Claim No: 298916

Date:20081031

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Heath v. Spears Concrete Formwork Inc., 2008 NSSM 89

BETWEEN:

Name Cecil Heath Claimant

Name Spears Concrete Formwork Inc. Defendant

Revised Decision: The text of the original decision has been revised to remove addresses of the parties on July 3, 2009.

DECISION

BACKGROUND

(1) The Claimant, Cecil Heath (Heath), claims the sum of $6,000.00 from the Defendant, Spears Concrete Formwork Inc. (Spears), for wrongful dismissal.

(2) Spears denies the claim and it is their position that the Claimant quit his employment.

(3) Heath was employed with Spears for two years as a carpenter/laborer.

(4) On May 26, 2008, Heath was at work on a project for Spears. He was working on the elevator walls tying in the corners of the walls to get ready to pour cement.

(5) Stephen Gillis (Gillis), also an employee of Spears, was present at that time.

(6) Gillis stated to Heath that the piece of plywood that he was using was not large enough. He stated that there were larger pieces in another location in the same building. Heath went down to get another piece of plywood.

(7) When he returned, a verbal altercation took place between Heath and Gillis as Gillis was putting taper bolts into the wall, standing on a piece of plywood. Heath told Gillis to get off the plywood, and Gillis said that he would but only when he was finished doing what he was doing.

(8) According to Heath, Gillis told Spears to leave the floor and go home. According to Gillis, Heath asked him to get off the plywood or he was going to quit and go home.

(9) Shortly after this verbal altercation, Heath left the job site.

(10) Greg Postma (Postma) was also an employee of Spears who was working that day on the same job site. He states that Heath left that day without telling him that Gillis had sent him home. In fact, Heath did not tell Postma that he was leaving the job site that day at all.

(11) There were other incidents in the past concerning Heath losing his temper and not getting along with others at work. In fact, he was dismissed from his employment with Spears on a previous occasion approximately one year earlier based on his inability to get along with other people on the same crew. He was hired back when he assured the owner, Darrell Spears, that his behavior would change.

(12) Following his rehiring, there were a few incidents prior to the incident which occurred on May 26, 2008, but none which caused major concern.

(13) The next morning, Heath showed up for work and met with Darrell Spears. He told Darrell Spears that Gillis had sent him home the day before. Darrell Spears told Heath that Gillis had no authority to do so and stated to Heath that he had quit and that was fine with him. He told Heath that he didn't need him on the job site anymore.

FINDINGS

(14) The first issue is whether Heath quit his employment or whether his services were discharged. I accept that there was a verbal altercation between Heath and Gillis on the job site on May 26, 2008. I also accept that Heath left the job site on that day. I find based on the evidence and his demeanor that Heath is an impulsive individual who sometimes acts without thinking. My impression is that Heath perceived that Gillis was acting in a condescending manner to him and he was upset about that.

(15) What is clear in this case, however, is that Heath clearly had time to reflect on his behavior and decided to show up for work the following day. While there was a suggestion by Darrell Spears in his evidence that Heath applied for work with another company the afternoon of May 26, 2008, there is no evidence to that effect other than hearsay, which is unreliable.

(16) Based on all of the circumstances, I conclude that Heath did not quit his employment following this incident. There was a verbal altercation, unpleasant words were said, and Heath decided to leave the situation. I do not fault Gillis for what happened but the actions of Heath do not constitute quitting his employment. Based on the entirety of the evidence, I am not satisfied that Heath had a permanent intention to leave his employment. To the extent his actions were interpreted that way, they were misconstrued.

(17) The second issue is whether Spears had just cause to terminate Heath's employment. From the employer's perspective, it is understandable that employees leaving the job site will create downtime, lead to instability in the workplace, and overall this creates a difficult situation. It is not advisable for employees to leave job sites in the middle of the day. Absenteeism from the workplace has been found to be just cause for dismissal in other cases (see Hunter v. Webcentrex Inc. et al, 257 N.S.R. (2d) 148).

(18) In Orman v. Graves, 1998 CarswellNS 424, Boudreau J. of the Nova Scotia Supreme Court stated at paragraph 10:

> *"... The law is well established that where an employee for an indefinite term is terminated for cause and without notice, the burden is on the employer to established or provide the just cause. In the present case the alleged cause is primarily poor performance due to wilful defiance, although there are overtones of alleged incompetence throughout."*

(19) Further, at paragraph 11, he stated:

> *"... In my view, an employer who changes his expectations of an employee in these circumstances had better make it abundantly clear, preferably in writing, what the expectations are, what reasonable time limitations are being placed on those expectations and what the result of failing to meet those clear expectations in the period of time allowed will be."*

(20) Justice Boudreau described the factual background of the case as follows at paragraph 7:

> *"7 Mr. Graves has claimed that he had just cause to terminate Ms. Orman's employment in December, 1996, because she was insubordinate, defiant and incompetent. This allegation is based primarily on her bookkeeping work and practices and her attitude after she terminated their sexual relationship in August of 1996. As I understand Mr. Graves' position, it is that the termination was primarily justified because her work and her attitude had deteriorated materially after August of 1996, to the point where it adversely affected the business."*

(21) Justice Boudreau concluded that in a case where the basis of termination for just cause is poor performance due to wilful defiance, a warning was necessary on the facts of the particular case. He stated at paragraph 12 as follows:

> *"12 I find that this is a case where those clear objectives and a clear warning as to what the consequences of failing to meet those objectives would be, is required. These requirements in a case such as this are inferentially stated in the following cases:*
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> > *Lewis v. Associated Laboratories Ltd. (1981), 44 N.S.R. (2d) 567 (N.S. T.D.). This is a decision of our Nova Scotia Supreme Court, former Chief Justice Cowan, where he found that, "if the previous warnings of dismissal had been provided to the plaintiff and the plaintiff had knowingly refused to perform certain tasks which were necessary and important, then no notice would be required". Obviously the case clearly infers previous warnings of dismissal would be required.*
> >
> > *Similarly, in Aston v. Gander Aviation Ltd. (1981), 32 Nfld. & P.E.I.R. 148, 91 A.P.R. 148 (Nfld. T.D.), a decision of the Supreme Court of Newfoundland. Again it was found that the plaintiff's wilful refusal to carry out reasonable orders of the defendant after having been warned of the seriousness of his disobedience was just cause for dismissal without notice.*
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> > *As indicated in the text cited by Mr. Graves' counsel, the same was found in Holden v. Metro Transit Operating Co., a British Columbia case at (1983), 1 C.C.E.L. 159 (B.C. S.C.)."*

(22) In the present case, while Heath had been previously dismissed from his employment in similar circumstances, there is no evidence that he was given a warning by Spears that if he

were to leave the job site or act in an insubordinate manner, he would be summarily dismissed in the future.

(23) According to Justice Boudreau, in the Orman case, it was necessary for the employer to clearly advise the employee of what expectations were there and the consequences for breaching those expectations.

(24) In Cardenas v. Clock Tower Hotel Ltd. Partnership, 1993 CarswellNS 228, Justice Goodfellow of the Nova Scotia Supreme Court stated at paragraph 7 as follows:

> *"7. Just cause is found when the employer establishes, on a balance of probabilities, that the conduct of the employee breaches one of the fundamental terms of the employment contract. Terms vary in degree with the nature of the employment. A breach of confidence by an employee in a law office, no matter how minor, might be considered justification for dismissal without notice as the aspect of confidentiality is so clearly a basic requirement in such a professional setting. On the other hand a loose comment on the approximate daily sales by a donut franchisee employee might be inappropriate warranting some disciplinary action such as a reprimand or speaking to but would not likely amount to "just cause" for dismissal."*

(25) In Squires v. Ayerst, McKenna & Harrison Inc., 1991 CarswellNS 130, Justice Gruchy of the Nova Scotia Supreme Court stated at paragraphs 19 and 20 as follows:

> *"19 The facts will be examined in relation to the law of just cause. The defendant has submitted that an acceptable definition of just cause is found in Clouston & Co., Limited v. Corry, [1906] A.C. 122 at pp.128-9 where it is stated by Lord James as follows:*
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> > *Still there are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict... Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.*

20 Mr. Justice MacIntosh of this Court addressed the definition of just cause in Delano v. Atlantic Trust Co. (1978), 24 N.S.R. (2d) 53 at pp.69, 70 as follows:

> *That an employment contract can be determined by an employer for just cause is well-settled.*
>
> *The definition of the words 'just cause' were considered by the Appeal Division of the Supreme Court of Nova Scotia in Walker v. Keating, Smith and Walker (1974), 6 N.S.R. (2d) 1, where Mr. Justice Cooper stated the following at page 11:*
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> > *In the first place I think that 'just cause' as used in s.76(5)(b)(i) of the Education Act must mean such cause as would justify a master in summarily dismissing a servant. Whether or not just cause for dismissal exists has been held to be a question of mixed fact and law - see, Re United Steelworkers of America, Local 7085 and East Coast Smelting & Chemical Co. Ltd. (1972), 21 D.L.R. (3d) 23. MacDonald, J., in the Canadian Gypsum case, supra, at p.314 refers to the legal requirement for justifiable dismissal without notice as being that set out in 25 Halsbury (3rd Ed.), p.485, namely:*
> >
> > > *Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged, is good cause for his dismissal.*
> > >
> > > *And in the leading case of Clouston & Co. v. Corry, [1906] A.C. at 129, it was said that "misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal". (Cf. Laws v. London Chronicle (Indicator Newspapers) Ltd. (1959), 2 A.E.R. 285.)*
> >
> > *I refer also to what was said by Schroeder, J.A., in his dissenting judgment approved by the Supreme Court in Regina v. Arthurs; Ex parte Port Arthur Shipbuilding Co., [1947] 2 O.R. 49, at p.55:*
> >
> > > *If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.*

> *Schroeder, J.A.'s judgment was approved in the Supreme Court of Canada, [1969] S.C.R. 85, and is referred to by Robertson, J.A., in International Woodworkers of America, Local 1-217 v. Industrial Mill Installations Ltd. , [1972] 1 W.W.R. 321, at 337:*
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> > *At common law there is no obligation on an employer to retain indefinitely in his employ an employee whose work is unsatisfactory."*

(26) In Halliday v. Michelin North America (Canada) Inc., 2003 CarswellNS 139, Freeman J.A. of the Nova Scotia Court of Appeal stated at paragraph 6:

> *"6 He said "continuous, recurring, intermittent absenteeism" caused greater problems for employers than long term disability, which could be dealt with by temporary replacements. He continued:*
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> > *If an employee is constantly missing a few days work, or, even worse, leaving during the middle of a shift, this simple solution is not possible. It is continually irritating to supervisors, and very harmful to production, always to be making adjustments and putting whatever employee is immediately available into the absentee's place. There will not be just one replacement, assigned to the job for a lengthy foreseeable period, who soon becomes an experienced and regular performer of the job.*
> >
> > *There is another reason for the necessary power of termination in this kind of case-the extreme difficulties of proof by the employer that the absenteeism is not bona fide and innocent. If an employee is constantly missing a few days work, it will be because of minor ailments and pains whose existence is very subjective. If an employee says he has a headache or sore back, and that he is not able to come to work, it is impossible to verify either the existence of any trouble or, certainly, its degree of severity. There is really no alternative to believing what the employee says. It is this arbitrator's experience that doctor's certificates, especially the large majority which follow a mere telephone diagnosis, are equally useless as verification. . . . Hence (the employer) must finally rely on the objective facts of the absenteeism and, if it cannot be expected to cease or at least come within the range of reasonable expectations for the employees, it must have the right to discharge the employee."*

(27) In Fleming v. J.F. Goode & Sons Stationers & Office Supplies Ltd., 1994 CarswellNS 344, Justice MacAdam of the Nova Scotia Supreme Court stated as follows commencing at paragraph 74:

> *"74 Absenteeism as a justification for dismissal, without notice, was reviewed in Levitt, The Law of Dismissal in Canada (Canada Law Book Inc., 1985). Mr. Levitt at pp. 88-93 notes 12 factors considered by the courts in assessing whether the absenteeism, in the particular circumstances, is sufficient cause for summary termination:*
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> > *(1) It must be misconduct of significance.*
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> *75 In amplifying on this factor, Mr. Levitt refers to the Saskatchewan decision in Warren v. Super Drug Markets Ltd. (1966), 54 D.L.R. (2d) 183 (Sask. Q.B.) where a pharmacist-manager of a drug store, who assisted in the formation of the company, and who was also a director and shareholder of the company which owned the drug store, was dismissed without notice for leaving the store two and a half hours early on the day before his holidays, without first having advised his employer. After indicating that the court had noted the conduct of the employee was not disobedient, untrustworthy or dishonest and did not harm the interest or reputation of the employer, the author quotes, at p. 191:*
>
> > *To my mind the action relied on as misconduct justifying summary dismissal would not have justified such dismissal of an ordinary clerk, let alone a store manager and director who had assisted in the formation of the company and been held out to the public as one of its future management.*
>
> *76 In the context of the present circumstance, the absence, whether the result of his intoxication or as a result of a deliberate intention not to attend work, could not be described as insignificant. Mr. Fleming missed, intentionally or otherwise, an appointment with one of the employers "important" customers.*
>
> > *(2) Failing to return promptly after a leave of absence, without advising one's employer, or taking time off despite a direct order not to do so.*
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> *77 This particular factor would be relevant in assessing any action taken as a result of Mr. Fleming's failure to return on the scheduled termination of his vacation. However, to the extent he was then absent without permission or leave, this failing was condoned by the subsequent conduct of the employer in continuing to employ Mr. Fleming. It is not therefore a factor in assessing whether the absenteeism in the present circumstance warranted the summary termination.*

(3) The employee took time off under false pretences.

78 There is no suggestion in the evidence that Mr. Fleming's absence was under "false pretences." Mr. Fleming attempted on his own to contact Mr. Goode and there is no suggestion of either disobedience or deceit in either his absence from work or the explanation which he provided to Mr. Goode.

(4) Prejudice to the employer's interest.

79 Mr. Fleming failed to keep the scheduled appointment with M & M Manufacturing. His failure to either keep the appointment or to provide the employer with reasons why the appointment should not, in the interest of the employer, be kept was prejudicial to the employer's interest. On the evidence, M & M Manufacturing was an important customer of the employer and the employer was entitled to assume that the employee, in the performance of his duties, would not act to the prejudice of the employer.

(5) Generally, two instances of absenteeism are required, particularly where the employee is of long service and has acted faithfully in all other respects.

80 Although Mr. Fleming was an employee of long service and had an excellent sales record, it could hardly be said that he had "acted faithfully in all other respects." The summary termination of January followed the warning letter, which also related to an incidence of absenteeism and failure to meet with one of the employer's important customers. There are, therefore, the two instances of absenteeism noted by Mr. Levitt as one of the factors considered by courts in analyzing whether summary termination is warranted in the circumstances.

(6) It must result from intentional misconduct, rather than just from a misunderstanding.

81 Mr. Fleming's decision not to report to work was intentional and not the result of any misunderstanding or unintentional conduct. In his evidence, he acknowledged that he had decided not to report to work and not to keep the appointment with M & M Manufacturing. His absence, therefore, resulted from "intentional misconduct."

(7) It must be the fault of the employee.

82 It was Mr. Fleming who decided to be absent from work and to miss the appointment with the company's customer. To the extent fault is to be attributed in the decision not to attend work it is that of Mr. Fleming and not Goode & Sons.

(8) Where warnings are provided, they should specify that the employee will be terminated if his absences continue.

83 Mr. Fleming's absence from work on October 10, 1991 and his altercation with a fellow employee in the morning of October 11 justified the warning letter delivered by Fred Goode. The letter, although specifically referrable to these incidents, noted the behaviour had occurred in the past and that he had been advised on more than one occasion the behaviour would not be tolerated from employees of the company.

84 Plaintiff's counsel submits that because the plaintiff did not believe the warning was serious and the defendant, being aware that the plaintiff did not believe the warning was serious, Goode & Sons was then required to take further steps to clarify the situation.

85 The message conveyed by the warning letter is unambiguous and if, in fact, the plaintiff did not believe it was serious, it was only because he failed to recognize "reality" rather than the defendant having failed to bring to his attention that his conduct had placed "his job in jeopardy." I do not find that Goode & Sons, or any of the three brothers, were aware that Mr. Fleming had not taken the warning seriously, nor am I satisfied that he did not, in fact, take the warning seriously.

86 The warning letter was specific and clear in warning that failure to show up for work would, in the absence of prior approval, result in immediate termination.

(9) Whether there is a reasonable defence, such as illness.

87 As earlier noted, alcoholism is an illness. It is not, however, in these circumstances, a reasonable defence for Mr. Fleming's absenteeism. In fact, Mr. Fleming testified he deliberately decided not to attend work in view of the previous week's sales and his anticipation that he was unlikely to generate substantial sales from calling upon the same customers a week later. The extent to which his intoxication may have influenced this decision is unclear.

88 On the evidence, Mr. Fleming deliberately decided not to attend work and his unilateral speculation that he would not generate a sufficient level of sales and that he should not attend the scheduled meeting with M & M Manufacturing were not his to make, without first having discussed and obtained the approval of his employer. In the circumstances, there is no reasonable defence for his absenteeism on January 30th, 1992.

(10) The type of employment.

89 Mr. Levitt suggests that senior employees are generally allowed a wider latitude to set their own hours than other more junior employees. Mr. Fleming was neither a manager, director or shareholder of the employer. He had been cautioned that the "work day" was not for him to decide and that his employment required him to attend work at times set by the employer. Although he maintained, in view of the nature of his employment as a salesperson and because his income was based on commission rather than an hourly wage, that he should be permitted a wider latitude in setting his own hours, it is clear this view was not accepted by the employer.

> *(11) An employee's history of long service without a record of significant absenteeism can be used as a mitigating factor.*

90 It is in respect to this factor that the past difficulties between Mr. Fleming and his employer may be relevant and in particular his extended vacation without approval. Offsetting any mitigating factor from his successful sales record and assistance in establishing the defendants' business are the several occasions when Mr. Fleming's conduct brought him into dispute with his employer. In assessing whether there are mitigating factors present, the historical relationship between Mr. Fleming and Good & Sons is a relevant consideration. In the instant, there are both positive and negative mitigating factors.

> *(12) The onus of proof is on the employee to establish that he has received permission to take a leave of absence.*

91 Mr. Fleming does not allege that his absence from work, either on October 10, 1991 or January 30, 1992 was with permission of the employer."

(28) In Daniel v. Survival Systems Ltd., 2000 CarswellNS 314, Chief Justice Kennedy stated in regards to wilful insubordination the following at paragraph 40:

> *"40 As to insubordination justifying cause for dismissal; Levitt in The Law of Dismissal in Canada (supra) at p. 142 cites Heyes v. First City Trust Co. (December 4, 1981), MacKinnon J. (B.C. S.C.) At p. 9:*
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> > *Wilful disobedience is, of course, a ground upon which an employer may dismiss without notice. In order to justify the dismissal on those grounds there is an onus upon the defendant to establish there were acts wilfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well-known by the*

> *employee as being necessary to the fulfilment of the employer's objectives."*

(29) I am unable to conclude based on all of the facts and circumstances that the Claimant in this case is guilty of serious misconduct or habitual neglect of duty, incompetence, or conduct incompatible with his duties or prejudicial to the employer's business. I am also unable to find that he wilfully disobeyed his employer's orders in a matter of substance. He has not disregarded the essential conditions of the contract of service.

(30) He made an error of judgment by leaving an uncomfortable situation. He should have reported immediately to his superiors and explained his point-of-view.

(31) His actions were less than perfect but were not tantamount to grounds for immediate dismissal without notice.

(32) There was no clear warning given to him that leaving the job site for any reason would lead to his immediate dismissal without notice.

(33) I have reviewed the factors set out by Justice MacAdam in the Flemming case in assessing whether Heath's actions constitute sufficient cause for summary termination in this case and, on balance, I am unable to conclude that Heath's actions in this case provided Spears with grounds for summary dismissal.

(34) Certainly, Spears would be justified in providing a written warning to Heath. It will be up to him in future to learn how to cope with uncomfortable or awkward situations when they occur. Simply leaving the job site and leaving his employer in a vulnerable position is not an appropriate answer.

(35) On the whole of the circumstances, however, I find that he was not dismissed for just cause.

DAMAGES

(36) Heath seeks the sum of $6,000.00 damages.

(37) According to Heath, this represents his anticipated earnings between May 26, 2008, and July 7, 2008, the latter date being the date that his first Employment Insurance cheque arrived.

(38) I have reviewed various authorities concerning appropriate notice and find that the requested period of 31 working days is certainly reasonable and within the range suggested by the authorities. No suggestion has been made by the Defendant that Heath did not make efforts to mitigate his damages.

(39) However, Heath has not proven that he would have worked a total of 291 hours at $21.50 during that period of 31 working days.

(40) I accept Heath's hourly rate at $21.50 per hour. I have reviewed the pay stubs which he provided and conclude that he was working an average of approximately 79 hours per pay period or 7.9 hours per day, which equates to 245 hours over 31 working days.

(41) I award Heath the sum of $5,267.50 as damages for wrongful dismissal.

COSTS

(42) As success is divided, each party will pay their own costs.

Dated at Dartmouth, Nova Scotia,
on October 31, 2008.

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Patrick L. Casey, Q.C., Adjudicator