

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

E.V. Towmasters Services Ltd.

(“Towmasters”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/590

DATE OF HEARING: January 10th, 1997

DATE OF DECISION: January 20th, 1997

DECISION

APPEARANCES

Dennis Vollans and
Pat Everett for E.V. Towmasters Services Ltd.

Steven L. Churchill on his own behalf

Steve Mattoo for the Director of Employment Standards

OVERVIEW

This is an appeal brought by E.V. Towmasters Services Ltd. (“Towmasters”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004080 (the “Determination”) issued by the Director of Employment Standards (the “Director”) on September 24th, 1996. The Director determined that Towmasters owed its former employee, Steven L. Churchill (“Churchill”), the sum of \$706.58 on account of one weeks’ wages (including vacation pay and interest) as compensation for length of service pursuant to section 63(1) of the *Act*.

Towmasters asserts that it was not obliged to pay Churchill any termination pay because it had just cause to terminate him [see section 63(3)(c) of the *Act*]. In particular, Towmasters says that Churchill’s employment as a towtruck driver was terminated (without termination pay or notice), after having been on the job for about five months, because of poor job performance.

The appeal hearing in this matter was held at Surrey, B.C. on January 10th, 1997 at which time I heard evidence from Mr. Dennis Vollans (“Vollans”) and Ms. Pat Everett (“Everett”), both of whom are officers, directors and shareholders of Towmasters, on behalf of Towmasters and from Churchill. Mr. Mattoo, on behalf of the Director, did not present any evidence although he did make a final submission in support of the Determination.

ISSUE TO BE DECIDED

Did Towmasters have just cause to terminate Churchill?

FACTS

Churchill commenced his employment with Towmasters as a towtruck driver on or about August 26th, 1995; his employment was terminated on January 30th, 1996. Towmasters' position is that Churchill was not a careful and prudent driver and, accordingly, was terminated for cause. In particular, Towmasters says that:

- Churchill was at fault in a two-vehicle motor vehicle accident that occurred on or about September 5th, 1995;
- Churchill was at fault in another single vehicle accident on November 30th, 1995;
- Churchill's poor driving was the cause of an early clutch failure on a truck that he had been driving;
- Churchill, contrary to company policy, improperly used a "j-hook" in the course of his duties (the employer also says that the improper use of this "j-hook" could have been a factor in the clutch failure); and
- on January 30th, 1996 Churchill's truck had a defective brake light and was taken off the road by Highways officials when the truck stopped at a weigh station. Towmasters says that the defective light should have been noted and corrected as part of the normal pre-trip inspection procedure. The clutch failure and this last event were the precipitating factors in Churchill's termination--according to Vollans, they constituted Churchill's "third strike".

Churchill's evidence, not surprisingly, differs somewhat from that tendered by Towmasters. Churchill admits his fault for the first accident (although he says wet road conditions were a contributing factor) and agreed to take, at his own expense and as requested by his employer, a defensive driving course. He successfully completed this course in November 1995.

Churchill says that he does not recall the November 30th accident and that the clutch failure cannot be attributed to his poor driving, particularly when he had

only been driving the truck in question, according to the employer's own evidence, about five weeks when the clutch failed (after about 39,000 km). Churchill says that he never improperly used a "j-hook" and that this particular piece of equipment was also used by other drivers. As for the defective brake light, Churchill says that it may have failed while he was driving the truck; he does not recall it being defective when he conducted his pre-trip inspection.

There are some points that are not in dispute between the parties, namely:

- Churchill was hired on the basis of a three month probationary period which he successfully completed;
- Churchill received regular increases in his gross commission percentage (from 30% on hiring to 34% at the time of termination);
- No written warnings were ever issued to Churchill regarding his job performance nor did he ever receive any formal performance appraisal;
- Churchill did not receive any notice of discharge or termination pay upon discharge.

ANALYSIS

In this case, Churchill was terminated for alleged poor work performance. Although some evidence was tendered at the hearing regarding Churchill's "attitude", I am satisfied that this is not a case about insubordination, nor was it argued as such. Accordingly, in order for Towmasters to show that it had just cause to discharge Churchill, it must prove that:

1. Churchill was made aware of the objective standard of performance to which he would be held;
2. In the event that Churchill failed to meet this standard, Towmasters made reasonable efforts to assist (by training or otherwise) Churchill to achieve the appropriate performance standard;

3. Despite Towmasters' reasonable efforts to assist Churchill, he nonetheless continued to fall below a minimally acceptable standard of performance; and

4. Churchill was specifically told that his continued failure to perform would result in dismissal.

I am satisfied that Towmasters, through a five-page "Position Description" that was provided to Churchill at the outset of his employment, met the first criterion set out above. As will be seen, I do not accept that Towmasters satisfied the other three points.

There is no evidence of any training being given to Churchill; indeed, Churchill was hired on the basis that he was an experienced driver and thus would not need extensive training. Following the September 5th, 1995 accident, Churchill was directed to take a driver training course which he successfully completed on his own time and at his own expense. I would note that Churchill was not disciplined following this accident and, although he denies the subsequent November 30th incident (and the evidence corroborating this incident is, at best, ambiguous), there is no record of any disciplinary or corrective action having been taken following that incident.

The evidence before me is that Churchill responded to between 160 and 180 service calls per month. There is no credible evidence, other than the evidence regarding the September 5th accident, that Churchill's performance was anything other than satisfactory. It would appear that Towmasters was generally satisfied with Churchill's performance, otherwise, how can one account for the fact that Churchill successfully completed his three month probationary period and received regular percentage increases in his gross commission allowance? At no time was Churchill told that his job performance was such that his continued employment was at risk.

The event that precipitated Churchill's dismissal, according to Vollans, was the clutch failure on truck no. 12. However, given the comparatively short period of time that Churchill was driving the truck in question, I cannot accept, on a balance of probabilities, that Churchill was solely, or even primarily, responsible for the problem.

As for the defective brake light, the employer's evidence is ambiguous--the defective light may have been missed in the pre-trip inspection (even if that was

true, this is hardly the sort of thing that justifies termination without notice or severance pay in lieu thereof) or it may have burned out during the day.

In summary, I am not satisfied that Towmasters has shown that Churchill's performance was sufficiently poor that it justified termination. In any event, even if there were some performance deficiencies, I do not see that Towmasters has met the second, third and fourth criteria set out above.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004080 be confirmed as issued in the amount of \$706.58 together with whatever further interest may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal