

An appeal

- by -

Gasmaster Industries Inc.
("Gasmaster")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/515

DATE OF DECISION: January 6, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Gasmaster Industries Inc. (“Gasmaster”) of a Determination that was issued on September 19, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded Gasmaster had contravened Section 63 of the *Act* in respect of the employment of Orison A. Barreto (“Barreto”) and ordered Gasmaster to cease contravening and to comply with the *Act* and to pay an amount of \$2,690.00.

Gasmaster says the Determination wrongly concluded that Barreto did not quit his employment.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether Gasmaster has shown the conclusion of the Director, that Barreto did not quit his employment, was wrong.

FACTS

Gasmaster operates a production facility. Barreto was employed by Gasmaster from January 2, 1997 to April 3, 2002 as a welder. At the time his employment ended, Barreto’s rate of pay was \$15.50 an hour for a regular 40 hour week.

The Determination concluded Barreto was placed on temporary lay off on September 21, 2001 and not recalled during the period of temporary lay off. During the investigation, Gasmaster took the position Barreto had quit. The Director concluded Barreto had been laid off, relying on the following information and evidence:

- a Record of Employment that was issued to Barreto on September 24, 2001, indicating he had been continuously employed from January 2, 1997 to September 21, 2001 and was stating the reason for issuing the Record as “A” - lay off due to shortage of work - with an unknown date of recall;
- an e-mail note dated September 21, 2001 from Gasmaster’s production manager to the payroll office stating: “Unfortunately due to a shortage of work it is necessary to lay Orison Barreto off. I appreciate if you would inform him as soon as possible. If you have any further question please do not hesitate to inform me.”
- a letter to Barreto dated September 21, 2001 from Gasmaster’s production manager stating, “It is with great regret that due to a shortage of work at Gasmaster Industries you are being laid off as of Sept. 21, 2001.”

No additional documentary evidence was provided with this appeal.

ARGUMENT AND ANALYSIS

The burden is on Gasmaster to show the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation.

Gasmaster argues that the relevant Record of Employment was recorded as a temporary lay off at the request of the complainant. Barreto had asked for a pay raise which was denied. He then asked to be laid off and that was also denied. He then voluntarily terminated his employment but asked the production manager to record it as a lay off, so he could collect unemployment insurance. According to the appeal submission, the production manager agreed to the request. Gasmaster had taken the same position during the investigation, although several different versions of that position were stated or attributed to Gasmaster. The Determination stated:

According to the employer, the complainant asked to be laid off. When the supervisor refused to do this, the complainant quit. In error, the employer's production manager put "temporary lay off" on the complainant's Record of Employment form.

In a letter to the Director during the investigation, Mrs. G. Zemianski, the Personnel Manager for Gasmaster, submitted the following explanation:

Orison Barreto asked his supervisor to lay him off, we were going through a slow period but the production manager wanted him to stay, he had no difficulty finding work for him. Orison then quit. The production manager agreed in error to put temporary lay off on his record of employment.

In another submission made during the investigation, the same person made the following comments:

Mr. Barreto was expecting to receive a garnishee against his wages. The attached record verifies that his wages was indeed garnished for one pay-period. Due to this fact, Mr. Barreto informed us that he wishes to terminate his employment. However, he asked the production manager to indicate "lay off" on his records of employment so he could collect EI payment.

In the appeal, M. Movassaghi, the General Manager for Gasmaster, includes the statement that Barreto's position "was filled almost immediately" and that he asked for a lay off letter because "it would be difficult for him to find another employment if he had to tell his potential employer he had quit his job".

Barreto has filed no reply to the appeal.

The Director has replied to the appeal. In the reply, the Director has supplemented the information set out in the Determination with an undated letter from Gasmaster over the signature of Mrs. Zemianski indicating the Barreto was employed by Gasmaster and had been laid off due to a shortage of work and a letter from the Director dated August 28, 2002 outlining the Director's findings on Barreto's complaint. The latter document included the Director's conclusion that Barreto had been laid off due to a shortage of work and was entitled to length of service compensation. The submission of the Director indicates that Gasmaster filed no response to that letter notwithstanding the letter advised that if there was any

additional information, it should be provided before September 6, 2002. The Director says there was no evidence to support the assertion made by Gasmaster that Barreto had quit his employment.

I find Gasmaster has failed to meet the burden of showing there was an error in the Determination. Gasmaster is simply re-arguing a position that was taken during the investigation. That position was considered by the Director and rejected. No good reason has been provided why I should accept it on appeal. I also agree with the Director that all of the objective evidence supports Barreto's claim that he was laid off due to a shortage of work and not called back.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 19, 2002 be confirmed in the amount of \$2,690.00, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal