



BC EST # D001/96

EMPLOYMENT STANDARDS TRIBUNAL

D. Rand Automotive Ltd.
("D. Rand")

-and-

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 95/001

DATE OF DECISION: January 5, 1996

DECISION

OVERVIEW

This is an appeal by D. Rand, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination No. CDET 000032 issued by the Director on November 9, 1995. In this appeal D. Rand claims that no compensation for length of service is owed to Rick Smith ("Smith") under Section 63 of the *Act*.

I have completed my review of the written submissions made by Rand, and the information provided by the Director. I have concluded that Smith is owed compensation in the amount calculated by the Director.

FACTS

Smith commenced employment with D. Rand as a mechanic on June 17, 1986. On March 8, 1994 Smith went off work due to medical reasons. During this period, Smith remained on D. Rand's extended health plan. In August/September 1994, Smith's employment was terminated by D. Rand without notice or compensation. Smith was issued a Record of Employment on September 9, 1994 which indicated the reason for issuance as "A - Shortage of Work". At the time of his termination, Smith earned \$600.00 per week.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer's liability to pay compensation for length of service has been discharged under Section 63(3)(c) of the *Act*. That is, has D. Rand demonstrated, on the balance of probabilities, that Smith was dismissed for just cause.

ARGUMENTS

D. Rand argues that Smith is not entitled to compensation as he was caught stealing from the company immediately prior to commencing his medical leave. The Director contends D. Rand has provided no proof that Smith was stealing from the company.

ANALYSIS

The burden of proof for establishing that Smith was dismissed for just cause rests with D. Rand. D. Rand has not provided sufficient evidence to substantiate its contention that Smith stole from the company. There is no indication that D. Rand charged Smith with theft. The statements of Kevin Keihil (referred to in the investigating officer's September 5, 1995 notes) were denied by Smith and not challenged by D. Rand. Furthermore, D. Rand took no action at the time of the alleged theft and chose instead, several months later, to dismiss Smith due to "shortage of work". If an employer does not dismiss an employee at the time of an act of misconduct, or within a reasonable time, then the employees' conduct will be held to be condoned and the employer will be precluded from dismissing the employee for that act at some later date. I find that D. Rand did not take disciplinary action within a reasonable time, and condoned Smith's alleged misconduct. D. Rand cannot rely on the alleged theft by Smith in March, 1994 to justify a dismissal in August/September, 1994. Finally, the failure of D. Rand to indicate a dismissal for theft on the Record of Employment brings into question the credibility and validity of this reason. I conclude that D. Rand did not have just cause to terminate Smith's employment.

For the above reasons, I conclude D. Rand owes compensation pay to Smith in the amount calculated by the Director.

ORDER

Pursuant to Section 115 of the Act, I order that Determination No. CDET 000032 be confirmed.

Norma Edelman, Adjudicator

Friday, January 05, 1996
Date