

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 -

Sunbird Disposal and Recycling Inc. (Sunbird Ventures Inc.)
("Sunbird")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 1999/315

DATE OF HEARING: September 30, 1999

DATE OF DECISION: October 21, 1999

DECISION

APPEARANCES

Mike Steves	for Sunbird Disposal and Recycling Inc.
Jeanette Steves	for Sunbird Disposal and Recycling Inc.
Derek Gregory LePage	for himself
Adam deTurberville	Counsel for Sunbird Disposal and Recycling Inc.

OVERVIEW

This is an appeal by Sunbird Disposal and Recycling Ltd. (Sunbird Ventures Inc.) (Sunbird) pursuant to Section 112 of the *Employment Standards Act (the "Act")* from a Determination dated May 4, 1999. The Determination found Sunbird had contravened Part 8, Section 63 of the *Act*. Sunbird was ordered to pay Derek LePage (Lepage) \$513.43. A penalty of \$0.00 was imposed.

The Determination found Sunbird had terminated LePage without proper notice or compensation in lieu of notice.

Sunbird appealed on the grounds there was an error in facts and the Determination was made without regard to a number of points. Sunbird claim LePage engaged in criminal activity, which was one of the grounds for termination.

A hearing was held and I took evidence from the parties under oath.

ISSUE TO BE DECIDED

Does Sunbird owe LePage wages for termination without proper notice or compensation in lieu of notice?

FACTS

Mike Steves (Steves) and his wife Jeanette (Jeanette) purchased Sunbird in November 1997. At the time Steves had a job with Blackchip Industries (Blackchip) thru a job creation program that paid part of his wages. The job with Blackchip paid Steves \$18.00 per hour and, rather than drive the waste disposal truck himself, Steves hired LePage as a driver on November 17, 1997 at \$12.00 per hour.

April 17, 1998 was the last day for which LePage was paid however his termination came later. A letter dated May 01, 1998 was prepared by Sunbird notifying LePage he was being laid off. This letter was given to LePage on May 04, 1998 along with his Record of Employment, also dated May 01, 1998.

LePage made Steves aware in January 1998 that he owed ICBC \$951.00 for insurance and, without that payment, would not be able to renew his drivers license. LePage claims Steves indicated that, if he needed help when the time came to renew his license, Steves would assist him.

On or before January 31, 1998 Sunbird loaned LePage \$500.00 to allow him to recover some items that had been pawned. Sunbird claim LePage has never made any attempt to repay the loan. Sunbird did hire LePage's wife to do babysitting which they applied against the loan. Sunbird deducted money from LePage's last cheque to apply against the loan.

LePage admits he had made no payments on the loan however he claims he worked many hours of overtime, which he did not claim. This, he maintains far exceeds the amount of the loan.

Steves maintain they were not informed until after January of the problem LePage was having with his insurance. They told LePage it was not their responsibility to pay for his insurance and, since he had made no effort to repay the \$500.00 loan, they were not prepared to give him any more money. Steves also claim they advised LePage to make monthly payments on his insurance.

In January 1998 Steves became aware LePage had a child taken to hospital, and while checking on the condition of the child, found LePage had no heating oil for the furnace. As it was a weekend, Steves told LePage to get cans of furnace oil from the Co-op on the business account, to have heat until Monday. According to Steves, LePage then had a fuel truck fill their furnace tank with fuel oil and charged it to the Sunbird account. LePage did not tell Sunbird of this until after the fuel had been delivered. This was repeated again in March with LePage re-filling the furnace tank and charging it to Sunbird. Also about this time LePage started using the Sunbird credit card to purchase gas for his own car. Sunbird claim LePage's wife was also seen on security camera at the Co-op purchasing gas for her car using the Sunbird credit card. Jeanette claims to have viewed the videotape where LePage's wife is seen filling their vehicle with gas.

LePage claims Sunbird knew about the furnace oil and gas purchases and LePage had admitted to the investigating RCMP officer he had used the Sunbird credit card. LePage denies his wife used the Sunbird credit card and denies she has purchased gas at the Co-op.

LePage claims Steves told him in March that Sunbird would not be able to give him a wage increase but offered to allow him to purchase gas for his own vehicle on the company credit card to a maximum of \$30.00 per week.

Steves denies any offer was made to LePage to allow the use of the company credit card for personal fuel. Steves claims they were already paying a higher wage to LePage and they had no intention of offering a wage increase as he had worked for less than 4 months. They further argued LePage was receiving \$150.00 per month for transportation from welfare to assist him in getting a job.

These incidents resulted in a court dispute between Sunbird and the Co-op over the Co-op allowing unauthorized use of the Sunbird credit cards. Sunbird won their case.

Sunbird admits LePage was a very hard and conscientious worker. They were pleased with his work and wanted to keep him as an employee, however LePage had a very bad temper and would “lose it” very easily. They claim that during an argument with the bookkeeper over his cheque he threatened to burn her house down.

LePage denies this happened.

On March 27, 1998 the truck blew two hydraulic hoses and was taken to Port Machine Works for repairs. Jeanette went to the shop to pay for the repairs. She claims LePage was having a temper tantrum and began screaming at her claiming the truck was a piece of junk and unsafe to drive. Later, when LePage came over to the Steves house another argument started between Steves and LePage. Steves fired LePage for shouting at his wife in front of other people at Port Machine Works and for shouting at him. Steves claim the other employees were pleased when he told them he had fired LePage, as they were afraid of him.

Steves claims Mrs. LePage called later asking for LePage to be rehired and that LePage was sorry he had lost his temper. The Steves' went over to see LePage at his house and agreed to rehire him if he would take anger management counselling and see a doctor. They claim he agreed to do so.

LePage visited the doctor and was prescribed medication. Steves claim LePage wanted to go on WCB. The doctor would not support this as he diagnosed it was not a work related issue. As the medication indicated that one should not operate heavy equipment while taking it, Steves claim they offered LePage a job at their recycle depot, which was a non-driving position.

Steves claim LePage did not go for counselling or report for work at the recycle depot.

LePage has a somewhat different version of the events but does not deny that the arguments took place. He also claims it was Steves who wanted him to go on WCB. He also claims he does not recall being offered a job at the recycle depot as "I was on medication".

Sunbird claims there were three incidents when LePage had accidents with the truck. The first incident was when LePage, rather than go to the occupant and have them move a vehicle from the driveway, drove across the owners yard and got the truck stuck. The truck frame was cracked when the vehicle was pulled out. A second incident was when LePage attempted to push a City of Port Alberni garbage truck out of the way and got stuck requiring a city vehicle to pull him out. The third incident involved LePage running into a United Carpet truck parked in the alley.

LePage made little reference to the event of getting the truck stuck in the yard. He claims the incident with the Port Alberni garbage truck was quite different. He pulled off the road to allow the Port Alberni truck to pass and became stuck in the ditch and was pulled out. He admits to the incident with the United Carpet truck but indicates it was not a big issue.

LePage claims: "On February 16th, one day after regular pay day the 15th they did not have the funds so Mike personally paid Derek in cash, and the secretary was paid the following day". According to LePage, this happened again on April 1st and he was told payday would be on April 3rd. LePage claims payday was always on the 1st and 15th of the month since he began working for Sunbird. LePage went to Steves' house to get his pay cheque and got into an argument with Steves over four days pay missing for March 19,20,23 and 24. During this time LePage says the truck was so unsafe he would not drive it and Steves drove the truck. LePage said: "Murray Stewart from Mainroad Construction had told Mike Steves that if he let his employee, Derek LePage, drive the truck as it was it would be like putting a loaded gun to his head".

Sunbird provided photocopies of the cancelled payroll cheques of LePage showing he was paid by cheque, dated February 16, 1998, for the period February 1-15th. The cheque cleared the bank February 17th. Sunbird claim the paydays are the 5th and 20th of the month however LePage's wife would call wanting LePage's cheque and, to avoid trouble, Sunbird instructed the secretary to issue his cheque early, if possible.

Sunbird presented a letter from Murray Stewart of Mainroad Construction in which Stewart denies ever saying the above quote. The truck was inspected and passed by Murray Stewart on March 30, 1998.

Drivers are required to complete a Trip Inspection Report each day listing the condition of the vehicle at the beginning and end of each shift. LePage did the pre-trip inspection reporting "clearance lights out and to have brakes set" on each day except the day he also reported a blown heater hose and blown hydraulic lines. He did not complete the end of shift report.

LePage advised Steves that his mother was coming from the east in April and wanted some time off and Steves agreed. When she arrived LePage took time from April 17, 1998 until she left. LePage met Steves, who was now driving the truck in his absence, and he was told to enjoy his time with his mother.

Steves has a different story. When LePage asked Steves for time off Steves indicated he could take the Friday and the Monday off as they were slow days and Steves would cover the route after his regular job. He indicated he might be able to give LePage more time off in the second week. LePage took the Friday and Monday off and did not report to work on Tuesday, Wednesday or Thursday for the following week. On the Wednesday Blackchip gave Steves an ultimatum, either work here or drive your truck. As Steves could not depend on LePage, he lost his job at Blackchip and began driving his truck. The next contact they had from LePage was on April 30, 1998 when he telephoned Steves at home. LePage was told he had lost his job as a driver as he had no license but he could go to work at the recycle depot to pay off his heating oil and gas bill. LePage refused and was told he was laid off. Sunbird prepared a letter and ROE, dated May 01, 1998 and it was given to LePage on the morning of May 04, 1998.

LePage claims the telephone call was made on Sunday, May 03, 1998 and the reason Steves was driving the truck was the result of Blackchip losing a large contract and Steves lost his job. LePage claims he told Steves he would have his license on May 04, 1998 and reported for work late with a valid license. He was given the letter of notice of layoff and his ROE, which gave the reason for layoff as “unable to renew his driver’s license”. LePage refused to go to work at the recycle depot to “pay off fictitious debts”.

ANALYSIS

There are a number of events that took place in the short time LePage was employed by Sunbird. Taken separately, a number of them would have been cause for Sunbird to terminate LePage without notice but the fact is they did not. They fired LePage but ended up taking him back. They declared he had abandoned his position but they took no concrete action. They continued to employ LePage while the criminal investigation over the theft of fuel oil and gasoline was underway. By taking no action Sunbird condoned the actions of LePage.

There are some key points that must be given weight. In their submission to the Tribunal dated May 25, 1999 at page 4 Sunbird state:

“On Wednesday when Mike was unable to show up for work for Blackchip Industries his boss gave him an ultimatum. Show up for work the next day to operate Blackchip’s equipment or keep driving his own truck. Mike’s job was gone. Greg was only hired to drive truck so that Mike could get a job to support his family instead of taking higher wages out of the company. Greg’s job only existed because Mike had a previous job through a U.I. grant before buying Sunbird Disposal. I repeat that Greg only had a position driving truck because Mike already had a job and couldn’t physically do both jobs. Greg knew that”.

Further on page 4:

“So when Greg finally called us at home, on Thursday April 30, 1998, Mike again told him that he was not driving the truck without a license and that Greg was to report to work at the recycle depot the next day, that being Friday, May 1, 1998.

Greg then told Mike we had to give him the money to get his license back, because he refused to work in the recycle depot. Mike told him that he didn’t have to do anything of the sort and he was laid off immediately. Mike then told Greg to pick up his separation slip the next day which would be Friday, May 1, 1998”.

Further at page 7 Sunbird quote a telephone conversation they had with the delegate saying:

“I agreed that we had improperly dismissed Mr. LePage stating that we should have fired his ass instead of permanently laying him off”.

In Sunbird’s second submission to the Tribunal dated July 17, 1999 at page 2 they state:

“I would also like to ask the board members what they think the response of their employer would be if they took off and did not report in to work over a two week period? I think we all know you would be fired without hesitation. Our mistake was that we laid Derek off permanently instead of firing him”.

Further at page 5 Sunbird state:

“-on page 4 I state that Greg was only hired to drive our truck because Mike already had a job through a U.I. grant he was placed on before we took on the company. Greg was clearly told that he only had his position driving truck because Mike already had work. Greg was warned when he was hired that should something happen to Mike’s job Mike would step in to drive the truck leaving Greg without a job”.

That I believe is the issue. Steves lost his job and so LePage lost his. Sunbird indicated they put up with a lot from LePage because they needed a driver. When that requirement was no longer there Sunbird did not need LePage and they laid him off. If LePage was the cause of Steves losing his job, Sunbird had just cause to terminate LePage at that point however they chose not to do so.

Sunbird did offer LePage work without any reduction in pay at the recycle depot and LePage refused to work there. The first time LePage says he was on medication and doesn’t remember the offer. The second time is when LePage says he was not going to work to pay off some fictitious debts. Again Sunbird failed to take action.

The ROE issued by Sunbird gives the reason for layoff as failure to renew his driver’s license. On May 04, 1998 LePage had a proper license. If, as LePage claims, he was given two weeks off to be with his mother there was no time LePage was in a position of needing a license until May 4th. If he were not given that time off I would think Sunbird would have moved to terminate him before May 1st, particularly in view of the fact Steves lost his job because LePage did not show up for work on April 21st.

Steves claims he gave LePage time off for the Fridays and Mondays while LePage’s mother was visiting but expected him to work the Tuesday, Wednesday and Thursday of those two weeks. Those dates were April 21, 22, 23, and 28, 29 and 30. Steves knew LePage’s license expired on April 20 and, to their knowledge, he had not renewed it as they claim he was still calling for money to pay ICBC. Steves told LePage to sell one of his cars however; at that point, LePage had not done so.

I have difficulty with that and the fact we have no evidence Sunbird attempted to contact LePage on April 21 or later as to why he was not at work. The first contact, according to Sunbird, is April 30. I find it hard to believe an employer would wait nine days before contacting an employee for failing to report for work and, according to Sunbird, it was LePage who called them at home on the 30th. Sunbird had every right to terminate LePage on April 21 for failing to report for work and for failing to have a current license but they did not do so.

The Authorities tabled by counsel are of limited benefit as they relate to matters which are not before me. While all the references were raised by Sunbird the reason stated on LePage's ROE was for failing to renew his driver's license. In the first case the cause of discharge is theft and LePage was not discharged for theft although he was accused. In the second case there was a prior warning to the employee if he failed to report for work he would be discharged. The employee had indicated he was taking time off and was told he could not. The employee took the time off and was terminated. Again, LePage was not warned he would be discharged for taking time off. In the third case the employee was dismissed for misconduct. LePage was laid off for failing to have renewed his driver's license, which at the time of receiving his layoff, he had done.

LePage had told Steves on April 30, 1998 that he would have his license by May 4, 1998 and he was told he was not needed as Steves was now driving the truck.

I believe Sunbird was a good employer to LePage and tried very hard to deal with their problems but when Steves lost his job they no longer needed LePage and they laid him off.

It is the responsibility of the appellant to convince the adjudicator there is sound reason to change the Determination. While I do not accept the credibility of some of the evidence of LePage I find that Sunbird has failed to convince me the Determination should be changed.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination dated May 4, 1999. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

**Adjudicator
Employment Standards Tribunal**