

An appeal

- by -

Christopher Fitchett  
("Fitchett")

- 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:** David B. Stevenson

**FILE No.:** 2002/607

**DATE OF DECISION:** February 26, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Christopher Fitchett (“Fitchett”) of a Determination that was issued on November 27, 2002 by a delegate of the Director of Employment Standards (the “Director”). Fitchett had complained that he was owed annual vacation pay and length of service compensation by his employer, Ainsworth Lumber Co. Ltd. (“Ainsworth”). The Determination found Fitchett was not owed either annual vacation pay or length of service compensation and the Act had not been contravened, ceased investigating and closed the file on the complaint.

Fitchett says the Determination contains an error in the facts and there were facts not considered in the Determination. He requests that the Tribunal make a judgement on the facts and decide on reasonable compensation.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

### ISSUE

The issue in this case is whether Fitchett has shown an error in the Determination sufficient to justify the Tribunal varying the Determination as requested.

### FACTS

Ainsworth operates an oriented strand board (“OSB”) plant in 100 Mile House. Fitchett worked at the plant from July 4, 1994 to March 8, 2002. At the time the employment relationship was ended, Fitchett was employed as a Team Leader at a bi-weekly rate of \$2,910.45.

Footner Forest Products Limited (“Footner”), an Ainsworth Joint Venture Company operating in High Level, Alberta, made a formal job offer to Fitchett on February 26, 2002, which he accepted on March 7, 2002. In the correspondence, his start date with Footner was confirmed as March 18, 2002 and he commenced his employment with Footner on that date.

While employed with Ainsworth, Fitchett had received the following annual vacation pay and time off:

- in 1994 he had received a payout of his annual vacation pay entitlement for his period of employment in that year - an amount of \$2,642.00.
- from 1995 through 1999, he was entitled to take 4 weeks’ paid annual vacation per calendar year and either took paid vacation in those years or received a payout on any unused portion.
- in 2000 and 2001, he was entitled to take 5 weeks’ paid annual vacation per calendar year and either took paid vacation in those years or received a payout on any unused portion.

At the end of 2001, Fitchett had received his full vacation entitlement up to that point.

For the calendar year 2002, Fitchett had requested and received approval for 4 sets of vacation time off. On February 23, 2002, he asked that his previously requested and approved vacation time off be replaced with a 5 week period from March 11, 2002 to April 15, 2002. This request was approved.

On, or about, March 8, 2002, Ainsworth became aware that Fitchett had accepted a job offer from Footner. Fitchett was asked to attend a meeting with Jim Miller, Ainsworth's Site Manager, Mark Cunningham, Fitchett's direct supervisor and Tom Gilgan, the Industrial Relations Manager at the OSB plant. He was asked if he had accepted a job with Footner and, apparently, just shrugged. The Determination includes the following findings of fact relating to the that meeting:

During the meeting of March 8, Fitchett specifically asked if he was being fired and was clearly told, "no, we are assuming you are quitting, given that you have accepted another job." At no time during the meeting did he indicate that he was not quitting, that he was just trying out a different job, or that he would be back to his job at Ainsworth at the end of his vacation.

At the end of the meeting, Fitchett asked for his final pay cheque. The Determination also notes that Fitchett had indicated it was his intention to give Ainsworth two weeks' notice on April 1, 2002 that he was terminating his employment with them effective April 15, 2002, the end of his vacation time.

The Determination found that Fitchett's annual vacation entitlement at the time his employment ended was 4.7 days and that he was correctly paid out that amount on his last cheque.

The Determination found evidence that Fitchett intended to quit in his conduct between January 21, 2002, when he submitted his resume to Footner, and March 18, 2002; in his "stating he felt he needed to find a new job"; and specifically in his conduct at the March 8<sup>th</sup> meeting, "when he was given an opportunity to clarify his intent to remain employed at Ainsworth's 100 Mile operation but would provide no comment or explanation of his actions or future intentions. He was told he wasn't being fired, but would not deny that he was quitting". The Director was also satisfied that, objectively, Fitchett had carried out acts that were inconsistent with the continuation of his employment with Ainsworth - he had applied for and accepted a position with another employer in another Province, had asked for his final pay cheque and had cleared his locker of all personal effects before the end of his last shift, notwithstanding he was told he was not being fired.

## **ARGUMENT AND ANALYSIS**

The burden in this appeal is on Fitchett to persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97, (Reconsideration of BC EST #D325/96)).

He has not met that burden. Nothing in the appeal convinces me that the findings and analysis in the Determination are wrong in any way. While Fitchett has challenged the truthfulness of some of the statements made in the Determination, he has done nothing to indicate in what way they are false, to demonstrate, either from the material on file or from other evidence, that they are, in fact, false or to provide any analysis or argument about how these allegedly false statements might have affected the correctness of the Determination.

Fitchett has raised some concern that references in the Determination to the employer's position on the issue of length of service compensation require explanation. The employer argued that certain events 'leading up to March 2002' (none of which are included in the facts stated above) demonstrated an intention by him to quit his employment. In the appeal he says he tried to submit letters to the Director that responded to that argument, but was told they were irrelevant. Having reviewed the letters, I agree with the Director. There is no hint in the Determination that the employer's argument was accepted. Consequently, it did not require Fitchett to either respond to or explain it, and, more particularly, does not provide any basis for challenging the Determination.

The appeal is dismissed.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated November 27, 2002 be confirmed.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**