

An appeal

- by -

JLC Auto-Repairs Ltd. operating 100 Mile Husky  
("JLC")

- 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:** David B. Stevenson

**FILE No.:** 2001/717

**DATE OF HEARING:** March 20, 2002

**DATE OF DECISION:** March 26, 2002

## DECISION

### APPEARANCES:

on behalf of JLC Auto-Repair Ltd.

Tom Nicholson  
Linda Mahoney

on behalf of the individual

No one appearing

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by JLC Auto-Repair Ltd., operating 100 Mile Husky (“JLC”) of a Determination that was issued on October 1, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that JLC had contravened Part 8, Section 63 of the *Act* in respect of the employment of Amanda Mills (“Mills”) and ordered JLC to cease contravening and to comply with the *Act* and to pay an amount of \$259.61.

JLC says the Determination was wrong in its conclusion that Mills was dismissed without just cause.

### ISSUE

The issue is whether JLC has shown the Director erred in finding that Mills was dismissed without just cause.

### THE FACTS

JLC operates a gas station and convenience store in 100 Mile House. The business is situated in a rectangular shaped building, sitting in a north/south orientation on a corner lot in a visible location just off Highway 97. The building consists of three main areas: the convenience store, the auto servicing area and the car wash. The convenience store occupies an area at the north end of the building. It is accessed from the outside through the main entrance door. The auto servicing area is immediately to the south of the convenience store and is connected to the convenience store through a metal frame door with barred glass insert. The auto service area consists of two servicing bays, each accessed from the outside by large garage bay doors. The car wash area is at the south end of the business premises. It consists of a single car wash bay which is accessible from the outside through two large garage bay doors at each end of the car wash area. Beside the entry bay door is a metal passage door with a heavy window insert this door does not open. The car wash area is connected to the auto service area through another metal frame door with barred glass insert.

Mills was employed for JLC from June, 2000 to May 6, 2001 as a station and convenience store attendant at a rate of \$7.60 an hour. Mills was dismissed on May 9, 2001, for what JLC believed was her involvement in a robbery of the business that occurred on May 6, 2001. There is some reference in the Determination to two letters given to Mills addressing work performance matters, but it was apparent from appeal submission and the evidence presented at the hearing of this appeal, that those letters were almost entirely irrelevant to the decision to terminate. They were not referred to or relied upon during the hearing of this appeal.

I heard evidence from Linda Mahoney, one of the owners of JLC and its operating manager, about the robbery and the facts upon which it was concluded that Mills was involved in it. Mrs. Mahoney testified that the business premises is monitored by a security company, which has placed a video security camera at the entrance door into the convenience store area and a security alarm system inside the building.

On Sunday, May 6, 2001, Mills worked the pm (afternoon/evening) shift. The shift started at 2 pm and ended at 9:00 pm. The business closed at 9:00 pm. From 5:00 pm until closing, she was the only employee on the premises. Mills was solely responsible for closing the business premises. Her responsibilities in that regard included: bringing in all product and equipment from outside, such as oil and anti-freeze, buckets, squeegees and the air hose, closing (if necessary) and locking the auto service area and car wash bay doors, shutting down the lights and equipment in the car wash, securing the metal frame door between the car wash and the auto service area, shutting off the lights in the auto service area, cashing out the proceeds of the shift, placing those proceeds into an envelope and putting the envelope into a locked black box located on the premises, placing the cash register tray in the office, setting the video monitoring system, setting the security alarm system and locking the main entrance upon leaving. Mills set the alarm at 9:06 pm on that day. The video camera recorded Mills leaving the business premises wearing a knapsack on her back.

At about 10:00 pm on May 6, Mills called Mrs. Mahoney at her home. She said she had left her purse in the business premises when she left after her shift and asked permission to enter the business premises to get it; permission was granted. Mrs. Mahoney testified that the records of the security company monitoring the premises indicate that Mills turned off the alarm system at 10:10 pm. The system was re-activated just over 1 minute and thirty seconds later. The video recorded Mills entering and exiting the business premises at that time. The video was not available at the hearing as it was in the possession of the RCMP, who are conducting a criminal investigation of the robbery. Mrs. Mahoney testified that the video shows Mills, on entering the business premises, to appear to be holding something under her coat with her left arm and unlocking and opening the main entrance door using only her right arm. The video shows Mills leaving the business premises swinging her purse.

The security system was operating properly and, except for the 1½ minute period during which Mills was on the business premises, was not breached and was continuously monitoring the business premises from 9:06 pm, May 6 to approximately 7:00 am May 7. While the security

system is turned on, it is impossible to get from any exterior door to the area where the locked black box was located without setting off the alarm. Another employee opened the business at approximately 7:00 am, turning off the alarm and unlocking the exterior doors. Mrs. Mahoney arrived at approximately 7:45 am. She went to the office, which is located on an upper level above the convenience store, and got the cash register tray and cash float. She opened the safe in the office and went to retrieve the contents of the locked black box. She found the lock on the black box had been removed and the box was empty. The lock that was on the black box was observed about four feet away; it had been cut. The black box should have contained the proceeds of four week-end shifts, the Saturday and Sunday am and pm shifts. Mrs. Mahoney talked to the employee on duty. That employee had not noticed the black box that morning, but told Mrs. Mahoney that the door connecting the car wash area and the auto service area was not secured when she arrived that morning and she had observed some glass on the floor of the car wash area.

The RCMP were called. As noted above, a criminal investigation is ongoing. On the recommendation of the RCMP officer conducting the criminal investigation, a full disclosure of the information available as a result of that investigation was not provided to the Director during the investigation of the complaint. Mrs. Mahoney testified that the exact amount of the loss is indeterminable, but estimated the loss to be between \$3500 and 4000.

The Determination concluded that JLC had not provided any evidence showing Mills had a role in the robbery and found just cause had not been established. The Determination did indicate, however, that if the evidence showed Mills to be involved or complicit in the robbery, cause would exist.

## **ARGUMENT AND ANALYSIS**

The burden is on JLC, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Specific to this appeal, the burden is on JLC to demonstrate on a balance of probabilities the existence of facts supporting just cause for termination. Proof, on a balance of probabilities, of Mills' involvement or complicity in the robbery of the business would satisfy that burden. While there is no direct evidence linking Mills to the robbery there is a significant body of circumstantial evidence supporting an inference that she was involved in some way. That evidence includes the following:

- The robbery occurred at the end or after the completion of Mills shift on May 6. The proceeds of her shift, as well as the proceeds of three other shifts were taken. Except for an employee who was alone on the business premises for approximately 45 minutes on the morning of May 7, no other known person had opportunity. The other employee was, however, following investigation and questioning by the RCMP, not considered to be a suspect in the robbery.

- Mills was interviewed by the RCMP and continues to be the prime suspect in the robbery.
- Undetected access to the locked black box could only have been accomplished by, or with the assistance of, an employee. Only employees knew of the location of the locked black box and knew that the proceeds of the sales from the four week-end shifts were placed in it.
- Mills acknowledged during the investigation that she “apparently left the side door to the business unlocked”. Even if that were so, no intruder entering the building premises through the car wash area could access the locked black box without setting off the alarm - if the alarm was set when the robbery occurred. The security alarm system was functioning normally and was not breached from the end of Mills’ shift until turned off at approximately 7:00 am the following morning. The only period the security system was not monitoring the business premises after 9:06 pm was during the 1½ minutes Mills went inside to allegedly collect her purse.

Mills has denied to the RCMP and to the Director any involvement in the robbery. The Director accepted her denial in the absence of any evidence of her involvement. I have the benefit of evidence not made available to the Director. The circumstances under which JLC failed to provide that information during the investigation of the complaint do not justify foreclosing JLC from presenting that evidence on appeal.

The evidence is circumstantial. The question I must decide is whether I may draw the inference from all the evidence presented that Mills was involved in the robbery. In deciding whether I may do that it is open to me to consider her failure to attend the proceeding and answer the allegations made against her and used by the employer to justify her termination. Mills was fully aware of the allegations made against her. The appeal submission was comprehensive in its analysis. The allegations made and the case presented by JLC to support her termination requires an answer. Mills is in the best position to establish her non-involvement in the robbery and to deflect the inferences indicated by the evidence. Her silence, amply demonstrated by her absence from the proceedings, in the face of circumstances that cry out for an explanation justifies my adopting the inference that is indicated by the evidence. I find, on balance, just cause has been established by JLC.

The appeal succeeds.

**ORDER**

Exercising my jurisdiction under Section 115 of the Act, I order the Determination, dated October 1, 2001, be cancelled.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**