

An appeal

- by -

Glen Brian Creer operating as G.C.'s Door Express
("Door Express")

- 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

TRIBUNAL MEMBER: Ian Lawson

FILE No.: 2004A/197

DATE OF DECISION: January 27, 2005

DECISION

SUBMISSIONS

Ivy Hallam	On behalf of the Director
Glen Brian Creer	On behalf of Door Express

OVERVIEW

This is an appeal by Glen Brian Creer operating as Door Express ("Door Express") pursuant to section 112 of the *Act*. The appeal is from Determination ER#122637 issued by Ivy Hallam, a delegate of the Director of Employment Standards, on October 5, 2004. The Determination required Door Express to pay wages, compensation for length of service, statutory holiday pay, vacation pay and interest to Lee Fisher ("Fisher") in the total amount of \$2,093.91, together with administrative penalties in the amount of \$1,500.00.

Door Express filed an appeal on November 12, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Door Express is a door manufacturer in Richmond, B.C., and employed Lee Fisher in the area of production control between July 18, 2002 and November 7, 2003. Fisher was dismissed as a result of an allegation of theft of doors belonging to Door Express. Fisher filed a complaint with the Director that he had not been paid wages for his last week of employment, that he was owed statutory holiday pay and vacation pay, and that he was owed compensation for length of service on account of wrongful dismissal. The Director elected to conduct a complaint hearing, which was done by the delegate on June 16, 2004.

At the hearing, Door Express did not dispute the amount of wages and vacation pay Fisher alleged was owing to him. Door Express argued that it did not have to pay these wages because Fisher had stolen from the business and was dismissed for cause as a result. Door Express alleged Fisher participated in a theft of three doors with another employee. The delegate found that Fisher was not afforded an opportunity to respond to this allegation, and the investigation carried out by Door Express had been faulty. In particular, the delegate stated the following in her Determination:

Evidence before me does not convince me that the theft occurred, and Fisher was responsible for stealing the doors. Both Fisher and John Moody readily admitted that they were going to talk with Creer when they were questioned regarding the removal of the doors from the premises. However, they were not given a chance to speak with Creer or to talk with Kingsley Lee, the crucial person to give evidence at the hearing, who was not present at the hearing. I do not accept that it was an admission of guilt on the part of Fisher when Fisher did not respond to Creer's question on any outstanding issues that needed to be discussed and therefore it was just cause for dismissal. I find it puzzling that Creer did not investigate any further. Fisher and John Moody were not allowed to tell their side of the story and to confront Kingsley Lee at the meeting. They were told to leave the premises immediately. If I had Kingsley Lee's evidence, I might have considered this issue differently, but I have no evidence from Kingsley Lee.

It appears Fisher's involvement in the alleged theft was as an accessory, as the doors ended up with another employee. The evidence of Kingsley Lee does indeed appear important, because that other employee said Kingsley Lee gave him permission to take the doors in question.

In its Notice of Appeal, Door Express alleges the Director failed to observe the principles of natural justice in making the Determination. Door Express identifies the following as issues, which I set out *verbatim* from its Notice of Appeal:

Glen Creer the owner of Door Express did not force the R.C.M.P. to charge Lee Fisher with theft and obtain a conviction because we felt that spending our time, the police time, court time and having Lee convicted of a criminal offence was not in the best interest of our company or the public or Lee Fisher. It appears this conviction would have been the only evidence satisfactory to the director even though Fisher admitted to driving the vehicle in which the stolen goods taken.

Everyone human being makes mistakes, but if this means the perpetrator is to be compensated for his damage to our company there is something seriously wrong with the system.

If the determination made by the employment standards director stands I would have no choice but to ask the R.C.M.P. to proceed with criminal charges for any and all thefts in the future no matter how small.

Due to my wishes to make everyone's life easier I have been screwed to put it bluntly.

Are all employers in the province aware that if an employee is fired due to theft a conviction must be obtained?

It would be virtually impossible to fire an employee for theft because you could not obtain a conviction the same day the theft occurred. An employer would have to keep the employee on payroll until a conviction was obtained. How reasonable would this be?

Door Express has filed no other submission in support of its appeal.

ISSUE

Whether a breach of the principles of natural justice has occurred.

ANALYSIS

Appeals to this Tribunal are not conducted "on the record" of proceedings before the Director because there is not usually a complete record of what happened before the Director. In particular, when a complaint hearing is held, no record at all is kept of what was said at that hearing. On the other hand, this Tribunal has held since its creation that appeals before it are not re-hearings of the matters before the Director (*Re World Project Management Inc.*, BC EST#D134/97). To re-hear every complaint would be contrary to section 2(d) of the *Act*, which states one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions. As a

result, appellants before this Tribunal bear the “risk of non-persuasion” and must first demonstrate there was some error or unfairness in the Determination on at least a *prima facie* or threshold basis in order to move the Tribunal to decide whether to exercise its authority under section 115 of the *Act* to vary or cancel the Determination. If an appellant fails to persuade the Tribunal at the threshold level that an error or unfairness has occurred, the Tribunal will not proceed to review the Determination under section 115.

Door Express identified a breach of the principles of natural justice as the issue on this appeal, but I find it has not provided any proof that such breach occurred, even on a threshold level. There does not appear to have been any unfairness in how the Director conducted the complaint hearing (or at least, Door Express does not identify any such problem). It seems to me Door Express disagrees with the result of the hearing, on the basis that no employer could successfully dismiss an employee for theft if employers were required to first ensure police had charged the employee and then ensure a conviction took place in court. As Door Express points out, it would be virtually impossible to dismiss for theft if employers were so required.

Fortunately, employers bear no such burden in order to dismiss an employee for theft. Theft usually goes to the heart of the employment relationship and the ensuing loss of trust is a fundamental breach of that relationship. It is not necessary that police be involved at all in order to dismiss for theft. The mechanics of dismissing an employee for theft are no different from those involved in dismissing an employee for insubordination or incompetence: the employer bears the burden of proving the employee’s actions amounted to a fundamental breach of the employment relationship which justifies dismissal. In any dismissal, the employer’s decision is subject to review by way of a complaint under the *Act* or an action in court for wrongful dismissal. If the employer fails to persuade the reviewing body that the employee’s actions justified dismissal, the employer will likely be liable to compensate the employee for this error.

In this case, Door Express decided Fisher had committed theft and dismissed him. When the Director received Fisher’s complaint and a delegate reviewed it at the complaint hearing, the delegate found there was not sufficient proof that a theft had actually occurred. In presenting its appeal from that decision, Door Express has failed to identify anything that could be described as an unfairness in the Director’s proceedings. I have also considered whether the delegate made any error of law in deciding the matter, and I can see no error. The delegate set out the test as follows:

In order for an employer to justify termination due to one incident, the employer must show the incident is so severe that it ruptures the working relationship between the employer and employee irrevocably. Theft is usually one of those incidents that has irrevocably broken the working relationship. In this case, Creer has to prove the theft occurred, and Fisher had stolen the doors.

While the delegate did make extended reference to the fact Fisher had not been charged, I do not find she strayed from the proper legal test for deciding whether a dismissal was justified: the issue is whether Door Express had proven the theft occurred and Fisher’s dismissal was justified. I cannot conclude the delegate believed the lack of police involvement amounted to lack of proof of the theft. The delegate found a key piece in the puzzle was missing, which was evidence from one of Door Express’s own employees who apparently had given permission to take the doors in question. The delegate therefore made no error in finding Door Express failed to meet the burden of proof resting upon it. I also conclude Door Express has failed to identify any unfairness or error in the Determination at even a threshold level, and so the appeal must be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER#122637 issued on October 5, 2004 is confirmed, with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal