

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Martin B. Oram
("Oram")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/767

DATE OF HEARING: January 16, 1998

DATE OF DECISION: February 11, 1998

DECISION

APPEARANCES

Martin B. Oram	On his Own Behalf
Amir-Omidvar	Owner of Accurate Import Auto
Kamran-Pashandi	Witness

OVERVIEW

The appeal is by Martin B. Oram pursuant to section 112 of the *Employment Standards Act* (the “Act”). Appealed is a Determination by a delegate of the Director of Employment Standards (the “Director”) dated October 3, 1997. The Determination is that Accurate Import Auto Ltd. (“Accurate”) does not owe compensation for length of service as it had just cause in terminating Oram.

ISSUE TO BE DECIDED

The sole issue is whether or not Accurate had just cause to terminate Oram for reason of theft. If it did not then Oram is owed compensation for length of service.

FACTS

Oram worked as an automotive mechanic for Accurate Import Auto until his termination on April 3, 1997. On that day he was dismissed by Amir-Omidvar, Accurate’s owner.

On terminating Oram, Amir-Omidvar told him to pack up his things and, according to the parties, he either said “I cannot afford you any more” or “I cannot afford people like you any more”. According to Oram, he was left with the impression that he was being terminated because the shop was not earning enough to employ him at his rate of pay. Oram knew, however, that Amir-Omidvar had that day found an air filter within his backpack. And Amir-Omidvar, on telling him to pack up his things and go, had locked him out of the shop and refused to speak with him further. There was no friendly parting of the ways. And by that evening Oram had at least come to suspect, if not completely understand, that he stood accused of theft. He conveyed that to Kamran-Pashandi on calling him at home that evening with the news that he had been terminated.

Oram says that Amir-Omidvar is wrong in thinking that he was going to take the air filter without paying. It was common practice that he would order parts for personal use through the company and then reimburse the company for them. And according to Oram, he fully

intended to pay for the air filter, indeed he says that he left a note to that effect. Amir-Omidvar says that no one found any note, just the air filter hidden in Oram's pack. And he makes it clear that he had for some time suspected Oram of stealing tools and parts from Accurate. He says that it was only on hiring Oram that things started to go missing.

Oram produces a note which is dated April 3, 1997. There is reference to a part number and an air filter and at the bottom of the note are the words, "Charge to Martin".

There is no hard evidence that Oram left the note as alleged. The evidence is that he never attempted to draw Amir-Omidvar's attention to the note. The delegate makes no mention of the note.

Oram was denied employment insurance on being terminated, ultimately because his appeal was dismissed through a decision of the Board of Referees of Employment and Immigration Canada. I am presented with records pertaining to his claim. They show that Oram argued that he fully intended to pay for the air filter. Oram, himself, makes that point in letters dated May 21, 1997, June 9, 1997, and June 24, 1997. In those letters there is no mention of the note. No other record makes mention of the note.

Oram's mid-October appeal to this Tribunal does refer to the alleged note. Oram says that the office worker was on the telephone and so he left his note "stuck to the service counter". According to Oram, on being terminated at the end of the day, he was told to return the air filter, pack up his things and go and that, on doing that, he picked up his note. And according to Oram, while he picked up the note he put it with other belongings which he then forgot to take with him.

It is the testimony of Oram that it was only on applying for unemployment insurance that it became clear to him that he stood accused of theft. He maintains that the real reason behind his termination is his rate of pay at a time of financial difficulty for Accurate.

ANALYSIS

Section 63 of the *Act* sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. The liability for compensation for length of service can be discharged as set out in section 63 (3). That section of the *Act* is as follows:

- (3) *The liability is deemed to be discharged if the employee*
 - (a) *is given written notice of termination as follows:*
 - (i) *one week's notice after 3 consecutive months of employment;*
 - (ii) *2 weeks' notice after 12 consecutive months of employment;*
 - (iii) *3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*

- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
- (c) terminates the employment, retires from employment, or is dismissed for just cause.*

A single act may be of such a serious nature that it justifies termination. As may less serious misconduct when repeated, or the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

The Determination is that Accurate had just cause for reason of a single act of theft. That Oram had taken an air filter and placed it within his backpack is an uncontested fact. But if Oram intended to pay for the air filter, then clearly Accurate is without just cause. Much turns on the note allegedly left by Oram on the 3rd.

The note is such that it could have been written at any time. Absent any hard evidence that the note was left as alleged, I must determine what is probably the case. To that end, I have considered what both Amir-Omidvar and Oram have had to say against the established facts. I find that Amir-Omidvar's explanation of matters is entirely credible while Oram's account is inconsistent and unlikely.

According to Oram, it was his understanding that he was terminated because Accurate had cash flow problems. And, he says, on being terminated, told to return the air filter, and told to pick up his things and go, he picked his note off the counter, still there hours later, put it with other belongings, and then promptly forgot to take everything with him. It is unlikely that the note would have still been there hours later. It is unlikely that he would save the note given what is said to have been understood to be the reason for termination. And if he did put it with other belongings, it is unlikely that he would promptly leave all behind.

Oram would have me believe that it was only on claiming unemployment insurance that he learned that Accurate was accusing him of theft. But that is contrary to the facts as they are presented to me. Oram told Kamran-Pashandi on the evening of the 3rd that he thought that his discharge might well have stemmed from Amir-Omidvar's discovery of the air filter in his bag. And it is also contrary to my assessment of what happened on the 3rd. Amir-Omidvar demonstrates to me that, while he does not always choose the most appropriate English phrase, he is quite able to make himself understood. When I consider that, along with the fact that on terminating Oram, he locked him out of his shop and would not speak with him, I am led to conclude that Oram knew full well, on being terminated, what he was fired for, namely, what Accurate saw as a clear attempt to steal an air filter.

Knowing or merely suspecting that he stood accused of theft, Oram made no attempt to draw Accurate's attention to his note. Yet he would have wanted to show that he fully planned to pay for the air filter. To set matters straight was in his interest, if not for the sake of his job, at least for job reference and other purposes. The logical, natural thing for him to do was to draw attention to the note as it would have absolved him of that which he stood accused, especially since, according to Oram, the note was in Accurate's possession. Oram did not do that, not at the point of termination, nor in the days that followed, and he has no explanation for it.

Oram applied for unemployment insurance and wrote letters in that regard. In none of them does he mention the note, even though, again, that was the logical, natural thing for him to do given its importance. And neither the delegate, nor the authorities which handled his unemployment insurance claim, refer to the note. I consider it likely that, had the attention of those offices been drawn to the note, I would see reference to it, given the importance of it. That absence of any reference to it leads me to conclude that Oram made no mention of his note.

Oram failed to draw attention to his note even though it was of vital importance to setting matters straight with Accurate, to his claim for unemployment insurance and to his complaint under the *Act*. As matters are presented to me, the note surfaces on appeal and nothing points to its existence prior to this appeal. All considered, I conclude, on the balance of probabilities, that the note did not exist as alleged on the 3rd.

Oram's explanation of matters is not credible. I am unable to accept him on the key point of the note, indeed I find that I am unable to believe much of what he says. The result is that I find myself quite unable to accept Oram on his claim that he planned to pay for the air filter found in his pack. I am satisfied that Accurate had just cause. There was a fundamental breaching of the employment contract. The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 3, 1997 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc