

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 -

A.D.W. Engineering Ltd.
("ADW")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/846

DATE OF HEARING: February 17, 1998

DATE OF DECISION: March 3, 1998

APPEARANCES

For the Appellant: Albert Low
The Respondent: Chris Robinson

OVERVIEW

This is an appeal by A.D.W. Engineering Ltd. ("ADW") pursuant to Section 112 of the *Employment Standards Act* ("the Act"). The appeal is from Determination #CDET 007093, issued by John Dafoe as a delegate of the Director of Employment Standards on November 4, 1997. The Determination required ADW to pay to its former employee, Chris Robinson ("Robinson"), compensation for length of service as well as overtime pay and funds improperly deducted from his wages, in the total amount of \$1,139.92.

ADW filed an appeal on November 20, 1997. An oral hearing was held at Smithers, B.C. on February 17, 1997.

FACTS

Robinson was employed by ADW as a Field Assistant/Labourer from July 15, 1996 to November 15, 1996, when he was dismissed. Prior to his dismissal, ADW deducted \$200.00 from Robinson's pay cheque on account of a piece of equipment that was stolen while in his care. ADW does not take issue with that part of the Determination which declared this deduction illegal and ordered return of these funds to Robinson. It appears undisputed that Robinson worked substantial overtime and neither party takes issue with the Director's calculation of overtime pay owing to Robinson.

ADW appeals from the Determination so far as it orders compensation for length of service payable to Robinson. ADW alleges that Robinson was dismissed for just cause, because he behaved in an aggressive or threatening manner toward two employees under his supervision. On May 21, 1997 the Director made a written request of ADW to provide information as to why Robinson was dismissed. The Determination notes that there was no response to this request, and so it was determined that there was no just cause for Robinson's dismissal and compensation for length of service was payable.

At the hearing, ADW presented no reason why details supporting Robinson's dismissal for just cause were not provided to the Director. Further, the only evidence presented by ADW was from Mr. Albert Low, the company's general manager, and Mr. Kent Delwisch, a supervisor. Neither individual had any first-hand knowledge of incidents in which Robinson allegedly behaved aggressively toward his co-workers. ADW sought to introduce into evidence a letter from A.W. Plato, who was a client of ADW and who states in this letter that he was not happy with Robinson's productivity in the field. However, Mr. Low admitted at the hearing that Robinson was not dismissed for any poor performance at work, other than his behaviour toward co-workers. I did not admit Mr. Plato's letter into evidence because it is irrelevant to the issue at hand, and also because it consists entirely of hearsay.

ADW also sought to introduce a letter signed by one of Robinson's co-workers, Nick Hammond, who alleges that Robinson had physically threatened him. Robinson gave evidence that the statements contained in this letter were false and that he did not threaten or behave aggressively

toward his co-workers. Robinson pointed out that Mr. Hammond was still employed by ADW and so could have been pressured by ADW to write the letter in question. Significantly, although Mr. Hammond was under ADW's control as an employee, he was not brought to the hearing by the employer. Mr. Low, on behalf of ADW, sought permission to have me hear Mr. Hammond's evidence at some other time, because Mr. Hammond was working in a remote location. I refused this request, on the basis that if the appellant wished to rely on important evidence to demonstrate an error in the Determination, that evidence must be presented at the time of the hearing. I did not admit Mr. Hammond's letter into evidence because it also contains nothing but hearsay. In the absence of reliable evidence to the contrary, I accept Robinson's testimony wherever there is a conflict with the employer's allegations of misconduct.

I am comforted in preferring Robinson's version of events over the employer's allegations after I heard Robinson describe, on a collateral issue, how Mr. Hammond always took charge of driving the company vehicle when in the field and how on one occasion Mr. Hammond deliberately took a long, circuitous route when taking Robinson and another co-worker back to the company office. All parties admit that Mr. Hammond is diminutive in stature, while Robinson presents as a fairly husky and fit individual. Mr. Hammond also had been working for ADW for many years, while this was Robinson's first job after having taken his training in surveying. I find it highly significant that although Robinson was supervising Mr. Hammond and the other crew member, Robinson stated with some amusement that Mr. Hammond insisted on driving the company vehicle everywhere, and on this one occasion, Robinson seemed to be helpless to deal with Mr. Hammond's determination to waste the employer's time by deliberately taking a circuitous route. If Robinson is the aggressive, threatening supervisor alleged by the company, I find it hard to understand how Mr. Hammond so easily had his way about things.

ISSUE TO BE DECIDED

This appeal requires me to decide whether ADW had dismissed Robinson for just cause and so whether it is liable to pay Robinson compensation for length of service.

ANALYSIS

At the hearing I advised ADW that I had reservations about hearing evidence and argument on the just cause issue, when ADW had ignored the Director's written request for information on the question, sent nearly six months before the Determination was issued. I have previously held that an appellant who elects not to present important evidence to the Director should not be allowed to take advantage of such evidence called for the first time on appeal (see *Astrolabe Marine Ltd. v. Director of Employment Standards*, BC EST No. D525/97).

If I were to permit ADW to present evidence of just cause for the first time on appeal, I would transform the appeal process into a second investigation into the same issues that were before the Director. In my view, to succeed in an appeal from a Determination by the Director, the appellant must demonstrate some error in fact or law made by the Director that warrants cancellation or variation of the Determination. An appellant, in my view, would be on difficult ground if it is alleged the Determination is in error on an issue the appellant completely ignored before the Director. In the present case, ADW made no response over a six-month period to the Director's request for information that might support its dismissal of Robinson for cause. I cannot accept that now ADW can argue the Determination is in error, when it ignored the Director's request for information on that very issue.

In any event, having proceeded to hear the employer's evidence as to just cause for Robinson's dismissal, I am satisfied that ADW's appeal should be dismissed. Even if I were to allow ADW to present for the first time in this appeal facts which could and should have been presented to the Director, I find that ADW has failed to prove that Robinson behaved aggressively toward his co-workers. I accept Robinson's evidence that he experienced no difficulties with his co-workers, and I also accept that Robinson appears to have been overly deferential to Mr. Hammond by acceding to Mr. Hammond's insistence on driving the company vehicle and on one occasion, by not trying to stop Mr. Hammond from deliberately wasting the employer's time.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Dafoe is correct and the appeal should be dismissed. Pursuant to section 115 of the *Act*, I order that Determination #CDET 007093 be confirmed, together with interest pursuant to section 88 of the *Act*.

**Ian Lawson
Adjudicator
Employment Standards Tribunal**