Civil Resolution Tribunal

Date Issued: August 23, 2021

File: SC-2020-009383

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Walton v. Mario's Towing Ltd.* 2021 BCCRT 925

B E T W E E N :

DARRYN WALTON

APPLICANT

A N D :

MARIO'S TOWING LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. The applicant, Darryn Walton, was employed by the respondent, Mario's Towing Ltd. (MT). Mr. Walton says MT wrongfully dismissed him and claims $5,000 in damages. Mr. Walton is self-represented.

2. MT disagrees and says it terminated Mr. Walton's employment for cause as a result of a violent workplace incident. MT is represented by an employee.

JURISDICTION AND PROCEDURE

3. These are the CRT's formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

4. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.

5. The CRT does not have jurisdiction over an employee's claim for statutory entitlements under the *Employment Standards Act* as the Director of Employment Standards has exclusive jurisdiction over these issues. I find that Mr. Walton's claim is not about his potential statutory entitlements, but rather is a wrongful dismissal claim based on a breach of the implied reasonable notice period in his employment contract. I am satisfied that the CRT has jurisdiction over this claim.

6. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

Late evidence and failure to disclose claim

8. MT submitted its evidence on April 6, 2021. Mr. Walton requested and was granted an extension to May 6, 2021, because he was asking third parties to submit evidence, including some of MT's current employees. Mr. Walton had problems uploading his evidence and did not submit any of it until May 10 and 11, 2021.

9. In submissions, MT requested that all of Mr. Walton's evidence that was not related to a third-party response be disregarded. Bearing in mind the CRT's flexible mandate, I decided to admit all Mr. Walton's late evidence because it was at least partially relevant and because MT had the opportunity to review and respond to it. I find the prejudice to Mr. Walton in refusing to admit essentially all of his evidence would outweigh the minor prejudice to MT in having to wait longer for decision.

10. MT also says Mr. Walton failed to disclose a claim and to present a case that can be defended. It says Mr. Walton's claim is vague and lacks facts and merit. On review of the Dispute Notice, I find it described the claim as being about wrongful dismissal, for damages of $5,000. I find this was enough information for MT to understand the case it had to meet – namely, to show that it had cause to end Mr. Walton's employment.

ISSUES

11. The issues in this dispute are:

    a. Did MT have just cause to end Mr. Walton's employment contract?

b. If not, what is the appropriate award of damages for failure to give reasonable notice?

EVIDENCE AND ANALYSIS

12. As the applicant in this civil dispute, Mr. Walton generally must prove his claims on a balance of probabilities. It is undisputed that MT dismissed Mr. Walton without working notice or termination pay. Therefore, as the employer relying on the defence of just cause, MT has the onus of proving it on a balance of probabilities: see *Staley v. Squirrel Systems of Canada, Ltd.*, 2013 BCCA 201. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.

13. It is undisputed that MT employed Mr. Walton as a tow-truck driver from July 14, 2018 to December 1, 2020. MT says it is a professional towing organization that does not tolerate bullying and violence in the workplace. It says it terminated Mr. Walton's employment for cause as a direct result of violence in the workplace.

November 19, 2020 incident

14. MT provided an undated report written by Mr. Walton about the November 19, 2020 incident. I summarize the report in the paragraph below without making any findings of fact.

15. Mr. Walton was driving on a highway and saw 2 tow trucks with their emergency flashers on at an information booth. Thinking the drivers might be coworkers, he turned into the pullout. Realizing the tow trucks belonged to a competitor, he drove past them and began to turn around. One of the competitor's employees blocked his exit. He stopped and recognized the driver as JM (Mr. Walton did not explain his relationship to JM). He put on his boots and stepped out of his truck. JM was agitated and talked about MT stealing calls. A verbal argument ensued, followed by JM taking 2 swings at Mr. Walton. Mr. Walton took JM to the ground and told him to stop talking. Mr. Walton let JM up, then JM came toward Mr. Walton again, and Mr. Walton

"straight armed him" and then threw him to the ground. After this, both parties calmed down. Mr. Walton apologized, said the whole thing was unnecessary, and said both companies had enough work and all that mattered was everyone getting home safely at the end of the day. JM agreed and the parties shook hands and gave each other a "quick hug" and exchanged phone numbers. Neither party was injured. The RCMP contacted Mr. Walton the next day for a statement before concluding it was a consensual fight and there would be no charges. Mr. Walton then reported the incident to his location manager, SH, and was suspended.

Termination letter

16. MT ended Mr. Walton's employment on December 1, 2020 by giving him a termination letter. The letter summarized the November 19 incident without making any findings of fact that were materially different from Mr. Walton's statement Then the letter said Mr. Walton made several errors in judgment and conduct, including driving into the pullout, stopping to get into an argument, opening the door, and getting out of his truck. It acknowledged that Mr. Walton said he felt threatened and was only defending himself, but said MT's opinion was that Mr. Walton was at least open to an altercation when he could have just driven away.

17. The termination letter described Mr. Walton's alleged previous altercations with co-workers, including "challenging" a co-worker at the co-worker's house, throwing a "broom" (elsewhere described as a metal mop handle) at another co-worker, and sending intimidating texts to a co-worker. It said MT management had spoken to Mr. Walton several times and directed him to the MT policy on workplace violence.

18. The letter said Mr. Walton violated the following policy or policies (reproduced as written): "Violence in the Workplace (Mario's Towing Policy Handbook / Bullying and Harassment. Mario's Towing Health and Safety Manual." The letter also said violence of any kind toward coworkers or the general public is not tolerated.

19. The letter concluded by saying the physical altercation with a member of the public alone was sufficient reason for termination, but combined with previous misconduct MT management felt its trust with Mr. Walton was broken and not repairable.

Analysis

20. The test for just cause is whether the employee's misconduct gives rise to a breakdown in the employment relationship: *McKinley v. BC Tel,* 2001 SCC 38. Physical assaults and other forms of workplace violence are generally considered to be very serious offences. That said, courts recognize that workplace assaults fall along a spectrum of seriousness, which the employer's disciplinary action must reflect. Each case is decided on a contextual analysis of the facts in determining whether dismissal is proportionate to the misconduct proven by the evidence: *McKinley.*

21. Mr. Walton says MT failed to use progressive discipline on him and never gave him verbal or written warnings. MT's employee handbook says disciplinary action may call for any of 4 steps – verbal warning, written warning, suspension or termination. The handbook also says conduct that threatens another employee, a customer or a member of the public will not be tolerated, and anyone responsible for threats of or actual violence will be subject to discipline up to and including dismissal. This is consistent with court cases that say while employers are expected to follow their progressive discipline policies, a single incident of serious misconduct can justify dismissal: *Ogden v. Canadian Imperial Bank of Commerce*, 2015 BCCA 175; *SW v. Marriott Hotels of Canada Limited*, 2009 BCSC 73. Based on MT's dismissal letter, its position is that the November 19 incident was serious enough that it warranted dismissal on its own, but MT also considered Mr. Walton's previous incidents of alleged minor misconduct as context.

22. MT largely does not challenge Mr. Walton's version of events of the November 19 incident, but questions the decisions Mr. Walton made. I agree with MT's conclusion that Mr. Walton's actions show he was at least open to a fight. Even if Mr. Walton did not throw the first punch, the rest of his actions are inconsistent with a reasonable

person acting only in self-defence. I find that by driving into the pullout, putting on his boots, exiting his truck and engaging verbally and then physically with an enraged employee of a competitor's towing company, Mr. Walton was at least a willing participant.

23. There are 2 other undisputed facts that I find significant in assessing the credibility of Mr. Walton's incident report and the seriousness of the incident. The first is that JM or JM's employer contacted the RCMP, not Mr. Walton who claims to have been the victim of an assault. The second is that Mr. Walton did not report the incident to his supervisor right away, and not until after the RCMP contacted him the next day. I find these actions together are inconsistent with being a victim of unprovoked assault.

24. I find Mr. Walton intentionally engaged in a serious incident of violence with a member of the public while he was working and driving an MT tow truck. I find there was a risk of harm to MT's reputation if other members of the public saw this conduct. I conclude that the incident's violent and public nature, together with Mr. Walton's failure to report it, made the incident sufficiently serious on its own to fracture the employment relationship.

25. I acknowledge Mr. Walton's extensive evidence of positive reviews he has earned for MT in his capacity as tow truck driver. I accept that Mr. Walton was a valuable employee who was generally good with customers. However, in my view this is insufficient to overcome the serious violent incident.

26. I also acknowledge the dismissal meeting among Mr. Walton and 2 MT managers, which Mr. Walton recorded without the managers' knowledge. Although Mr. Walton says he was lied to several times in that meeting, I find the managers did not say anything inconsistent with the termination letter or the evidence before me.

27. Finally, I acknowledge Mr. Walton's submissions that he had not signed or seen any MT policies on workplace violence. I find this is not determinative of whether dismissal was warranted. An employer is not expected to spell out every type of prohibited misconduct in a policy. I accept that Mr. Walton ought to have been aware that

engaging in violence with a member of the public while working would be considered serious misconduct going to the root of his employment contract.

28. Given the above conclusions, it is not necessary to consider the previous incidents of alleged minor misconduct on Mr. Walton's employment record.

29. In conclusion, I find MT had just cause to terminate Mr. Walton's employment contract. As a result, it is not necessary to determine the reasonable notice period and related damages.

30. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to recover their CRT fees and reasonable dispute-related expenses. MT was successful but did not pay fees or claim expenses. I dismiss Mr. Walton's claim for reimbursement of CRT fees.

ORDER

31. I dismiss Mr. Walton's claim and this dispute.

Micah Carmody, Tribunal Member