Claim No: 339136

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Sunshine Driveway Sealers v. Gosbee, 2011 NSSM 10

BETWEEN:

SUNSHINE DRIVEWAY SEALERS

Claimant

- and -

GRANT GOSBEE

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on December 21, 2010 and January 18, 2011

Decision rendered on January 24, 2011

APPEARANCES

For the Claimant	Arlington Smith, partner
For the Defendant	Melissa Clattenburg, agent

BY THE COURT:

[1] The Claimant is a partnership of Arlington Smith and Erin Smith. Part of its business is operating trucks, usually three in number, hauling fill under contract with Dexter Construction ("Dexter"). Arlington Smith (hereafter "Smith") drives one of the trucks himself and directs the employees who drive the other two trucks.

[2] The Defendant was a driver employed by the Claimant for a period of approximately seven weeks, until his employment was terminated on November 4, 2010 as a result of an incident which will be described below.

[3] As described by Smith, at the relevant time his company had a contract with Dexter Construction to haul away fill being removed at a construction site on Gladstone Street in Halifax, to a designated dump site in Harrietsfield. Payment under these contracts was sometimes by the hour, and sometimes by the load. At the time in question, Dexter was paying $46.00 for each load removed from Gladstone and delivered to Harrietsfield.

[4] The Defendant had been doing these runs for some or all of his time as an employee with the Claimant, and was (or ought to have been) familiar with the routine.

[5] On November 4, 2010, the Defendant took a call on his CB radio from an independent trucker, Peter White ("White"), who was also contracted by Dexter to remove fill at the Gladstone site. White had been approached by someone who lives on Rockingstone Road in Spryfield, who was looking for some free fill

to level a neighbour's backyard. White had agreed to provide some loads and offered to try and recruit someone else, namely the Defendant, to do the same.

[6] Both White and the Defendant testified that they saw nothing wrong in taking the fill and dropping it off in Spryfield, rather than taking it a further five kilometres or so to Harrietsfield. From their perspective, it was a win-win situation all around. They did not believe that Dexter placed any value on the fill; in fact, although they may not have been aware of all of the details, Dexter did not own the site in Harrietsfield and was apparently paying a third party a tipping fee to deposit it. By dropping off some loads in Spryfield, White and the Defendant would be able to get back to Gladstone faster and probably haul more loads that day. And they believed they were performing a good deed for someone who needed fill.

[7] The Defendant went along with this, without consulting his boss, Smith. Clearly he should have done so.

[8] Although Smith believed that White and perhaps the Defendant were pocketing some money for the fill, the evidence does not bear that accusation out. All of the people directly involved in the dealings testified and denied that any money changed hands. There is no doubt that had the Defendant been attempting to profit from the fill he was hauling, this would have been a gross breach of his duties as an employee.

[9] Unfortunately for the Defendant, after dumping his one and only load in Spryfield, he managed to get his front wheel stuck in the mud, requiring a tow truck to extricate him. This also put him out of commission for about two hours, during which time Smith was trying to locate him. Smith testified that when he

did manage to contact the Defendant, the Defendant essentially lied about where he was. The Defendant denied doing so. Under all of the circumstances, I do not believe that I have to resolve this discrepancy.

[10] Unfortunately for the Claimant and the Defendant, as well as for White, Dexter had someone in Harrietsfield tracking and counting loads, and when several trucks failed to arrive on schedule Dexter was informed, and in turn so was Smith.

[11] The end result was that Dexter regarded the diversion of fill as a breach of the agreement that it had with the Claimant, and suspended one of the Claimant's trucks for the balance of that day and for six days thereafter. White suffered a similar fate.

[12] In this action, the Claimant seeks to hold the Defendant personally responsible for the financial losses caused by his unauthorized activities that day. As mentioned, the Defendant also had his employment terminated summarily as soon as the Claimant found out what he had done.

[13] The defence offered at trial included these points:

a. The Defendant is an uneducated individual, with a learning disability, who did not receive proper training and may not have understood all of the Claimant's procedures;

b. The Defendant did not intend to harm the Claimant in any way, and was just trying to perform a good deed;

c. The Defendant did not contact the Claimant to ask permission because he did not really think he needed permission;

d. The Defendant was not dishonest in any way.

e. The damages claimed are excessive, for a number of reasons.

[14] The law in this area is not crystal clear. An employee is not necessarily liable to indemnify his employer for every mistake he makes which has the effect of costing the employer money. For example, if the Defendant had a routine traffic accident, which did damage to his employer's truck, the employer could not necessarily ask the employee to pay the cost of repair. It is an implied term of the contract of employment that the employee is not perfect, and that the cost of honest employee errors is simply part of the cost of doing business.

[15] However, if the employee acted dishonestly, or with gross negligence, he might be personally liable to the employer.

[16] Against that backdrop, I make the following findings. I believe that the Defendant knew, or should have known, that what he was being asked to do was highly irregular. On the evidence, it was clear that virtually the only instruction he had from Smith was where to go to pick up fill, and where to take it. The Defendant was not given any leeway or discretion.

[17] There is no merit to the contention that the Defendant was not properly trained in procedure. He was already an experienced truck driver, and no particular procedures were involved in this job.

[18] I make no allowance for the fact that the Defendant allegedly has a learning disability. He came across at the trial as an ordinary, thoughtful person who expressed himself reasonably well. Even if he has trouble reading, there was nothing that he needed to read to understand his job requirements. As

described by Smith, all he had to understand was the instruction to pick up fill at point A and drive it to point B.

[19] The Defendant offered no reasonable excuse for failing to consult Smith about taking his fill to Rockingstone. I have no basis to find that there was any dishonest motive, but it was a serious error in judgment.

[20] This is not a case of negligence. The Defendant acted deliberately, although without a dishonest motive. I find that this was a breach of the implied terms of his employment agreement, namely the requirement that he carry out his direct instructions. I find that he is therefore responsible to make good any losses suffered by the Employer resulting from his misconduct.

[21] I make no findings as to whether or not dismissal was justified, as that question was not before me.

[22] Various figures for damages were presented. I approach the calculation this way:

a. The Claimant lost six potential days of work. There was a reasonable likelihood that Dexter would have required all three of his trucks for those six days, although we can never know for sure. This uncertainty will be reflected in a deduction for contingencies.

b. The revenue from Dexter would have come at some cost. In particular, there would have been salary to the driver, the cost of gas and wear and tear on the vehicle.

c. The amount the Claimant might have earned for each of those six days is 10.5 hours X $52.50/hour = $551.25. Six times that figure is $3,307.50.

d. Had a driver been paid to earn that money, he would have received $16.00 per hour, plus benefits. Adding a nominal 10% for benefits (including CPP) the daily wage cost would have been $184.80. Over six days that amount is $1,108.80.

e. Each round trip from downtown Halifax to Harrietsfield would involve perhaps 10 kilometres of driving each way. If a typical day involved 15 trips, as contended, this would mean 300 kilometres of driving. Without much evidence to go on, I think it is reasonable to expect that this would burn no less than 60 litres of gas. I assess the daily cost of gas, wear and tear at $100.00.

f. The loss of profit, assuming all six days would have been driven, is therefore:

gross revenue	$3,307.50.
Less wage cost	($1,108.80)
Less cost to run truck	($600.00)
Loss of profit	$1,598.70

[23] From this sum must also be deducted an amount for contingencies. This reflects that fact that the revenue stream was not guaranteed. However, I believe it was far more likely than not that it would have been earned, and I am only prepared to reduce the amount by 15%. The loss of profit that I assess for the time that the truck was under suspension is therefore $1,358.90.

[24] The Claimant is also entitled to the cost of filing the claim, namely $89.68.

[25] I was advised that the Claimant has withheld the Defendant's last paycheque, in the amount of $920.22, as partial compensation for his losses. This amount, which will be retained, is properly set off against the judgment. The following is the net result:

loss of profit	$1,598.70
Less 15% for contingencies	($239.81)
less Paycheque held back	($920.22)
cost of filing claim	$89.68
Net judgment to Claimant	$528.35

[26] The Claimant shall accordingly be entitled to retain the amount being withheld, and in addition shall have judgment against the Defendant for $528.35.

Eric K. Slone, Adjudicator