Employment Standards TRIBUNAL

An appeal

- by -

Jack's Towing Ltd. (“Jack’s” or “Employer”)

- and by -

Greg Guggenheimer (“Guggenheimer” or “Employee”)

- 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: Paul E. Love

FILE No.: 2003A/227 and 2003A/237

DATE OF DECISION: November 3, 2003

DECISION

SUBMISSIONS

Glenn Slusar	on behalf of Jack's Towing Ltd.
Greg Guggenheimer	on behalf of himself

OVERVIEW

This Decision is rendered in respect to an appeal by an employer, Jack's Towing Ltd. ("Jack's Towing" or "Employer"), (Tribunal File 2003A/227) and by Greg Guggenheimer ("Guggenheimer" or "Employee") (Tribunal File 2003A/237) from a Determination dated July 24, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*").

The Employee filed a complaint alleging that he was entitled to compensation for length of service. After conducting an investigation, the Delegate issued a Determination finding that Guggenheimer was dismissed without just cause, and that he was entitled to compensation for length of service. The Employee filed an appeal of the Determination alleging new evidence, and claiming that the Employer made unauthorized deductions from his paycheque. The "unauthorized deduction" claim was not raised by Guggenheimer in the six months after his termination, and did not form part of Guggenheimer's original complaint to the Employment Standards Branch. Section 74(3) of the *Act* provides for complaints to be filed within six months after the termination of employment. I dismissed this appeal, as it was evident that the Employee's claim for unauthorized deductions was not made in the original complaint, and was raised after the Employee received the Determination, and more than six months after his termination.

The Employer filed an appeal alleging a breach of natural justice and an error of law. The Employer pointed out a calculation error in the Determination, and this error was admitted by the Delegate. I therefore corrected the Determination. While the Employer alleged bias on the part of the Delegate and a breach of natural justice, the Employer provided no evidence supporting an allegation of bias. It was evident that the Delegate provided a reasonable opportunity to Jack's Towing to participate in the investigation. I therefore dismissed the argument relating to a breach of natural justice.

In reviewing the allegation of error of law, it was apparent that the Delegate applied the correct test in determining whether or not the Employer had just cause to dismiss the Employee. The Employee was absent from work due to the effects of dental surgery. The Employer did not ask the Employee for a doctor's note. There was no cogent evidence of any history of absences, and no cogent evidence that Guggenheimer was warned that his job was in jeopardy due to absences, or a failure to report absences directly to Glen Slusar ("Slusar"), a principal of the Employer. Guggenheimer reported the absence to the dispatcher. There was evidence from the dispatcher that other persons who were absent reported the absence to the dispatcher, rather than to Slusar, and were not terminated by Jack's Towing. While it is open to an employer to manage absences through a direct reporting system, an employer must also ensure that the Employee is aware that a failure to direct report will result in termination. There is no evidence

that the Employer made Guggenheimer aware that a failure to report an absence to a principal of Jack's Towing would result in termination.

ISSUE:

Did the Employee establish that the Determination should be corrected for "new evidence" related to unauthorized deduction of wages?

Did the Employer establish any breach of natural justice or error of law in the Determination finding that the Employer did not establish just cause for the dismissal of Guggenheimer?

FACTS

These two appeals proceeded by way of written submissions from the Employer, the Employee, and the Delegate.

Glenn Guggenheimer ("Guggenheimer" or "Employee") is a tow truck driver, formerly employed by Jack's Towing Ltd. ("Jack's Towing" or "Employer") in Abbotsford, B.C. Glen Slusar ("Slusar") is a principal of Jack's Towing. On April 11, 2002, a non-working day, Guggenheimer had a wisdom tooth extracted by his dentist. Guggenheimer was scheduled to work in the afternoon on April 13, 2002. On April 13, before the start of his shift Guggenheimer called the office of Jack's Towing, and reported to the dispatcher, Maria Sunder, that he could not work his shift because of the extraction. When calling in his absence, Guggenheimer did not speak to Slusar, as he was concerned that Slusar would not give him the time off that he required for medical purposes.

On April 14, 2002, Guggenheimer called into the Employer's dispatch office, and indicated that he was fit to work, and ready to take radio calls. The dispatcher directed Guggenheimer to call Glen Slusar at home. Guggenheimer called Slusar and was Slusar told him that he was not allowed "any" day off of work without his permission. Slusar directed Guggenheimer to return the truck. The Employer terminated Guggenheimer's employment. The Employer did not request any medical proof of the reasons for the absence from Guggenheimer.

Guggenheimer presented a copy of a letter from his dentist to the Delegate, verifying the tooth extraction on April 11, 2002. The Delegate accepted Guggenheimer's evidence that he was in pain, and was taking pain medication for the extraction, and that Guggenheimer was in discomfort, the extraction was still bleeding and oozing, and this caused an unpleasant odour which he felt was not good for business.

I note that the Employer appears to have been inconvenienced by the absence of Guggenheimer from the workplace on April 13, 2002. The Employer appears to believe that the absence was due to an alcohol problem that Guggenheimer had, however, there is no proof that Guggenheimer failed to attend work on April 13, 2002, because of an alcohol related problem.

ANALYSIS

The Grounds for Appeal and the Burden:

In an appeal of a Determination, the burden rests with the appellant, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(b) of the *Act* provides for an appeal on grounds that:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

It is convenient to consider both appeals in one written Decision. In this Decision I will deal first with the Employee's appeal, and then with the Employer's appeal. Each party bears the burden of proof on his or its respective appeal.

The Employee's Appeal:

Employee's Argument:

The Employee claims that the Employer made unauthorized deductions from his paycheque, and that the Delegate erred, in that evidence became available which was not available at the time the Determination was being made.

The Delegate's Submission:

The Delegate submits that she investigated Guggenheimer's complaint that he was terminated without just cause, and that the claim of unauthorized deductions was not brought to her attention, prior to the filing of the appeal of the Determination by the Employee. The Delegate says that the "unauthorized deduction" issue was not investigated, and cannot be appealed.

The Employer did not file any submission in response to the Employee's appeal.

Analysis - Employee's Appeal

In my view, this is an appropriate case for a summary dismissal of the Employee's appeal, without any consideration of the merits of the claim raised by Guggenheimer. Guggenheimer was terminated by the Employer on April 14, 2002. He filed an employment standards complaint on June 25, 2002. In the complaint Guggenheimer sought compensation for length of service and damages for wrongful dismissal. He did not raise the issue of unauthorized deductions from his pay.

The Employee says that upon receiving the Determination, he noted that deductions had been taken off pay cheques which he believed were for damage claims. The Employee filed an appeal on August 22, 2003. The Employee says that these deductions add up to $1,900 over a year. The Employee seeks to have the amount of the unauthorized deductions added to the Determination.

Guggenheimer failed to comply with the provisions of section 74 of the *Act*, which reads as follows:

> 74 (1) An employee, former employee or other person may complain to the director that a person has contravened
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> (a) a requirement of Parts 2 to 8 of this Act, or
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> (b) a requirement of the regulations specified under section 127(2)(l).
>
> (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
>
> (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

The legislature intended that employment standards complaints be raised within a defined period after the termination of an employment relationship. The Tribunal has no jurisdiction to extend the six month period for the filing of a complaint. Guggenheimer did not raise his complaint within the prescribed time limit, and therefore I dismiss his appeal from the Determination.

The Employer's Appeal:

Employer's Argument:

The Employer has alleged that the Delegate erred in law, and also breached natural justice. In its submission of August 12, 2003, accompanying the notice of appeal the Employer elaborated on its reasons for saying no oral hearing was necessary:

> ... I must be honest, I have been very disappointed in the conduct of [the Delegate] and the conclusion she arrived at. From the beginning she acted very unprofessional in faxing a rather insulting statement made by Guggenheimer to an open fax at our dispatch office for any of my employees to read. She than attempted to entrap me through lengthy telephone conversations trying to find something to substantiate her pre-determined decision in favour of Guggenheimer. When this failed she then twisted the facts in her final brief to make it appear unfair to Guggenheimer.
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> I wonder, when our business is located in Abbotsford and Guggenheimer lives in Abbotsford, why the Prince George office would handle this case? Is it because Guggenheimer is native? Is [the Delegate] native or partial to natives? By her actions it would appear so, however, I hope this does not prove to be true.

The Employer says that the Employer has

> a fundamental right to require employees to report directly to their assigned supervisor at any time that they are unable for any reason to being or complete their scheduled shift.

The Employer says that Guggenheimer is not entitled to compensation for length of service. The Employer points out that it runs an emergency towing service, and it is essential that it have adequate staff on hand, and that if an employee has legitimate reasons for missing work other arrangements must be made. The Employer says that Guggenheimer failed to show up for work, and notified a fellow employee rather than his supervisor. The Employer says that the Employee "made sure that he could not be found for confirmation". The Employer says that the failure to notify the supervisor is grounds for dismissal.

The Employer appears to believe that Guggenheimer was absent from his shift due to a problem with alcohol. The Employer alleges a past work history of Guggenheimer failing to attend work. The Employer wants the Tribunal to refer this matter back to the Director.

One of the grounds of appeal relates to a calculation error. It is not necessary to set out the particulars of the calculation because the Employee has not responded to this point, and the Delegate admits the calculation error.

Employee's Argument:

The Employee admits to having had a problem with the consumption of alcohol. The Employee says that on the date in question he was absent because of the effects of a wisdom tooth extraction. He says that he phoned in his absence to the dispatcher, before the start of his shift. The Employee says:

> The bottom line is very simply that Mr. Slusar reacted out of anger. If an employee is ill, it is their fundamental right to have the day off in order to recover without being disciplined, degraded or second guessed by their employer. I do not deny that during my employment that I required days off for either illness or injury; however, I do not agree that this was chronic or occurred more frequently than any other employee. ...

The Employee denies that, in the past, he failed to report for work, without calling into the office before the absence. The Employee indicates that he suffered from a chronic back problem, and that he did take days of work due to illness or injury, but reported his absences to the Employer, before the shift started. Guggenheimer points out that other employees reported absences to the dispatcher, rather than to Slusar, and were not terminated. The Employee says that there was no written company policy in place specifying that Slusar was to be contacted directly by an employee in order to obtain authorization to take an unscheduled day off.

Guggenheimer did not respond to the Employer's allegation that the Delegate erred in the calculation of compensation for length of service.

Delegate's Argument:

The Delegate states that she provided a reasonable opportunity to the Employer to participate in the investigation of the complaint, which was conducted between December 2, 2002 and July 24, 2003. The Employer was told specifically of the allegation. A decision contrary to the Employer's position is not a denial of natural justice. The Delegate says that the Employer has produced no evidence of an error in law or a breach of natural justice, and argues that the Determination should be confirmed. In a submission dated October 20, 2003, the Delegate accepts that she erred in the calculation of the amount of compensation for length of service, and provided a corrected set of calculations for the compensation for length of service, vacation pay and interest.

ANALYSIS - Employer's Appeal

The Delegate accepts that a calculation error has been made, and has provided a corrected set of calculations. The Employee is entitled to the sum of $1,353.12, consisting of compensation for length of service in the amount of $1,231.41, vacation pay of $49.26, and interest of $72.45. The Determination will be amended to correct the calculation error, but I dismiss the balance of the Employer's appeal for the reasons expressed below.

Natural Justice:

The Employer has not asserted any factual basis from which one can conclude that the Delegate was biased in favour of Guggenheimer. It is often unfortunate that a party who does not accept the results of an investigation, makes an allegation of bias or breach of natural justice. Allegations of bias are "rather easily" made, when a party does not like the result of an investigation. The allegation is a serious allegation. It is incumbent upon an appellant making an allegation of bias to adduce some proof. The Employer adduced absolutely no proof of bias and therefore I dismiss "bias" as a grounds for appeal.

The Delegate has a duty to provide a reasonable opportunity to a party under investigation to participate in the investigation: section 77 of the *Act*. From a review of the Employer's appeal submission, the Employer's complaint relates to the conclusions drawn by the Delegate, rather than demonstrating any denial by the Delegate of an opportunity for Jack's Towing to participate in the investigation. In the Delegate's submission, the Delegate details the steps she took to ensure that the Employer was advised of the nature of the dispute, and solicited the Employer's information. It appears that the Employer did provide information to the Delegate. The nature of the information provided by the Employer did not satisfy the burden of proof on the Employer to establish just cause for a dismissal.

Error of Law:

This case involves the Delegate's consideration of the facts, and the application of the *Act* to the facts. The applicable section is 63 of the *Act*, which sets out the Employee's entitlement for compensation for length of service:

> 63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages for compensation for length of service.
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> (2) The employer's liability for compensation for length of service increases as follows
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> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages
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> ...
>
> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> ...
>
> (b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or
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> (c) terminates the employment, retires from employment or is dismissed for just cause

The Employer bears the onus before the Delegate, in establishing that it had just cause for dismissal. If the Employer can establish just cause, the Employer is not obliged to pay compensation for length of service. If the Employer cannot establish just cause, the *Act* provides that an Employer must pay compensation for length of service. In my view, this is simply a case where the Employer does not accept the Determination made by the Delegate.

The Delegate found that Guggenheimer was absent from work, because he was recovering from dental surgery. There is ample evidence to support this finding of fact, including a dentist's note confirming the extraction date, as well as evidence from the Employee. The Employer apparently believes that the

Employee was absent due to a drinking problem. The Employer offered no proof to support its suspicion that Guggenheimer was absent due to alcohol consumption. The Employer's suspicion is not evidence of the reasons for the Employee's absence.

There was also evidence before the Delegate that Guggenheimer reported his absence from work to the dispatcher before his absence. There was evidence from the dispatcher that other persons who reported to her absences from work due to illness, were not terminated by the Employer.

In the investigation before the Delegate, the Employer alleged a past history of absences from work by Guggenheimer, and previous warnings. The Employer offered no evidence of the dates on which these absences occurred, and apparently produced no records supporting allegations of an attendance problem. The Delegate found as a fact that there was no written record of warnings being given for past absences from work. The Delegate concluded that Guggenheimer was not warned that his job was in jeopardy, and did not appreciate that his job was in jeopardy by failing to report his absence directly to one of the two principals of the Employer.

In my view, the Delegate correctly identified in the Determination that the Employer bears the burden of proof. The Delegate correctly set out the test for dismissal for misconduct.

> ... It is often accepted that wilful misconduct means that the employee knew what to do, and deliberately did not do it, or the reverse - knew what not do to, but did it. Some activities such as theft, fraud dishonesty and conflict of interest require only one provable incident to justify dismissal without compensation or notice. Others, like poor performance, low productivity, absenteeism or tardiness, require corrective discipline in order to create just cause. There is no requirement for an employer to warn the employee in writing. A finding that no written warning was given does not automatically lead to the conclusion that there is no just cause. While it is easier to prove when written warnings are given, it is not required. In determining whether just cause exists, the Director will consider the concept of corrective discipline as outlined below.
>
> ... Employees who fail to respond to corrective discipline may be terminated for just case.

The Delegate found that:

> Slusar has not presented any tangible evidence of past warnings or discussions with Guggenheimer which were clear to Guggenheimer that should he fail to flow procedure by calling himself (Slusar), he (Guggenheimer) would be terminated. Slusar also did not present any written evidence of past warnings he alleges he gave to Guggenhiemer regarding the same issue. In addition the dispatcher, Maria Sunder, acknowledges that other employees did not strictly follow the policy and there were no consequences.
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> Without any tangible or corroborating evidence from Slusar, there is no way to prove Guggenheimer was fairly warned his job was in jeopardy. As a result, I find that Jack's Towing Ltd. Has not proven it had just cause to terminate Guggenheimer's employment, and hs (sic) contravened section 63 of the Act ...

I note that Slusar indicated in his appeal submission of September 12, 2003 that to his knowledge no other employee ever missed a shift without first notifying him. This evidence has to be considered in context with information obtained from the dispatcher, Ms. Sunder, that "other employees did not follow the policy", and were not terminated by the Employer.

I note that in this case the Employer did not apparently ask Guggenheimer for a note verifying the absence, or reasons for the absence. Had the Employer asked, it could have ascertained that the Employee's absence was for a legitimate reason.

In my view, it is certainly open to an employer to manage the attendance of its employees, and provide a clear system which will result in the termination of an employee for undue absenteeism, or a wilful failure to follow the employer's system to manage attendance. Here, however, the Employer did not provide any clear system, with clear consequences, consistently enforced by the Employer. If an employer sets out its attendance management system in writing, and the system is reasonable, and employees are aware of the system, an employer may well have cause to terminate an employee. When an employer deals with these matters on a casual basis, as did Jack Towing, the Employer will often not be able to meet the evidentiary burden on it to establish just cause. The *Act* clearly provides that an Employer must pay to an Employee compensation for length of service, unless the Employer establishes just cause, resignation, or some other defence set out in the *Act*.

The Delegate was not satisfied that the Employer clearly communicated the policy and consequences of not complying with the policy to Guggenheimer. This is essentially a finding of fact, for which there was an evidentiary basis. The Delegate appears to have considered the information from both parties, as well as from the dispatcher, and come to a reasonable conclusion with regard to the findings of fact. The Delegate correctly applied the applicable law, including section 63 of the *Act*. I am not satisfied that the Employer has shown any error of law or natural justice with respect to this finding.

For all the above reasons, I dismiss the appeal of the Employee, the Employer, and confirm the Determination in the revised amount of $1,353.12, together with interest in accordance with section 88 of the *Act*.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated July 24, 2003 is confirmed in the amount of $1,353.12, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal