

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Christopher Whalley

(“Whalley”)

-of a Decision issued by-

The Employment Standards Tribunal

(the “Tribunal”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/559

DATE OF DECISION: November 24th, 1999

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Reconsideration of BC EST #D220/99

DECISION

OVERVIEW

This is an application filed by Christopher Whalley (“Whalley”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision to confirm a Determination that was issued by a delegate of the Director of Employment Standards on January 18th, 1998 (the “Determination”).

Whalley’s original complaint alleged that his employment with Cambium Forest Management Ltd. (“Cambium” or the “employer”) was terminated without any prior written notice and without just cause; accordingly, Whalley claimed compensation for length of service pursuant to section 63 of the *Act*. By way of the Determination, the Director’s delegate held that Cambium did, in fact, have just cause to terminate Whalley’s employment and thus no compensation for length of service was payable to him.

Whalley appealed the Determination to the Tribunal; a hearing was held on May 6th, 1999 and in written reasons issued on May 31st, 1999 a Tribunal adjudicator, as noted above, confirmed the Determination. Whalley now seeks to have the adjudicator’s decision set aside on the ground that the adjudicator erred in law and failed to comply with the principles of natural justice.

BACKGROUND FACTS

Whalley was formerly employed by Cambium as “Forestry Technical Supervisor”; informally, he was known as Cambium’s “computer guru”. Cambium was contracted by Downie Timber Ltd. (“Downie”) to do certain work relating to a forest management plan. Whalley’s responsibility under this latter contract included creating a “computerized digital mapping file” from data gathered by a Cambium field crew. Ultimately, the relationship between Cambium and Downie soured and Cambium claimed it was still owed some \$10,000 on account of work completed and billed.

In an effort to generate some goodwill and to spur payment of its outstanding account, Cambium delivered certain documents to Downie including the digital mapping file that had been prepared by Whalley. Some few months later, Downie formally terminated its contractual relationship with Cambium. Prior to the formal termination of the contract, however, Downie entered into discussions with a competitor of Cambium, namely, Control Point Consulting Ltd. (“Control Point”)—a firm which then employed certain former Cambium employees.

Control Point’s principal, Mr. Joe Talbot, testified that the digital mapping file that Cambium had delivered to Downie “was not useful” and that he assumed Downie’s file was incomplete. Accordingly, he asked two of his employees—one a friend of Whalley and both former Cambium employees—to contact Whalley directly and “find out if Cambium had more data than what had been delivered to Downie Timber” (Adjudicator’s Decision, p. 5). Whalley, when asked, provided the digital mapping file, as requested, directly to Control Point without recording the transfer in any internal Cambium

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logbook. Whalley did not have authorization from Cambium's client, Downie, to do so nor was any such consent ever sought even though Cambium's internal Digital File Transmittal form specifically states that a record was to be made of the transfer and that all transfers required the client's express authorization. Whalley was well aware of this internal policy but nonetheless breached it and, in addition, attempted to conceal the transfer by failing to advise Cambium's president about the matter. After discovering these events, Cambium terminated Whalley's employment, maintaining that it had just cause to do so.

The adjudicator's key findings are set out below (at p. 13 of his Reasons for Decision):

“I agree with the Director that Whalley owed [a] duty of fidelity to Cambium and he breached that duty. That duty included protecting any interests Cambium had in the digital mapping file and existed even in the absence [of] any specific instruction not to transfer the file to anyone. If, in addition, Whalley delivered the data in the face of instructions prohibiting him from doing that, which he concedes he might have and I find he did, then he committed an act of insubordination as well as breaching his duty of fidelity. I do not accept that the data compiled by Cambium and retained by Cambium in their records ‘belongs’ to the client. Downie Timber seems to have received all that it was entitled to, and perhaps more. It follows that I do not accept Whalley was justified in passing Cambium's file to Control Point. The seriousness of his conduct was compounded by his failure to record the digital mapping transfer file transfer and his intention to avoid telling his employer it had been done until and unless it was necessary.

The facts of this case support a conclusion that the conduct of Whalley undermined his employment relationship with Cambium and justified his summary dismissal.”

THE REQUEST FOR RECONSIDERATION

Whalley's request for reconsideration is contained in a written submission to the Tribunal dated September 12th, 1999. Whalley alleges two principal “mistakes in applying the law” which, in essence amount to the same error, namely, that the adjudicator erred in finding that Whalley had been expressly told not to deliver any digital mapping data to Downie without express permission.

Whalley's various--and detailed--allegations that the adjudicator failed to comply with the principles of natural justice do not, in fact, address natural justice issues (for example, bias, failure to allow relevant evidence, hearing one side's evidence but not the other's etc.) but rather amount to a undisguised attempt to have certain findings of fact--and the conclusions arising therefrom--overturned. So far as I can gather, both Whalley and the employer were given a fair--in every sense of the word--opportunity to present their respective positions and to challenge each other's evidence. Whalley's complaint is not so much one about the hearing process itself but rather a complaint about the *result* of that process, namely, a finding that he was dismissed for cause.

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ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the *Act* (the “reconsideration” provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever. For the most part, Whalley’s request for reconsideration is nothing more than an attempt to reverse certain findings of fact that were made by the adjudicator.

Clearly, there was some conflicting evidence before the adjudicator and, thus, he was obliged to make certain findings of fact, none of which, as I review the record, could be characterized as perverse in the sense that there was no evidentiary foundation for such findings.

There are two points to be noted regarding the alleged errors of law made by the adjudicator. First, the employer’s evidence--at least in part--was that Whalley had been specifically told not to transfer the mapping file without permission. Quite apart from any verbal instruction, this advice is repeated--unequivocally--on the transmittal form itself. As was noted by our Court of Appeal in *Stein v. B.C. Housing Management Commission* (1992), 65 B.C.L.R. (2d) 181 at p. 185:

“...the employer has a right to determine how his business shall be conducted [and] may lay down any procedures he things advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employee and are within the ambit of the job for which any particular employee was hired. It is not for the employee...to consider the wisdom of the procedures. The employer is the boss and...the employee must obey the orders given to him.

It is not an answer for the employee to say: ‘I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it’”.

In the instant case, the employer established a rule about the transfer of files and the employee willfully ignored it. His “good faith” in violating the rule--as Whalley puts it--is not relevant. For example, it does not matter whether or not, as a matter of law, Downie, or its agent, was or was not entitled to the data in question (although I fail to see how a client, such as Downie, who has not paid for the data in full is entitled--absent some sort of court order--to the fruits of the contractor’s labour). The employer’s direction to Whalley was that *the data was not to be transmitted without permission* and that permission was never sought nor obtained, a clear instance of insubordination. In any event, the evidence on the record before me suggests that Whalley was not, in fact, acting in good faith when he breached the employer’s rule. For one thing, a person acting in good faith does not attempt, as Whalley did here, to conceal his or her actions especially when, on the face of it, such actions are contrary to the employer’s express policy and procedures.

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ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal