Employment Standards TRIBUNAL

An appeal

- by -

Joya Brothers Holdings Ltd.
(the"Employer")

- 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: Ib S. Petersen

FILE No.: 2000/860

DATE OF HEARING: March 29, 2001

DATE OF DECISION: May 30, 2001

DECISION

APPEARANCES:

Mr. Richard Kyle Paisley Mr. J. Clare	on behalf of the Employer
Mr. Joel Dayrit	on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on November 27, 2000. The Determination against the Employer concluded that the Employer terminated Joel Dayrit (the "Employee") without just cause and that he, in the result, was owed $4,003.49 on account of compensation for length of service. The delegate held in the Employer's favour with respect to a claim for vacation pay.

ISSUE

The issues before me boils down to these. Did the Employer have cause for the termination of Dayrit for "malingering" or, is Dayrit entitled to compensation for length of service because of his failure to return to alternative light duties?

FACTS

A hearing was held at the Tribunal's offices on March 29, 2001. At the hearing, an interpreter was provided for Dayrit. At one point during the hearing, Dayrit questioned the translation generally because the interpreter was from a different region of the Philippines and requested an adjournment. I denied the adjournment. First, the Interpreter was properly sworn, and in my view, there was nothing to substantiate the assertion that the interpreter did not properly translate the proceedings, an assertion which was, as well, opposed by the Employer. Second, in my view, it was clear from Dayrit's questioning of the Employer's witness that he was not as incapable of understanding the proceedings as he might have let on.

The background facts are largely not in dispute and may be gleaned from the Determination and the evidence presented at the hearing:

1. Dayrit worked for the Employer, an auto repair business, as an auto mechanic from June 22, 1993 to November 29, 1999. He was paid $12.00 per hour.

2. Bob Joya ("Joya"), who was also working elsewhere as a Karate instructor, took over the management of the business in August 1999 when his brother, Tim Joya, left the country for medical treatment. Unfortunately, Tim Joya passed away while abroad.

3. The shop carried a heavy debt load due to a decline in business and the decision was made to sell the business.

4. On Friday, November 26, 1999, Dayrit claimed that he twisted his ankle at the shop. He reported for work on Monday, November 29, 1999 and worked a full shift. After that date he did not return to the Employer to work.

5. Dayrit filed a workers' compensation claim which was accepted.

6. On December 6, 1999, Dayrit attended the work place and provided the Employer with a doctor's note and picked up his pay cheque.

7. On December 13, 1999, the Employer called Dayrit. At that time, says the Employer, Dayrit was offered a return to work on light duties. According to the Employer, Dayrit refused.

8. On December 17, 1999, the Employer issued a Record of Employment. The ROE stated that the reason for issuance was "D", illness or injury, and stated the return date as "unknown," as opposed to "not returning."

Joya testified for the Employer. He expressed considerable doubt with respect to the veracity of Dayrit's claim that he was injured at work, or at all. He says that there were no witnesses to the accident and that Dayrit told him of the injury on November 29, 1999 and that Dayrit worked the whole shift on that day. Joya also says that he was surprised that Dayrit came to work on the Monday and worked the whole day. In any event, Joya explained that Dayrit was "not noticeably limping" on that day. When told of the injury, Joya said "fine" and explained that he expected Dayrit to return to work in 1-2 weeks.

Dayrit explained in his direct testimony that there was a witness to the accident, Orly Dugay. The Employer submitted an affidavit from Dugay stating that he did not actually observe the accident but was subsequently told by Dayrit about it. Dayrit also says that he told Joya about it after the latter came back from lunch. The injury report filed with the WCB indicates that the accident occurred between 1:00 and 1:30 p.m. and that it was reported to the Employer around 2:00 p.m. He explained further that he completed Friday's shift and took "painkillers" when he got home. The following Monday, he stated, the swelling was down and he decided to return to work. The following day, however, the ankle was swollen again and Dayrit went to see his family physician who told him "not to go back to work." A doctor's note, dated December 6, 1999, states that Dayrit "is still unable to work because of an ankle injury. Estimated time off 1-2 weeks." Dayrit explained that he attended physiotherapy in December 1999 and January 2000, and submitted receipts to support that.

Subsequently, Joya offered Dayrit alternative employment. While the tenor of the evidence overall was that there were at least two conversations on the topic a return to work, it was not clear to me exactly when the matter was first broached. In any event, there appears to be no dispute that there was a conversation on December 13, 1999 between Joya and Dayrit and that Joya offered a return to work on "light duties." Joya testified that Dayrit had previously--prior to the accident on November 26--asked to be laid off in the place of one of the mechanics. In his view, Dayrit also knew that he was a valued employee and needed in the business. Dayrit knew that one of the other mechanics had been scheduled to go to the Philippines to visit a sick brother. This trip had been booked for a long time. In any event, according to Joya, the alternative employment offered to Dayrit consisted of answering the telephone, taking orders, and doing estimates and diagnostics (with Joya doing the actual work). In cross examination, Dayrit expressed some difficulties with Joya's statement that he could do diagnostics from the office. Joya explained that he "needed [Dayrit] to be there" in the business, even if it was in a more limited capacity. It was clear from the evidence that the Employer considered Dayrit's failure to return to work, as stated in the Determination, as the "root cause" of the problems of the business. As well, Joya explained that this was work Dayrit had done before in one of the other shops previously operated by the Employer in Richmond. Joya said that Dayrit would not have to "use his ankle." He could sit on a chair in the office, which is independent of the shop, and would not be required to wear safety boots. The upshot of the conversation was that he told Dayrit that he would be terminated if he did not accept the offer of a return to work on light duties. Dayrit does not dispute that he was offered a return to work. The delegate seems to have accepted this as well.

Dayrit agrees that there was a conversation between himself and Joya regarding his return to work. He says that Joya telephoned him, asking him to return to work. Dayrit says that he told him that he had pains in his ankle and was taking medication for that and that his physician had told him that he would be off work for 1-2 weeks and that the doctor would "see [him] again in 1-2 weeks' time." In cross examination, Dayrit agreed that Joya spoke with him twice about alternative work. Dayrit explained that approximately one week later he was telephoned by the WCB and asked if he had been laid off by the Employer. He said that he had been. After another two weeks, he went back to his physician and started a program under the WCB. The last conversation between Joya and Dayrit took place on December 13, 1999.

In the circumstances, it seem to me that both parties treated the employment relationship as at an end after December 13, 1999. Curiously, the ROE did not reflect this fact. Rather, as noted above, the ROE stated that the reason for issuance was "D", illness or injury, and stated the return date as "unknown," as opposed to "not returning."

Joya also testified with respect to his conversations with an investigator from the Workers' Compensation Board. His direct evidence in that regard was that he was told that Dayrit was "not returning to work in the immediate future because [of his] injury."

Corazon Joya, the mother of the deceased Tim Joya, also testified. She testified that she saw Dayrit at a swap meet at Terminal and Main, in Vancouver, in the first or second week of December. The implication of her testimony is obvious, namely that Dayrit was not injured and capable of working.

In part the Employer's focus in cross examination of Dayrit was to show that he was to blame for the demise of the business. In my view, while I have some sympathy for the Employer's difficulties arising out of Tim Joya's illness and untimely death, that was misdirected. However, I do accept that Dayrit's answers to some of the questions were less than candid. I found him evasive. For example, he denied knowing of the business difficulties of the Employer. In the circumstances, the relatively small operation, his length of service and position with the Employer, I do not find that credible. As a mechanic, surely he would have known that customers were "not showing up" and employees were being laid off. Overall, I find that his evidence was less than credible and, therefore, where the are conflicts in the testimony, I prefer that tendered by the Employer's main witness, Joya.

ANALYSIS

In this case, the burden is on the Employer, as the appellant, to persuade me that the Determination should be set aside.

The onus is on the employee to establish that he or she was dismissed from his or her employment (*Walker v. International Tele-Film Enterprises Ltd.*, [1994] B.C.J. No. 362 (February 18, 1994) (BCSC)). In this case, I find the facts show that the employee was dismissed on or about December 13, 1999.

