

An appeal

- by -

Brooks Wetsuits Ltd.  
("Brooks" or "Employer")

- 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:** Paul E. Love

**FILE No.:** 2001/812

**DATE OF DECISION:** January 24, 2002

## DECISION

### OVERVIEW

This is an appeal by an employer, Brooks Wetsuits Ltd. (“Employer”), from a Determination dated November 1, 2001 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”), concerning Abbas Khan-Mohammad. Mr. Khan-Mohammad suffered a work place injury, and was on a graduated return to work program, with the Employer, and wage indemnity was paid to Mr. Khan-Mohammad by the Workers’ Compensation Board. Because of the Employee’s absences from the workplace, lack of cooperation with the WCB therapist, and work place comments, the Employer ceased its involvement with the graduated return to work, and issued records of employment to Khan-Mohammad. At the time the Employer withdrew Mr. Khan-Mohammad from the graduated return to work program, Mr. Khan-Mohammad was an employee, and he was not permanently disabled. While the Employer had concerns with attendance and the Employee’s attitude, the Employer did not have just cause to dismiss Mr. Khan-Mohammad. I therefore confirmed the Determination.

### ISSUE:

Did the Delegate err in determining that Abbas Khan-Mohammad was entitled to compensation for length of service?

### FACTS

I decided this case after considering the written submission of Brooks Wetsuits Ltd. (the “Employer”) and Abbas Khan-Mohammad. Mr. Khan-Mohammad was employed as a sewer with Brooks Wetsuits Ltd. between February 2000 and May 1, 2001. Mr. Khan-Mohammad was terminated by the Employer on May 2, 2001.

On December 7, 2000 Mr. Khan-Mohammad was injured at work.. His injury was accepted by the Workers’ Compensation Board (“WCB”) for left-sided rotator cuff tendinitis, wrist/thumb tendinitis and lateral epicondylitis. He received WCB benefits. At the time of his termination, he was on a graduated return to work program. He was on modified duties and was paid by the WCB.

It is apparent from the material provided to me that while he suffered from his injuries, Mr. Khan-Mohammad was not permanently disabled from employment at the time of termination. A letter dated July 27, 2001 from Mr. Khan-Mohammad's WCB case manager, Zen Kozak indicates that:

As the evidence before me is that you have not sustained any permanent injury under this claim, but rather you have recovered from your compensable injuries, I will therefore not refer this claim to either Vocational Rehabilitation Services or the Disability Awards Department.

The report further summarized that there were no objective findings supporting any continued disability, but Mr. Khan-Mohammad had subjective complaints of pain.

At the time of termination Mr. Khan-Mohammad had been absent from work on April 27, 30, 2001 without leave. He absented himself from the workplace at noon on May 1, 2001. He showed up at the workplace on May 2, 2001 at 1:45 pm, after reporting at 8:00 am that he would not be at work that day because of a headache. During the three weeks of attendance at the workplace on a graduated work program, the Employer received numerous complaints from co-workers regarding Mr. Khan-Mohammad's conduct. The Employer terminated him on or about May 2, 2001.

The Employer issued a record of employment dated May 10, 2001 which noted that Mr. Khan-Mohammad was not returning to work, and in the comments indicated that:

The employee was on WCB (may still be) and recently returned to work on a WCB re-entry program. We did not pay for the days worked as per WCB instructions. It was decided that the employee could not return to work in the capacity required WCB was notified.

The Employer issued a correcting record of employment dated May 25, 2001 which indicated that the date of expected recall was unknown, and in the comments indicated that:

Employee went on a WCB claim in November 2000 and has still not returned to work.

The Delegate found that the Employer did not have cause to terminate Mr. Khan-Mohammad. The Delegate found that the Employer was obliged to pay Khan-Mohammad compensation for length of service for 1 week, plus vacation pay on this entitlement and interest pursuant to s. 88 of the *Act*. The amount found to be due and owing was \$600.74. This calculation was based on a 40 hour work week and an hourly rate of \$14.00 per hour.

**Employer's Argument:**

The Employer alleges errors of fact with regard to revisions made to a record of employment issued to Mr. Khan-Mohammad. The original record of employment issued on May 10, 2001 and corrected on May 25, 2001 contained errors. The Employer argues that it was confused as to the status of Mr. Khan-Mohammad, and that is why they erred in the completion of the record of employment. The Employee was on workers compensation and paid by WCB at the time of the termination. These errors made by the Employer are not germane to any findings of the Delegate. The failure of the Delegate to refer to the corrected record of employment, cannot be said to have affected the Delegate's decision with regard to entitlement or quantum of the compensation for length of service.

The Employer argues that Mr. Khan's absences from the work place was extremely disruptive. The Employer says that Mr. Khan-Mohammad failed to cooperate with the WCB therapists, failed to report to the WCB, and was disruptive in the work place as a result of comments he made. The Employer says that it thought it had made it clear to Mr. Khan-Mohammad the consequences of missing work, without prior to notice. The Employer concedes that at no time did it give Mr. Khan-Mohammad any written warnings.

**Employee's Argument:**

Mr. Khan-Mohammad claims that he had a reasonable excuse for absences on April 31, 2001 (car broke down during bus strike), May 1, 2001 (permission from employer due to pain), May 2, 2001 (absence due to pain).

I note that the Delegate did not make any findings of fact concerning the legitimacy of the excuses offered by Mr. Khan-Mohammad for his absences. It is not necessary for me to consider those excuses, in light of my disposition of this case. The Delegate found that Mr. Khan-Mohammad was "apparently a difficult employee and disruptive in the workplace".

**ANALYSIS**

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination. The Delegate found that the Employer sincerely believed that it had just cause for the termination of Mr. Khan-Mohammad.

In my view, it is apparent that the Employer misunderstands its legal position with regard to the status of an employee on WCB, and the requirement of the Employer to show just cause for terminating an employee, particularly a progressive discipline approach to employee absenteeism, and misconduct falling short of serious misconduct.

The fact that Mr. Khan-Mohammad was on WCB and received WCB benefits for a temporary disability, did not effect a termination of the employment relationship. Mr. Khan-Mohammad retained his status as an employee despite his WCB injury, and despite his status on the graduated return to work program. Prior to May 2, 2001 when the Employer terminated its involvement in the graduated return to work program, Mr. Khan-Mohammad had not resigned his position with the Employer.

In certain circumstances an Employer may terminate an Employee, without paying compensation for length of service, if an employee is incapable of working. This is set out in s. 66 of the *Act* which reads as follows:

If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

In the case of a longstanding permanent disability, the Delegate may determine that the employment of the employee has been terminated: *Khan, BCEST #D067/01*. In such a case, the Delegate may determine that a condition of employment (the obligation of the employee to provide labour in return for wages) has been altered such that the employment has been terminated. The medical evidence in this case does not establish that Mr. Khan-Mohammad was permanently disabled, and therefore the employer cannot take advantage of s. 66 of the *Act*. I note that the s. 66 did not form any part of the Delegate's analysis, but it was not necessary for the Delegate to analyze this point as it is quite apparent that Mr. Khan-Mohammad was not sufficiently disabled for an employer to seriously argue a substantial alteration of the terms of employment.

Mr. Khan-Mohammad worked for this employer for a sufficient length of time to be entitled to compensation for length of service. The fact that he was on a WCB claim, and on a graduated return to work status at the time of his termination did not alter the fact that he remained an employee of the Employer.

An Employer who terminates an Employee must give reasonable notice or failing reasonable notice must pay compensation for length of service. The Employer did not provide notice to discharge its liability under s. 65 of the *Act*. In order to avoid paying compensation for length of service, the Employer must establish just cause. An Employer who is able to establish cause for dismissal is not required to pay compensation for length of service.

The Delegate determined that the Employer had not established just cause, as the Employer had not demonstrated to the Delegate that it had applied a progressive discipline approach in its dealings with the Employee. I accept that the Employer has established some degree of employee misconduct. The Employee appears to have been "difficult and disruptive" in the workplace. It is up to the Employer, however to discipline an employee. Where the Employee files a complaint, the Employer must be in a position to demonstrate that it had just cause to dismiss the Employee. In certain very serious situations, such as theft or fraud, one incident of misconduct will be sufficient for the Employer to show just cause. This case involves Employer

allegations of excessive absenteeism and misconduct of a less serious nature. In cases involving less serious misconduct, the Employer must set the standard for behaviour in the workplace, communicate that standard to the employee, warn the employee that the conduct falls short of the standard, and give the employee an opportunity to correct the deficient conduct prior to terminating the employee. Excessive absenteeism can form just cause for a dismissal, but again the Employer is required to set the standard, communicate the standard to the Employee, and warn the Employee that repeated absences could result in dismissal. It is clear that the Employee's attitude and attendance caused the Employer to decline to participate further in the graduated return to work program, however, the Employer has not established cause for dismissal.

For all the above reasons I dismiss this appeal.

### **ORDER**

Pursuant to s. 115 of the *Act* I order that the Determination dated November 1, 2001 is confirmed, with interest in accordance with s. 88 of the *Act*.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**