

**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 -

Daimen Golob  
("Golob")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Paul E. Love

**FILE NO.:** 97/552

**DATE OF DECISION:** February 16,1998

**DATE OF DECISION:** May 5, 1998

## DECISION

### APPEARANCES

Daiman Golob

### OVERVIEW

This is an appeal by Daiman Golob from a Determination of the Director dated October 23, 1997 which determined that Mr. Golob was terminated for cause by his employer Marzen Artistic Aluminum Ltd. d.b.a. Starline Windows. After hearing from Mr. Golob and reviewing the documents contained within the appeal file and documents filed at the hearing, I decided that the Director erred in finding that the employee was dismissed for cause.

### ISSUE TO BE DECIDED

Was Daimen Golob dismissed without cause?

### FACTS

Daimen Golob ("Golob") was employed with Marzen Artistic Aluminum Ltd. ("Marzen") as a service man at its shop located in Parksville, British Columbia between April 19, 1995 and March 17, 1997. On March 18, 1997, Golob was terminated by his supervisor, Massimo Trasolini ("Trasolini") when he arrived at 10:00 am. three hours late for his shift. On this particular occasion Golob slept in and he admitted to the employer and to this Tribunal that his conduct was inexcusable. When he arrived at the workplace, he apologized to the employer, the employer indicated that his conduct was unacceptable and the employer terminated Golob.

Later that morning after leaving the workplace, Golob met a number of his co-workers for lunch at a local pizza restaurant. He asked one of the co-workers, Darby Rai, to see how angry Trasolini was. Later in the afternoon Mr. Rai phoned Golob indicating that Trasolini did not appear to be particularly angry. Golob attended at the workplace and asked for his job back. Trasolini indicated that it was unlikely that he would give Golob his job back, but he agreed to meet with Golob later in the week. At the time of the later meeting Trasolini indicated that he could not give Golob his job back because he would then have to give anyone his job back whoever worked for the employer and was terminated.

The employer apparently advised the Director's delegate that Golob had been late on a number of occasions and that he was given a written warning on November 7 or 22, 1996

placing Golob on probation for a 3 months period. The Director's delegate indicated that Golob was told that if he were late again he would be terminated.

According to the sworn testimony of Golob, the Director's delegate did not interview Golob and in particular did not discuss with Golob any of the allegations made by the employer. The Determination makes no reference to an interview with Golob.

At all material times to this matter, Marzen maintained a punch clock and required its employees to punch in and out on days worked. The employer permitted a 7 minute grace period. The Determination makes no reference to the existence of a time clock and a 7-minute grace period.

In November of 1996, Golob was about 30 minutes late for work. Mr. Masolini noted that Golob was late and asked in a joking manner what Golob had been doing the night before.

The entire Determination in this matter reads as follows:

I have now completed my investigation of your *Employment Standards Act* complaint against Marzen Artistic Aluminum Ltd.

**Allegations**

In your complaint you allege that you were dismissed without notice or pay in lieu of notice.

I have completed my investigation into these allegations. These are my findings:

During your employment with this company you had received numerous verbal and one written warning with regards to your failure to show up for shifts and lateness. On November 22, 1996 you were given written notice for being late, and placed you on a three month probation, with a further warning that any further occurrences would result in dismissal. You were late again on March 18, 1997, and you were dismissed on that date.

Based on the evidence, you were dismissed for just cause, and no compensation for length of service (termination pay) is due.

Your complaint will now be closed on this file.

According to the information placed before this Tribunal the employer did not have a regular method of assessing the performance of an employee. Golob was unaware of any complaints concerning the quality of his work.

**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 cancel the Determination. It would have been helpful for me to hear from both the employer and the Director's delegate in this case, particularly because there was no information in the written file outlining the employer's position, and the Determination was very brief. Neither of these individuals appeared. It would be quite improper for me to decide in favour of the appellant, for the sole reasons of the non-attendance by the employer or the Director's delegate at the oral hearing. In many cases the attendance of the respondent is not necessary because the burden of proof rests with the appellant, and that burden does not shift because of the non-attendance of a respondent. While there is no duty on either the employer or the Director's delegate to appear at a hearing, the non-appearing respondents take the risk that information helpful to its position will not be placed before the Tribunal. The non-appearing party takes the risk that the appearing party will meet the persuasive burden: *Guru Lucky Sweets*, (BC EST #D051/98).

Mr. Golob gave his evidence in a candid and straightforward manner. I accept his evidence that he never received a written warning. I accept his evidence that he did not feel that his job was in jeopardy as a result of one late attendance in November of 1996, prior to the incident that gave rise to the termination. I accept his evidence that the Director's delegate failed to adequately investigate the facts surrounding the dismissal. In particular the Director's delegate failed to interview Golob, and obtain from him his position concerning the employer's allegations. Further the Director's delegate in a very short submission, fails to identify that the employer had a punch clock in place. The Director's delegate fails to identify that the employer had acquiesced, and allowed a 7-minute grace period, around the 7:00 am start time. I cannot tell from the Determination whether the numerous lateness referred to by the Director's delegate would fall within the grace period. Golob has testified that there were only two dates on which he was more than 7 minutes late.

An employer is entitled to have timely and regular attendance by its employees. The lack of timely and regular attendance can impose hardship or harm on a business, particularly a small business, which may be less capable of adapting quickly to employee absence. If, however, an employer does not insist clearly that the employee attend in a regular and timely fashion, it will not be able to rely on this point to establish cause for dismissal on this basis. It is a question of fairness.

I draw some significance from the fact that the employer did not appear at either of the two employment insurance hearings in which Golob questioned the issue of termination, nor did the employer file any material before this Tribunal.

There is no doubt that Golob's late attendance on March 18, 1997 was inexcusable. There is, however, no evidence of a pattern of repetitive lateness, or any evidence from which I can infer that the employer had insisted on a standard of attendance, which had been communicated to the employee, such that an employee in the position of Golob would have realized his job was in jeopardy as a result of 2 incidents of lateness.

I conclude therefore that while the employer had some cause to impose discipline on the date of the termination, there was not a sufficient record of tardiness in attendance such as to justify a dismissal.

Golob is entitled to termination pay for lack of notice. I find that he is entitled to two weeks pay in lieu of notice. According to the information provided at this hearing, Golob worked a 42 hour work week, and was paid \$13.00 per hour for the first 40 hours and 19.5 hours for the following 2 hours. This amounts to \$1,118.00 for two weeks pay and he is entitled to that amount plus interest, to be calculated in accordance with Section 88 of the *Act*.

Golob sought reimbursement for two additional days (Good Friday and Easter Monday). Easter Monday is not a "statutory holiday" as that term is defined in Section 1 of the *Act*. An employee's entitlement to be paid statutory holiday pay is set out in Section 45 of the *Act* which requires the employee to have worked for at least 15 of the last 30 days before the statutory holiday. Golob's employment ceased on March 18, 1997 (some ten days before Good Friday) and, as a result he is not entitled to be paid statutory holiday pay for either day.

At the hearing Golob sought leave, which I granted, to amend his claim to include reimbursement for a ticket which he received while driving a company vehicle. The ticket was for \$150.00, which the employer agreed but failed to reimburse him for. I am not prepared to award him the cost of the ticket, as my jurisdiction is limited to an award of termination pay.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated June 26, 1997 be cancelled and that Marzen Artistic Aluminum Ltd. pay to Damien Golob by cash or certified cheque the sum of \$1,118.00 plus interest calculated in accordance with Section 88 of the *Act*.

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