

An appeal

- by -

A & E Motorcars Ltd.  
("A & E Motorcars")

- 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 (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2009A/126

**DATE OF DECISION:** November 17, 2009

## DECISION

### SUBMISSIONS

Cherrie Emnace	on behalf of A & E Motorcars Ltd.
Samuel Santos	on his own behalf
Ed Wall	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by A & E Motorcars Ltd. (“A & E Motorcars”) of a Determination that was issued on August 17, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that A & E Motorcars had contravened Part 8, Section 63 of the *Act* in respect of the employment of Samuel Santos (“Santos”) and ordered A & E Motorcars to pay Santos an amount of \$2,094.79, an amount which included wages and interest.
2. An administrative penalty was imposed on A & E Motorcars under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$500.00.
3. The total amount of the Determination is \$2,594.79.
4. A & E Motorcars says the Director erred in law in finding they had not established just cause to summarily dismiss Santos as a result of his being late on October 1, 2008. More particularly, A & E Motorcars says the Director erred in deciding they were not able to consider Santos’ previous pattern of behaviour to support the dismissal and in finding they had not warned Santos his job was in jeopardy if he was late again.
5. A & E Motorcars has suggested the Tribunal should conduct a hearing on this appeal. While we have a discretion whether to hold an oral hearing on an appeal – see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575 – I have reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) Record filed by the Director, and have decided an oral hearing is not necessary in order to decide this appeal.
6. If I find there is merit to the appeal, I can exercise any of the powers set out in Section 115 of the *Act*, including changing or varying the Determination (as requested in the appeal) or referring the matter back to the Director.

### ISSUE

7. The issue in this case is whether the Director erred in law in finding Santos was entitled to length of service compensation under Section 63 of the *Act*.

## THE FACTS

8. A & E Motorcars operates a car dealership. Santos was employed as a mechanic from September 1, 2005 until October 1, 2008, when he was dismissed.
9. A & E Motorcars said Santos was dismissed for cause after a long history of chronic absenteeism and lateness. The evidence presented by A & E Motorcars to the Director included a summary of Santos' absenteeism and lateness for a period from April 1, 2008 until his dismissal. Until September 25, 2008, A & E Motorcars had not raised any issue with Santos over his absenteeism and lateness. A & E Motorcars acknowledged they had condoned Santos' absenteeism and lateness until that date.
10. On September 23 and 24, 2008, Santos was absent and on September 25, 2008, he was late.
11. On September 25, A & E Motorcars said their general manager, Arlan Emnace, had a discussion with Santos concerning his lateness on that day. Mr. Emnace provided evidence to the Director of the content of that discussion, which is summarized in the Determination. Troy Page, who works occasionally for A & E Motorcars, gave evidence confirming the fact and content of the discussion.
12. Santos said he did not recall having any discussion with Mr. Emnace on September 25.
13. On October 1, 2008, Santos was late and was summarily dismissed by Mr. Emnace.
14. The Director analyzed the dismissal from the perspective of the comments of the Tribunal decision in *Kenneth Kruger*, BC EST # D003/97, concerning the requirements for establishing just cause where the dismissal is based on instances of minor misconduct. The Director found that while a discussion had taken place on September 25, the evidence of the content of that discussion fell "far short" of establishing a clear and unequivocal warning had been given to Santos that he would be fired if he was late again. The Director found, as a matter of fact, that no such warning had been delivered to Santos.

## ARGUMENT

15. In this appeal, A & E Motorcars argues the Director erred in law in using the concept of "condonation" to disallow reliance on Santos' history of absenteeism and lateness. A & E Motorcars says that since Santos was warned after his absenteeism on September 23 and 24 and his lateness on September 25 that he would be fired if he were absent or late again without informing the office, those instances come back into play.
16. The Director and Santos have responded to the appeal.
17. The Director acknowledges that A & E Motorcars, although it had condoned Santos' absenteeism and lateness, was not forever precluded from terminating him for absenteeism or lateness. The Director says the burden of proving just cause was on A & E Motorcars and, on the test enunciated in *Kenneth Kruger, supra*, failed to meet that burden. Specifically, the Director points to the conclusion in the Determination, that the evidence failed to show Santos had been clearly and unequivocally warned that his employment was in jeopardy if he were absent or late again without notifying the office.
18. The Director says the assertion by A & E Motorcars that Santos was issued a clear warning that he would be fired for any unreported absenteeism or lateness is inconsistent with the findings made in the Determination. The Director says those findings do not amount to an error of law, that A & E Motorcars is simply

expressing disagreement with findings of fact and that kind of disagreement is not a matter that can be challenged in an appeal.

19. Santos' response does not address the error in law on which the appeal is grounded and for that reason, I do not find it particularly helpful.
20. Similarly, the final reply made by A & E Motorcars mainly responds to the assertions and allegations made in Santos' response. They do, however, reiterate their disagreement with the Director's finding on whether a warning was issued, which they say was "definitely issued".

## ANALYSIS

21. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

*112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was made.*

22. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

23. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

24. Although A & E Motorcars has built this appeal around their expressed disagreement with the Director's consideration of the effect of having condoned Santos' absenteeism and lateness, at its core the appeal is about their disagreement with the Director finding Santos was not clearly warned that his job was in jeopardy if his absenteeism and lateness continued.

25. In respect of the question of condonation, I can find no legal error in how the Director dealt with that matter, which is summarized in the following excerpt from the Determination:

. . . without a clear final warning his job was at stake if he was late again, A & E cannot rely on the summary [of condoned absenteeism and lateness] above, even if Mr. Santos was late or absent on each day alleged.

26. As indicated above, the Director found A & E Motorcars did not warn Santos his job was in jeopardy if his pattern of absenteeism and lateness without notice or excuse continued. It is apparent A & E Motorcars disagrees with that finding. At several points in the appeal submissions A & E Motorcars asserts Santos was clearly, and specifically, warned that his conduct was unacceptable and would no longer be tolerated.

27. Reference has been made earlier in this decision to the *Britco Structures Ltd.* decision. In that decision, the Tribunal concluded there was no authority in the Tribunal to review findings of fact, *simpliciter*, but such

findings could be reviewed as errors of law if the findings were based on no evidence or on a view of the facts which could not reasonably be entertained. The Tribunal also noted that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact were perverse and inexplicable, in the sense that they were made without any evidence, they were inconsistent with and contradictory to the evidence or they were without any rational foundation.

28. That last comment accurately expresses the burden on A & E Motorcars in taking issue with the factual finding that Santos was not warned of the adverse consequences of a continued course of unacceptable absenteeism and lateness. It does not advance the appeal for A & E Motorcars to simply express the view that Santos was clearly and adequately warned. The Director found otherwise, identifying the evidentiary basis and the rationale for that finding. A & E Motorcars has not met the burden of showing that finding was an error of law.
29. As the Director's finding on that point is accepted as a finding of fact, the Tribunal has no authority under Section 112 to consider an appeal based on a challenge to that finding. Based on the facts as found by the Director, I do not find any error of law in how the Director dealt with the concept of condonation or with the analysis of the requirements described in the *Kenneth Kruger* decision for establishing just cause in the circumstances of the case.
30. Accordingly, I can find no reviewable error in the Determination and the appeal is dismissed.

## **ORDER**

31. Pursuant to Section 115 of the *Act*, I order the Determination dated August 17, 2009, be confirmed in the amount of \$2,594.79, together with any interest that has accrued under Section 88 of the *Act*.

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