COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Van den Boogaard v. Vancouver Pile Driving Ltd.,* 2014 BCCA 168

Date: 20140501
Docket: CA041303

Between:

Kirk Van den Boogaard

Appellant
(Plaintiff)

And

Vancouver Pile Driving Ltd.

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated September 20, 2013 (*Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2013 BCSC 2105, Vancouver Docket S133407).

Counsel for the Appellant: M. Sheard and C. Beneteau

Counsel for the Respondent: C. Keri and M. Prohl

Place and Date of Hearing: Vancouver, British Columbia March 26, 2014

Place and Date of Judgment: Vancouver, British Columbia May 1, 2014

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel

Summary:

The appellant brought an action against his former employer for wrongful dismissal. The employer defended the action alleging after-acquired cause. After his dismissal, the company discovered the appellant, a senior manager responsible for the safety of a job site in a high risk, safety-sensitive, heavily regulated industry, had sent a series of text messages to his direct subordinate soliciting illegal drugs. The trial judge found this amounted to cause and dismissed his action. On appeal, the appellant alleges the trial judge failed to take a contextual approach to his conduct and made findings that were unsupported by the evidence.

HELD: Appeal dismissed. The trial judge's finding of cause was based on a contextual approach and there were no errors regarding his application of the evidence. The appellant's illegal conduct was admitted and, in all of the circumstances, went to root of the employment relationship.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Overview

[1] Kirk Van den Boogaard brought an action against his former employer, Vancouver Pile Driving Ltd., for wrongful dismissal. The action was commenced under the Fast Track Rule (Rule 15-1, *Supreme Court Civil Rules*, B.C. Reg. 168/2009) and proceeded by way of summary trial. This is an appeal from the dismissal of that action.

[2] Vancouver Pile Driving Ltd. is a large marine general contractor. Mr. Van den Boogaard was hired as a project manager on December 11, 2011. He was a senior manager responsible for the safety of a job site in a high risk, safety-sensitive, heavily regulated industry. His core duties included workplace safety, safety training, and enforcement of drug-prohibition policies. He participated in the creation of a core value statement for the company and created policies in respect of safety, legal and regulatory risks for the company.

[3] Mr. Van den Boogaard's employment was terminated on February 13, 2013, without cause and he received four weeks' base salary in lieu of notice. He commenced an action for wrongful dismissal. Vancouver Pile Driving responded by alleging "after-acquired" cause. It alleged that Mr. Van den Boogaard had misused a corporate gas credit card and BC Ferries card, and had failed to pay a hotel bill.

[4] By far more serious, and what is at issue on this appeal, is that when Mr. Van den Boogaard returned the company cell phone, the employer discovered a series of text messages he had sent, many during work hours, to solicit and procure drugs from a union employee he supervised, as well as other people. The primary drugs involved were Dexedrine and clonazepam, which are listed substances under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Other drugs mentioned in the text messages or in his evidence were Adderall, performance-enhancing vitamins, hydromorphone, and "CM". Mr. Van den Boogaard first maintained CM meant "call me", and denied it meant crystal methamphetamine or cocaine, but eventually suggested it meant mushrooms.

[5] Mr. Van den Boogaard admitted he used the company cell phone to solicit and procure illegal drugs from an employee under his direct supervision. He admitted the possibility he consumed illegal drugs with the employee, referred to by the trial judge as "MB", after work. He admitted he had asked MB three times if he was using drugs at work, and claimed he was satisfied with MB's responses. Some of the texts were sent during working hours but, disingenuously, Mr. Van den Boogaard claims he would have been on breaks or off the worksite when he sent them.

[6] The employer argued that Mr. Van den Boogaard's actions amount to a gross breach of his employment contract and the core value statement of the company; undermined the safety of the worksite; and prevented him from overseeing risk and safety management in the workplace. As such, it is said his actions constituted just cause for termination.

[7] In brief reasons, the trial judge found that Mr. Van den Boogaard's conduct was seriously incompatible with his duties as a project manager for major contracts. Soliciting illegal drugs from an employee under his supervision was misconduct that went to the heart of the employment relationship and created a conflict of interest. The trial judge noted that Mr. Van den Boogaard's position was at the third level of management, being more important than the positions of Superintendent or General

Foreman. He worked unsupervised. He asserted a level of control over his employees and had therefore put MB in a "difficult and untenable position": para. 10.

[8] At the summary trial, Mr. Van den Boogaard sought to establish that the company had had a lax attitude toward drug use and that without being given the opportunity to make this evidence available at trial, the judge could not properly assess the context of his actions. The judge disagreed, finding that the job descriptions, nature of the work, and admitted facts were sufficient for him to take a contextual approach and make a decision. The trial judge dismissed Mr. Van den Boogaard's claim and awarded costs against him.

[9] I do not understand the appellant to be asserting on appeal that the summary trial process, which he pressed for, was unsuitable.

[10] Mr. Van den Boogaard submits the trial judge erred in law in his application of *McKinley v. BC Tel*, 2001 SCC 38. It requires courts to apply a contextual analysis to determine what amounts to cause for dismissal. The Supreme Court of Canada made it clear that not every act of dishonesty or misconduct will amount to grounds for dismissal. In the words of the Court:

> [48] …whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

Absent a contextual analysis of the alleged misconduct it would be impossible to conclude that "it sufficed to justify dismissal without notice": para. 51.

[11] In the alternative, Mr. Van den Boogaard submits the judge erred in fact in finding that cause had been established. He submits there was no evidence of misconduct during working hours and no evidence from the employer that his

conduct would have led to his dismissal had the employer been aware of it prior to his dismissal.

[12] For the reasons that follow, I would dismiss this appeal.

Trial Decision

[13] At para. 5 of the reasons for judgment, the trial judge set out Mr. Van den Boogaard's job description as follows:

> This is a full working level requiring a minimum of 8 - 10 years of construction supervision experience within a union environment. The incumbent is required to oversee all construction activity on site, including civil, mechanical and electrical installations.
>
> EXPERTISE
>
> Requires above average organizational and negotiating skills...
>
> SUPERVISION
>
> … Supervises all project personnel assigned and is responsible for the selection and development of subordinates.
>
> …
>
> LEVEL OF DECISION MAKING
>
> Key level decisions affecting projects up to $10-15 million. Errors in judgment directly affect the project profitability and client relations.
>
> DUTIES
>
> …
>
> - Organizes work crews to ensure effective utilization of Human Resources.
>
> …
>
> - Responsible for staffing through the company Dispatcher or directly with the union halls.

[14] At para. 6, he detailed Mr. Van den Boogaard's role as outlined in his written argument:

> 71. Mr. Van den Boogaard was an important supervisor in a multi-million dollar company. His position was the third level of management, being more important than the positions of Superintendant and General Foreman.
>
> 72. His role was as "Project Manager" under the heading "Major Contracts" as distinct from "Small Contracts" as evident from the Defendant's own organizational chart.

> 73. This was a senior and important role. His remuneration was also quite high for a person of his age and this too reflects the importance of his role.
>
> 74. The Plaintiff deposes to being involved in "upper management" discussions within the Defendant company. This too is unchallenged in any of the Defendant's materials.
>
> 75. Safety was, on all evidence, a very important function at the Defendant company. The Plaintiff supervised safety.

[15] The trial judge set out the test for determining cause at para. 7 as follows:

> [7] The courts have held that just cause is conduct which, in all the circumstances of the case, is seriously incompatible with the employee's duties; it is conduct which goes to the root of the contract and fundamentally strikes at the employment relationship: see, for example, *Adams v. Fairmount Hotels & Resorts Inc.*, 2009 BCSC 681.

[16] At paras. 8-11 he discussed the context for his decision:

> [8] The matter must be viewed contextually. Although it was the plaintiff who brought this summary judgment application and who initially urged its appropriateness, he now says that I do not have sufficient evidence of that context to reach a decision finding cause. The context he wishes to adduce is that others in the company may have smoked marijuana at a company party, showing a lax attitude toward drug use. I disagree. The job descriptions, nature of the work and admitted facts form sufficient context for a decision.
>
> [9] In my view, asking an employee under his supervision to procure illegal drugs is misconduct that goes to the root of the employment relation. The plaintiff agreed that it was his role to set a good example for the employees under him. His conduct did the opposite.
>
> [10] Moreover, the plaintiff acknowledged that he had the power to remove MB from the worksite, and the job description makes it clear that he also exercised a degree of control over MB. To make matters worse, the plaintiff in his discovery stated that on several occasions he asked MB whether he was taking drugs at work. To solicit drugs in those circumstances could only put a subordinate in an extremely difficult and untenable position. As a result, the plaintiff's position with the company was untenable as well: he put himself in a conflict of interest.
>
> [11] I do not think it matters whether MB and the plaintiff were friends. Nor do I think it matters whether the solicitation took place on or off the worksite or during or after work hours. The situation should not have arisen under any circumstances.

Analysis

Did the trial judge err in law by failing to apply the contextual analysis mandated by *McKinley*?

[17] The trial judge correctly stated the test for cause for dismissal: it is "behaviour that, viewed in all the circumstances, is seriously incompatible with the employee's duties, conduct which goes to the root of the contract and fundamentally strikes at the employment relationship": *Panton v. Everywoman's Health Centre Society (1988)*, 2000 BCCA 621 at para. 28.

[18] Mr. Van den Boogaard argues the judge took a "strict and inflexible approach" to the circumstances of his misconduct, misapplying the *McKinley* test in analyzing whether just cause existed. He points to the judge's statement that "[t]he situation should not have arisen under any circumstances" (para. 11) as evidence that the judge did not consider the entire employment relationship but instead applied a "generic standard" of conduct. He contends the judge ignored his evidence that he had appropriately discharged his duties and that his employer was satisfied with his work performance. Further, the employer led no evidence to prove that Mr. Van den Boogaard's buying drugs actually affected his performance in the workplace.

[19] In addition, the plaintiff submits that the employer acquiesced in a workplace culture of drug and alcohol use during off-work hours and that its policies did not apply during off-work hours. He submits that others may have smoked marihuana at a company party (which was denied), or bragged about getting stoned or drunk outside the workplace in front of a supervisor, evidencing a lax attitude or implied consent toward drug use. Mr. Van den Boogaard argues that by ignoring this evidence, the judge failed to consider the context of his actions and instead made a blanket ruling that the solicitation and procurement of illegal drugs were necessarily incompatible with a supervisor-subordinate relationship.

[20] Mr. Van den Boogaard asserts that he believed his employment would not have been terminated had his conduct been discovered during his employment. He maintains there would have been an investigation to determine the course of

disciplinary action and termination for cause would have been the last resort. As the employer did not submit evidence to the contrary, he argues there is an absence of evidence establishing cause; that is, that his conduct was incompatible with his continued employment.

[21] While the judge's reasons were brief, he clearly understood he was required to take a contextual approach as set out in *McKinley*. It is also apparent from his analysis that he considered the circumstances of the misconduct. He considered Mr. Van den Boogaard's job description, the nature of the work, and his admission that he committed a criminal offence by purchasing drugs. He noted Mr. Van den Boogaard's submissions about the workplace culture but did not find them compelling.

[22] In my view, Mr. Van den Boogaard's real complaint is that the judge gave more weight to some circumstances than others. For example, the judge was clearly troubled by the fact that Mr. Van den Boogaard was a manager on a dangerous job site; he was supposed to set a good example for other employees; and he bought drugs from his direct subordinate. The judge was concerned with the potential consequences of Mr. Van den Boogaard's actions and his ability to do his job given the conflicting nature of his actions and his responsibilities. These factors were seen as more troubling than the fact that Mr. Van den Boogaard was initially dismissed without cause (implying his employer may have been satisfied with his work) or his allegations about the company's lax attitude toward drug use. That is the context in which the judge observed, "The situation should not have arisen under any circumstances". The judge did not apply a "generic standard".

[23] I would not accede to this ground of appeal. The trial judge did not err in law. He properly applied the contextual approach approved in *McKinley* to assess Mr. Van den Boogaard's conduct. The weight given by the trial judge to particular matters is an exercise of discretion and I find no reversible error in his reasons.

Did the trial judge make a palpable and overriding error in finding cause?

[24] In the alternative, Mr. Van den Boogaard challenges the factual record and argues that the finding of cause was based on a palpable and overriding error. He contends that the trial judge upheld the termination based on finding a "conflict of interest", but that was neither pleaded nor reasonably supported by the evidence. He argues the evidence did not support any other grounds justifying his dismissal. He characterizes the employer's defence as being based on safety concerns and conduct that took place during work hours. He submits there was no evidence that his actions actually affected workplace safety or that any misconduct took place during working hours. He maintains there was no evidence from Vancouver Pile Driving that his conduct would have resulted in his dismissal.

[25] Before I address the substance of these submissions, it is noteworthy that the facts relied on by the trial judge were admitted. There was no dispute that Mr. Van den Boogaard sent text messages from his employer's phone to procure illegal drugs from his subordinate. Many of these messages were sent during work hours. While Mr. Van den Boogaard claimed the messages were sent during his breaks or when he was off the worksite, it was for the trial judge to determine whether this was a credible assertion and its impact, based on the evidence before him. There was no dispute that Mr. Van den Boogaard worked in a high-risk industry for accidents. A significant aspect of his duties was to ensure the safety of the worksite. Mr. Van den Boogaard acknowledged that, as a high level manager, he was expected to set an example. He was also responsible for safety training and enforcing the company's drug-prohibition policies. He admitted his acts were criminal in nature.

[26] Mr. Van den Boogaard asserts that there must be actual evidence of consequences substantiating Vancouver Pile Driving's concerns. He points to *Payne v. Bank of Montreal*, 2013 FCA 33, as an example of this requirement. I disagree. Determining whether conduct amounts to cause is a factual inquiry and is fact-specific: *McKinley* at para. 49; *Carroll v. Emco Corp*., 2007 BCCA 186 at para. 15. Not only are the facts in *Payne* easily distinguishable from this case (and it was a

review of an arbitrator's decision), but the Federal Court of Appeal expressly stated the employer was under no obligation to establish that actual harm resulted from the misconduct. It is sufficient if the conduct resulted in a risk of harm: paras. 58-59.

[27] Mr. Van den Boogaard asserted there must be subjective evidence from the employer that it was concerned about the misconduct (or would have been, had it known). He relies on the following cases in support: *Davey v. Syncrude Canada Ltd.*, 2004 ABCA 190; *Rodgers v. West Fraser Mills Ltd. dba Eurocan Pulp and Paper Company*, 2006 BCSC 467; *Nicholls v. Columbia Taping Tools Ltd.*, 2013 BCSC 2201; and *Leung v. Doppler Industries Incorporated* (1995), 10 C.C.E.L. (2d) 147 (B.C.S.C.).

[28] *Davey* concerned a conflict of interest. Mr. Davey authorized the purchase of chemicals from a company of which his brother was the majority shareholder. Mr. Davey raised this conflict of interest after the fact with his immediate supervisor. His supervisor advised him to disclose the conflict of interest with the corporate secretary. When Mr. Davey made a written statement, he only disclosed his own personal interest in the company, which was small. Mr. Davey was dismissed, although his immediate supervisor did not believe that was the right course of action. Mr. Davey's claim for wrongful dismissal was successful, in part, because his actions could not be characterized as dishonest given he had disclosed all the relevant information to his supervisor.

[29] In *Rodgers*, an employee of 29 years was dismissed on allegations that he attempted to steal eight litres of motor oil for a friend's boat. Mr. Rodgers denied that he intended to take any company property and provided an innocent explanation for the events that led to his dismissal. The trial judge found Mr. Rodgers had been wrongfully dismissed on the basis that his employer failed to establish he attempted to steal the oil on a balance of probabilities. This case is distinguishable from the case at hand insofar as Mr. Van den Boogaard's actions were admitted: there was nothing for Vancouver Pile Driving to prove in this regard.

[30] Mr. Van den Boogaard cites *Nicholls* and *Leung* for the proposition that the 'just cause' defence has frequently failed where the employer has failed to say words to the effect that "This conduct in this particular job could only lead to termination". However, *Nicholls* concerned an employee whose employment was terminated for cause for "[f]ailing to reach sales targets", "[m]aking numerous mistakes","[b]eing argumentative and insubordinate", as well as failing to complete directives and lying about his progress in a project: para. 21. Not only are the alleged grounds for cause distinguishable from the facts in this case, the vice president and general manager of the company in *Nicholls* testified that even the most serious allegation of dishonesty against Mr. Nicholls would not necessarily have resulted in termination: para. 212. There is no such evidence in this case.

[31] The issue in *Leung* was whether an employee who quit but was coaxed back to work was then constructively dismissed when her employer changed the nature of her responsibilities. The dispute was over the terms under which Ms. Leung had agreed to return to work. The company argued, in the alternative, that she had been dismissed because of a "poor and tardy performance": para. 25. Mr. Van den Boogaard referred the Court to para. 26 of *Leung*, which reads:

> [26] Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

I agree this is an accurate statement of the law.

[32] However, I do not think these cases stand for the broad principle Mr. Van den Boogaard urges this Court to adopt. Mr. Van den Boogaard is effectively asking this Court to overlook the gravity of his admitted actions because Vancouver Pile Driving failed to provide an affidavit expressly stating that, if it had known he was using a company phone during working hours to purchase illegal drugs from his subordinate, the company would have terminated him. Such subjective evidence is not required; the test from *McKinley* as to whether conduct amounts to misconduct has an objective element. As succinctly stated in *Lewis v. M3 Steel (Kamloops) Ltd*., 2006 BCSC 681:

> [25] The test for just cause for summary dismissal is an objective one: is the misconduct something a reasonable employer could not be expected to overlook, having regard to the nature and circumstances of the employment? Can the employment relationship viably subsist?... In other words, did the misconduct violate an essential condition of the employment contract, breach the faith inherent to the work relationship, or was it fundamentally or directly inconsistent with Mr. Lewis' obligations to M3…
>
> [Emphasis added, citations omitted.]

See also the majority's discussion in *Henry v. Foxco Ltd*., 2004 NBCA 22.

[33] The Supreme Court of Canada set out the principle behind after-acquired cause in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553 at 563-564, as follows:

> The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:
>
> > It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

[34] Regardless of whether dismissal for after-acquired cause or for cause is being argued, the issue is whether the employer can establish that, at the time of dismissal, there were facts sufficient in law to warrant a dismissal. If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated.

[35] The New Brunswick Court of Appeal recently addressed the legal requirements to establish after-acquired cause in *Doucet v. Spielo Manufacturing Inc.*, 2011 NBCA 44. In this case, the Court held that there must be the kind of subjective evidence Mr. Van den Boogaard argues is missing in this case. However, that requirement was expressly made in order to reconcile the common law doctrine with s. 30(2) of the province's *Employment Standards Act*, S.N.B. 1982, c. E-7.2:

see paras. 13, 74-91. This section requires an employer to provide an employee with written reasons for dismissal if cause is alleged. If an employee is not provided with reasons, no dismissal without notice is valid, notwithstanding that cause for dismissal may have existed. There is no equivalent provision in British Columbia legislation.

[36] On the facts of this case, it is a matter of common sense that Mr. Van den Boogaard's admitted misconduct was something a reasonable employer could not be expected to overlook, having regard to the nature and circumstances of his employment.

[37] The judge did not ignore evidence or simply apply a "generic standard" of workplace conduct. He considered the circumstances of the procurement of illicit drugs in the context of all the circumstances.

[38] The judge's application of the facts to the principles in *McKinley* and his weighing of the evidence to determine whether there were sufficient grounds for dismissal are questions of fact or mixed fact and law. Mr. Van den Boogaard has failed to establish that the judge made a palpable and overriding error in his assessment of the evidence. Based on the evidence, Mr. Van den Boogaard's actions in these circumstances met the definition of 'just cause'. I would dismiss this ground of appeal.

Conclusion

[39] Vancouver Pile Driving defended Mr. Van den Boogaard's dismissal, alleging after-acquired cause. Mr. Van den Boogaard admitted he engaged in criminal conduct with a person over whom he had direct supervisory authority, including the ability to hire or fire. He had a high level of responsibility as a project manager on a worksite in one of the highest accident risk industries. He was responsible for site safety and effective execution of all projects under his control. He worked without supervision. He was responsible for the implementation of drug policies. He was expected to supervise his drug dealer in a safety sensitive workplace. He exhibited lack of judgment. As the trial judge found, "asking an employee under his

supervision to procure illegal drugs is misconduct that goes to the root of the employment relation". The employment relationship could not be restored in the circumstances.

[40] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Frankel"