

**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-

McCall Bros. Funeral Directors Ltd..  
("McCall ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	C. L. Roberts
<b>FILE NO:</b>	98/489
<b>DATE OF DECISION:</b>	September 14, 1998

## DECISION

This is a decision based on written submissions by R. Helme, Barrister and Solicitor, on behalf of McCall Bros. Funeral Directors Ltd, and G. Omstead, delegate of the Director of Employment Standards.

### OVERVIEW

This is an appeal by McCall Bros. Funeral Directors Ltd. ("McCall"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 16, 1998. The Director found that McCall contravened Section 63 of the Act in failing to pay Reid Pearce ("Pearce") compensation for length of service, and Ordered that McCall pay \$7,279.93 to the Director on behalf of Reid Pearce.

### ISSUE TO BE DECIDED

Whether the Director correctly determined that McCall contravened the Act in failing to pay compensation for length of service.

### FACTS

Pearce worked as a funeral director for McCall from March 5, 1986 until his termination on November 18, 1997. He filed a complaint on November 19, 1997 with the Employment Standards Branch claiming that McCall had failed to pay wages as required under the Act.

On May 21, 1998, the Director's delegate advised McCall of the complaint and requested a meeting to discuss the allegations. A Demand for Employer Records was sent the same day. Both were sent by certified mail. The Director advised that the records were to be provided by June 11, 1998.

McCall responded on June 11, stating that it had terminated Pearce's employment based on legal advice it they had cause to do so. No further explanation was provided, and no records were provided. McCall did however, enclose minutes of two meetings of the Vintage Car Club of Canada.

On June 12, the Director's delegate faxed a letter to McCall, again requesting written reasons for the termination by June 19. He advised McCall that it was the employer's obligation to prove just cause, and asked for documentation supporting that claim.

On June 16, the Director's delegate received a telephone call from Mr. David McCall requesting an extension of time to provide the documentation, and was given until June 26 to do so. On June 24, the Director's delegate again faxed a letter to McCall's solicitor, Roxanne Helme, and to Mr. McCall requesting reasons to be provided by June 30.

On July 6, the Director's delegate recieved a fax from Helme indicating that McCall had dismissed Pearce for cause, specifically dishonesty, but provided no other details. On that same day, the

Director's delegate faxed another letter to Helme and Mr. McCall asking that reasons for cause and specifics of the dishonesty allegation be provided by July 10. Nothing was received by that date.

The Director's delegate, having determined that he had afforded McCall a reasonable opportunity to respond, and having reviewed the documentation provided, found that there was insufficient evidence to support the allegation that Pearce was dismissed for cause. The Director's delegate concluded that McCall had contravened the Act, and ordered 8 weeks compensation in lieu of notice.

## **ARGUMENT**

McCall contends that Pearce was dismissed for cause, specifically for conversion of funds in the amount of \$11,000.00 from an organization for which he served as Treasurer. McCall states that minutes of a meeting showing that conversion were sent to the Director in support of his request.

McCall suggests that the minutes were accepted by the Director's delegate as proof of wrongdoing, and those were sufficient to establish the grounds for the termination for cause.

McCall argues that the Director's inquiry need not be complex or lengthy, and that the minutes and correspondence provided by McCall clearly indicated that Pearce was guilty of an offense of dishonesty for which he was terminated. It contends that a trust relationship between employer and employee is the foundation of the employment relationship, and when that is breached, the employer has just cause to dismiss an employee.

The Director's delegate argues that documentation was sought on numerous occasions and McCall failed to provide it as requested. Further, he argues that the minutes of the Vintage Car Club do not constitute evidence in support of the employer's actions. They were vague, and identified persons on a first name basis only. The Director's delegate contends that those documents are insufficient to prove just cause without further explanation. The Director's delegate states that there is no documentation which suggests that \$11,000, or any sum, was converted by Pearce.

The Director's delegate further argues that he never accepted the minutes as proof of Pearce's wrongdoing. What he wrote in his letter of June 12 was:

"I would assume that you provided those minutes as some sort of proof of wrong doing by Mr. Pearce. You however never stated why Mr. Pearce was terminated by your company. Please forward to me the written reason(s) for this termination. I would also ask you to provide me with a written job description of the job performed by Mr. Reid Pearce".

Consequently, he contends that the appeal should be dismissed.

## **ANALYSIS**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

I am unable to find that McCall provided the Director with information in a timely manner. The Director requested complete disclosure of information on which the company relied in dismissing Pearce. The Demand for Employer Records, which was sent May 21, specifically identified "all documents relating to the termination of the above named employee, including any documents that

the company relies on to establish just cause to terminate the employee as well as a copy of the Record of Employment." The sentence "Failure to comply with this Demand may result in a penalty against you and without further notice" is typed in bold at the bottom of that letter.

Section 85(1) of the Act provides that for the purpose of ensuring compliance with the Act and the Regulations, the Director may (c) inspect any records that may be relevant to an investigation under this Part, and (f) require any person to produce or deliver to a place specified by the director, any records for inspection under paragraph (c).

Section 46 of the *Employment Standards Regulations* provides that a person who is required under Section 85 of the Act to produce or deliver records to the director must produce or deliver the records as and when required. Section 28 provides for a \$500.00 penalty for a contravention of section 46 of the regulation.

These sections underscore the importance of providing documentation to the Director upon request.

In response to the Director's request for documents in May, MacCall sent minutes of two meetings of the Vintage Car Club of Canada. The minutes dated November 4, 1997 contain the following sentences in the middle of the page:

"Jack Woolard reported to the members that he has obtained a copy of our bank statement from Pacific Coast Savings. There is \$66.02 in the chequing account, \$.11 in the savings account and there is no Term Deposits. Jack has spoken to Reid, who has admitted to having spent all of our money".

The minutes of December 2, 1997 contain the following sentence:

"Jack reported that he has met with Reid, and an agreement has been signed. \$1,500 has been recovered, and we have possession of his 1930 Pontiac which the Club can sell if the balance has not been repaid by May 31, 1998".

I agree with the Director that these minutes, in and of themselves do not provide sufficient reasons for termination for cause. They do not identify who "Reid" is, and do not explain the relationship of the information contained in them with McCall's actions. Furthermore, the minutes do not indicate how much money was involved.

The response to that demand was a letter stating that the company relied on advice of company solicitors. The minutes of the meetings noted was enclosed.

The Director made three further requests for particulars. It should have been apparent to McCall that the Director's delegate was not satisfied with the information provided. The letter of June 12 noted above made that clear. It stated, after the above noted paragraph,

"I should point out that the onus of proof for a just cause termination falls on the employer. Please provide me with any and all evidence you have to establish your claim"

The letter of July 6 contains the following paragraph:

"Your letter dated July 6, 1998, indicated that the company dismissed Mr. Pearce for cause, specifically for dishonesty. You however did not explain what the company claims as cause, specifically what was his dishonesty. Please provide

me an explanation in writing of the cause for his dismissal in particular of his dishonesty. Without an additional explanation to show just cause I have no alternative to suggest that just cause has not been established."

It ought to have been abundantly clear to McCall that the Director's delegate required further documentation.

On July 12, Helme signed a letter which states in part:

"I confirm that my client dismissed Mr. Pearce for dishonesty, specifically for stealing in excess of \$11,000 from the Vintage Car Club, where he acted as Treasurer. Incidentally, the sum stolen was virtually the entire sum over which Mr. Pearce was responsible. When confronted with the allegation, Mr. Pearce admitted this theft to Mr. McCall.

There are no documents upon which my client needs to rely."

That letter was not sent to the Director's delegate until July 20, four days after the Determination was issued, and 10 days following the date specified by the Director.

The Tribunal has dismissed appeals in instances where an employer attempts to produce evidence on appeal which ought properly have been produced during an investigation. (see *Tri-West Tractor* B.C.E.S.T. D268/96, and *Kaiser Stables Ltd.* B.C.E.S.T D058/97).

The information provided to the Director was vague and incomplete, despite several requests for details. McCall's provided no evidence as to how Pearce's alleged conversion of a sum of money, which was never detailed, constituted a breach of the trust relationship between Pearce, an employee of over ten years employment, and McCall.

The Director was not privy to the legal advice of the solicitor to McCall's as to the justification, and I am unable to find that the information provided was sufficient to meet the demands.

## **ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination dated July 16, 1998 be confirmed in the amount of \$7279.93, together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

**Carol Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**