

BC EST #D110/96

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 -

Dentex Dental Laboratories

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Jerry W. Brown

FILE No.: 96/128

HEARING DATE: April 25, 1996

DATE OF DECISION: June 3, 1996

DECISION

APPEARANCES

Joe Birner	Owner of Dentex Dental Laboratories
W. Murray MacDonald	Accountant for Dentex Dental Laboratories
Lynne L. Egan	For The Director of Employment Standards
Douglas Munro	On His Own Behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 000857 issued by the Director of Employment Standards (the "Director") through its delegate on January 24, 1996.

The Director determined that Dentex Dental Laboratories Ltd. ("Dentex") was in breach of section 63 of the Act and that the complainant, Douglas Munro ("Munro"), would receive compensation for length of service in the amount of \$9,158.40.

Dentex claims that there is no liability for compensation owed for length of service set out in the Act because Munro quit when he refused to come back to work for a few days when work became available within the 13 week period during which Munro was temporarily laid off.

Written submissions were received from Dentex and information was provided by the Director's delegate. An oral hearing was subsequently held.

FACTS

Munro was employed by Dentex as a dental technician at a rate of pay of \$27 per hour for a 40 hour week. Munro's first day of work with Dentex was February 1, 1983 and his last day at the

job was May 19, 1995. At that time he began a one week vacation and was scheduled to return to work on May 29, 1995. On Sunday evening, May 28, 1995, while still on vacation, he received a phone call from Dentex owner Joe Birner ("Birner") telling him not to report to work as there was a shortage of work.

On Monday, May 29, 1995, Birner provided Munro with a written letter confirming his layoff from Dentex effective immediately due to lack of work. Munro had requested the letter. Munro was also provided with a Record of Employment ("ROE") prepared by Dentex's accounting firm, MacDonald, Ng & Co. ("MacDonald") dated May 29, 1995. It indicated in box 19 of the form, that Code A or shortage of work was the reason for leaving Dentex. In the comment box it had the word "layoff" written.

There were errors in the ROE dated May 29, 1995 which was prepared by MacDonald. The first day of work was incorrectly stated and the amount of insurable earnings was also incorrect. Munro requested those two items be amended. MacDonald provided the Amended Record of Employment ("AROE") and in addition to the corrections with respect to the first day worked and the insurable earnings, included a further comment in box 22 that now read "layoff - temporary. Note - amended record ROE at employee request". The code for reason for issuing in box 19 remained A - "shortage of work".

Birner and Munro had some conversations during this period but no written formal recall to work was ever issued by Dentex. There was a disagreement about holiday pay but Dentex eventually complied with Munro's accounting and that matter has been resolved. Munro picked up a cheque left by Birner at Dentex's neighbour. Dentex did not attempt to contact Munro after that time.

ISSUES TO BE DECIDED

1. Did Dentex terminate Munro or was he placed on temporary layoff, subject to recall?
2. (a) If Munro was on temporary layoff was he properly recalled by Dentex?
(b) If Munro was properly recalled by Dentex did he fail to return to work or quit?

ANALYSIS

1. Did Dentex terminate Munro or was he placed on temporary layoff, subject to recall?

Birner does not dispute the fact that he called Munro on the last day of his vacation and advised him that he should not come to work as there was a shortage of work. The parties are in agreement that there was a conversation during which Munro requested confirmation that he was being laid off. Birner complied with this by giving him hand written notice dated May 29, 1995 confirming that it was an official layoff from Dentex effective immediately due to lack of work.

The first ROE was prepared by an assistant in MacDonald's office. There were two mistakes in this ROE and Munro requested that it be revised to reflect the correct original date of employment and the correct amount of insurable earnings. The accountant issued an AROE the next day, but also took the liberty of inserting in the comment box a notation indicating that this was a temporary layoff. Birner has clearly indicated that he was relying on his accountant's advice throughout this whole period on how to deal with this matter.

Munro testified that he was told verbally and in writing that the layoff was permanent. He indicates the AROE is in an attempt by Dentex to modify its original position that Munro relied upon. Dentex contends that the original ROE was prepared in error and that the AROE was in fact the correct statement of the situation.

The circumstances surrounding this event are difficult for the parties to reconcile in that there was a longstanding relationship that suddenly came to an end. This is magnified by the fact that Munro is now a competitor of Dentex and Birner. This came out clearly in Birner's testimony. Unfortunately, based on the written materials and the evidence at the hearing I find that Munro's rendition of what transpired, supported by the materials before me, lends support to his account of the story. This is not to suggest that Birner was not a credible witness, but rather that the written evidence lends strong support to Munro's position.

I therefore find that Dentex did, in fact, terminate Munro and he is entitled to compensation for length of service.

Even if I am incorrect in finding that Munro was terminated, an exploration of the scenario that he is placed on temporary layoff still requires me to uphold the Director's delegate's determination. The Act is quite clear on this matter. Where an employee not covered by a collective agreement is temporarily laid off by an employer and the layoff exceeds the temporary layoff period as defined

in the Act, the employee shall be deemed to have been terminated at the beginning of the temporary layoff. It goes on to provide that the employer shall pay the employee compensation pursuant to the Act.

Given Birner's testimony about Dentex's attempts to contact Munro during this period, it allows me to conclude that Dentex did not make an adequate or acceptable contact with Munro. The first and only significant attempt was through the secretary in the office next door who, according to Birner, was asked to tell Munro to come in for two days work. This was when she was acting as a pick up point for a cheque that Dentex had left for Munro. Dentex apparently made no attempt, nor provided any documented evidence, that a recall to continuing, permanent employment was made. The request through the secretary was not satisfactory. In fact, when Munro failed to comply with the request made through the secretary, there was no formal documented attempt made by Dentex to contact and recall Munro.

The appellant, Dentex, has the burden of proof in this appeal. Nothing that was presented persuades me to find that the Director's determination was in error. If Munro was as good an employee as Birner indicated in his evidence then Dentex would have made a more significant attempt to contact and recall him. Although there are no guidelines in the Act on how to recall an employee, Dentex failed to notify Munro in a reasonable manner when it attempted to call Munro back to work.

Having determined that Dentex failed to recall Munro in a reasonable manner there is no need to address the issue of if Munro quit.

In am unable to find that Dentex has discharged the burden of establishing that the determination was in error and I deny the appeal.

I also take note and accept the Director's delegate's submission to increase the determination to include interest for the period from November 1, 1995 to January 24, 1996 in the amount of \$167.17.

ORDER

In summary, I order under Section 115 of the Act, that Determination No. CDET 000857 be varied only to increase the amount to be paid to Munroe of \$9,325.57 to include the interest due as set out above.

JERRY W. BROWN
Adjudicator
Employment Standards Tribunal

EKB:98251