

An appeal

- by -

Witmar Holdings Ltd. operating as Big White Motor Lodge

- 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: John M. Orr

FILE No.: 2003A/3

DATE OF DECISION: March 18, 2003

DECISION

OVERVIEW

This is an appeal by Witmar Holdings Ltd. operating as Big White Motor Lodge (“Witmar”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated December 03, 2002 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the Act the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Director’s delegate determined, following an oral hearing, that Witmar had terminated the employment of Ms. Lynne Fournier (“Fournier”) without just cause and without compensation for length of service. Witmar had discovered the theft of a small amount of money during shifts worked by Fournier and another employee. Witmar was unable to identify which of the two employees had stolen the money and dismissed both. The delegate found that Witmar had the burden of establishing just cause and as there was insufficient evidence to establish that Fournier was the thief there was not just cause for her dismissal. She was awarded compensation for length of service.

Witmar appeals on the basis that the delegate failed to consider that the two employees could have conspired together to steal the money and therefore there would have been just cause to dismiss both employees regardless of which one actually committed the theft.

ISSUE ON APPEAL

The issue on this appeal is whether the delegate failed to consider or address the theory that both employees could have conspired to commit the theft and that therefore there was just cause to dismiss both employees.

ANALYSIS

In theory it is possible that both employees could have conspired to commit the theft as alleged and, if this had been established by Witmar, it may have created just cause for dismissal. However, it is apparent from the documents provided and the submissions of the parties that this theory was not advanced at the hearing before the delegate. The theory was not put to the employees under cross-examination and was not submitted to the delegate for consideration. It ill behoves Witmar to complain that the delegate failed to consider this theory in the determination.

The onus is on the employer to establish just cause for dismissal. Therefore, in this case, Witmar would have to have established either that Fournier had actually stolen the money or that there was, in fact, a conspiracy. In this latter case, Witmar had to provide some evidence of an agreement between the two employees to commit or participate in the theft. There was no such evidence given to the delegate and no such evidence presented on this appeal. Without some evidentiary foundation the conspiracy theory remains just that – a theory.

I am not satisfied that Witmar has met the onus of persuading the Tribunal that the determination was wrong and therefore the appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the appeal is dismissed and as a result the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal