
CANADA / JUDGMENT

Neen v. Cobble Hill Grocery Ltd.

2006 BCSC 1494

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 1494err1 Neen v. Cobble Hill Grocery Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Neen v. Cobble Hill Grocery Ltd.,

2006 BCSC 1494

Date: 20061006

Docket: S9773

Registry: Duncan

Between:

Cory Alan Neen

Plaintiff

And

Cobble Hill Grocery Ltd.

Defendant

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

Counsel for the Plaintiff:

D.E. Taylor, Q.C.

Counsel for the Defendant:

S.W. Farquhar

Date and Place of Trial:

November 1-4 and 23-25,

December 15, 2005

January 25, February 24 and

March 28, 2006

Duncan, B.C.

I. THE NATURE OF THE PROCEEDINGS

- [1] On April 28, 2004, the Defendant dismissed the Plaintiff from its employ.
- [2] In this action, the Plaintiff seeks damages arising from that dismissal. The Defendant, on the other hand, contends that the Plaintiff's claims should be dismissed because it had just cause to dismiss the Plaintiff.
- [3] For reasons which follow, I am satisfied that, on the balance of probabilities, the Defendant has proven that it was justified in its dismissal of the Plaintiff. Having reached that conclusion, I dismiss this action and the Plaintiff's claim of wrongful dismissal.

II. THE BACKGROUND CIRCUMSTANCES

- [4] Though there is a dispute as to whether the Plaintiff conducted himself in the manner alleged by the Defendant, there was no dispute regarding many, if not most, of the other background circumstances.
- [5] At the time of his dismissal, the Plaintiff was employed as one of the two co-assistant managers at a grocery store owned by the Defendant in Cobble Hill, B.C., a small community located about 45 to 60 minutes north of Victoria, B.C. (the "Store"). He had been employed at the Store for four years. He was 34 years old when he was dismissed.
- [6] Though the Defendant has a head office in Victoria, B.C., from which much of the administrative tasks are done, the Defendant is not a large or particularly sophisticated operation.
- [7] The Store opened in 1999 and the Plaintiff joined its staff as one of two senior clerks in April 2000. At the time of his dismissal, the Store employed as many as 80 to 90 part-time and full-time employees, including the management staff.
- [8] Throughout the Plaintiff's employment, the day-to-day management staff of the Store was comprised of three positions - the Store Manager and two assistants. (Prior to the early fall of 2002, each assistant held the position of senior clerk. After that time they each held the position of co-assistant manager). Throughout the Plaintiff's employment, these positions were held by the same three people - namely, Greg Wicklund was the Store Manager and the Plaintiff and Ron Moore were his two assistants. (Both the Plaintiff and Mr. Moore became

the co-assistant managers when these positions were created in the fall of 2002).

- [9] As a co-assistant manager, the Plaintiff was responsible for the operation of specific departments within the Store. His duties included not only the stocking and ordering of the goods to be sold in those departments (and for dealing with the various sales representatives for those goods) but also the training and supervision of staff in those departments.
- [10] Most of the employees of the Store were young (being teenagers or young adults) and for most of them it was their first job. Because the success of the Store is, in large measure, determined by the quality of the service provided by these employees, their training and supervision was an important aspect of the Plaintiff's responsibilities as a co-assistant manager.
- [11] There is no dispute that as far as the Plaintiff's performance of his administrative duties was concerned, the Plaintiff was an exceptional employee. As was acknowledged by most, if not all, of the witnesses that worked with him, the Plaintiff's knowledge of the grocery business was above average. Moreover, he was recognized as being a very hard worker. (It was not uncommon for him to work longer hours than required. He was not paid for this extra work). In 2001, he was awarded Employee of the Year.
- [12] Though his performance throughout his employment was regularly evaluated in the good to very good range, in the fall of 2002 serious concerns were raised regarding the Plaintiff's performance of the personnel duties associated with his job.
- [13] In 2002, because the Defendant recognized that morale in the Store was not good, and because there had always been a high turnover in employees at the Store since it opened in 1999, the Defendant decided to try and identify the possible causes of these problems and to obtain an overall view of the working environment in the Store. To accomplish these ends, the Defendant asked the Store employees to answer a broad-ranging questionnaire. This questionnaire was voluntary. (The Plaintiff testified that he completed one). It was also done on a confidential or anonymous basis, although none of the witnesses could remember which it was.
- [14] The results of this questionnaire identified the management style of the Plaintiff as being one of the causes for the poor morale among many of the employees - particularly the junior employees. As Peter Cavin (the managing partner) put it in his evidence, "things [in the Plaintiff's conduct] were happening that should not be happening".
- [15] In response to these results, Bernice Turner (the Defendant's personnel development manager) met with a number of the junior staff members to learn more about the concerns that they had raised in the questionnaire. (Ms. Turner is now Ms. Dallin, having recently been married. Because she was Ms. Turner when all of the events pertaining to this case occurred, and because the documents tendered in this trial refer to her as Ms. Turner, in this Judgment she is referred to as Ms. Turner).

- [16] The complaints that emerged from this meeting, and from the questionnaire, were that the Plaintiff did not treat employees with respect. For example, employees reported that he gave them little, if any, positive feedback; spoke to them in a negative and belittling manner (for example, telling them repeatedly that they could easily be replaced); used vulgar language directed at them (for example, "move your fucking ass"); fraternized, or attempted to fraternize, with some of the female employees (for example, asking them out for a drink, etc.); adjusted employees schedules, contending that he was doing it because they had not been doing a good job; and made inappropriate remarks about the anatomy of some of the female employees.
- [17] Further, it was alleged that he undermined the authority of the other members of the management staff of the Store by making, without their knowledge, derogatory comments about them to other employees.
- [18] The Defendant's assessment of these complaints was that this alleged behaviour probably constituted a breach of its (the Defendant's) Harassment Policy. Given that fact, if a formal investigation was conducted and these complaints were proven, the Defendant would have to terminate the Plaintiff's employment as the Defendant's Harassment Policy was one of zero tolerance.
- [19] Because the Plaintiff had been working for the Defendant for almost three years at that point; because he had been a dedicated and hardworking employee throughout that period; and because his knowledge of the grocery business had been above average, the Defendant decided that it would take steps to ensure that the Plaintiff changed his management style to comply with its Harassment Policy rather than embark on a formal investigation that might well result in his dismissal.
- [20] To accomplish this end, in early December 2002 (shortly after the meeting with the employees), Ms. Turner and the Store Manager met with the Plaintiff and advised him of the complaints made against him; however, they but did not tell him the names of the complainants.
- [21] Though the Plaintiff denies that this meeting ever took place, for reasons which I have subsequently set out, I do not accept his evidence. Rather, I accept the evidence of Ms. Turner that this meeting did take place. I also accept her evidence as to the content of this meeting.
- [22] Specifically, Ms. Turner, at the commencement of this meeting, described, in a general way, the complained of behaviour to the Plaintiff - namely, that he did not treat employees with respect and that he undermined the authority of the other members of the management staff. The Plaintiff denied all of these allegations. He requested that he be provided with the names of the complainants and the specific details of the complaints.

- [23] In response to the Plaintiff's requests, Ms. Turner explained that the information had been given on a confidential basis; that if she were to give him these names and details a formal investigation would have to be done; and that the result of such an investigation might well be his dismissal for breach of the Harassment Policy. The Plaintiff then withdrew his request for the names and details.
- [24] Further, Ms. Turner advised the Plaintiff that the Defendant did not want to terminate his employment but rather wanted him to change his management style. To assist him in achieving this end, the Defendant recommended that the Plaintiff take a management course. The Plaintiff agreed to take this course. Lastly, Ms. Turner explained to the Plaintiff in this meeting that another occurrence of any of the complained of behaviours could result in his dismissal.
- [25] On December 10, 2002 (some days after that meeting), Mr. Cavin, as the managing partner of the Defendant, sent a confidential memo (which had been drafted by Ms. Turner) to the Plaintiff. This memo contained a confirmation of the Plaintiff's meeting with Ms. Turner; a general description of the complained of behaviour; confirmation that the Plaintiff would be taking a management course; and notification that any continuation of any of the complained of behaviour might result in his dismissal.

- [26] Included in this memo were the following comments:

Demeaning, belittling etc. comments are harassment and are to cease immediately. ...

Effective immediately negative comments and attitude are to cease. ...

You need to adjust your management style to provide a more positive work environment for all your team members. In your position as co-Assistant Store Manager, it is imperative that you maintain a positive attitude within the store at all times. ... Verbal and non-verbal negative communication results in producing a negative work environment which drastically affects everyone's performance and is not setting the standard that we want in our store. You set the standard by your demeanor. Leadership starts at the top.

As the Co-Assistant Manager Store Manager, you need to interact more in a positive manner with all staff. Treat them with respect. Do not belittle or make subtle comments that are intimidating or threatening. A positive work environment is our goal and you need to make necessary adjustments in your management of your team to have a positive influence.

There is to be no retaliation by you to any coworkers or supervisors. This includes the "silent" treatment, producing a negative work environment, changes of scheduled hours, less allocated hours, assignment of tasks, etc. Your performance in the above areas has to improve drastically. You are required to ensure a fair rotation of work assignments and shifts. You agree to take management courses that are recommended by the company and these courses will be taken on your own time and paid for in accordance with current company procedures and policies.

It is imperative that you fully recognize the seriousness of this matter. We will not condone or tolerate at any time the style of management that produces a negative environment for our team by having a negative attitude including non-verbal communication, subtle intimidation or threats.

Your position requires you to be objective at all times. You are expected to set and maintain fair and equitable management of your team as well as a positive work environment for all our team members in the store. As we discussed in our meeting, we intend to have our team members working in a positive environment at all times.

Our goal is to continue to have you on our team, but you need to take immediate steps to address the areas noted above. If your performance does not improve and stay consistent with us, your position, duties and responsibilities will be reassessed and dismissal may occur.

[27] The Plaintiff was also provided with a copy of the Defendant's Harassment Policy. As he attested during the trial, he read through the policy when he received it. Included in that Harassment Policy are the following provisions:

Harassment can be defined as an unwelcome action by any person whether verbal or physical, on a single or repeated basis, which humiliates, insults or degrades. Conduct exhibited once or repeatedly that offends, belittles, demeans or humiliates another person and that the person exhibiting the conduct knew or ought to have reasonably known would be unwelcome. This comprises objectionable conduct by remarks, gestures, and displays that demean or belittle, humiliates or embarrasses another person. "Unwelcome" or "unwanted" in this context means any actions which the harasser knows or ought reasonably to know are not desired by the victim of the harassment.

Racial Harassment [includes]: Unwanted comments, racist statements, slurs, and jokes. ...

Harassment means improper comment or conduct that a person knows or ought to know would be unwelcome, offensive, embarrassing or hurtful. Harassment may result from one incident or a series of incidents. Examples of harassment include, but are not limited to: derogatory remarks; threats; inappropriate jokes, innuendos and teasing; insulting gestures, belittling or demeaning comments or gestures; practical jokes which result in embarrassment; ...

[28] Though the Plaintiff agrees that he received a copy of this memo (he signed a copy of it, acknowledging receipt of it) and a copy of the Harassment Policy, as was touched upon earlier, he denies that Ms. Turner and the Store Manager (or any one for that matter) met with him to advise him of the complaints.

- [29] Rather, he testified that the first notice that he received regarding any concerns about his conduct was when the Store Manager came down from his office one day and handed him the December 10, 2002 memo from Mr. Cavin. The Plaintiff further testified that the memo did not make any sense to him as he had never been told that there were any problems of any kind before this time and because his "management style had never been questioned" previously.
- [30] I do not accept this evidence of the Plaintiff.
- [31] Apart from the fact that it is difficult to identify a reason why Ms. Turner would have referred to such a meeting if none had taken place (a meeting was not required), the Plaintiff's own conduct is inconsistent with his testimony.
- [32] That is, on December 20, 2002 he wrote a memo in response to Mr. Cavin's memo of December 10, 2002. Mr. Cavin's memo began with the sentence "As was discussed in your meeting with Greg, your Store Manager, ..."
- [33] In his memo, the Plaintiff went through the Defendant's memo almost on a paragraph-by-paragraph basis asking questions and requesting information regarding the details of the allegations that had been made against him and the behaviour that he was being requested to change.
- [34] At no point, however, did he question the meaning of the first sentence. In my view, this conduct is inconsistent with his testimony.
- [35] On January 14, 2003, Mr. Cavin and Ms. Turner met with the Plaintiff regarding his December 20, 2002 memo, and went through the points covered in it. As had occurred at the first meeting, the Plaintiff requested that the names of the employees who had brought forward their concerns regarding the Plaintiff's management style. Again, the Plaintiff was advised that that information would be provided to him if he persisted, but that doing so would convert the process into a formal investigation which might result in his dismissal.
- [36] This January 14, 2003 meeting was subsequently confirmed by Mr. Cavin in a memo dated January 16, 2003. This memo also confirmed that the Plaintiff would participate in the management course which was scheduled to begin on January 27, 2004 and which would continue for eight weeks - namely, until March 17, 2003.
- [37] On March 3, 2003 (just a little over half way through the management course), the Plaintiff wrote Mr. Cavin a memo in response to Mr. Cavin's January 16, 2003 memo. In this memo, the Plaintiff acknowledged that some of the issues had been resolved and that it was time to move forward; but he also requested disclosure of the specific comments that he made and to whom he had made them. He went on to explain that he believed he was entitled to this information under the Defendant's Harassment Policy.

- [38] In response to this memo, Ms. Turner met with the Plaintiff and again explained the possible repercussions to him if the names of the employees were provided. The Plaintiff agreed that he would not pursue that request further.
- [39] As far as the management course was concerned, although there was some dispute as to the number of sessions that the Plaintiff missed (the Plaintiff thought that it was one while Ms. Turner thought that it was two, possibly three), there was no dispute that he attended the majority of the sessions. (With respect to the session that it was agreed that he had missed, the Plaintiff is a member of the volunteer fire department and on that evening he had been called out to a fire).
- [40] In April 2003, the Plaintiff's performance evaluation was very good. There was an issue as to whether there had also been an evaluation for October 2003 because, if so, it was not provided in the Defendant's documents. The Plaintiff's personnel file did not contain an evaluation for October 2003.
- [41] Whether the explanation for this situation is that that was the time when the Defendant switched from semi-annual to annual evaluations (in other words, there was no evaluation done in October 2003) or that it was simply misplaced, does not make a material difference in this case. That is, given his positive evaluation in April 2003, it is probable that, if an evaluation had been done in October 2003, it would also have been positive. As the evidence disclosed, the Defendant believed that the Plaintiff had addressed and rectified the earlier identified short-comings in his management style, and that those problems were a thing of the past. At the company Christmas Party in December 2003, the Plaintiff was recognized for his years of service to the Defendant.
- [42] Unfortunately, that perception of the situation was incorrect. In late April 2004, Carl Baker, a former employee of the Defendant, wrote a letter to the Store Manager (copied to Ms. Turner) in which he made a formal complaint against the Plaintiff. His complaint pertained to the Plaintiff's conduct as Mr. Baker's supervisor, conduct which Mr. Baker described as unpleasant and distasteful, and as being the reason that he eventually left the employ of the Defendant.
- [43] To put his letter in context, Mr. Baker is a young man of First Nations descent who worked part-time at the Store for a 19 month period extending from August 2002 until late March or early April 2004. (Mr. Baker was still in high school when he began to work at the Store).
- [44] Specifically, his letter provided that:

April 22, 2004

To Greg Wicklund

As Per our conversation and your request.

I am writing this letter in regards to the treatment that I have experienced by assistant manager Cory Neen @ Country Grocery.

Ultimately, it was Cory who made my job unpleasant and distasteful, he rather enjoyed picking on me, it seems he was displaying his authority and dominance as assistant manager to the rest of the workers. On one occasion he tried to make me clean the staff bathroom immediately after he had defecated, stating to several other co-workers that I would enjoy the smell. Cory lacked a legitimate reason for making me clean the bathroom, he disappeared and reappeared a short while later, saying that I had to clean it because there was a picture of a naked female on the wall with my name underneath it, which I feel he was responsible for drawing. This was very embarrassing for me as I was delegated this task in front of three of my co-workers.

Cory also "trails" me around the store, harassing me and asking what I'm working on when it's clear that I'm busy facing shelves or sweeping the floor. I find it very frustrating to have him tell me that I'm not working, when it is clear that I am working. He also accuses me of not doing jobs delegated to me, when I have done them. Also when something goes wrong in the store, Cory is always quick to ask me, "Do you know anything about this Carl?" assuring me that he has asked other staff members, only for me to find that I was the only one confronted about the situation.

And just before Cory leaves every afternoon, the grocery team is regularly called into the back room and delegated tasks for the remainder of the night. If someone doesn't like the job they were assigned, then Cory always replies, "Well that's okay, Carl will take care of it, won't you Carl?" I often find myself carrying the brunt of the load, often being assigned the "dirtier," and more physically demanding jobs.

I know that this isn't all coincidence, as I've been told by two other co-workers that Cory dislikes me. It really saddens me that I had to resort to leaving my position at Country Grocer, as I liked my position and most of my co-workers (including the other grocery managers). I don't think that Cory's attitude reflects the efforts of the other two managers, as they have confronted Cory about his attitude before, and they have been supportive of me in my efforts at the workplace.

Another very disturbing aspect of working with Cory was his constant use of vulgar language, and on occasion would make cultural generalizations and Racial Slurs in references to First Nations and Afro-Americans. He would always refer to me as Carl Weathers (an Afro American actor) Coming from an aboriginal background, I found his remarks to be ignorant, unprofessional and very hurtful, making it very uncomfortable for me to work with him or in a situation like that.

Thank you in advance for the consideration put forth looking into this situation. I would like to make a couple remarks in closing. I would like to thank Country Grocer for affording me the opportunity learn the grocery business. I liked my position at the store and looked forward to seeing and working with my fellow co-workers. It saddens me that I must give up my position in the store when I feel as well as other management feel I was an asset to this organization. I worked 19 months and at every 6-month review I would always get a raise and would be told I was doing a good job. I feel that I can no longer work in an environment such as this and I feel that when you are dealing with and invite the public into such a public place so close to a First Nations

reserve, there is absolutely no room for abusive racist behaviour. I think it is terrible that there is nothing wrong with taking money from people of first nations descent but yet certain employees mock, and make racist comments. The Grocery business is a Very Very competitive business, and first nations from the neighbouring reserve make up a big part of the business at Country grocery. I am sure that these issues and concerns are not the way the management feels. I would also hope that head office look into these very serious matters. I would be more than willing to sit down and discuss these issues with

management. I hope that these matters can be dealt with at this level. I would like a formal response from Mr. Greg Wicklund as well as Head Office.

Respectfully yours,

Carl Baker

- [45] When the Store Manager received the letter, he contacted Ms. Turner who requested that a copy be faxed to her.
- [46] Within a short period of time, (namely on Monday, April 26, 2004), Ms. Turner and the Store Manager arranged to meet with the Plaintiff. At this meeting, the Plaintiff was advised of the complaint that had been made against him and that a formal investigation was going to be done. Most of the letter was read to him by Ms. Turner. The portions that were not read were summarized by her.
- [47] In response to the allegations, the Plaintiff stated that he did not remember the bathroom incident, but did admit that he had called Mr. Baker, "Carl Weathers", and that he did appreciate that Carl Weathers was African American while Mr. Baker was of First Nations heritage.
- [48] In the course of this meeting, Ms. Turner advised the Plaintiff that as part of the Defendant's investigation she would be interviewing other members of the staff and that it would be better if he was not at work while that was occurring. Moreover, she told him that he should excuse himself from the Crown Isle Golf Event which was going to take place on Wednesday, April 28, 2004. (This golf event was a company function).
- [49] Ms. Turner then met with Mr. Baker and his father. She explained to them that there would be a formal investigation done. During this meeting, Mr. Baker Sr. mentioned that he might file a complaint with the Human Rights Tribunal regarding the manner in which the Plaintiff had treated his son. Ms. Turner responded to this comment by explaining that that was an independent process, and that regardless of whether he pursued it or not, the Defendant would also be dealing with the matter internally.
- [50] Ms. Turner then commenced her investigation of the matter. After interviewing five or six staff members, she concluded that Mr. Baker's allegations were true and that the Plaintiff had not changed the behaviour about which he was warned in December 2002.

- [51] After reaching that conclusion, Ms. Turner met with Mr. Cavin and advised him of the results of her investigation. He, in turn, consulted with his partners and they then made the decision to dismiss the Plaintiff for cause.
- [52] The Plaintiff was asked to attend a meeting on April 28, 2004. Mr. Cavin, Ms. Turner, the Store Manager, as well as another managing partner were at this meeting. The Plaintiff was advised that his employment with the Defendant was terminated for cause.
- [53] He was asked to clean out his locker, but he advised them that he had already done that. (As the Plaintiff explained in his evidence, he anticipated that his employment was going to be terminated when he was told to excuse himself from the golf event and when he tried to contact people in the two preceding days and no one returned his calls. It was unclear in the evidence whom he was trying to call).
- [54] Though he was dismissed for cause, the Defendant nevertheless gave him four weeks severance pay.
- [55] By August 2004, the Plaintiff had secured new employment. To say the least, however, the months following the termination of his employment with the Defendant were difficult for him. He went through a period of humiliation and depression.

III. ANALYSIS AND DECISION

- [56] The pivotal issue in this trial is whether the Defendant has met the onus on it to prove that its termination of the Plaintiff's employment was justified given the Plaintiff's conduct. Specifically, did the Defendant establish that the Plaintiff's misconduct was incompatible with his employment duties - that is, that it went to the "root of his contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance"?: *Leung v. Doppler Industries Inc.* (1995), 10 C.C.E.L. (2d) 147 (B.C.S.C.).
- [57] To determine this issue, as was set out in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 there are two questions to be addressed:
- A. has the Defendant proven the alleged misconduct; and
- B. if so, does the nature and degree of that misconduct warrant dismissal?
- [58] For reasons which follow, I am satisfied that the Defendant has met the onus on it, and that the answer to both of these questions is yes. The Defendant was justified in terminating the employment of the Plaintiff.
- [59] As a preliminary matter, relying on *McKinley* as the authority, the Plaintiff contends that proof of misconduct allegations such as deceit and dishonesty require a higher standard of proof than the balance of probabilities. Rather, these types of allegations require a standard of proof closer to the standard of beyond a reasonable doubt.

- [60] The Plaintiff further submits that the alleged misconduct in this case is tantamount to deceit and dishonesty and therefore a higher standard of proof is to be applied.
- [61] Assuming for the purposes of this submission that the Plaintiff's alleged misconduct is tantamount to deceit or dishonesty (though I am not satisfied that it is), in my view, McKinley does not stand for the proposition asserted by the Plaintiff.
- [62] Rather, McKinley clarifies that when determining the second question (that is, whether the alleged misconduct warrants the sanction of dismissal), the Court must consider the nature and the degree of the misconduct to ensure that the sanction of dismissal is proportionate to that misconduct. In other words, not all acts of misconduct falling within a particular genre (for example, not all acts of deceit or dishonesty) will call for the sanction of dismissal. Another sanction may be proportionate given the nature and the degree of the particular act or acts of dishonesty, etc.
- [63] In my view, McKinley does not provide that the "proportionate approach" should be interpreted to mean that a standard of proof higher than the balance of probabilities should be applied with respect to the proof of misconduct allegations such as dishonesty and deceit.
- [64] If, however, I am wrong with respect to this legal conclusion, I am satisfied that if a higher standard of proof was applied in this case the Defendant has met that higher standard in any event.

A. Has The Defendant Proven The Alleged Misconduct Of The Plaintiff?

- [65] The alleged misconduct for which the Defendant dismissed the Plaintiff was the demeaning and belittling manner with which he treated the employees under his supervision and, in particular, the fact that his comments regarding their performance were for the most part negative (rarely, if ever, positive); that he directed vulgar and profane remarks at them personally; that he embarrassed them in front of fellow employees by yelling at them and criticising them publicly; that he addressed some of the employees (namely, Mr. Baker) using a racial slur; and that he was unfair in the manner in which he assigned tasks.
- [66] Both Ms. Turner and Mr. Cavin testified that the Plaintiff was not dismissed because of Mr. Baker's letter. Rather he was dismissed because after investigating the complaints reported by Mr. Baker in his letter, he was continued to conduct himself in a manner that was incompatible with his job. His behaviour was much the same, if not the same, as it had been when complaints initially arose in the fall of 2002.
- [67] The Plaintiff contends that some of these allegations of misconduct cannot be relied upon by the Defendant because they are different than the allegations set out in the Statement of Defence. (Both parties agree that the Defendant is not entitled at trial to rely on conduct for dismissal that is different from the conduct alleged in its Statement of Defence. That is, the Defendant is precluded from relying upon any grounds that do not fall within its pleadings).

[68] The alleged misconduct of the Plaintiff is set out in paras. 3 and 5 of the Statement of Defence.

[69] Paragraph 3 provides that "the Plaintiff was terminated with cause for breach of the Defendant's Harassment Policy after having been provided with reasonable opportunity to rectify his performance".

