Employment Standards TRIBUNAL

An appeal

- by -

Argon Landscaping Ltd.
(the "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: Ib S Petersen

FILE No.: 2000/738

DATE OF DECISION: February 13, 2001

DECISION

SUBMISSIONS/APPEARANCES

Mr. Timothy Bonner	on behalf of the Employer
Mr. Darren Rose	on behalf of himself

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on October 3, 2000. The Determination concluded that Rose was owed $3,172.25 by the Employer on account of compensation for length of service.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong. The Employer has not, in my opinion, discharged that burden.

Briefly, the relevant background facts may be gleaned from the Determination. As indicated by its name, the Employer is in the landscaping business. Rose was employed by the Employer between August 31, 1993 and December 22, 1999 when he was laid off and not recalled within the period for a temporary layoff. At the material time, his earnings as a landscape labourer were $2,050 per month. Rose was laid off on December 22, 1999 and advised that he would return to work on March 1, 2000. This date was also set out in the Record of Employment issued by the Employer. From the Determination, there does not appear to be a dispute that Rose was subsequently contacted by the Employer and told that he was not returning to work. Rose stated that this happened in the second week of February 2000. The Determination notes that the Employer took the position that it discovered after the lay-off that he should have been terminated for cause and, therefore, was not entitled to compensation for length of service.

The determination also notes that the delegate from early April 2000 requested records and information about the lay-off and subsequent termination and that the employer agreed to provide such information and records. The employer failed to provide the records. Subsequently, a Demand for Employer Records was issued. From the delegate's submission to the tribunal, it appears that the DER was issued on July 11, 1999. The Employer failed to respond to this Demand. In the result, the delegate found that the Employer had not supplied any evidence to refute Rose's allegations and concluded that, based on his service, he was entitled to six weeks' pay.

The Employer's appeal submission explains that Rose was terminated for willful breach of a company policy with respect to use of a company vehicle. I gather from the submissions that the vehicle in question was parked or kept at Rose's home. While the appeals also suggests that Rose for some time prior to the termination displayed a poor attitude and performance (and there is precious little in the way of particulars to support this anyway), the alleged beach of company policy is the stated ground for termination. Essentially, the employer says that it advised Rose in early 1997, that he had the use of the company vehicle for commuting to and from work and short errands. The Employer says that Rose on at least one occasion had used the vehicle on a weekend in an unauthorized manner. In the result, the Employer further restricted the use of the vehicle. On October 20, 1999, Rose was informed that he could only use the vehicle for "business purposes." The Employer notes that "[n]o further unaccounted mileage was noted after the written order." Rose was laid off on December 22, 1999. The Employer says that on January 4, 2000, Rose called the Employer and informed it that the vehicle would not start when he was going on a "personal, non-work related errand." The Employer says that it informed Rose in February 2000

> "that due to the company losing customers because of service quality there would be insufficient work for his return and [he] was told to seek employment elsewhere."

With respect to the failure to cooperate with the delegate's investigation, the Employer argues that it informed the delegate that it (and its directors) were relocating and that his requests would have to be "researched and forwarded at a much later date." The Employer also says that the delegate relocated and attempts to contact him by telephone failed because the delegate did not leave a forwarding telephone number for his office. The Employer says that after a considerable time it did leave a voice message for the delegate at his new location. In September, says the Employer, it left a message that the records and information would be forwarded within a two week period. However, shortly thereafter, the Employer received the Determination and did not forward the records.

Rose takes issue with the Employer's allegations regarding his performance. He agrees that he was given a letter, on October 20, 1999, restricting the use of the company vehicle. He says he complied with the Employer's instructions. He explains the following about the incident that gave rise to the termination:

> "... The vehicle had been parked in my designated parking space in the building and the truck wasn't driven. However, it was during this time that a fire inspection of our building was completed. Condo owners were ordered to ensure that parking stalls were to be cleaned and free of debris, as well as all oil stains. It was then on December 27, 1999 that I moved the truck to the street in front of my building to clean up the excessive oil which had leaked from Mr. Bonner's truck. When I went to drive the truck back to my parking stall on December 29, 1999 the truck wouldn't start and I called Mr. Bonner indicating mechanical problems

> with the truck. I did not use the truck for any personal errands during that time and the truck was parked on the road. Mr. Bonner had his mobile mechanic do the necessary repairs in front of my building and I left the truck keys with him. Mr. Bonner retrieved the truck in mid January 2000."

In short, Rose says that he did not violate the October 20, 1999 directive. Rose also points out that he did not receive any notification of termination on January 4, 2000 and refers to an ROE, dated January 25, 2000 which states that his return to work date was March 1, 2000. This is inconsistent with the Employer's assertion of cause for termination. Rose's submission attaches two ROE's, issued by the Employer, one dated January 25, 2000, and one dated December 28, 1999--both have the same return date, namely March 1, 2000. Rose agrees that he received a call from the Employer in mid February 2000 to the effect that there was a shortage of work and to look for other employment.

In its reply, the Employer says that on January 4, 2000, Mrs. Lisa Bonner received a call from Rose stating "I just got in to go to the store and the truck wouldn't start. There is something wrong with the steering tumbler." The Employer maintains that it had cause for termination.

The delegate reiterates that the Employer failed to provide records to support any allegations to support its allegations of cause. The delegate also states that upon his transfer to another office of the Branch the telephone message associated with his "old" telephone number indicated that he had been transferred and the number where he could be reached.

As mentioned above, I am of the view that the appeal must be dismissed.

First, in my view, considering the totality of the circumstances, the Employer failed to cooperate with the delegate's investigation. The particulars are set out in the Determination and in the delegate's submission in the appeal. It is clear that the delegate made real efforts to obtain information and documents from the Employer. The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination (*Kaiser Stables*, BCEST #D058/97). It is apparent to me even from the Employer's own submission that there was considerable reluctance to cooperate withe delegate's investigation. The appeal explains that the delegate's request for information and records would have to be "researched and forwarded at a much later date." The Employer does not deny that it received the Demand for Employer Records. In September, says the Employer, it left a message that the records and information would be forwarded within a two week period. However, shortly thereafter, the Employer received the Determination and did not forward the records. In short, the Employer admits that it did not comply with the Demand. It is not for the Employer to unilaterally decide if or when is going to comply with a Demand for Employer Records. Moreover, as it readily apparent from the documents actually attached to the appeal, this is not a complicated case with extensive documentation. The Employer, in this appeal rely on the directive issued to Rose not to use the company vehicle for personal business. The appeal also attaches a mechanic's invoice (dated January 6, 2000) and a ROE (dated December 28, 1999).

These document could have been produced to the delegate in his investigation. An argument that information and records would have to be "researched and forwarded at a much later date" is disingenuous at best.

Second, and in any event, even if I am wrong with respect to the above, and consider the appeal on its merits, I would still dismiss it. On the facts, not in dispute, the Employer's justification for the termination of Rose is not supportable:

1. December 22, 1999, Rose is laid off.

2. On December 28, 1999, the Employer issues a ROE, indicating a return date of March 1, 2000.

3. On January 4, 2000, the Employer says it discovered Rose's breach of company policy (the unauthorized use of a company vehicle).

4. Rose was not notified of his termination around January 4, 2000.

5. On January 25, 2000, the Employer issues a ROE, indicating a return date of March 1, 2000.

6. The Employer says that it informed Rose in February 2000

> "that due to the company losing customers because of service quality there would be insufficient work for his return and [he] was told to seek employment elsewhere."

The Employer's conduct is wholly inconsistent with cause for termination. First, if, as the Employer now says, it regarded the personal use of the company vehicle (assuming it to be true) as ground for termination, it begs the question of why the Employer waited until February before terminating his employment. The fact that the Employer did not act on this for a month or more, indicates that this was not as serious a matter as is now suggested. Second, the issuance of the second ROE at the end of January 2000--a copy was attached to Rose's submission and its authenticity was not in dispute--belies the Employer's contention that it had cause for termination in early January. Third, and importantly, the Employer's communication to Rose in February that there was "insufficient work" for his return support the delegate's conclusion that Rose was laid off and not recalled for that very reason, *i.e.*, the reason had nothing to do with his alleged use of the company vehicle.

The above is not to say that an Employer may not rely on misconduct unknown to it at the time of the dismissal. The comments from England and Christie, *Employment Law in Canada* (Butterworths, 3rd ed., 1998 -, para. 15.86) are, in my opinion, apposite:

> "The Supreme Court of Canada in its seminal 1961 decision in *Lake Ontario Portland Cement Co. v. Groner* re-affirmed the old principle that an Employer

> may justify summary dismissal by reliance upon employee misconduct unknown to the employer at the time of dismissal. .... Of course, if the employer knows of the new grounds but fails to rely on them at the time of dismissal, not only will this be evidence that those grounds are not regarded as "serious" by the employer, but also that the employer may be treated as having abandoned them. ....Misrepresentation of the grounds for dismissal by an employer invites judicial misinterpretation of the employer's true motives so that employers are well advised always to state honestly and comprehensively their real reasons for a dismissal." [footnotes excluded]

In short, considering all of the circumstances, I am of the view that the Employer has not discharged the burden on the appeal. The application is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 3, 2000, be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal

ISP/bls