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)).

As well, Section 65 provides for certain exceptions to Sections 63 and 64:

> 65. (1) Sections 63 and 64 do not apply to an employee ...
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

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

> "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."

The delegate considered the termination in terms of just cause, namely whether Dayrit was malingering and whether the Employer was justified in terminating his employment for that reason. In her lengthy and detailed decision, the delegate considered the factual circumstances and legal principles. The delegate stated, correctly in my view, that temporary absences from work due to illness do not constitute cause for termination. She then set out to analyse the Employer's claim that Dayrit was malingering. She found that there was "very little evidence" to support the allegations. The delegate relied upon the following:

1. The delegate interviewed Dayrit's case manager at the WCB, who in essence, confirmed that there was medical proof of disability. She also indicated that there was light work available but that it was unclear when the Employee would be fit to return to work.

2. As well, the delegate spoke with Dayrit's physician. She confirmed that she first saw Dayrit with respect to this injury on November 30, 1999. She saw him regularly until he began the work re-conditioning program at the WCB. According to the delegate, she spoke with Dayrit about returning to work on light duties "but that he would have been unable to wear his safety boots and that it was not recommended."

3. Finally, the delegate spoke with witnesses suggested by the Employer. These witnesses included Corazon Joya, Matthew Milton, Anna Lucente and Cynthia Quidlat. The essence of the evidence provided by these witnesses is that they saw Dayrit walking on various occasions. The implication being, obviously, that he is malingering.

It is clear that the delegate did not accept the Employer's argument that Dayrit was malingering. I agree largely with the delegate's analysis of the facts and his conclusions in that regard. While the Employer--with some justification, in my opinion--takes issue with the delegate's characterization of the witnesses mentioned above as "friends of the Employer", judging from the content of the information provided to the delegate, there is, indeed, little evidence to support the Employer's claim that Dayrit was malingering. At most, the evidence of these witnesses would be that Dayrit was capable of walking during the relative short period of time he was observed by the witnesess. The witnesses were not entirely certain when they observed Dayrit. While I fully understand the Employer's suspicions and scepticism, I agree with the delegate that the evidence provided by the Employer does not in any substantive manner support the argument that he was not injured as he claimed and unable to work. Even if I accept that Dayrit was, in fact, "walking," as stated, that does not prove that he was capable of working in his position as an auto mechanic.

There are two important indications that Dayrit was unable to work in that capacity for medical reasons, the determination by WCB and the note from his doctor. I agree that the determination by the WCB does not decide the issue of whether or not Dayrit was medically unfit for work in his employment as an auto mechanic for the purposes of the *Act*. All the same, it does provide some support for the finding that he was. In any event, there was, as well, a note from Dayrit's family physician, dated December 6, 1999, to the effect that he was unable to work for 1-2 weeks. If the Employer had seriously intended to question that opinion, the Employer could have summonsed the doctor to testify at the hearing. In short, what was before the delegate was, on the one hand, the determination of the WCB, which certainly does not have an interest in the matter, and the opinion of Dayrit's physician and, on the other, the statements of lay persons who, quite aside from their potential interest in the matter, are clearly not qualified to judge whether or not Dayrit was unable to work as an auto mechanic for medical reasons.

I essentially take the same view of Joya's opinion with respect to Dayrit's disability based on the latter's attending the work place on December 6 and the fact that Dayrit was not at home when Joya first called him on December 13. The Employer was asking that the delegate infer from this that Dayrit was capable of working. As noted by the delegate, "all it shows is that Dayrit was out of the house." The delegate dismissed this as irrelevant. While I would not go that far, it is a

leap of faith to infer from that Dayrit was seen walking or was away from his home indicates that he capable of working, particularly, where there is medical evidence to the contrary. In other words, I am prepared to accept that Daylis was medically unable to work in his position as an auto mechanic at the material time. In my view, the delegate correctly dismissed the Employer's allegations of just cause based on the allegation of malingering. On the evidence before him, I do not see how the delegate could have arrived at any other conclusion on this issue. The Employer's evidence amounts to little more than conjecture and speculation.

That does not end the matter, however. The real issue, in my view, is whether the Employer may avail itself of the "defence" provided in Section 65(1)(f)--set out above.

The delegate found that this provision was not applicable to the circumstances. She disposed of this question in this manner:

> "The employer also takes the position that by refusing light duty Dayrit refused a reasonable alternative position as per Section 65(1)(f) of the Act and is therefore not entitled to compensation for length of service. Section 65(1)(f) is intended for a situation such as the following. For example, if an employer has two auto-repair shops and is closing one down, the employer might offer an employee at the shop that is closing a position at the other shop. If the employee refuses the new position and files a complaint for compensation for length of service, the Branch would have to consider the conditions of employment at the new position as compared to the old to determine whether if was an offer of reasonable alternative employment. Some of the conditions that would be considered include the wage rate, the distance the employee would have to travel and the hours of work. If the offer were found to be reasonable, then the employee would not be entitled to compensation for length of service.
>
> Both parties agreed that Dayrit was offered light duties and declined to accept those. I have confirmed with the employee's doctor that the matter was discussed and that the conclusion was that the employee was unfit to perform light duties. As a result, the employee cannot be said to have refused reasonable alternative employment when he is following the advice of his doctor."

I disagree with the delegate that Section 65(1)f) is limited as indicated in the Determination and that it is not applicable to the circumstances such as those in the instant case. In my opinion, the delegate erred.

The onus of showing that the offer is reasonable is on the party making it, here the employer. In *Southside Delivery Services Ltd.*, BCEST #D246/97, although not directly on point, the adjudicator considered the circumstances where an employee was terminated because he chose not to return to work as a result of an injury. In that case, the adjudicator noted:

> "I therefore find that Acker terminated the employment of his own initiative and therefore the employer's liability to pay compensation is discharged.
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> If it was necessary, I would also find that the employer offered reasonable alternative employment to Acker in accordance with S. 65(1)(f) of the *Act*. Acker refused light duty driving on the basis that his back was wrecked and unable to even sit in a drivers seat. Yet within weeks of the termination of employment with Southside he enrolled in a completed a Class 1 drivers program which is far more strenuous than the duties offered by the employer. Under these circumstances S. 63 does not apply and there would be no compensation payable."

In *Helliker*, BCEST #D338/97, reconsideration of BCEST #D357/96, a case submitted for my consideration by the Employer, the adjudicator stated:

> ".... I agree with the adjudictor that the test of reasonableness is an objective test, that is, what a reasonably officious bystander would consider reasonable, not what the employee believes reasonable. This test will include an assessment of the following factors:
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> 1. The nature of the job offered compared to the one currently performed;
>
> 2. Any express or implied understandings or agreements;
>
> 3. If there a comparable wages, benefits, working conditions and security of employment;
>
> 4. Geographic proximity or costs of dislocation; and
>
> 5. Any objective personal circumstances that might operate against accepting the offer."

The delegate erred in law and, therefore, did not properly investigate the offer of employment. I am not convinced that the fact, referred to in the Determination, that the delegate spoke with Dayrit's physician (who confirmed that she spoke with Dayrit about returning to work on light duties "but that he would have been *unable to wear his safety boots* and that it was not recommended") is sufficient to indicate that the delegate properly considered the issues raised by Section 65(1)(f) and that would seem to be relevant here: the nature of the position offered, express or implied understandings or agreements, comparable terms and conditions of

employment, and objective personal circumstances operating against accepting the light duties offered. With respect to the personal circumstances, an obvious one would be Dayrit's medical condition. Further, I am also influenced by the Employer's submissions that the question of the safety boots/equipment was never raised in the course of the fact finding conference that apparently was held with the parties. The Employer says that the first time it learned of this was in the Determination.

In the result, I am persuaded to refer the Determination back to the Director for further investigation in accordance with the above.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated November 27, 2000, be referred back to the Director.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal