Employment Standards TRIBUNAL

An appeal

- by -

Jim Pattison Chev-Olds, A division of Jim Pattison Industries 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:	Kenneth Wm. Thornicroft
FILE No.:	2001/285
DATE OF HEARING:	July 17th and 30th, 2001
WRITTEN SUBMISSIONS RECEIVED:	November 13th & 14th, 2001
DATE OF DECISION:	December 4, 2001

DECISION

OVERVIEW

This is an appeal filed by Jim Pattison Industries Ltd., carrying on business as "Jim Pattison Chev-Olds" (the "Employer"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on March 9th, 2001 (the "Determination"). The Director's delegate determined that the Employer owed its former employee, Raymond Coumont ("Coumont"), the sum of $5,524.69 on account of 6 weeks' wages as compensation for length of service, concomitant vacation pay and section 88 interest. The delegate held that Coumont was not intoxicated by alcohol when he reported for work on May 11th, 2000 and that his behaviour that day was accounted for by a medical condition (Determination, at page 4):

> In matters of this nature, the burden of proving just cause lies with the employer. I find that the evidence of Lawless and Olson of Coumont's behaviour at the workplace on May 11, 2000 can, on a balance of probabilities, be explained by Coumont's medical evidence of complex partial seizures...
>
> Based on the finding that Coumont was not intoxicated while at work on May 11, 2000, there is no need to make a finding on the secondary issue of if Coumont was intoxicated, did the employer have just cause to terminate his employment.

PREVIOUS PROCEEDINGS

I heard the *viva voce* evidence relating to this appeal on July 17th and 30th, 2001 and, following the receipt of further written submissions, issued reasons for decision (B.C.E.S.T. Decision No. D551/01 issued October 19th, 2001) in which, *inter alia*, and after having considered the evidence before me, I made the following findings of fact:

> I reject Coumont's assertion that his condition on May 11th [2000] can be accounted for by a seizure. The medical evidence does not, in my view, support such a conclusion (indeed, the medical evidence is totally inconsistent with such a conclusion). I find the evidence of the Employer's witnesses to be both consistent and credible. On May 11th, Coumont appeared to be drunk, acted as if he was drunk, admitted that he had been drinking, never denied that he had been drinking and, the very next day, apologized on two separate occasions for his behaviour the previous afternoon.
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> I am particularly impressed by the evidence of MacDonald, the only "independent" witness who appeared before me. Since he is no longer employed by the Employer, what incentive would MacDonald have to fabricate his

> evidence? Indeed, he testified that he had never had any difficulties with Coumont and frankly conceded that Coumont's behaviour on May 11th was out of character. How would MacDonald know about the televised hockey game unless Coumont told him? Why would Coumont tell MacDonald that he had been drinking in the bar while watching the game if that were not so? Finally, MacDonald's evidence was not shaken in any fashion by either Coumont or by the Director's counsel on cross-examination.
>
> If Coumont was not drinking on May 11th, I find it inconceivable that he would admit to such behaviour. He never denied, to any of his accusers, that he had been drinking. Indeed, he admitted that he had been drinking to both Lawless and MacDonald. Coumont never even denied to his wife, on May 11th, that he had been drinking--rather, his testimony was that he told her he had been sent home for drinking. I suspect that Coumont did not anticipate that his behaviour would result in termination and, accordingly, he never attempted to deny that of which he had been accused. I am fortified in this conclusion by the fact that Coumont spoke with both Lawless and MacDonald the next day and apologized for his behaviour; in my view, a recognition that his behaviour the day before was both willful and inappropriate.

The parties' submissions and my October 19th reasons for decision addressed a number of legal issues including issues relating to the *Evidence Act* and section 77 of the *Act.* However, the question of whether the Employer had just cause to terminate Coumont's employment, even assuming Coumont reported for work in an intoxicated state, was not addressed at the appeal hearing. Accordingly, I issued the following directions:

> The delegate concluded that Coumont was not intoxicated on May 11th and, accordingly, never turned her mind to the question of whether or not that behaviour justified termination. I have concluded, based on a consideration of all of the evidence before me, that the delegate's determination on that point was incorrect. However, even though I accept that Coumont was intoxicated on May 11th, it does not inevitably follow that the Employer had just cause for termination.
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> Although it is within my jurisdiction to refer this matter back to the delegate to determine if the Employer had just cause in light of the facts as I have found them, I do not consider that approach to be appropriate in this case, especially when all of the relevant evidence is now before me. A referral back will only lengthen and delay the adjudication of this matter which has now been ongoing for nearly 1 1/2 years.
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> Accordingly, I am directing the Registrar to canvass the parties regarding their preference for making written or oral submissions on the issue of just cause.

> Upon hearing from the parties, the parties will be given a schedule for delivery of final written submissions or, alternatively, a date will be set for final oral submissions.

Counsel for the Employer and the Director's delegate both expressed a preference to make written rather than oral submissions. I have now received written submissions from counsel for the Employer and from the Director's delegate. Mr. Coumont did not file a submission. I will now address the "just cause" issue.

DID THE EMPLOYER HAVE "JUST CAUSE" FOR TERMINATION?

An employer is not required to pay compensation for length of service if it has "just cause" to dismiss the employee [section 63(3)(c)]. The burden of proving just cause lies with the employer.

While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract" (see *McKinley v. B.C.Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

In this case, counsel for the Employer notes that not only was Coumont intoxicated on the day in question, he also lied about it during his testimony before the Tribunal even though he had taken an oath to tell the truth. Coumont was less than fully candid during his testimony before me and, exacerbating the situation, he also swore an affidavit that was provided to the delegate during her investigation in which he averred that he had not consumed any alcohol on May 11th, 2000 or at any time during the 3-month period prior to May 11th.

It must be remembered, however, that Coumont's dishonesty was not directed toward the Employer nor was dishonesty the basis for the termination. Indeed, I have found that Coumont *did* acknowledge to the Employer the fact of his alcohol consumption on May 11th and, in addition, apologized for his behaviour the very next day. Coumont's lack of candour during the course of proceedings under the *Act* might be relevant if Coumont was seeking reinstatement but it must be remembered that I, unlike a grievance arbitrator, do not have the jurisdiction to make such an order in this case [reinstatement is an available remedy in only a few limited circumstances under the *Act*--see section 79(4)].

The Employer's witnesses all agreed that Coumont's behaviour was surprising and "out of character"--his behaviour on May 11th appears to have been an isolated incident. I have no evidence before me of any prior problems of a similar nature. Indeed, for some 6 years, Coumont had seemingly been a very good employee. This is not a case where the alcohol consumption occurred on the employer's premises nor is this a case where the Employer had a

clearly communicated "zero tolerance" policy in place. I consider all of these matters to be mitigating factors.

Reporting for work in an intoxicated state is a very serious matter; all the more so, given that automobile salesmen may be required to operate a motor vehicle as part of their normal job duties. I do not doubt that any customer who witnessed Coumont's behaviour on May 11th would have been taken aback that an employee would behave in such a fashion. Nevertheless, given Coumont' evident impairment, it is obvious that Coumont was not going to be putting any customers (or anyone else) at risk by getting behind the wheel of an automobile. Nor can I ignore the fact that Coumont was suffering from a serious medical condition which, although not the cause of his erratic behaviour on May 11th, may nonetheless have been a contributing factor to his alcohol consumption due to his anxiety about his health.

I am of the view that the Employer would have been fully justified in meting out some lesser disciplinary sanction. The Employer might have suspended Coumont without pay and subsequently returned him to work with a clear warning that a second incident would result in termination. However, if an employer has just cause for discipline it does not inevitably follow that there is just cause for termination. In all the circumstances of this case, I am of the view that the Employer acted precipitously by immediately terminating Coumont's employment. Accordingly, I hereby confirm the award of 6 weeks' wages as compensation for length of service.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied to reflect the findings of fact set out in my reasons for decision issued on October 19th, 2001. The Determination is confirmed with respect to the monetary award in favour of Coumont in the amount of $5,524.69. In addition, Mr. Coumont is entitled to whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* as and from March 9th, 2001 (the date of issuance of the Determination).

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal