

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

- by -

Donald Michael Logan

("Logan")

- of a Determination issued by -

The Director Of Employment Standards

(the "Director")

ADJUDICATOR: Genevieve Eden

FILE No.: 96/058

DATE OF HEARING: May 9, 1996

DATE OF DECISION: May 18, 1996

DECISION

APPEARANCES

Donald Logan	on his own behalf
Donald Howes	President, Wasteline Containers Ltd.
Alice Howes	Secretary/Director, Wasteline Containers Ltd.
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Donald Michael Logan ("Logan") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination # CDET 000426 issued by the Director of Employment Standards on December 13, 1995. The Director found that the employer, Wasteline Containers Ltd. ("Wasteline") had not contravened the *Act* and, accordingly, that Logan was not entitled to severance pay in lieu of notice. In this appeal, Logan seeks a reversal of the Director's Determination.

A hearing was held in Victoria on May 9, 1996. All witnesses gave evidence under oath.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128(4) of the *Act* states, in part:

"...Section 63 applies to an employee whose employment began before Section 63 comes into force and is terminated after that Section comes into force."

Logan's employment ended before November 1, 1995 (the date on which the *Act* was proclaimed). The parties agreed that the relevant statute for purposes of determining the employer's liability is the *Employment Standards Act* (S.B.C. Chapter 10) (the "former *Act*"). The relevant parts of Sections 42 and 43 of the former *Act* state:

Notice required

- 42.(1) An employer shall not terminate an employee without giving the employee, in writing, at least
- (a) 2 weeks' notice where the employee has completed a period of employment of at least 6 consecutive months, and ...
- (3) When an employer terminates an employee and fails to comply with subsection (1) the employer shall pay the employee severance pay equal to the period of notice required...

Notice not required

43. Section 42 does not apply to
(a) an employee discharged for just cause,

FACTS

Logan was employed as a first year Apprentice Steel Fabricator by Wasteline on June 11, 1994. On Friday, June 9, 1995, Logan and another employee, Darren Reeves ("Reeves") were given two weeks notice of termination.

Logan and Reeves called the employer on the morning of June 12, 1995 to advise they would not be in to work. What transpired during the telephone conversations is in dispute. Darren and Reeves did not return to work and both filed complaints with the Employment Standards Branch on June 13th claiming severance pay. The Determination states that the employer had provided two weeks notice of termination as required by the *Act* and that an employee has an obligation to work through the period of notice in order to be entitled to payment. In dismissing the complaints, the Determination noted:

The parties were in a period of extreme confrontation both immediately prior to the notice of termination and thereafter. This culminated with the employees filing complaints with WCB and the other government agencies. It would have been difficult if not impossible for the employees to work out their notice of termination under these circumstances. The complainants must have realized this when they decided to file complaints on June 12, 1995 rather than working.

The Determination added that the complainants also filed complaints with Environment Canada and the Municipality of Saanich. Logan appealed the Determination; Reeves did not.

The Determination sets out the different versions of the telephone conversations on June 12, 1995 between the employer and Reeves and Logan. Prior to the commencement of the shift, Reeves called the employer, Donald Howes ("Howes"), to advise he would not be in to work. Reeves indicated the following conversation occurred with Howes:

DR: I called to tell you I can't come to work today for personal reasons.

DH: Fine, don't come back we'll mail you your cheque.

DR: I don't mean permanent I mean just today.

DH: What are your reasons?

DR: I can't tell you.

DH: Don't come back, we'll send your things (hangs up).

The Determination then presents Howes' version of the phone call:

Howes denied advising Reeves not to come back. He advised that after being told it was for personal reasons, he commented "What is it you want ... do you want me to mail your cheque?" Mr. Howes alleges that Mr. Reeves said "Are you firing me?" to which he responded "No, but do you want me to send you your cheque?" Mr. Howes advises the phone was then hung up.

According to the Determination, a similar conversation occurred between Logan and Howes within a few minutes of the previous conversation. At the hearing, Logan testified as follows:

When I phoned Don, I told him I would not be in today for personal reasons. He replied that he had just had a conversation with Darren and figured I wouldn't be coming back either. Then he said I'll send your cheque and things in the mail and then hung up.

Howes denied that he had advised either employee not to come back. He testified that:

Logan called in and said he wouldn't be in to work. I simply said to Logan "What is it you wished to do?" I asked "Are you quitting? What is it you want us to do? Do you want us to send you your cheque?" There was no response. That was the end of the phone conversation.

Alice Howes referred in evidence to a letter dated July 28, 1995 she had written to the Canada Employment Centre stating that on the morning of June 13th, she tried to phone Logan to ask him when he would be back to work but only got his answering machine; she did not leave a message as she wished to speak with him personally. Donald Howes submitted in evidence a letter dated June 14th from his lawyer to Logan affirming that Logan called on June 12th and said he would not be in to work and that he did not show up for work on Tuesday or Wednesday; accordingly Mr. Howes was accepting his resignation. According to Howes, the issue revolves around the telephone conversation of June 12th and the fact that Logan never returned to work. He considered Logan left employment of his own accord.

According to Logan's evidence, the matter involves more than the telephone conversation. In his reasons for appeal dated December 29, 1995 he states "I was unable to work out the two weeks notice of termination due to unsafe working conditions at Wasteline Containers Ltd. and because the employer, Don Howes, told me not to return to work during a conversation of June 12, 1995." Then, in a letter to the Tribunal dated February 15, 1996, Logan recaps the telephone conversation and goes on to state:

However, I would argue that this issue is not a question of whether we did not show up to serve out two weeks notice or if the employer told us not to return.

The real issue is that working conditions at the shop were hazardous to our health and the employer was requesting that we perform unsafe work practices. When Darren and I visited the Workers' Compensation Board to inform them of our situation, we were told that we should not have to

return to work to complete my two weeks notice if the shop conditions were as bad as we said they were. WCB did visit Wasteline Containers and cited Don Howes with 37 violations of Health and Safety Regulations. I have enclosed three copies of the WCB report which verifies that I would have been justified in failing to serve the two weeks notice even if I had not been told by Don Howes to never return.

At the outset of his testimony, Logan testified that he did not appear for work after the telephone conversation of June 12th because he felt he had been dismissed. He stated that he had all intentions of returning to work the following day, but did not feel he had a job to go back to. He also maintained that he had been dismissed unfairly on June 9, 1995 for raising unsafe work conditions. He then provided further background surrounding his dismissal.

On June 7, 1995, Logan made a telephone call to the Workers' Compensation Board ("WCB") regarding safety violations at the workplace. He was advised by WCB that it sounded like an unsafe work environment and to go see them. On June 9th, Logan "confronted" Howes and said he did not want to work in the shop where spray painting and welding operations were occurring. At that point, Howes said "Are you refusing to work?" Logan replied he was refusing to work in an unsafe place. Both he and Reeves were given two weeks notice of termination that afternoon. He felt he was fired for refusing unsafe labour. He maintained he had raised safety issues with Howes in the past. Logan stated that, after being fired, he was verbally abused; he was told by Howes to pick up stones on his hand and knees. After he refused, he was given a broom and shovel and he swept the driveway.

Logan and Reeves did not attend work on June 12, 1995 so that they could visit the WCB to file complaints against the employer respecting a variety of safety issues. An officer of the Board conducted a work site inspection the next morning. A number of safety violations were found. Logan and Reeves then picked up their belongings from the workplace on the afternoon of June 14th. Logan testified that "I worked at Wasteline for a year. I never thought I was harming myself in any way. Not till I went to WCB did I think I was harming myself so on Monday, I felt I was harming myself by going to work." He also stated that "it shouldn't come down to the telephone call" and "right from Friday afternoon it was with the full intention that I was refusing unsafe labour".

Howes (Donald) and Alice Howes also gave evidence of the events that transpired prior to the dismissal. Sometime in May 1995, Logan asked Don Howes for time off beginning June 16th to attend an occasion in Ontario. Howes replied that it was a busy time and said he would get back to him. According to Howes, Logan's attitude changed right after that -- "he was out of sorts with everyone", had a chip on his shoulder and was "sour as the dickens". Alice Howes referred in evidence to her letter of July 28, 1995 to the Canada Employment Centre which states that Logan's attitude changed considerably to the point that he was late, rude, not speaking to others at work, and making working relations with other employees uncomfortable. She maintained that Logan left on holidays on June 16th and was now claiming severance pay. When offered an opportunity to cross examine Alice Howes, Logan put no questions to her; rather he informed me that he "never made any arrangements for the trip" and that he "did not leave on June 16th".

Howes submitted in evidence a letter dated January 8, 1996 from Douglas Tellier ("Tellier"), a five year employee of Wasteline which states that Logan had never brought up the subject of working conditions and in late May 1995 became very offensive towards his employment and claimed the employer denied him the opportunity to take advantage of a seat sale. Tellier was not present at the hearing to give evidence, but no objection was raised to the admissibility of the letter. Howes also testified that, on June 3, 1995 Logan refused to work claiming he was cheated on his pay; this testimony was uncontradicted.

On June 6, 1995, Howes met with Reeves, Logan, and Howes' accountant to discuss work loads and to find out what, if any, concerns the employees had. Howes stated the employees were asked three times whether they had any concerns regarding their employment or working conditions but no answers were forthcoming. Howes contended that Logan never brought up working conditions with the company and queried why he would wait a year to do so.

Howes testified that on June 9th, he gave Logan two weeks verbal notice of termination notwithstanding that he had been advised by legal counsel that the company had grounds for outright dismissal and that there was just cause. On the weekend he drafted a letter confirming the dismissal and notice as well as the expectation that Logan carry out his normal duties during the notice period. This letter was dated June 12, 1995 and was to be given to Logan that day, but given that Logan never returned to work, he did not receive it.

Regarding the safety issues, Howes' evidence is that working conditions could not have been that bad given that a follow-up inspection was not conducted by WCB until March 1996. He submitted a WCB Inspection Report dated March 12, 1996 which stated that all orders had been complied with and that "The Employer displayed a very positive attitude towards all safety discussion without any protest".

Regarding the alleged verbal abuse, Howes testified that apprentices do just about everything around the shop. He had asked Logan to take the broom and shovel and sweep some gravel in the yard. When Logan refused, Howes stated he told Logan "if you don't want to use the broom and shovel, I said you can get on your hands and knees".

Conflicting testimony was also heard from Logan and the Director's delegate, Terry Hughes ("Hughes"). Logan stated in his appeal that Hughes had not conducted a complete investigation of the circumstances surrounding his dismissal and that "I was not contacted at all by Terry Hughes on this matter". Hughes testified that he had set up a meeting at his office with the complainants. The meeting lasted about an hour and this time was spent discussing the events surrounding the dismissal as he wanted to get their story.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Logan is entitled to severance pay under Section 42 of the former *Act*. To answer this question it is necessary to determine the following:

1. Whether, subsequent to two weeks notice being given, a resignation or dismissal occurred effectively terminating employment at an earlier date. If employment was subsequently terminated by the employer so as to preclude working out the notice, the issue becomes whether there was just cause.
2. Whether an entitlement to severance pay exists where the employee did not work out his notice of termination alleging unsafe working conditions.

ARGUMENTS

Howes argued that the Director's Determination was correct. He contended that the matter rests on the telephone conversation of June 12, 1995 and that Logan left his employment of his own accord. He maintained that Logan's attitude towards his employment changed in a two week period and after his request for time off. He thought it strange that Logan claimed he was justified in not working his notice due to safety reasons but had never said a word about safety for a year. He submitted that if Logan had concerns about safety, he should have told him about it. Moreover, Logan had offered no reason for not coming to work on June 12th beyond that of personal reasons. He submitted that Logan set out with a vendetta in mind in his contacting of government agencies and that it seemed he had something he was mad about.

Logan argued that by law he had a right to refuse unsafe labour and that he got "fired" on June 9, 1995 for refusing unsafe labour; this did not constitute just cause. He contended that it shouldn't come down to the telephone call and that if he had an unsafe work environment he was justified in not working. He argued that the "hands and knees" conversation was harassment. He maintained he had no malice intent but was just trying to protect himself. He added that he was never served with legal notice in that he never received the termination letter.

ANALYSIS

I am not satisfied that, subsequent to the notice of termination given to Logan, a dismissal occurred effectively terminating employment at an earlier date. Upon weighing the conflicting evidence of Logan and Howes, I prefer the testimony of Howes regarding the telephone conversation of June 12, 1995. Howes' version of the phone call is consistent with his letter to Logan of June 12th, that is, he expected Logan to be at work during the notice period. It is also consistent with the evidence of Alice Howes who testified that she tried to contact Logan to determine when he would be back at work. Further, if Howes had told Logan not to come back to work the morning of June 12th, and Logan believed he had no job to return to, I have difficulty understanding why the issue of returning to work the notice period was discussed with the WCB later that same day. If Howes had indicated that same morning that he didn't want Logan back, returning to complete the notice period should not have been an issue.

Moreover, Logan's testimony that he had all intentions of returning to work on June 13, 1995 appears inconsistent with other evidence given by him. In his letter to the Tribunal of February 15, 1996, his characterization of the "real issue" as hazardous working conditions and

unsafe work practices and his contention that he would have been justified in failing to serve the two weeks notice, together with the statement on his appeal that he was unable to work out the notice due to unsafe working conditions as well as his discussion of working out the notice with the WCB, and his final submissions all suggest to me an intention not to work out his notice.

The onus of proving a subsequent dismissal occurred rests with the appellant. On the whole of the evidence before me, I am not satisfied that, on a balance of probabilities, a subsequent dismissal took place.

The evidence also falls short of a resignation. The onus of proving an employee quit rests with the employer. The act of resigning or "quitting" is a right that is peculiar to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

In this case there is an absence of an expressed intention to quit. Nor am I satisfied that an inference can be drawn that Logan intended to sever his employment. There was no evidence of an intention to resign on Logan's part prior to being given two weeks notice on June 9, 1995. While, for reasons stated above, I am not satisfied that Logan had an intention of working out the notice period, I do not consider that this constituted a resignation in this case. On a balance of probabilities, I conclude that Logan did not resign from his employment.

I conclude that Logan's termination was occasioned by Howes with the giving of notice on June 9, 1995. Under section 42 of the former *Act*, severance pay is payable where the employer fails to give the employee the applicable notice. In this case, two weeks notice was given by the employer; thus the employer's liability is discharged. Regarding Logan's allegation of unfair dismissal, it is not necessary under the *Act* for the employer to demonstrate just cause where the requisite notice has been given. Even if just cause did not exist, the employer's liability would be two weeks notice. While verbal notice was given on June 9th, the evidence reveals that Howes intended to give Logan written notice on June 12th and prepared a written letter to that effect, but Logan never returned to work.

Thus, I conclude that with respect to the first question to be answered in this appeal, severance pay is not payable. I now turn to the second question.

Logan did not work out his notice. An employee has an obligation to work or be available for work during the period covered by a notice of termination. Section 1 of the former *Act* defines "work":

"work" means the labour or services an employee is required to perform for an employer and includes time the employee is required to be available for his employment duties at a place designated by the employer..."

Even if Logan had reasonable cause to believe that the work environment was unsafe, it does not follow that he would be entitled to compensation under the *Act*. I can find no provision in

the language of the former *Act* that would support such an entitlement. I conclude that Logan is not entitled to severance pay.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 000426 be confirmed.

Genevieve Eden
Adjudicator
Employment Standards Tribunal

May 18, 1996
Date