

An Application for Reconsideration

- by -

Gremallen Enterprises Limited operating as Green Timbers Pub
("Green Timbers")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Ian Lawson

FILE No.: 2004A/40

DATE OF DECISION: June 29, 2004

DECISION

SUBMISSIONS:

Len Tennant	on behalf of Gremallen Enterprises Limited operating as Green Timbers Pub
Bruce Lawson	on his own behalf

OVERVIEW

Bruce Lawson (“Lawson”) filed a complaint with the Director on December 23, 2002, alleging he was owed wages, vacation pay and compensation for length of service by Gremallen Enterprises Limited operating as Green Timbers Pub (“Green Timbers”). The wage and vacation pay issues were settled by the parties on April 25, 2003, when a complaint hearing was held by the Director’s delegate. The only remaining issue was whether Lawson had been terminated for just cause. The Director’s delegate heard evidence at the hearing and on June 6, 2003, issued a Determination finding there was just cause for Lawson’s dismissal and no further action was taken on the complaint. Lawson appealed from that decision to this Tribunal. On September 3, 2003, Adjudicator Roberts allowed the appeal on the basis of errors of law, set aside the Determination and referred the matter back to the Director. On December 8, 2003, another delegate of the Director filed a report with the Tribunal in response to the referral-back. The report found there had been just cause for dismissal. Both parties made submissions on the report, and Adjudicator Roberts issued her decision in response to the report on February 10, 2004. In that decision, it was found Green Timbers did not have just cause to dismiss Lawson and the amount of compensation for length of service payable was referred back to the Director. In response to that referral-back, the Director’s delegate reported that \$3,604.00 was payable to Lawson, plus interest pursuant to section 88 of the *Act*. On March 17, 2004, Green Timbers filed a request for reconsideration of Adjudicator Roberts’s decision dated February 10, 2004. This request is now decided on the basis of written submissions and all the material before the Tribunal.

FACTS

Lawson was employed as manager of the pub operated by Green Timbers between June 18, 1997 and December 17, 2002. He was dismissed upon the employer’s allegation he failed to follow company policy regarding the handling of money, that he stole money from a charity meat raffle, and that he cheated on a football pool. In the referral-back report, the delegate found Green Timbers had condoned Lawson’s breach of company policy regarding the handling of petty cash, but found Lawson did breach company policy by not immediately securing cash received from a charity meat raffle. The delegate concluded, however, that this single act was not sufficient to justify termination.

The delegate then considered the allegation Lawson had stolen money from the same raffle. She considered evidence heard by the first delegate that two witnesses found discrepancies between ticket sales and money eventually turned in by Lawson. The delegate also considered evidence from Lawson and another witness which cast doubt on the theft theory. The referral-back delegate concluded on the balance of probabilities that Green Timbers had failed to prove theft as it alleged.

Finally, the delegate considered Green Timbers's allegation that Lawson had cheated when he won a football pool on December 8, 2002. The delegate reviewed evidence heard by the first delegate that Lawson had not followed normal procedure regarding change of his "picks" and stated as follows:

The complainant agreed that he was aware that procedure in making second picks required him to remove the first pick before the midnight Saturday deadline, and identify the replacement as a second pick. The complainant stated that he did not remove his first picks for the December 8th football pool. However he denied cheating in order to win the pool money. The witness Kevin O'Flynn supported the complainant in his position. Even though Mr. Flynn was a friend of the complainant I give some weight to his evidence.

In order to determine that the employer had just cause to terminate the complainant over his actions surrounding the December 8th football pool I would have to accept that, on a balance of probabilities, the complainant committed the acts attributed to him by the employer and that those acts constituted just cause for his termination. I have reviewed the evidence and applied the relevant tests and have determined that on the balance of probabilities there was just cause to terminate the complainant.

This was a serious breach of company policy that would have resulted in the complainant winning a large amount of money if the breach had not been recognized. I am also mindful of the previous actions of the complainant with respect to handling of monies and adherence to company policy. While I have determined that those individual acts were not sufficient to warrant termination for cause, they form part of the employee's history with this employer. He has shown in the past that he did not feel policies applied to him.

The complainant's misconduct with respect to the football pool incident was such as to undermine an essential aspect of the employment relationship and his discharge was appropriate. He is not owed compensation for length of service.

In deciding Lawson's appeal from this decision, Adjudicator Roberts stated:

The evidence is that the football pool was managed by Mr. Lawson for the members of the pool. The only evidence referred to by the delegate regarding company policy with respect to football money was that prize winnings were to be paid by cheque from Green Timbers' account. Although Mr. Lawson apparently agreed that he kept pool money as cash and paid prize money out of his pocket, the delegate concluded that "[t]his was a serious breach of company policy that would have resulted in the complainant winning a large amount of money if the breach had not been recognized" (my emphasis). It is not clear what policy was breached, or how. The employer's evidence was that Mr. Lawson had not followed "normal procedure." A procedure is distinct from a policy, and there is no indication in the delegate's decision what the "normal procedure" was or how Mr. Lawson had failed to follow it.

There is some evidence that Mr. Tennant was not familiar with the operation of the pool, or the ways [sic] picks were recorded. The delegate also states that she gave "some weight" to the evidence of a witness for Mr. Lawson who corroborated Mr. Lawson's evidence that he had not removed his first picks. There is no explanation for why the delegate gave more weight to Mr. Tennant's evidence than Mr. Lawson's corroborated evidence.

The evidence and submissions demonstrate that Mr. Tennant holds a strong belief that Mr. Lawson has a gambling addiction. The evidence also demonstrates that Mr. Tennant drew a conclusion that Mr. Lawson cheated and stole money without giving Mr. Lawson an opportunity

to explain how his conclusion might be flawed. Mr. Tennant's conclusion must be substantiated by clear and compelling evidence.

In my review of the documents, I find no clear and convincing evidence that Mr. Lawson stole money from the football pool, or "rigged" the result. Furthermore, the record discloses no evidence from which the delegate could conclude that there was a fundamental breach of the employment relationship. There is no evidence of a policy with respect to the football pool, and no evidence that, if there was such a policy, how Mr. Lawson's conduct constituted a significant breach of that policy.

In my view, Mr. Lawson showed bad judgement in participating in a pool that he was responsible for administering. However, the evidence is that Mr. Lawson worked for Green Timbers for over 5 years. During that time, Mr. Tennant developed a personal relationship with Mr. Lawson, and attended his wedding. Mr. Lawson had no prior written or verbal warnings about his conduct. At most, this incident gave rise to a minor instance of misconduct which warranted a warning and the establishment of performance standards that Mr. Lawson was expected to comply with. There is no evidence that was done.

ISSUES

In any request for reconsideration there is a threshold issue whether the Tribunal will exercise its discretion under section 116 of the Act to reconsider the original decision.

If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is whether Lawson was dismissed for just cause.

ANALYSIS OF THE THRESHOLD ISSUE

The Tribunal's power to reconsider its decisions discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for the Tribunal's approach is grounded in the language and the purposes of the Act. One of the purposes of the Act, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers." The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98, which can be usefully summarized as follows:

- Any party exercising its right to request the Tribunal to reconsider must first pass the threshold of persuading the Tribunal that it is appropriate to enter upon a reconsideration of the adjudicator's decision. The obligation to satisfy the Tribunal that it ought to embark on a reconsideration may be seen as roughly analogous to the obligation, in some statutory contexts, to obtain leave to appeal before a Tribunal decision may be appealed to the Courts.
- In recognition of the importance of preserving the finality of adjudicator's decisions, the Tribunal will agree to reconsider those decisions only to the extent that it is first satisfied that one or more of the issues raised in the reconsideration application is important in the context of the *Act*.

- The Tribunal tends not to be favourably disposed to entering upon a reconsideration where the reconsideration application is untimely, where it asks the panel to re-weigh evidence, and where it seeks what is in essence interlocutory relief.
- Where the Tribunal agrees to enter upon a reconsideration of a decision, the Tribunal moves, at the second stage, directly to the merits. The standard of review at this stage is the correctness of the decision.
- Unlike the process for seeking leave to appeal in the Courts, the party requesting the Tribunal to reconsider must address in one submission both the test for reconsideration and the merits of the decision.

Unfortunately, unless a party is familiar with the *Milan Holdings* decision, section 116 of the *Act* itself does not shed much light on the test to be met. Green Timbers begins its request for reconsideration as follows:

I have read the decision of Carol Roberts, adjudicator for the Tribunal in the case of Bruce Lawson (employee) and Green Timbers Pub (employer). I understand that, under Section 116 of the Act, the Tribunal may reconsider a decision if:

- a) The Adjudicator failed to comply with the principles of natural justice
- b) The Adjudicator made a serious mistake in applying the law
- c) Some significant new evidence has become available.

Green Timbers then sets out a 10-page critique of the decision, in which the following key points are raised:

- The Adjudicator misunderstood the issue: Lawson committed fraud, not theft.
- The Adjudicator relied on the corroborative evidence of Lawson's witness Kevin O'Flynn, when there was reason to doubt the evidence of O'Flynn on several points and in any event it was not clear what parts of Lawson's evidence were so corroborated by O'Flynn.
- Lawson's evidence was that he submitted a second "pick" after calling his brother in Harrison, B.C., but the brother was not called as a witness and Green Timbers seeks to submit long-distance records to prove no calls to Harrison were made from the pub at the alleged time.
- The Adjudicator found "no clear and convincing evidence" that Lawson cheated, but in doing so, she disregarded the evidence of Len Tennant.
- The Adjudicator should have deferred to the findings of credibility made by the first delegate after the complaint hearing, and to the weight that delegate gave to the evidence of each witness.
- Green Timbers seeks to present new evidence that Lawson had in fact been warned about his misconduct on previous occasions.
- The Adjudicator erred in finding Green Timbers should have allowed Lawson an opportunity to respond to the allegations before being dismissed.

Green Timbers summarizes its submission in support of reconsideration as follows, which I quote *verbatim*:

1. The Adjudicator did not give due weight to the Delegate's original conclusions after the in-person hearing, a hearing where the truthfulness of certain statements could be assessed based on the personal impression the Delegate got of the parties and their witnesses;
2. The Delegate and Adjudicator gave too much weight to Bruce's written appeals, once armed with the employer's case;
3. The Adjudicator did not weigh the extent of Bruce's cash handling irregularities or the missing \$4,000 that he collected and (according to Bruce) subsequently lost;
4. The Adjudicator did not weigh the fact that Bruce kept the \$400 he paid himself for a win that, by his own admission, he was disqualified from for submitting two entry sheets;
5. The Adjudicator misunderstood to which act the Delegate was referring when she cited a breach of policy;
6. The Adjudicator erred when she found that Mr. Tennant was not familiar with the pool;
7. The Adjudicator erred in accepting Mr. O'Flynn's opinions as corroborating facts, especially in light of the inconsistencies and possible perjury;
8. The Adjudicator should have taken into account that Bruce did not call his brother to support his claims or provide any evidence of long distance calls;
9. The Adjudicator failed to accept Mr. Tennant's testimony on weight against Mr. O'Flynn's, nor the testimony of Mr. Tennant's witnesses;
10. The Adjudicator erred in faulting the employer for not discussing the dismissal in more detail with the employee. The employee's actions may have constituted a criminal act and, even if not, I don't think the employer is under an obligation to divulge details of the dismissal except before a hearing of Employment Standards or a court of law;
11. The Adjudicator failed to see that cheating on a company-run football pool by a key employee who administered the pool was a breach of the employee relationship;
12. The Adjudicator, in the face of overwhelming evidence proving that Bruce cheated or, at the very least, attempted to get away with submitting two entry sheets without penalty, still overruled the Delegate on two occasions and found that "at most, this incident gave rise to a minor instance of misconduct."

Green Timbers has clearly misapprehended the nature of the test to persuade me that this decision must be reconsidered. I will nevertheless consider its request in the context of the appropriate test, in the interests of efficiency and fairness.

I have read the impugned decision with care, and have considered all of the findings of fact and law made in the initial Determination, the referral-back decision by Adjudicator Roberts, the report upon referral-

back, and all of the submissions made by each party at those stages of the proceeding. Of the many points raised by Green Timbers in support of reconsideration, I treat the following as best supportive of the burden that rests upon it to persuade me the impugned decision should be reconsidered:

1. The Adjudicator misunderstood the issue: Lawson was not only alleged to have cheated on a football pool, but to have undertaken a course of action over a period of time that caused Green Timbers to lose trust in him and give rise to a fundamental breach of the employment contract.
2. The Adjudicator should have shown deference to the original delegate's findings of credibility and the weight she attached to the oral evidence she heard.
3. Green Timbers seeks to introduce new evidence that Lawson had been warned about his misconduct on previous occasions.

The power to reconsider must be used with restraint (*Re Valoroso*, BC EST #D\RD046/01). If it were otherwise, the integrity of the appeal process would be undermined – the appeal process is intended to be the primary forum for the final resolution of disputes regarding Determinations (*Milan Holdings, supra*). An “automatic reconsideration” would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to litigate (*Re Zoltan T. Kiss*, BC EST #D122/96). I will consider the points raised by Green Timbers in light of these cautionary principles, and I will follow the steps outlined in *Milan Holdings*.

Are Any of the Issues Raised of Importance in the Context of the Act?

Dismissal for just cause is a routine consideration in deciding whether employees are entitled to compensation for length of service under the *Act*. The principles governing this area are well-developed in the Tribunal's jurisprudence and at common law. I see nothing in the issues raised that could support reconsideration on this ground, and in particular, I see no novel or difficult issue that might affect the interpretation of the *Act* or future cases to be decided by the Tribunal.

I find the Adjudicator did not misunderstand the issue as suggested by Green Timbers, and she in fact referred to Green Timbers's representative Len Tennant as holding a strong belief that Lawson has a gambling addiction. The Adjudicator was well aware of the other incidents of misconduct that were alleged by Green Timbers, but which had been rejected by the Director's delegates. In this knowledge of the employer's view and the other instances of misconduct, the Adjudicator decided Lawson's misconduct was not so serious as to justify dismissal. It is essential to preserving the integrity of the appeal process that parties not see the reconsideration process as another “kick at the can” in the hope of achieving the favourable result they were unable to achieve at the appeal. It is not my place to substitute my own decision for the Adjudicator's, or to say I might have arrived at a different result, unless it is an appropriate case for the reconsideration power to be exercised.

Green Timbers's argument that the Adjudicator should have shown deference to the original delegate's findings of weight and credibility is not supported by anything in the impugned decision. While this issue could be of importance generally in the context of adjudications under the *Act*, I see no instance in the decision where the Adjudicator rejected any finding of fact by the delegate or reassessed the weight to be attached to any of the evidence. In fact, the Adjudicator was in the same position as the referral-back delegate, as neither of these decision-makers heard the oral evidence of witnesses. The Adjudicator comments that there is no explanation why the delegate gave more weight to the evidence of Len Tennant

for the employer than to Lawson's corroborated evidence regarding removal of his first pick, but the delegate found Lawson admitted he did not remove his first pick as he was supposed to. In any event, the delegate was in no better position than the Adjudicator to assign weight to evidence and I do not see how anything of significance turns on these remarks. On the contrary, the Adjudicator expressly relied on the fact-finding of both delegates as to how the football pool was operated. The inferences and conclusions to be drawn from those facts, however, are the Adjudicator's rightful domain. The Adjudicator found the facts on which the delegate relied were insufficient as a matter of law to support summary dismissal.

Green Timbers's desire to introduce new evidence relating to previous warnings for misconduct does not on its own raise any issue of importance in the context of the *Act*. An employer bears the onus of defending its decision to dismiss summarily. The new evidence referred to by Green Timbers certainly existed at the time Lawson's complaint was first filed with the Director. Green Timbers's unexplained failure to introduce that evidence before two different delegates and at two different Tribunal appeal proceedings certainly cannot justify its reception now.

Is the Reconsideration Request Timely, Does it Ask the Tribunal to Re-weigh Evidence, and Does it Seek in Essence Interlocutory Relief?

I am satisfied Green Timbers filed its request for reconsideration in a timely manner. I am also satisfied that at bottom, Green Timbers wishes me to re-weigh the evidence and come to a conclusion different from the one reached by the Adjudicator. Green Timbers is hoping I would see the facts, and the pattern of misconduct by Lawson, as supporting summary dismissal. For the reasons previously stated, it would be incorrect for me to do so. Finally, it cannot be said the relief sought by Green Timbers is interlocutory, as we are clearly dealing with a "final" decision.

I therefore conclude Green Timbers has failed to meet the heavy burden that rests upon it to persuade me that the reconsideration power ought to be exercised in this case. It is not necessary to move to the second stage, which would have been a review of the correctness of the impugned decision on its merits.

ORDER

Pursuant to section 116 of the Act, the request for reconsideration is refused. The funds held in trust for Lawson should be paid to him, with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal