski testified that the envelope had contained cash, mostly in $20 bills. The cash had been in a separate standard white envelope in the larger brown envelope containing the invoices. (The material in the larger brown envelope--but not the envelope itself--was entered as an exhibit in the proceedings. The material, consisted of partially burnt invoices and business records but there was no fragment of money (except a two dollar coin, which appeared to have been burned) or the envelope containing the money.) Not surprisingly, the Employer questioned Mr. and Ms. Jutras as to what had happened to the money. The Employer was suspicious because there was no trace of the money (except as noted above) among the burnt documents. The Employer was of the view that--in the circumstances-- there should be some fragment of the money left. Mr. Puchalski stated that there was supposed to be a "stack of bills" and he "expected some left" but "there was not a fragment". Mr. Puchalski went to Mr. Jutras home but did not find any fragment of the money.

Mr. Jutras explained the events of the morning of August 31 as follows. After he and his wife had breakfast, they left the kitchen. Shortly thereafter, they were alerted to smoke coming from the kitchen. He ran to the kitchen and discovered that the envelope (containing the invoices, cheques and cash) was on the stove and on fire. He put some of the paper into the sink but, he explained, there was still some paper on the element of the stove which he left to burn out on its own. He and his wife cleaned up the kitchen and went to work. He brought the remains of the documents to work in the morning, around 7:00 a.m. When Mr. Jutras told the purchasing manager what had happened, he was told that it "was not good". While he was in the purchasing manager's office, Mr. Puchalski telephoned and was informed of the situation.

In the initial meeting with the purchasing manager, Mr. Jutras testified that he felt responsible and wanted to replace the missing cash. He would do "within the hour" if the Employer would let him know the amount. As I understood the evidence, he re-iterated this in an interview with Mr. Puchalski around 10:00 that same morning. He thought that his insurance might cover the loss and, therefore, he might possibly recover the money. Subsequently, Mr. Jutras went back to work loading the truck (he was scheduled to go to Nanaimo). Later, he was told that he was not going to Nanaimo and to take a few days off until the matter had been resolved. While Mr. Jutras was waiting for a ride home, the police came. The police interviewed Mr. Jutras. According to Mr. Jutras, the officer suspected that he had taken the money and told him "we both know what happened to the money". In any event, Mr. Jutras signed a statement which read as follows:

> "I Paul Jutras am repaying $1,379.19 that was damaged in the fire and do take sole responsibility for the loss.
>
> (Signed)
> "Paul Jutras"
>
> Should I not pay Russ <Puchalski> has permission to lay charges or garnish wages.
>
> (Signed)
> "Paul Jutras"
>
> Received 8:15 a.m. $1,379.19 from Paul Jutras Tuesday, September 1st, 1998.
>
> (Signed)
> "Russ Purchalski"
> Manager, Westgate Door"

Mr. David Arts, who also testified on behalf of the Employer, said that he interviewed Ms. Jutras--separately from Mr. Jutras--about what had happened. She confirmed what Mr. Jutras had told the Employer. Among other things, she told Mr. Arts that her husband had run to the sink with the burning material and "put water on it". From her demeanor--he stated that she was trembling and was not looking him in the eye--Mr. Arts suspected that she was not telling the truth. In his view, her demeanor --during the interview was not characteristic of her. He said he knew her as a genuine person. He was also concerned that the paper was not wet. Mr. Arts also testified that the partially burnt documents were not wet (though they clearly have water stains) when they were brought in Monday morning. That, in his view, was inconsistent with Mr. Jutras' explanation that he had put the documents into the sink to put out the fire.

Based on his investigation, Mr. Puchalski felt that the Employer had no choice but to terminate the Jutras' employment.

Mr. Jutras repaid the money. No charges were laid and no criminal prosecution took place.

ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BCEST #D003/97):

"1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offenses 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 instances of minor 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 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 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."

This case deals falls within the fourth category, summary dismissal based on a single act of misconduct. Theft and allegations of dishonesty are serious matters, both for the employee and the employer.

The delegate found, as fact, the following:

- There was a fire.
- Cash either was stolen or was destroyed in the fire. It is not known if the cash was stolen or destroyed. If he cash was stolen, it is not known if one or the other of Paul R. Jutras and Andrea L. Jutras (Complainants) or someone else stole the cash. The cash was not located. Remnants of the ash containing the cash was not located.
- Police attended but did not lay charges.
- Paul R. Jutras and Andrea L. Jutras (Complainants) replaced the cash loss.

The delegate concluded that the Employer did not have cause for termination:

> "A suspicion of theft, fraud or dishonesty is not proof of just cause. The standard of proof is "on the balance of probabilities". If the balance of probabilities is equally weighted as to the employer and employee then, as employment standards legislation as a mechanism for providing employees minimum benefits, any doubt should be resolved in favour of the employee.
>
> Not knowing if the cash was stolen or destroyed in the fire is a consideration. The theft would need to be proven. If it were theft, then who did the theft would need to be proven to be the complainants. Without knowing who did the theft or even if it were a theft, is a consideration. Fraud has not been directly brought up by the employer. There is no proof of fraud. From the versions of the events presented I cannot conclude that there was even dishonesty. On the balance of probabilities, I do not find that there was theft, fraud or dishonesty.
>
> Without, on the balance of probabilities, proof of theft, fraud or dishonesty or who did the theft, or whether fraud or dishonesty occurred, just cause is not proven."

In England et al., *Employment Law in Canada* (3d) (Toronto and Vancouver: Butterworths, 1998- at pages 15.21-22) the learned authors consider the test for "just cause" where dishonest conduct is alleged:

> "When the employer alleges theft or some other fraudulent conduct as the reason for dismissal, the greater stigma attached to such conduct has resulted in most courts imposing on the employer a more exacting --standard of proof than the regular civil law "balance of probabilities" but one which nonetheless falls short of the criminal law test of "beyond a reasonable doubt". Collective agreement arbitrators have adopted a similar "intermediate" standard. Various linguistic formulations have been articulated in an attempt to clarify the nature of this standard, but none has attained a particularly edifying degree of exactitude. Ultimately it appears to boil down simply to whether or not the court is *satisfied* that the worker committed the acts in question. ... It follows that an employee can

> be dismissed for "just cause" on the basis of the employer suspecting that he or she acted dishonestly, provided the facts existing at the date of the dismissal confirm, on the balance of probabilities, that the employee probably committed the wrongful acts, even though the employee is subsequently shown in a criminal trial not to have done so. ... <T>here must be evidence, on the balance of probabilities, that at the date of the dismissal the employee actually committed the wrongdoing in order to confirm the employer's suspicions. In other words, the employer's suspicions cannot be merely speculative or otherwise unsubstantiated by evidence. ... The critical point is that if an employer "suspects"--in the layperson's commonly understood sense of that word--that an employee has committed theft or fraud, and the facts at the date of dismissal confirm that the employee likely did the acts in question on the evidentiary balance of probabilities, summary dismissal will be ruled for "just cause". ..."

In my view, the delegate was wrong in deciding that a factual dispute should be resolved in favour of the employee based on the remedial nature of the legislation. In this case, the proper resolution of the factual dispute is whether or not the Employer had sufficient "facts at the date of dismissal confirm that the employee likely did the acts in question on the evidentiary balance of probabilities". In my view, there is nothing in the Determination to suggest that the delegate analysed and reviewed the evidence before him. Rather, the delegate appears to simply have taken each version--the Employer's and the Employees'--at face value. It is not proper to simply take each version of the facts at face value, note that they are inconsistent, and then conclude that the "balance of probabilities is equally weighted". The delegate must consider the testimony of each witness against "the preponderance of probabilities" to assess their credibility. In my opinion, the delegate did not resolve the credibility of the various witnesses in order to arrive at a determination of whether the Employer, in fact, had "just cause" for termination. I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, <1952> 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

The delegate erred in law and, in my view, this is sufficient to set aside the Determination.

Having considered the evidence and the law carefully, I am of the view that the Employer did have just cause for the termination of Mr. and Ms. Jutras. In my view, the Employer had sufficient "facts at the date of dismissal confirm that the employee likely did the acts in question on the evidentiary balance of probabilities". I base that decision on the following (which essentially comes down to a decision with respect to the credibility of the witnesses and their testimony).

It is possible that the events leading up to the termination of Mr. and Ms. Jutras unfolded as testified to by them. It is possible that the envelope got placed on the stove following the Jutras'

breakfast, that the cooking element got turned on while after they left the kitchen (perhaps by their children), that there was a fire which destroyed only part of the content of the envelope, *i.e.*, the smaller envelope containing the cash, and destroyed that part such that there was no trace. In all of the circumstances, though, I consider it unlikely.

It is not in dispute that Mr. Jutras brought the cash, $1,379.19, mostly in $20 bills, from Nanaimo, *i.e.*, he took possession of the envelope containing the cash, that this amount of money belonged to the Employer, and that it was a part of his regular employment duties to deliver the money (and other documents) from the Employer's outlet in Nanaimo to the Abbotsford operation. Mr. Jutras did not dispute the Employer's allegation that the cash was in the envelope when he took possession of it. It is clear that the cash was not delivered to the Employer. Ultimately, the evidence cannot support a finding that Mr. Jutras (or his wife, for that matter) stole the money. It is clear, however, that the money disappeared while under Mr. Jutras' care and control and--as suggested by the Employer--under suspicious circumstances. I am satisfied that, at the very least, the Jutras "covered up" the disappearance of the money.

Understandably, the Employer became concerned or suspicious when Mr. Jutras did not deliver the envelope with the cash for several days, despite being requested to do so. As noted above, simple suspicions are not sufficient cause for the termination of employment. In any event, the did not terminate Mr. and Ms. Jutras' employment based on this.

Following a specific direction to bring the envelope on the following Monday, Mr. Jutras brought the burned and charred remains of the envelope and its content to the Employer. The Employer investigated the incident, and interviewed Mr. and Ms. Jutras to evaluate and assess their explanation for the missing cash. As well, the Employer went to the Jutras' residence to look for traces of the money. (There is no suggestion that this was not done by consent.) The Employer in this case did not act simply on the basis of suspicions. The Employer's witnesses were particularly concerned that there was no fragment of the money (except for the "toonie") to be found either with the envelope and its content that had been handed over to the Employer, or at the Jutras' home. In fact, the Employer's witnesses considered it unlikely that the envelope containing the cash would have been completely destroyed without a trace or fragment of money or the envelope itself. I agree.

At the hearing, Mr. Jutras testified that when he moved the burning material from the stove to the sink, some paper was left on the cooking element which burned out on its own. This was his explanation for the missing cash. I find it difficult to accept that there would be no fragment of money in the house. Moreover, I find it difficult to accept that there were not more coins handed in to the Employer or found at the residence, given the amount missing, $1,379.19.

The witnesses for the Employer testified that the envelope and other remains were dry when they were brought in to the Employer Monday morning (when--according to the Jutras--the fire occurred). In the Employer's view, that was inconsistent with the paper being placed into the sink and doused with water to put out the fire. The Jutras did not contest or otherwise explain this. In

my view, this is an important element in deciding on the credibility of the respective--and competing--versions of the facts.

In fact, as pointed out by the Employer, there were water stains on the invoices. However, it is unlikely that the paper would have had the time to dry before the Jutras came to work. Judging from the burn marks on the paper, it is likely that the paper did, in fact, come into contact with a cooking element or a similar device for some extended period of time. In view of the water stains, it is likely that the paper was doused with water (presumably to put out the fire) at some point in time between Mr. Jutras' return from Nanaimo and Monday morning. However, it is unlikely that it happened that Monday morning. This may explain why Mr. Jutras did not bring in the envelope until Monday.

In short, I do not accept the Jutras' explanation of the events surrounding the disappearance of the Employer's cash.

In my view, the Jutras--at the very least--"covered up" the circumstances of the missing cash. They acted dishonestly. In *McPhillips v. British Columbia Ferry Corporation* (1994), 94 B.C.L.R. (2d) 1, the Court of Appeal held, at page 6:

> "Dishonesty is always cause for dismissal because it is a breach of the condition of faithful service. It is the employer's choice whether to dismiss or forgive."

While I am not convinced that the law is quite as "black and white" as one might understand from the remarks of the Court of Appeal in *McPhillips*, it is clear that dishonesty is a very serious matter which may justify termination. In the case at hand, it is my opinion that the conduct of the Jutras justifies termination, particularly in the case of Mr. Jutras. After all, it was a part of his employment duties to bring money from Nanaimo to Abbotsford. The Employer would have difficulty trusting Mr. Jutras in the future.

In the circumstances, the Employer also had cause to terminate Ms. Jutras employment. In the interview with the Employer, she confirmed her husband's explanation with respect to the missing cash. She maintained that explanation at the hearing. I appreciate that she was put in a difficult position when she was interviewed by the Employer. She was uncomfortable during the interview, as testified to by the Employer. This may have been an act out of character. Nevertheless, regrettably, she participated in the "cover up", was terminated for cause and is, therefore, not entitled to compensation for length of service. This "cover up" was not a trivial matter.

The Jutras referred me to a decision of the Board of Referees which set aside the initial refusal of Human Resources and Development Canada to provide Employment Insurance. The initial decision was that the Jutras' own misconduct had caused the termination and that they were not entitled to Employment Insurance. I am not bound by the decision of the Board of Referees or the

initial decision. These decisions were made under a different statutory regime, the *Employment Insurance Act*. The purpose of that legislation is to provide benefits to employees who lose their employment through an insurance scheme paid for by employers and employees. The main purpose of the *Employment Standards Act* is to provide minimum terms and conditions of employment, including notice of termination (see Section 2).

In all of the circumstances, I am persuaded to allow the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 23, 1999 be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal