

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 -

Claude Guindon
("Guindon")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul Love

FILE NO.: 97/831

DATE OF HEARING: January 27, 1998

DATE OF DECISION: February 3, 1998

DECISION

APPEARANCES

Claude Guindon on his own behalf

Greg Prinz on behalf of Triangle Towing

OVERVIEW

This is an appeal by Claude Guindon from a Determination of the Director dated October 23, 1997 which determined that Mr. Guindon quit his employment with Triangle Towing Ltd. ("Triangle"). After hearing from the witnesses for the employee, Claude Guindon , Christina Johnson, and John Walsh and witnesses for the employer, Greg Prinz, Alan Moore and Pam Findlay, and reviewing the documents contained within the appeal file and documents filed at the hearing, I decided that the Director did not err in the decision made. This case rests on the credibility of witnesses, and I preferred the evidence of Triangle Towing Ltd.

ISSUE TO BE DECIDED

Did Claude Guindon quit his employment or was he terminated without cause ?

FACTS

Claude Guindon was employed as a tow truck driver, with Triangle in Duncan, B.C. from August 20, 1996 to February 22, 1997. Mr. Guindon was a difficult employee, who was stubborn, easily frustrated, and did not take direction from his employer, and more senior employees well. This was the evidence of Greg Prinz ("Prinz"), the principal of Triangle. This was confirmed through the evidence of John Walsh, a former employee, and a witness called by Mr. Guindon. Mr. Guindon, and the other tow truck drivers were employed on a commission basis and paid 35 % of the fees. Mr. Guindon was warned by Mr. Prinz concerning his poor attitude, and his failure to share call outs with the other drivers. He was also warned about speeding when driving Triangle's tow truck.

Shortly before February 22, 1997, Mr. Guindon attended a call at the curling club for a person who was locked out of his vehicle. While attending that call, Mr. Guindon became aware of a motor vehicle collision nearby, and left that customer to assist the RCMP, without completing that duty and without being called by the RCMP. He completed the RCMP call and returned to the curling rink and completed the "lockout". At no time did he request Doug Shields to assist, although Doug Shields was also working and standing by

for calls. Doug Shields confronted Mr. Guindon about this and told him that he "fucked up" and reported this to the dispatcher, Pam Findlay. Ms. Findlay is also the common-law wife or girl friend of Mr. Prinz. Ms. Findlay advised Mr. Prinz about this matter, and he requested Mr. Guindon by telephone to attend at the office for a meeting.

On February 22, 1997 Mr. Guindon drove a tow truck to the office, and his common law – wife, Christina Johnston, also attended at the office driving her own vehicle. When Mr. Guindon entered the office he commenced yelling, and slammed his briefcase down on a chair. Mr. Guindon told Mr. Prinz to take this fucking job and shove it. He threw his keys and other company property down, and left with Christina Johnson in her vehicle.

At the time of Mr. Guindon's entry into the office Mr. Prinz was talking to Findlay on the telephone. Findlay verified that she heard a loud noise, and heard Mr. Guindon yelling. She recognized Mr. Guindon's voice due to a pronounced lisp. Findlay's 10 year old daughter was present during the altercation and traumatized by Mr. Guindon's behavior. Mr. Guindon agrees that Findlay telephoned him after the incident about his conduct, but disagrees with the contents of the conversation alleged by Findlay. Findlay testified and I accept her evidence that on three occasions during the conversation Mr. Guindon said that he couldn't take it any more so he quit.

Ms. Findlay endorsed on the dispatcher's log for February 22, 1997 a note relating to the fact that Mr. Guindon quit, on or about the date of his resignation. She did this on the basis of information related to her by Mr. Prinz and her conversation with Mr. Guindon on the date following his resignation. She also testified that this was her general practice, and a copy of the dispatcher's log for January 7, 1997 was filed showing that another employee had quit.

The Director's delegate heard from all the witnesses and came to the Determination that he was not satisfied on a balance of probabilities that Mr. Guindon had been terminated.

ANALYSIS

In this case the burden is on the employee to demonstrate an error in the Determination or a reason for me to vary or rescind the Determination. Neither the written submissions prepared by Mr. Guindon, nor his oral testimony identifies any gaps or errors made in the investigation by the Director's delegate. It is clear that Mr. Guindon does not accept the findings of fact made by the Director's delegate in this case.

In this case there were two different stories. Mr. Guindon says it was Mr. Prinz that was doing the yelling and that he was fired over the incident relating to the curling club and RCMP call out. His common-law wife, Christina Johnson testified confirming his story. I do not accept their evidence, as it was neither trustworthy nor credible. Mr. Guindon gave his evidence throughout the hearing in a most unfair, ranting, and at times theatrical manner. Mr. Guindon spent most of his testimony attempting to attack in a general way the credibility of Mr. Prinz, starting with an allegation that Mr. Prinz had interfered with a

witness he intended to call, suggesting that Mr. Prinz had forged or altered records filed with the Tribunal. His common law wife appeared nervous when I asked her some questions concerning the "termination meeting".

I found it unusual that Christina Thompson would accompany Mr. Guindon to the office on a Saturday. I do not accept her explanation or Mr. Guindon's explanation that they thought that Mr. Prinz was going to fire Mr. Guindon and that is why she accompanied Mr. Guindon to the office. Mr. Prinz had dropped into the office that day briefly with Ms. Findlay's daughter, while on a drive to Duncan to look at real estate. It is clear from the words uttered by Mr. Prinz that he wished to investigate the issue concerning the curling club and RCMP, as he was concerned that the appropriate customer relations approach was not followed, and that Mr. Guindon was yet again not sharing the calls with other commissioned employees. Mr. Prinz testified that Mr. Guindon's common-law wife and Mr. Guindon drove away in her vehicle. This is consistent with a pre-arranged plan and an intention to quit.

I note that Doug Shields was present during the termination interview, and he confirmed Mr. Prinz's version to Mr. R.A. Stea, the Director's delegate. It might have been helpful for me to hear from Doug Shields, but I draw no adverse inference in this case from his non-attendance. It appears he is a former employee of Triangle.

It is clear from the evidence of Mr. Prinz that he found Mr. Guindon to be a most unsatisfactory employee and he would have terminated Mr. Guindon, during an up and coming slow down period had Mr. Guindon not quit. Mr. Guindon on the other hand felt that he was a dedicated employee. As notice or compensation for lack of notice turns on whether an employee was dismissed, without "just cause". No compensation or notice is payable if an employee quits. It is not necessary for me to determine in this case whether there was "just cause", because it is clear that Mr. Guindon quit his employment. There is therefore no compensation payable by Triangle to Mr. Mr. Guindon.

Procedural Rulings

Before leaving this case I make comments on procedural matters raised by Mr. Guindon during the hearing. I indicated to the parties that I would give reasons on these points.

Allegation of Witness Tampering:

At the outset of this hearing Mr. Guindon alleged that Prinz had attempted to tamper with a witness and Mr. Guindon produced his notes of the points he discussed with the witness, and also a typewritten statement which the witness was asked but refused to sign. Mr. Guindon, in my view exaggerated and overstated the true facts concerning Mr. Prinz's dealings with the witness, and from his own evidence there is no basis for me to find any tampering. I do not accept that Mr. Prinz was involved in witness tampering. I accept Mr. Prinz's version that the witness was a personal friend of his, who did not wish to be

involved in the matter. I marked the handwritten and typed notes as Exhibits "1" and "2" for identification, respectively, but I did not review these notes in the course of making this decision. These notes were clearly hearsay, and there is no basis for assuming that there is any reliability.

Request for Adjournment

Mr. Guindon also asked that I adjourn the hearing so that he could produce further evidence. He wished to obtain subpoenas to compel the attendance of a RCMP officer, Jean Wilcox a clerical supervisor at ICBC and Ron Wiebe a former employee. Mr. Prinz opposed the application for the adjournment. It is apparent from his submissions that the evidence was related to the "general credibility" of Mr. Prinz, and did not relate in any way to the issue of whether there was a resignation or termination. Mr. Guindon did not give any advance notice of this application to the Tribunal or to Mr. Prinz. I denied the adjournment on the basis that no advance notice was given, that the hearing had been set for some time, and that the information he sought to produce did not relate the issue in this appeal.

Additional Documents

At the hearing Mr. Guindon referred to documents which I did not have. Apparently he subsequently phoned the Tribunal office, and these documents which were filed by him before the hearing, were faxed to me. I have considered these documents. A letter of January 18, 1998 requested the Tribunal to obtain the dispatch records of Triangle, and obtain RCMP records. In my view these documents would not assist in proving or disproving whether Mr. Guindon was dismissed or whether he quit his job. The package also contained an unsigned statement, apparently prepared by Mr. Guindon for signature by Mr. Walsh. The "statement" which was not referred to by Mr. Walsh in his evidence related to an issue of overtime pay.

Overtime Pay

The package also contained a letter by Mr. Guindon to the Tribunal requesting overtime pay in the amount of \$19,247.00. At the hearing he mentioned that this sum is compensation at the minimum wage rate of \$7.00 for all hours worked, taking into account the differing overtime rates set out in the Act.

I note that this overtime issue was not raised by Mr. Guindon in his original complaint to the Employment Standards Officer following his resignation from Triangle. The only issue that was raised was whether he was fired or he quit, and whether there was an entitlement to termination pay. The Act requires that complaints be made in writing and within 6 months of the last day of work (s. 74(2) and (3)). I am without jurisdiction to deal with the overtime complaint.

ORDER

Pursuant to section 115 of the **Act**, I order that the Determination in this matter, dated October 23, 1997 be confirmed.

Paul Love
Adjudicator
Employment Standards Tribunal