[70] Paragraph 5 provides:

Particulars of the Plaintiff's misconduct include:

- (a) In or about December, 2002, the Plaintiff made negative and offensive comments in the workplace. The Defendant's Personnel Development Manager, Bernice Turner, and the Defendant's Store Manager, Greg Wicklund, addressed these concerns in a meeting with the Plaintiff and advised, in writing that if his performance did not improve his position, duties and responsibilities would be reassessed and dismissal may occur;
- (b) In or about March, 2003, the Defendant received further complaints about the conduct of the Plaintiff and again raised these concerns with the Plaintiff;
- (c) In or about April, 2004, the Defendant received a written complaint from a staff member that the Plaintiff was making racial slurs directed towards him. The Plaintiff admitted that he was calling that staff member by an Afro-American name repeatedly when he knew that the staff member was, in fact, of First Nations descent;
- (d) Between March and April, 2004, the Plaintiff used vulgar language in the workplace in the presence of other staff members; and
- (e) The Plaintiff made negative comments about the Co-Assistant Manager and Store Manager.

[71] Though the Plaintiff submits that the alleged misconduct should be limited to the allegations set out in para. 5, a review of the wording of that paragraph does not support that submission.

[72] Rather, para. 5 provides that "Particulars of the misconduct include" (my emphasis). If the misconduct was to be limited to these particulars, that paragraph would have used wording such as "Particulars of the misconduct are" or "Particulars of the misconduct are restricted to" (my emphasis), etc.

[73] The wording of these paragraphs reveals that para. 3 is a general statement of the alleged misconduct for which the Plaintiff was dismissed and para. 5 provides some examples of that misconduct.

[74] Put another way, the alleged misconduct on which the Defendant may rely is misconduct which constituted a breach of the Defendant's Harassment Policy for which the Plaintiff had been given a reasonable opportunity to rectify.

- [75] Consequently, the allegations of misconduct relied upon by the Defendant are the breaches of its Harassment Policy set out in its memo to the Plaintiff in December 2002, as those were the breaches that the Plaintiff had been given an opportunity to rectify. As that memo did not include any reference to racial slurs (presumably because the Defendant was unaware of that misconduct until just prior to the termination of the Plaintiff's employment) it cannot be included in the misconduct relied upon. With that exception, the allegations of misconduct are as set out at the commencement of this section of the Judgment - namely, the demeaning and belittling manner with which he treated the employees under his supervision which included such conduct as describing their job performances in negative rather than positive terms; directing vulgar and profane remarks at them personally; yelling at them and criticising them publicly; and assigning tasks unfairly.
- [76] As far as the proof of this alleged conduct is concerned, the Plaintiff denies that he behaved as alleged. The Defendant, on the other hand, called six witnesses (including Mr. Baker), all of whom testified that the Plaintiff committed the alleged misconduct.
- [77] The six defence witnesses included Phillip Gilbertson, Matthew Paddle and Mr. Baker (all of whom worked as grocery clerks directly under the Plaintiff's supervision); Courtenay Wuttunee and Nina Matthews (who both worked on the front end section of the Store under the supervision of the Plaintiff, albeit to a lesser degree than Mr. Baker, Mr. Paddle and Mr. Gilbertson); and Mr. Moore (who throughout worked in positions at the Store that were parallel to those held by the Plaintiff).
- [78] Though the Plaintiff contends that the evidence of these witnesses is unreliable because they are interested parties and are biased against him, the evidence did not support his contentions.
- [79] As the evidence showed, none of these witnesses have anything to gain by testifying for the Defendant in this trial. With the exception of Ms. Matthews, none of these witnesses currently work for the Defendant any longer.
- [80] Moreover, the evidence certainly fell short of proving that these witnesses collaborated on their evidence. Apart from Ms. Wuttunee and Mr. Moore (who are engaged to one another), there was no indication that any of these witnesses have had any contact with each other.
- [81] Furthermore, the demeanour of these witnesses while testifying and the tone of their testimony were consistent with the conclusion that their evidence could be relied upon. That is, each of them presented as people who were endeavouring to give an accurate account of events. Though they testified as to the shortcomings of the Plaintiff's managerial abilities, they also testified that he was a very hard worker and was very knowledgeable of the grocery business.

- [82] The Plaintiff argues that the evidence of Phil Gilbertson supported his position that his managerial style was not demeaning or belittling. A review of Mr. Gilbertson's evidence does not support that characterization. To the contrary, Mr. Gilbertson did not contradict the evidence of the other employees regarding the belittling or demeaning manner which the Plaintiff employed to train and supervise employees. Rather, Mr. Gilbertson testified that he simply accepted it as the Plaintiff's managerial style.
- [83] Though Mr. Baker candidly admitted during his testimony that he hated the Plaintiff, that admission did not render his testimony unreliable in my view. Rather, it was consistent with the straightforward and candid manner with which he gave his testimony, testimony in which it was clear that he was endeavouring to provide a fair and full description of the events as he recollected them. In any event, the evidence of Mr. Baker was corroborated by the evidence of the other defence witnesses.
- [84] The Plaintiff further submits that I should not rely upon the evidence presented by the Defendant, but that rather I should draw an adverse inference against it because of the Defendant's failure to call the Store Manager as a witness in this trial.
- [85] There is no dispute that the failure of a party to call a witness who was in their power to call, and by which the facts might have been elucidated, justifies the Court in drawing an inference that the evidence of that witness would have been unfavourable to that party: *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.).
- [86] However, the Court is not bound to draw an adverse inference from the failure of a witness or party to testify: *Weeks v. Baloniak*, 2005 BCCA 193. An explanation may be provided which explains the failure to call the witness. Explanations which have been found to justify such a failure include that the party was prevented from calling the witness: *Murray*, supra, or that it was unnecessary because the witness was examined for discovery and that evidence is before the Court: *Co-Operative Fisheries Ltd. v. Canadian Imperial Bank of Commerce* (1970), 7 D.L.R. (3d) 610.
- [87] Applying these principles to this case, I am not satisfied that an adverse inference should be drawn against the Defendant because it did not call the Store Manager as a witness. Much, if not all, of the evidence that he would have given was before the Court as, at the request of the Plaintiff, he was examined for discovery. Portions of that discovery were relied upon by the Plaintiff in this trial.
- [88] In this case it was not solely in the power of the Defendant to call the Store Manager - the Plaintiff may also have called him. (He was not the representative of the Defendant in this trial. Rather Mr. Cavin, being the managing partner, was called to represent it).
- [89] As there is no property in witnesses, and as there is no indication that this witness was hostile to the Plaintiff (to the contrary, the evidence indicated that they had an amicable relationship) this witness could have been called by the Plaintiff. (At one point in these proceedings, he was on the Plaintiff's witness list).

- [90] Given all of these circumstances, an adverse inference will not be drawn against the Defendant for its failure to call the Store Manager as a witness.
- [91] The Plaintiff further argues that I should not rely upon the evidence presented by the Defendant because he (the Plaintiff) was named Employee of the Year in 2001, and that recognition is inconsistent with this misconduct.
- [92] There was no dispute on the evidence that the Plaintiff had an exceptional knowledge of the grocery business and that he was a dedicated and hard worker. The complaints regarding the Plaintiff pertain to the manner with which he supervised and trained people. Given that he did some aspects of his job well, it is not inconsistent that he received the recognition of Employee of the Year at one time.
- [93] As far as the evidence of the Plaintiff was concerned, I did not find him to be a credible witness because his evidence was both inconsistent with his own conduct and inconsistent with other evidence.
- [94] For example, as was mentioned earlier in these Reasons, although the Plaintiff testified that the first paragraph of the Defendant's December 10, 2002 memo is incorrect because he never met with anyone prior to receiving it, that testimony is inconsistent with his conduct and, in particular, with his written response to that memo.
- [95] The Plaintiff testified that he was surprised by the contents of the December 10, 2002 memo because his management style had never been criticized before. That evidence is inconsistent with some of the comments in his performance evaluation dated April 23, 2002 - namely, "There is only one issue that needs a little attention. Re: conduct. You are definitely polite to customers but not as much to a few employees. I need you to work together with a few employees telling them that they are doing a great job rather than telling them things that they have missed doing. Negative stuff, etc.".
- [96] The Plaintiff contends that I should accept his evidence that he did not behave in the manner alleged because his evaluations which were done by the Store Manager were very positive, including, and perhaps most significantly, the last one.
- [97] This apparent discrepancy was explained by the evidence. Specifically, the evidence established that the Plaintiff changed his managerial style when members of the management staff (such as Mr. Cavin and Ms. Turner) were around. This evidence was given by a number of witnesses in a matter-of-fact manner - at times just made as a passing reference.

[98] To conclude, I am satisfied that the evidence proves that the Plaintiff committed the misconduct alleged by the Defendant. That is, I am satisfied that he treated the employees under his supervision in a demeaning and belittling manner and, in particular, that he rarely, if ever, commented positively on their job performance; that he directed vulgar and profane remarks at them personally; that he embarrassed them in front of fellow employees by yelling at them and criticising them publicly; and that he assigned tasks unfairly.

B. Has The Defendant Proven That The Nature And Degree Of

This Misconduct Warrants The Sanction Of Dismissal?

- [99] As was set out earlier in these Reasons for Judgment, to justify the sanction of dismissal, the misconduct of an employee must be one that is "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": Leung, *supra*.
- [100] The resolution of this question requires a consideration of the nature and degree of the Plaintiff's misconduct; a consideration of the Plaintiff's employment (namely, his duties and responsibilities); and a determination as to whether, given the particulars of his job, the nature and degree of his misconduct justified his dismissal.
- [101] With respect to the Plaintiff's employment, one of his primary responsibilities was to provide the day-to-day training and supervision of many of the employees of the Store. As was set out in the Defendant's memo of December 2002, "Thorough training in a team environment with grocery staff is imperative". Many of these employees were very young (some still teenagers) and for some this was their first job.
- [102] The nature of the misconduct is that the Plaintiff failed to perform that primary responsibility. That is, the evidence showed that the belittling and demeaning manner with which the Plaintiff supervised employees resulted in a negative and tense working environment and in an atmosphere in which many of the employees felt humiliated and demoralized. This misconduct of the Plaintiff undermined the confidence of many, if not most, of the employees under his supervision. His manner rendered it harder to work because you were distracted, waiting for the next criticizing remark from the Plaintiff. As one of the witnesses attested, she dreaded coming to work if the Plaintiff was there.
- [103] As this misconduct occurred whenever the Plaintiff was working (except for those limited periods when other management staff were present), the degree of the misconduct was significant. It was not misconduct that happened on the odd occasion. It was constant.
- [104] For all of these Reasons, I am satisfied that both the nature and the degree of the misconduct were significant.

- [105] Though the Plaintiff submits that, in any event, his misconduct did not warrant a dismissal from his employment as his conduct did not differ materially from the conduct of other managers, this submission was not supported by the evidence. Rather, the evidence proved that the other management personnel did not use a belittling and demeaning style of management.
- [106] Though other members of the managerial staff would use vulgar language or profanity from time to time (for example, they might use a swear word if they spilled something, etc.), that profanity or vulgar language was never directed at an employee. The Plaintiff, on the other hand, frequently directed vulgar language or profanities at employees. For example, he would say to an employee "move your fucking ass" etc.
- [107] In other words, the manner in which the Plaintiff used profane and vulgar language was to demean and belittle his employees. The manner in which other members of the management staff used profane and vulgar language was to express frustration with a situation, but it was not directed at a person.
- [108] The Plaintiff also submits that this misconduct does not warrant dismissal because it was condoned by the Defendant as evidenced by the fact that his prior evaluations had been very good. In my view, this fact does not prove that the Defendant condoned it. Rather, it confirm the evidence that the Defendant was unaware of the Plaintiff's continuing misconduct because the Plaintiff changed his behaviour whenever another member of the managerial staff was present.
- [109] Furthermore, this change in the Plaintiff's behaviour shows that the Plaintiff was aware that his misconduct was not condoned by the Defendant.
- [110] In addition, the fact that the Defendant did not condone this misconduct is clearly set out in the memo that it sent to the Plaintiff in December 2002 and in the meetings that Ms. Turner had with the Plaintiff in December 2002, January 2003, and March 2003.
- [111] The Plaintiff also argues that his misconduct does not justify dismissal because the Defendant failed to warn him. (Because the misconduct of the Plaintiff is an accumulation of incidents, the Defendant had a duty to warn him). The evidence does not support the Plaintiff's submission, that is, (the Defendant) had breached that duty.
- [112] Not only did the Defendant warn him in the memo of December 2002, but the Defendant also warned him through the various conversations that Ms. Turner had with the Plaintiff in January and March 2003. In these conversations, Ms. Turner advised the Plaintiff that if a formal investigation was done of his conduct, he could be dismissed because his behaviour probably violated the Defendant's Harassment Policy.
- [113] Lastly, the Plaintiff argues that his misconduct does not warrant dismissal because the Defendant failed to follow the procedure required under its Harassment Policy.

- [114] The procedure set out in the Defendant's Harassment Policy is that the complainant of an alleged harassment is to confront the individual that they allege is harassing them, advising them that "his or her behaviour is unwelcome and ask him or her to stop".
- [115] Though the complainants of these alleged incidents of misconduct did not confront the Plaintiff with their allegations, he was advised of the contents of them and that such conduct was unwelcome. He was then given the opportunity to change his behaviour - an opportunity that he would not be afforded if a formal investigation occurred and he was found to be in breach of the Policy.
- [116] Even though the failure to confront the Plaintiff constituted a procedural breach of the Harassment Policy, given that the Plaintiff was aware of the complained of conduct, and the fact that it was unwelcome, that failure does not show that the sanction of dismissal is unwarranted.
- [117] To the contrary, it demonstrates that this sanction is warranted as the other possible sanctions that were tried (such as further training to develop the appropriate managerial skills and the opportunity to change his managerial style) failed.
- [118] To summarize, given that developing and maintaining a positive work environment for the employees under his supervision was an essential requirement of the Plaintiff's employment, the nature and the degree of his misconduct went to the root of that employment and constituted a permanent fracture in that relationship. Consequently, dismissal is an appropriate sanction.

IV. CONCLUSION

- [119] For all of these reasons, I am satisfied that the Defendant has proven that it was justified in terminating the employment of the Plaintiff. This action is dismissed.

V. COSTS

- [120] Pursuant to the Rule 57(9), the general rule governing costs is that costs follow the event unless, for reasons of fairness, such an order would not be appropriate.
- [121] I am satisfied that for reasons of fairness, there should be a departure from that rule in the circumstances of this case.
- [122] In particular, though the Statement of Defence did set out the allegations of misconduct it was drawn in such a manner that the issues became unnecessarily confused. As a consequence, in my view, the proceedings became unnecessarily complicated and protracted.
- [123] For this reason, the costs to be recovered by the Defendant will be reduced to 50% of their party and party costs, the scale on which those costs are to be calculated being Scale 3.

"J. Sinclair Prowse, J."

The Honourable Madam Justice J. Sinclair Prowse

October 24, 2006 - Revised Judgment

Corrigendum to the Reasons for Judgment issued advising that paragraph 123 is corrected to read as follows:

[123] For this reason, the costs to be recovered by the Defendant will be reduced to 50% of its party and party costs, the scale on which those costs are to be calculated being Scale 3.

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