

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 -

HCAS Supply Ltd.
("HCAS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO: 96/175

DATE OF HEARING: May 14, 1996

DATE OF DECISION: May 29, 1996

- HCAS is a franchisee which operates an automotive repair business at two locations in Greater Vancouver (Main Street, Vancouver and King George Highway, White Rock). Previously, it operated at a third location on East Hastings Street, Vancouver.
- Stratford was employed by HCAS from April 1989 to July 29, 1995 as an installer/pipe technician. He was employed at the East Hastings Street location but was transferred to the Main Street location after it was acquired by HCAS.
- Stratford's wage rate was \$15.00 per hour when his employment was terminated in July, 1995.
- Stratford submitted a complaint to the Employment Standards Branch on August 1, 1995 alleging that HCAS owed him overtime wages and that HCAS had terminated his employment without cause.
- Determination # CDET 000821 found that HCAS contravened Section 35 of the *Act* (Maximum Hours of Work) and owed Stratford \$2,539.21 in overtime wages. It also found that HCAS contravened Section 63 of the *Act* by terminating Stratford's employment without just cause.

EVIDENCE

Hugh Corke, President and part owner of HCAS, gave the following evidence concerning Stratford's employment:

- Stratford initially worked at the Hastings Street location. He had difficulty getting along with his co-workers and managers, particularly Bob Kumar (Assistant Manager).
- Stratford and Kumar engaged in a physical altercation at the Hastings Street location which resulted in each throwing punches at the other.
- Corke received frequent complaints from employees and managers about Stratford's argumentative nature.
- Following Stratford's transfer to the Main Street location in early 1994 these complaints continued. The "problems" occurred when Corke was not at the work site.
- In June, 1995 three management staff at the Main Street location signed a letter outlining their concerns about Stratford's behaviour and attitude towards them. It also notes the quality of his work was outstanding. This letter was not given to Stratford, although Corke agreed with its contents and it was put into Stratford's personnel file.
- Corke gave a letter of reprimand to Stratford on July 6, 1995. The letter described Stratford's disregard for his supervisors' authority as "bordering on insubordination." It

also noted “...numerous complaints from **all** your co-workers with regard to your interaction with them” (bold in original). A third concern dealt with Stratford’s inappropriate comments on the Midas Inspection Reports. The letter concluded with the following statement:

Therefore, you may consider this correspondence a letter of reprimand.
Any further incidents of this nature will result in further disciplinary action up to and including dismissal.

- Corke’s evidence was that Stratford did not change his attitude nor his behaviour after July 6, 1995
- On July 21, 1995 Corke suspended Stratford for one week without pay due to an oil spill which occurred on July 5, 1995 while Stratford was repairing a motor home. The letter notes that the oil spill resulted in an anonymous complaint to the provincial Environment Protection Agency which in turn resulted in an order to HCAS to clean the drains. The cost of the clean up was \$1,000.00. Corke concluded his letter with the following statement:

Please take this time to consider the seriousness of this incident. Any further incidents of this or a similar nature will result in further disciplinary action up to and including dismissal.

- According to Corke’s evidence, the oil spill could have been prevented if Stratford had put an oil pan under the vehicle rather than using a piece of cardboard.
- On July 22, 1995 Corke received a 3 page letter dated July 13, 1995 from Stratford concerning the July 6th letter of reprimand. Corke testified that Stratford’s letter did not make sense to him and he was concerned that Stratford would do something more serious in the future.

- In a letter dated July 26, 1995 Corke informed Stratford that his employment was terminated, effective immediately. The reason for terminating Stratford's employment was stated in the following terms:
 "Quite frankly, Charles, our attempts to counsel and discipline you are not succeeding. Your correspondence clearly indicates no remorse what so ever with regard to the issues raised in the letter of reprimand."
- Under cross-examination, Corke stated that after he imposed the suspension on Stratford he "...found out who made the call to the EPA."

Corke gave the following evidence concerning Stratford's claim for overtime wages:

- HCAS pays its employees overtime pay when they work overtime hours.
- Employees are given leeway about start and stop times.
- Stratford was paid \$3,900.00 in addition to his regular wages for renovation work he performed at the White Rock location.
- Prior to June, 1995 HCAS maintained weekly summaries of employees' hours of work and daily hours of work records have been kept since June, 1995.

Stephen Rudkowski (Manager, Operations and Finance) gave evidence concerning the incidents described in the letter of July 6, 1995. He stated that Stratford often spoke critically of co-workers, managers and his employer (Corke). He also testified that Stratford was sent home early at the beginning of July, 1995 following a "verbal altercation" with Karen Livingstone (Office Manager). Rudkowski gave evidence that prior to June, 1995 employees were paid bi-weekly unless their managers approved extra hours, in which case overtime was paid.

Tony Quan (Manager, Main Street location) gave the following evidence:

- Stratford was not a team player.
- Other employees had difficulty with Stratford to the extent that productivity was decreased .
- Quan sometimes had to come to work on a scheduled day off to resolve problems between Stratford and his co-workers.
- Following the scuffle between Stratford and Kumar, Stratford was transferred to Main Street "...to see if a new work environment would help."

- There were many meetings with employees to explain the correct procedure for filling out Midas forms such as “Exhaust Inspections Report” and “Customer Questionnaire Exhaust.” Stratford did not attend all of these meetings.
- There were problems getting Stratford to complete these forms and he would often write unacceptable comments on them. Often, he would not sign the forms as required.

Under cross-examination, Quan stated that while he saw both Kumar and Stratford throw punches, he did not know how the altercation began nor who threw the first punch.

Darryl Saundry was the Assistant Manager of the Main Street location until October, 1995. He gave evidence which confirmed the evidence of Corke, Rudkowski and Quan concerning Stratford’s attitude, his negative comments about co-workers and managers as well as his detrimental effect on productivity. He also stated that arguments between Stratford and his co-workers occurred on a regular basis.

Stratford called three witnesses who were customers at HCAS’s Main Street location .

Randall Maxwell testified about the high quality of work done by Stratford on his custom “hot rod” automobile.

Edward Oyama testified that he used the facilities at HCAS Main Street to repair the muffler on his car. He also assisted Stratford on several occasions to organize mufflers in the shop and by welding metal carts which Stratford was building. This assistance took place between 10:00 p.m. and 11:00 p.m. Oyama stated that Stratford “...seemed to be working crazy hours... until 2:00 a.m and then had to be at work the next morning.”

Patricia Kelson gave evidence that when she went to pick up Stratford she “often waited until 9:00 p.m or 9:30 p.m while he locked up the shop.” She also testified that she “often” saw Stratford “... working on cars late at night.”

Stratford gave the following evidence about his employment with HCAS:

- He performed renovations on the White Rock store while working full-time at the Hastings Street store.
- He often worked until 2:00 a.m or 3:00 a.m doing these renovations.
- He was never told that he had an attitude problem until the last few months of his employment. Near the end of 1994 he discovered that Corke was not happy, although Corke did not tell him what the problem was.
- All of the renovations he carried out at the White Rock store and the Main Street store were to benefit HCAS’s business.

- He worked long hours with management's knowledge and, specifically, with Corke's knowledge and approval.
- In early 1995 he understood that management wanted him to reduce his hours of work, at which time his key to the shop was taken from him.
- Stratford expressed his opinions about what he considered to be confusing instructions from the different managers.
- The letter of reprimand issued by Corke on July 6, 1995 came as a shock, but he was aware there was a problem once he received that letter.
- Under cross - examination, Stratford confirmed that he did not recant the statements made in his July 13th letter to Corke.

Stratford's evidence concerning the oil spill on July 5, 1995 was that the oil leaked when he moved a high pressure hose on the motorhomes's engine oil cooling system. He said he told the manager that he intended to deal with the spill by putting cardboard under the vehicle and the manager approved. The next morning, when he arrived at work, he saw Corke using a pressure washer to remove the oil and it was going down the drains.

Under cross-examination, Stratford initially refused to answer when asked if it was he who reported the oil spill to the Ministry of Environment. He then stated that he "...telephoned Pennzoil to discuss the situation." He later admitted that he telephoned "... a government agency" because he was "...concerned about oil leaking from bins in the shop." He could not recall whether he made the telephone call before or after he received the letter of reprimand.

When asked if he had been paid \$3,900.00 for the renovations work he performed, Stratford answered:

"I guess so ... possibly ... there was more than one cheque... over a period of time ... I'm not aware exactly ... it was in 1993 or 1994, I believe."

When asked if he told the Director's delegate about the \$3,900.00 payment, Stratford testified that he could not recall.

Stratford's evidence concerning the Customer Questionnaire and Inspection Report forms was that he had not completed some of the Inspection Reports as required: However, he stated that "...just because an installer's name appears on an invoice, that does not necessarily mean that, that installer actually did the work."

Stratford testified that he maintained a record of the hours he worked during 1995 in a calendar and provided a copy of the calendar to the Director's delegate during his investigation .

Stratford submitted to the Tribunal seven written statements from co-workers and customers concerning his work habits, hours of work and his interpersonal style.

ANALYSIS

Counsel for HCAS raised a procedural issue and an evidentiary issue in his submission to the Tribunal. I have found it unnecessary to deal with these issues in deciding this appeal.

Overtime Wages

Section 35(a) of the *Act* requires employers to pay overtime wages if an employer “...requires or, directly or indirectly, allows an employee...” to work more than 8 hours a day or 40 hours a week.

Section 40 of the *Act* sets out the overtime wage rates which must be paid to an employee who works overtime hours.

Section 28 of the *Act* describes the payroll records which an employer must keep for each employee. In particular, Section 28(1)(d) requires that a record be kept of the hours worked by an employee “...on each day.”

The Director’s delegate states in the Calculation and Reasons Schedule of the Determination that:

The employer’s records are incomplete and inconsistent with the employee’s. I accept the employee’s records as accurate.

The Director’s delegate concluded on the basis of Stratford’s records that HCAS owes Stratford \$2,539.21 in overtime wages for the months of January/95 to June/95.

The evidence I heard confirmed that HCAS did not keep daily payroll records prior to June, 1995. Stratford gave evidence about his hours of work both during and after the time that he was carrying out the renovations work for HCAS. I conclude that the hours worked by Stratford between January/95 and July/95 were not related in any way to the renovations projects, for which he was paid separately by HCAS. There was no documentary or oral evidence to contradict the findings made by the Director’s delegate concerning overtime wages owing to Stratford.

HCAS argued that in **Arbutus Environmental Services Ltd.** [1996 BCEST #D002/96], the Tribunal relied on the employer’s payroll records when there was a dispute between them and the employee’s hours of work records.

I do not accept the argument made by HCAS on this point. The **Arbutus Environmental** decision does not stand for the proposition that an employer’s payroll records will always be preferred over an employee’s records. The Tribunal will make a decision based on the particular facts of each appeal.

In this appeal, HCAS did not maintain daily records concerning Stratford's hours of work prior to June, 1995.

For these reasons I confirm that HCAS owes Stratford \$2,539.21 in overtime wages.

Just Cause

Section 63 of the *Act* creates a liability for employers to pay compensation to employees based on the length of their employment. Section 63(3) states that this liability is deemed to be discharged if an employee is given written notice of termination or if the employee resigns, retires or is "...dismissed for just cause."

HCAS argues that it had just cause to dismiss Stratford.

The Director's delegate concluded that Stratford's employment was terminated without just cause and supported his finding in the following terms:

The employee responded in writing to the employer's letters on both occasions to correct any inaccuracies and to answer the allegations. I accept his explanation and find no act of insubordination. The employee also explained that the oil spill was not caused by his negligence but by a high pressure hose which ruptured while he was working on it and that he had taken all measures to contain the spillage with the approval of the duty manager.

On July 29, 1995, when the employee returned to work after the suspension, he was handed a letter of dismissal dated July 26, 1995, stating that the employee's correspondence "clearly indicates no remorse whatsoever with regards to the issues raised in the letter of reprimand".

Based on the information provided by all parties, I find, on a balance of probabilities, that there was no just cause for terminating the employee's employment without notice or termination pay, contrary to Section 63 of the *Employment Standards Act*.

As the appellant in this appeal, HCAS bears the onus of proving that it had just cause to dismiss Stratford.

In the absence of willful misconduct, constituting a fundamental breach of the employment relationship by Stratford, HCAS must meet the following test to establish that just cause existed for dismissing him:

1. That reasonable standards of performance have been set and communicated to the employee;

2. That the employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. That a reasonable period of time was given to the employee to meet such standards; and
4. That the employee did not meet those standards.

The letter of reprimand dated July 6, 1995 sets out the various grounds for reprimanding and warning Stratford:

- Disregard for supervisors' authority, bordering on insubordination;
- Referring to Corke as "an incompetent bloody idiot";
- Numerous complaints from co-workers who were offended by insulting and flippant remarks;
- The manner in which Stratford completed MIDAS inspection report forms;
- Several employees threatened action if Stratford's behavior did not change; and
- Discussions on a number of occasions concerning these issues.

I note that there is no reference in this letter to the physical altercation between Stratford and Kumar at the East Hastings Street location. I note also that I heard no evidence to suggest that HCAS took any disciplinary action against Stratford or Kumar as a result of that altercation. Since HCAS did not take disciplinary action within a reasonable time of the altercation, I find that HCAS effectively condoned Stratford's actions and cannot rely on that misconduct as a ground for dismissing him.

The sequence of events leading up to Stratford's dismissal is significant. In summary, the sequence of events was:

July 6, 1995	Letter of reprimand
July 21, 1995	Letter of reprimand and one week suspension without pay.
July 22, 1995	Stratford delivers two letters to Corke in response to the two letters of reprimand
July 24-28, 1995	Suspension without pay.

July 26, 1995 Stratford's employment is terminated, effective immediately.

The July 26th letter gives the following reasons for terminating Stratford's employment:

“Quite frankly Charles, our attempts to counsel and discipline you are not succeeding. Your correspondence clearly indicates no remorse whatsoever with regards to the issues raised on the letter of reprimand.”

I find it very interesting that HCAS terminated Stratford's employment while he was serving a one-week suspension without pay. The question which immediately comes to mind is: What happened between July 21st and July 26th, 1995 to cause HCAS to change a suspension into a dismissal?

In his evidence, Corke explained his decision to dismiss Stratford by stating that he was concerned that Stratford would “...take out his frustration on vehicles or property.” Corke also testified that Stratford's letters “didn't make sense” and that he was “...concerned about a more serious event” occurring. Corke's letter of July 21, 1995 makes reference to an “anonymous complaint” to the Environmental Protection Agency (EPA) concerning the July 5th oil spill. Under cross examination, Stratford testified that he telephoned “...a government agency” about “...oil leaking from bins in the shop.” The oral evidence given by Corke and Stratford, when considered with the schedule of events leading to Stratford's dismissal, leads me to conclude that Corke believed Stratford reported the July 5th oil spill to the EPA and dismissed him for that reason. This conclusion by Corke constitutes a new ground for disciplinary action against Stratford.

My analysis of Stratford's evidence leads me to conclude that he reported the July 5th oil spill to the EPA with the deliberate intention of discrediting or damaging HCAS's reputation. In short, it was a premeditated act of willful misconduct which Stratford could reasonably have expected would be prejudicial to or damage HCAS's business interests. I have come to that conclusion for the following reasons. Stratford gave evidence that he had become discouraged because his key to the shop and some responsibilities had been taken away from him by Corke. He also testified that the absence of any salary increases during his six years of employment had “become an issue” towards the end of his employment at HCAS. He also gave evidence that his relationship with Corke had “soured” in early 1995 and that he was “quite upset” about working at HCAS. He further stated that he believed, and specifically did not recant, the critical comments of Corke which he put in his letters dated July 13, 1995 and July 22, 1995. Finally, Stratford offered no reasonable excuse which might justify his decision to report to the EPA an incident which he primarily caused. In summary, the evidence leads me to conclude that Stratford's actions amounted to serious and willful misconduct which had the effect of breaching irreparably the element of trust which is at the heart of any employment relationship. I conclude from the evidence that Stratford's report to the EPA was a malicious act against HCAS which was intended to damage HCAS. Furthermore, I conclude that Stratford displayed no respect for his supervisors

or his employer, Corke. The disciplinary action taken by HCAS against Stratford did not have the intended result of changing Stratford's behaviour. Stratford showed no remorse for his actions. The element of trust that is central to the employment relationship was breached irreparably by Stratford's deliberate actions. For all of these reasons, I conclude that HCAS had just cause to dismiss Stratford.

I should add one point of clarification. My decision in this appeal should **not** be taken to stand for the general proposition that employees who report a statutory infraction by their employer thereby create a situation where their employer has just cause to dismiss them. That would be wholly unacceptable and contrary to the intended purpose of statutes designed to protect society's interests. In this appeal, Stratford's report to the EPA was for malicious reasons rather than bona-fide reasons.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination CDET# 000821 be varied to show that HCAS owes Stratford \$2,539.21 in overtime wages and, because Stratford was dismissed for cause, HCAS is not liable under Section 63 of the *Act* to pay compensation for length of service.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sf