

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
)	
PETER TONG)	<i>Kevin Fox, for the Plaintiff</i>
Plaintiff)	
)	
- and -)	
)	
THE HOME DEPOT OF CANADA INC.)	<i>Jonathan L. Dye, Matt Link, for the</i>
Defendant)	Defendant
)	
)	
)	Heard: March 23 & 24, 2004

ECHLIN J.

REASONS FOR DECISION

- [1] Just Cause is "the capital punishment crime of employment law".
- [2] On June 5, 2003, Home Depot of Canada Inc. dismissed Peter Tong, a 54 year old sales associate of more than four and one half years' service, alleging just cause.
- [3] Home Depot has limited its allegations of just cause to alleged instances of "time fraud" as detailed by its "racetrack manager", Bill Macdonald. The use of the term "racetrack manager" arose from Home Depot's sponsorship of NASCAR racing. Mr. Macdonald's primary job as a floor manager was to ensure customer service. His daily routine involved constantly circulating within the store. Mr. Macdonald proudly testified that he could make the rounds of this large Leaside store in 3-1/2 minutes.
- [4] Macdonald started his new position on Tuesday, May 6, 2003. Within 24 hours, he had formed the opinion that Peter Tong was taking longer breaks than permitted. Shortly after he started his new duties, he met with his store manager, Sandra Galucci, and shared his conclusion with her: "Sandra, you'll never believe it. This is what's going on in your store. I can't believe it."
- [5] Ms. Galucci told Mr. Macdonald to observe and see if it was happening on a consistent basis.
- [6] Mr. Macdonald did just that. During most of the month of May, 2003, Macdonald kept Tong constantly under surveillance. He followed him into the lunchroom and made notes on his clipboard. He eventually transferred some of these notes onto another sheet of paper and gave them to Ms. Galucci. His surveillance involved marking down the time that he saw Mr. Tong

leave the floor, noting when he ate lunch, and recording when he punched in and out on the computerized "KRONOS" system.

[7] Based solely upon what Mr. Macdonald had told her, a review of the Punch Detail Report (the computerized summary) and Mr. Tong's personnel file (which apparently disclosed no prior incidents of "time fraud"), and after conferring with the Human Resources Manager, Craig Bates, and her assistant manager Jalal Hamad, Ms. Galucci fired Mr. Tong on June 5, 2003 without notice or pay in lieu of notice, alleging just cause.

[8] Was she right in so doing?

[9] In determining the answer to this question, it must be remembered that the burden of proving just cause lies with the employer. Where dishonesty or fraud is alleged, the standard, although not nearly as high as the criminal standard of beyond a reasonable doubt, is somewhat higher than the usual civil standard in the sense that the evidence offered to sustain dishonesty or fraud must be considered having regard to the gravity of the consequences of proof of such an allegation: *Homer v. Roccha* (1988), 20 C.C.E.L. 281 (N.B.C.A.). This standard was specifically adopted a decade later in Ontario by Dilks J. in *Nagy v. Metro Toronto Convention Centre* (1998), 35 C.C.E.L. (2d) 209 (Ont.Gen.Div.), at p. 216.

[10] Applying this standard to the case before me, while I find Mr. Tong's denials of wrongdoing to be sincere, there is also no doubt in my mind that Mr. Macdonald honestly believed that he was acting in the best interests of his employer. He thought that Mr. Tong was dishonest and was stealing time from his employer.

[11] Regrettably, it appears that Mr. Macdonald, untrained in investigation methods, began his examination of Mr. Tong's actions and movements with the firm belief that the plaintiff was a wrongdoer.

[12] His investigation was fatally flawed. He destroyed his original notes and presented only a summary prepared just prior to his meeting with Ms. Galucci advising of his conclusion that time fraud had occurred. He completed a one page "Incident Witness Statement" at his boss' request on June 5, 2003 which contained inaccurate exaggerations of the evidence. In his written statement, he noted that "time theft happened *every day* Peter worked - which I personally observed from May 6 to Monday, June 2, 2003." (Italics added).

[13] In his evidence, he admitted that transgressions were not observed every day. He conceded that his investigation did not start on May 6. He also confirmed that there were days not included in his written report during which Mr. Tong's lunch hours were not in issue and "not noteworthy". Notably, he did not even include any reference to those in his report. He went so far as to admit that on those days, Mr. Tong's performance was "alright." When pressed in cross-examination, he agreed that his report contained exaggerated conclusions.

[14] Mr. Macdonald failed to obtain corroborating evidence from other employees and admitted that he did not interview any other Home Depot employees. Indeed, at no time did he even speak to Paul Griffin, Mr. Tong's immediate superior, nor did he ever pass along his concerns. At no time did he offer Peter Tong an opportunity to respond to his concerns. He never sought feedback, comments, or an explanation from the alleged dishonest perpetrator.

[15] Macdonald initially testified that the concerns about Tong's alleged time theft were widely-held within the paint department. When pressed, he was unable to substantiate this assertion, beyond two employees who had previously had disagreements with Tong.

[16] Regrettably, Mr. Macdonald appeared to have become consumed with building a case against Mr. Tong. While I find Mr. Tong's responses to the serious allegations made against him to be sincere, the circumstances were certainly highly suspicious. Mr. Tong had no specific explanation for the discrepancies, save and except to deny any wrongdoing.

[17] Notably, Paul Griffin, Mr. Tong's immediate superior, was not called as a witness. No evidence was led of any complaints from his boss. The employer file referenced by Ms. Galucci before firing Mr. Tong was not introduced into evidence. In circumstances in which no explanation was given for them not being introduced, I take the adverse inference that both Mr. Griffin's evidence and the contents of Mr. Tong's personnel file would not have disclosed support for the defendant's position.

[18] The evidence led at trial is too weak to sustain a finding of just cause. In this instance, Home Depot has failed to meet the onus required to establish just cause.

[19] I reach this conclusion after applying the clear standard the law expects of employers who choose to summarily dismiss employees for alleged workplace wrongdoings. In this case, no prior complaints had ever been levelled against Mr. Tong regarding the length of his lunch breaks, his arrival and departure times, his morning and afternoon breaks, or how he punched into the timeclock. Mr. Tong was given no warnings. The option of discipline short of termination was not utilized by Home Depot.

[20] Having regard for the fact that there had been no prior record of similar conduct, perhaps a suspension or punishment short of dismissal might have been more appropriate, if a proper investigation had been conducted and if culpability was found. Alternatively, if the employer had determined that it must dismiss, it could have done so with notice or pay in lieu thereof.

[21] After being fired, Mr. Tong engaged in a job search which extended approximately over five and one half months which led to him accepting a lower paying night shift job at The Building Box in receiving on November 27, 2003. The sufficiency of the plaintiff's mitigation efforts was in issue up until the last day of trial, at which time the defence conceded that it was no longer being challenged. I find that Mr. Tong's job search efforts were reasonable in the circumstances and that he acted properly in attempting to secure comparable alternate employment.

[22] It is generally unwise for employers to persist in challenging a plaintiff's job search efforts where no concrete evidence exists to show the inadequacy of same. This is particularly the case where serious allegations of wrongdoing are combined with a failure by the employer to provide job search assistance, relocation counselling, or any other support towards the securing of alternate employment.

[23] Counsel in this case, Mr. Fox and Mr. Dye, both served their clients well and conducted this trial in exemplary fashion. Where appropriate, they reached consensual agreement on a

number of matters. At the outset of trial, they advised this Court that agreements had been reached on damages. They indicated that if liability were found, a period of notice of three months was agreed upon and that damages should total \$6,652.71.

[24] Additionally, counsel agreed that if I were to award "Wallace damages", they should be fixed in the amount of \$5,543.93 representing 2.5 months. In considering whether Home Depot breached its obligations of good faith and fair dealing, I do not find that it was guilty of conduct that was untruthful, misleading or unduly insensitive. While it acted upon a flawed investigation by Mr. Macdonald, I had no evidence before me that Home Depot communicated the circumstances to other potential employers as was the case in *Trask v. Terra Nova Motors Ltd.* (1995), 9 C.C.E.L. (2d) 157 (Nfld C.A.). Similarly, at no time did it refuse to provide a letter of recommendation as in *Jivrag v. Calgary (City)* (1986), 13 C.C.E.L. 120 (Alta.Q.B.) because Mr. Tong did not ask for one.

[25] While Justice Iacobucci of the Supreme Court of Canada has noted that "in my opinion, the law must recognize a more expansive list of injuries which may flow from unfair treatment or bad faith in the manner of dismissal": *Wallace v. United Grain Growers Ltd.* (1999), 36 C.C.E.L. (2d) 1 at p.37, in this case, there is no unfair treatment or bad faith upon which to found such a claim. Care was taken by this employer not to create "a lot of attention" after Mr. Tong was dismissed. Mr. Hamad walked with Mr. Tong to his locker, but observed from afar as he exited the Leaside Home Depot store for the last time. No "Wallace bump up" is appropriate in this case.

[26] Far too often, employers treat dismissed employees as quasi-criminals and have been known to goose-step them off the premises and immediately change the locks. This did not happen here. The Home Depot took care to treat Mr. Tong with dignity.

[27] The parties have also reached agreement on the issue of costs. At the conclusion of trial, I was advised that regardless of any offers that might have been served, both parties are content that the successful party should recover an all-inclusive amount of \$12,000 for costs.

[28] I therefore award Peter Tong the sum of \$6,652.71 for damages for wrongful dismissal, plus pre-judgment interest pursuant to the *Courts of Justice Act* plus costs in the amount of \$12,000.

ECHLIN J.

Released: April 8, 2004

**Court File No.: 03-CV-251667SR
Date: 20040408**

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PETER TONG

Plaintiff

- and -

THE HOME DEPOT OF CANADA INC.

Defendant

REASONS

ECHLIN J.

Released: April 8, 2004