IN THE MATTER OF THE *CANADA LABOUR CODE, PART III*

-and-

IN THE MATTER OF AN ADJUDICATION UNDER SECTION 251.12

BETWEEN:

S. E. FREIGHT SYSTEMS INC.
- The Employer (Appellant)

- and -

WILLIAM MAYHEW
- The Employee (Respondent)

AND IN THE MATTER OF the Employer's wage recovery appeal under *Division XVI*

Referee: Howard Snow

Appearances:

On behalf of the Employer (Appellant)

Dawn Mitchell	- Driver Manager, Safety & Compliance Officer
Zaid Joseph	- President/Owner
Vickie James-Joseph	- Office Manager/Owner

On behalf of the Employee (Respondent)

William Mayhew	- Employee
Sheila Lumley	- Advisor

Hearing held November 16, 2007, in London, Ontario.

AWARD

I. INTRODUCTION

This Employer dismissed the Employee with neither notice nor severance pay. A federal government inspector ordered two weeks wages for the Employee. This matter is an appeal by the Employer from the Inspector's order.

II. THE FACTS

The Employer, S. E. Freight Systems Inc., operates a trucking business in London. Its employment matters are regulated by the *Canada Labour Code*.

The Employee, William Mayhew, worked for the Employer as a truck driver from October 2005 until June 2006. After his dismissal the Employee claimed unpaid wages using the wage recovery provisions of the *Code.*

A federal government inspector found that the Employee had been dismissed without just cause and without notice and was therefore entitled to two weeks wages under Section 230 (1) (below). The Inspector concluded that the Employer owed the Employee $1,400.76 less deductions. The Employer paid that money in trust to the Federal Government, exercised its right of appeal, and the matter came before me as referee. No issue was taken at the hearing as to any of the Inspector's monetary calculations - the sole issue was whether there was just cause for the dismissal which would exempt the Employer from paying the two weeks wages.

The Employer said it dismissed the Employee because of three driving incidents in 2006. The first incident took place in May 2006 when a complaint was received that the Employee had cut off another driver. The Employer gave the Employee a verbal warning at that time.

In June another complaint was received regarding the Employee's driving and he was given a written warning. Soon thereafter the Employer said a third complaint was received and, relying on all three incidents, the Employer said that it had dismissed the Employee for just cause.

The Employee acknowledged there was some truth to the first two incidents but he said that they were not as the Employer had described them. As for the third incident, the Employee said that there was simply no truth to that allegation. He said that he had been warned regarding the second incident just two days previously, and had been driving very carefully on the day of the alleged third incident.

The Employer's first witness was Vickie James-Joseph, the Office Manager and an owner of the business. Ms James-Joseph was examined by Dawn Mitchell.

Ms James-Joseph testified that Dawn Mitchell's role with the Employer was to recruit drivers, and that Ms Mitchell was responsible for safety and compliance. Ms James-Joseph testified that Ms Mitchell took safety and compliance issues seriously, that Ms Mitchell treated drivers fairly, and that Ms Mitchell advised all drivers that their employment would be terminated if they violated safety and compliance requirements. Ms James-Joseph also testified that there was documentation showing that the Employee signed both an employment contract and a safety and maintenance compliance contract, that there had been a corrective action form signed by the Employee regarding the second incident, that the Employee had signed the corrective action form of his own "free will," that under the "Ontario Trucking League Act" Ms Mitchell had fired other drivers for angry and destructive conduct, and that Ms Mitchell had not singled out the Employee. As for the third incident Ms James-Joseph said she was not involved, that "Derek or Zaid" had been involved.

However Ms James-Joseph did identify two documents relating to the third incident. One document was from a "dispatch" employee who wrote on a "Driver Incident Report" as follows:

> Citiizen [sic] reported in Bill for driving irratict.[sic] on Hwy 86, cut off and almost hit mini van. Derek pulled him off run and we terminated as per our letter of warning with just cause.

I note that there was no further evidence as to who wrote that report, nor when it was written, nor was there any evidence as to who received the telephone call from the citizen.

The second document was an October 12, 2006, fax memo from Derek Aukland, the Employer's Fleet Manager, to Mark Hawkins, the federal government inspector in this matter. Mr. Aukland wrote as follows:

> The trird [sic] complaint was called in by the driver of a mini van who was not willing to leave their [sic] name or number. The caller claimed that Bill was tail gateing [sic] and when he finally passed he cut the mini van off almost running the van off the road.

Ms James-Joseph said that, apart from her general role "overseeing all aspects of the office," she had no role in the preparation of either of the two documents she had identified regarding the third incident (above), she had no role in the two earlier incidents of discipline, she had no role in the third incident, and she had no role in the Employee's dismissal.

The Employer's next witness was Dawn Mitchell. Ms Mitchell was examined by Zaid Joseph.

Ms Mitchell testified that she was the Driver Manager and the Safety and Compliance Officer with the Employer, and that the Employer was owned by Zaid and Vickie Joseph. Ms Mitchell said that she had implemented most of the Employer procedures and, when there was an incident involving one of the procedures, she first took the driver's position as she believed a driver was "innocent until proven guilty." She said her practice was to discuss the incident with the person who made the complaint and that she might then take corrective

action such as a warning, or a suspension, or dismissal for just cause. She said she was very concerned about safe driving for the safety of the Employer's drivers, but also because of her concern for the safety of others sharing the road. She said that when she called a driver in for an interview she explained the reason for any corrective action.

With respect to the Employee, she testified that in June 2006 she had completed a "Corrective Action Form" regarding the second incident. She testified that she discussed the incident and the seriousness with the Employee and that the Employee gave her his view of the incident. She said that the Employee signed that corrective action form "without any distress," had "admitted he was at fault," and that the Employee clearly understood the statements on the form.

With respect to the third incident which led directly to the dismissal, Ms Mitchell testified she had not been involved as she had been in Windsor, Ontario, at that time.

The Employee did not testify and he called no evidence.

III. PROVISION OF THE *CODE*

The key provision of the *Canada Labour Code* is as follows:

> 230. (1) . . . an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either
>
> (a) notice in writing . . ., or
>
> (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

IV. EMPLOYER SUBMISSIONS

Ms Mitchell presented the Employer's submissions. Ms Mitchell stated that she wanted it noted that the Employee had admitted the first two incidents, and that the only issue was whether it was fair to terminate his employment "before something happened." She submitted that in good conscience she could not allow anyone to drive after three incidents and that if I found fault with her for trying to do her job then she needed to know.

V. EMPLOYEE SUBMISSIONS

The Employee submitted that "the papers and statements say it all."

When I sought clarification of this unusually brief submission, the Employee indicated that the Employer document regarding the second incident recorded his view of that incident and that there was no third incident of poor driving.

VI. DECISION

In this case this Employer sought to bring itself within an exception to the requirement to pay severance pay under Section 230 (1) by its assertion that it had just cause for dismissal. The onus of proof when a party claims the benefit of an exception is routinely placed on the party claiming that benefit. In addition, the onus of proof in cases of just cause for dismissal is routinely placed upon an employer. In this case, then, the Employer had the onus to prove it had just cause for dismissal. The Employee was not required to prove his innocence; instead, the Employer had to prove the facts justifying its dismissal decision.

Just cause is a common concept. Two aspects are particularly relevant in this appeal.

First, it is generally held to be just for employers to begin with a mild form of discipline

when attempting to correct unacceptable employee behaviour.

This Employer began with such discipline. It began with a verbal warning and then a written warning for the first two incidents about which it complained. This concept of imposing progressively more serious discipline is often referred to as "progressive discipline" - that is, the discipline becomes progressively more serious when the misconduct continues.

A second aspect of just cause is as follows: in order to rely upon an employee's discipline record to impose more serious discipline - such as dismissal - than would otherwise be warranted, the Employer must prove that there was a final incident which justified discipline. This is often referred to as the need to establish a "culminating incident."

In this case the Employer said there was a third incident. The Employer said it relied upon that third incident, together with the Employee's two earlier incidents, in dismissing the Employee. In substance, the Employer said it had relied upon a culminating incident.

The Employer said the that third incident began with an anonymous phone call received regarding the Employee's driving. But no one testified as to the Employee's actual driving at that time and no one testified as to having received any telephone call complaint, anonymous or otherwise. Ms James-Joseph testified that she was not involved in the incident, that it had involved Derek or Zaid. Neither Derek Aukland, the Employer's Fleet Manager, nor Zaid Joseph, the President and an owner, testified, although Zaid Joseph attended the hearing and examined Ms Mitchell. Ms Mitchell, the only other witness, testified that she had been in Windsor at the time of the third incident and was not involved.

The Employer did, however, place in evidence the two documents relating to the third incident, set out above. As for the "Driver Incident Report," I note that there was no

evidence as to who wrote that report, nor when it was written, nor was there any evidence as to who took the telephone call from the citizen.

The second document, the fax memo from Derek Aukland, simply repeats the substance of the incident report. I note that there was no evidence that Mr. Aukland had any direct knowledge of the incident and he did not testify.

The question before me is this:

> Did the Employer meet its onus by proving the facts regarding a third driving incident which justified the imposition of discipline upon the Employee.

In my view, the Employer evidence did not prove a third incident meriting discipline. Producing a document written by some unspecified person, on some unspecified date, purporting to report that some other unknown person believed that some driver (who may or may not have been the Employee) drove improperly on a specified highway without any further particulars as to the time or place and without any further or supporting evidence is inadequate to satisfy the onus placed upon the Employer to prove just cause, especially in this instance when the Employee had denied any such improper conduct.

I understand the difficulty for this Employer in leading evidence to support discipline based on an employee's driving when a truck driver works away from the Employer premises. That logistical difficulty does not, however, mean I should ignore the Employee's rights under the *Code*. There was simply no meaningful evidence upon which I could find a third incident justifying discipline. It follows that I find there was no culminating incident. As there was no culminating incident, it would be unjust to allow the Employer to rely upon the earlier discipline in deciding to dismiss the Employee. I find that the Employer did not prove just cause for dismissal.

I note that in the absence of proving the third incident it would be unjust to allow the Employer to revisit the two earlier incidents and substitute dismissal for the written warning it originally imposed. Apart from that, the Employer did not dismiss the Employee on the basis of the first two incidents, but rather on the basis of the three incidents.

As the Employer has not demonstrated just cause for dismissal, the Employer has not brought itself within the exception for paying two weeks wages in lieu of notice under Section 230 (1) of the *Code*. I find that the Employee is entitled to the two weeks wages.

VII. ORDER

Under Section 251.12(4) of the *Code* I confirm the May 22, 2007, payment order of the Inspector, Mark Hawkins. I direct that the money held in trust by the Receiver General that relates to this appeal be paid to the Employee, William Mayhew.

VIII. EMPLOYER CONDUCT AT THE HEARING

At the hearing the Employer was represented by three persons. The conduct of the three representatives was so unusual that it deserves brief mention. I record here only three of the Employer representatives' many unusual comments and actions.

First, after arriving late for the hearing the Employer representatives loudly and repeatedly informed me that, before they would sit down, I had to decide whether Sheila Lumley, who was in attendance with the Employee, could testify or even remain in the meeting room.

Secondly, after I asked Ms Mitchell repeatedly to speak more slowly so that I could take accurate notes, Ms Mitchell responded rudely that I would just have to write faster.

Thirdly, during the morning two Employer witnesses testified. The Employer indicated it had no further witnesses at a time when the Employer had called no direct evidence regarding the Employee's driving, no witness who had been involved in the third incident, and no witness who had been involved in the Employer's decision to dismiss the Employee. Because the Employer representatives appeared inexperienced about wage recovery appeal proceedings, I advised the Employer representatives that I had anticipated hearing evidence from someone who had been involved in the dismissal, and I invited the Employer to reconsider its position regarding additional witnesses.

At this point the Employee sought a break. I indicated I would recess the hearing for five minutes. Zaid Joseph, the Employer President, then launched into a loud and emotional speech indicating, among other "points" that (1) safety was the key, (2) he had signed "the documentation," (3) the "law" said a driver was not to cross an intersection on a red light, (4) I was there at the hearing based on "our money," (5) I could take my "mumbo jumbo" elsewhere, and (6) he would later sue the Employee. As I left the room for the recess, Mr. Joseph advised me that he was going to follow me into the hotel lobby to ensure that I did not give any advice to the Employee; Mr. Joseph appeared to do exactly that.

I have noted these three examples of unusual Employer conduct in part to indicate that I have ignored these and the other unusual Employer conduct in reaching my decision in this matter.

I remain seised to deal with any issues which may arise in the implementation of this award.

Dated in London, Ontario, this 17th day of December, 2007.

Howard Snow, Referee