

An appeal

- by -

Richard Myers

- 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: Carol L. Roberts

FILE No.: 2002/435

DATE OF HEARING: November 5, 2002

DATE OF DECISION: November 12, 2002

DECISION

APPEARANCES:

Richard Myers	On his own behalf
Brian Gregory	On behalf of Rainbow Insurance Agency Ltd.

OVERVIEW

This is an appeal by Richard Myers pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 9, 2002 . The Director's delegate concluded that Rainbow Insurance Agency Ltd. ("Rainbow") had not contravened the Act in failing to pay Mr. Myers compensation for length of service.

ISSUE TO BE DECIDED

At issue is whether the delegate erred in concluding that Mr. Myers had been dismissed for cause, and that no compensation for length of service was owed to him.

FACTS

Mr. Myers worked for Rainbow for a total of approximately 11 years, most recently from July 1994 to February 1, 2002 as an Insurance Operations manager and level one Insurance salesperson.

On July 2, 2001, Mr. Myers went on disability leave. He was prohibited from conducting insurance transactions while on that leave. On September 1, Mr. Myers attempted to complete an insurance transaction while off premises. He telephoned Rainbow while attempting to process the transaction, and Mr. Gregory, Rainbow's operator, told him that he could not proceed with the transaction. Mr. Gregory advised the delegate that Mr. Myers became verbally abusive towards him. Mr. Gregory sent a lengthy email to Mr. Myers following that conversation setting out a number of concerns he had with Mr. Myers' conduct, reprimanding him for that conduct, and indicating that he did not appreciate the verbal abuse Mr. Myers had exhibited towards him.

Because of Mr. Gregory's concerns about Mr. Myers' extreme language and verbal abuse, he took steps to have the office locks changed that afternoon. Later that day, Mr. Myers came to the office and apologized for his behaviour. At that time, Mr. Gregory gave him a printed copy of the email, and Mr. Myers returned his office keys to Mr. Gregory.

Mr. Myers advised the delegate that, on September 7, he went to the office to renew his automobile insurance. While he was there, he said that he learned that Mr. Gregory had changed insurance codes so that he would not receive commissions owing to him. He advised the delegate that he then attempted to print off the client list. Mr. Myers advised the delegate that Mr. Gregory grabbed at the list he was printing, and that he was assaulted. He stated that he suffered scratches on his face and arms in an attempt to protect himself from Mr. Gregory's assault. Mr. Myers left the office and called 911.

Mr. Gregory says that Mr. Myers was defying his email directive that he was not to access business documents while on disability leave, and that he was printing off contact information on clients for which he had been paid a commission. Mr. Gregory advised the delegate that he told Mr. Myers that he was not authorized to print the information, shut the printer off, and took the printed information from the printer. Mr. Gregory stated that Mr. Myers then hit him in the head with his fist, knocking his glasses to the floor. Mr. Gregory suffered a small cut to his nose, which he suggests was caused by his glasses.

Mr. Myers did not return to work. In late January 2002, a medical insurance representative contacted Mr. Gregory regarding Mr. Myers' return to work. Rainbow then terminated Mr. Myers' employment.

The delegate obtained a statement from Mr. Forouhar, a Rainbow employee, who witnessed the September 7 incident. Mr. Forouhar stated that he observed Mr. Myers and Mr. Gregory pushing each other, and that he asked Mr. Myers to leave. Mr. Forouhar observed the cut to Mr. Gregory's nose, but did not see whether Mr. Myers was visibly injured in any way.

The delegate considered the conflicting evidence of Mr. Myers and Mr. Gregory, as well as the evidence of Mr. Forouhar. She preferred the evidence of Mr. Gregory, supported by Mr. Forouhar. She also considered the fact that Mr. Myers was attempting to print Rainbow's proprietary information when he went to the office purportedly to renew his automobile insurance.

The delegate also considered the fact that Mr. Myers acknowledged that he did not want to return to work after his altercation with Mr. Gregory. She noted that he filed a complaint for compensation for length of service while on medical leave, indicating his intention to quit, although he never communicated that to Rainbow.

The delegate concluded that Mr. Myers verbally assaulted Mr. Gregory on the telephone on September 1, and physically assaulted Mr. Gregory on September 7, and that those actions were sufficient for Rainbow to terminate his employment without payment for compensation for length of service. Although the delegate did not expressly state as much, I infer that she considered the period between September 7 and February 2, when Mr. Gregory sent Mr. Myers a letter setting out the grounds for the termination, to be inconsequential, since Mr. Gregory assumed Mr. Myers would not return to work. At the hearing, Ms. Gregory stated that she was under the impression that Rainbow could not terminate Mr. Myers' employment while he was on medical leave, and thus no steps were taken to do so until it became apparent that Mr. Myers was attempting to return to work.

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.

Mr. Myers' sole ground of appeal was that the delegate erred in concluding that he assaulted Mr. Gregory, and thus, that there were no grounds to terminate his employment without compensation for length of service.

Section 63 of the Act establishes a statutory liability on an employer to pay compensation for length of service to an employee upon termination of employment. An employer may be discharged from that liability by the conduct of the employee where the employee is dismissed for just cause.

What constitutes just cause has been set out in a number of cases by the Tribunal. It includes fundamental breach of an employment relationship, or a single act of misconduct by an employee that is sufficiently serious to justify summary dismissal without the requirement of a warning. Fundamental breach has been found in instances involving serious breaches of company policy and conscious refusal of an employee to either acknowledge or correct it (*Kruger*), criminal acts, including assault on a co-worker (*Downie Timber*, BC EST #D023/98, *Broadcam Holdings Ltd.* BC EST #D241/98), breach of trust, theft (*Oram* BC EST #D040/98), insubordination (*Evans* BC EST #D069/97), and deliberate and wilful conduct that is prejudicial to an employer's interests (*Jenkins* BC EST #D314/02). (see also *Sears Canada Inc.* BC EST #D210/02)

The delegate concluded that Rainbow had sufficient grounds to end Mr. Myers' employment for cause. That conclusion can only be disturbed on convincing evidence. In my view, Mr. Myers has not provided that evidence.

There is no dispute that, on September 1, Mr. Myers voiced his displeasure with Mr. Gregory over the phone. Mr. Myers denies that the phone conversation constituted an assault, as he says he did not utter threats towards Mr. Gregory, but he he did acknowledge using abusive language. Mr. Gregory sent a detailed email to Mr. Myers immediately after the telephone conversation. In that email, Mr. Gregory expressed concerns about Mr. Myers' performance, including his discovery the Mr. Myers had engaged in unauthorized and perhaps fraudulent insurance transactions, and had entered Rainbow after hours without permission. Mr. Gregory also warned Mr. Myers that he was not to transact any business on Rainbow's behalf while he was on disability leave. Mr. Gregory's email concluded with his expression of displeasure and discomfort with Mr. Myers' reaction to him when he advised him he was not to transact any business for Rainbow. I am unable to conclude that the delegate erred in finding that this contemporaneous record was the best evidence of the events that transpired that day. Mr. Gregory was sufficiently concerned about Mr. Myers' behaviour that he changed the locks to Rainbow offices that day.

Although Mr. Myers was aware that he was not to be performing transactions while on disability leave, he went to Rainbow's offices one week after the telephone incident, ostensibly to renew his personal auto insurance. While there, he began to print off customer names. He had no justified reason for doing so. As a result, Mr. Gregory attempted to stop him, and an altercation ensued. I need not determine whether Mr. Myers assaulted Mr. Gregory, or Mr. Gregory assaulted Mr. Myers. It is sufficient, in my view, to note that Mr. Gregory was in the process of attempting to prevent Mr. Myers from obtaining information he was not entitled to have, and that Mr. Gregory suffered an injury, albeit a slight one. But for Mr. Myer's presence and his unauthorized actions, Mr. Gregory would not have been injured. I find that not only had the relationship between Mr. Myers and Mr. Gregory irretrievably broken down, but that Mr. Myers' acts, taken as a whole, constituted a repudiation of the duty of faithfulness of a employee to an employer. In my view, in light of all of the evidence, Mr. Myers carried out acts inconsistent with his continued contract of employment.

I note further, that at the hearing, Mr. Myers called Mr. Gregory a "freak", sentiments similar to those he expressed in his September 1 telephone call. As noted above, verbal insults and profanity are sufficient to constitute a fundamental breach of the employment relationship.

I am not persuaded that the delegate erred in concluding that Mr. Myers' employment was terminated for cause, and dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated August 9, 2002, be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal