

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-

L & D Stores Ltd.
("L & D")

Gertrud Dust
("Dust")

Marianne Lauser
("Lauser")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/728

DATE OF HEARING: March 26th, 1997

DATE OF DECISION: April 2nd, 1997

DECISION

APPEARANCES

Douglas H. Christie	for L & D Stores Ltd., Gertrude Dust and Marianne Lauser
Tam Tran	on his own behalf
Terry Hughes	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by L & D Stores Ltd. (“L & D”), Gertrud Dust (“Dust”) and Marianne Lauser (“Lauser”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination Nos. CDET 004610, DDET 000524 and DDET 000537, respectively, all of which were issued by the Director of Employment Standards (the “Director”) on November 14th, 1996.

The Director determined that L & D owed its former employee, Tam Tran (“Tran”), the sum of \$2,411.56 on account of unpaid statutory holiday pay and other unpaid wages, an unauthorized payroll deduction and compensation for length of service. The Director issued Determinations against each of Dust and Lauser, also in the amount of \$2,411.56, on the basis that Dust and Lauser were directors or officers of L & D when Tran's wage and other claims arose (see section 96 of the *Act*).

L & D formerly operated a bakery in the greater Victoria area. I understand the business has now been sold. Tran was one of three bakers who were formerly employed by L & D.

The appeal was heard in Victoria on March 26th, 1997 at which time I heard evidence from Sigfried Lauser, Marianne Lauser and Gertrud Dust on behalf of the appellants and from Tran and Huyen Nguyen on behalf of the respondent Tran. The Director was represented by Terry Hughes, who did not present any evidence

but did make a final submission to me as did Tran and Mr. Christie on behalf of the appellants.

I should note, as a preliminary matter, that the appellants do not challenge the Determination with respect to statutory holiday pay, the unauthorized payroll deduction and wages owed to Tran for the 4.5 hours worked on January 15th, 1996.

ISSUES TO BE DECIDED

Mr. Christie, on behalf of the appellants, raised three grounds of appeal in the notice of appeal that he filed with the Tribunal:

1. The Director's delegate "acted in a manner that implied a racial bias" in the way in which he conducted his investigation;
2. The appellants Lauser and Dust should not have been found liable under separate Determinations because they "were not the operating mind or functioning administrator of the company"; and
3. Tran was terminated for just cause (falsification of his time card) and, therefore, was not entitled to any termination pay by reason of section 63(3)(c) of the *Act*. I should add that during the course of the appeal hearing, the appellants apparently abandoned this ground of appeal in favour of an alternative ground, namely, that Tran voluntarily resigned his employment with L & D. This latter ground of appeal was not specifically set out in the appellants' notice of appeal, however, this alternative position was advanced during the investigation of the complaint and was dealt with in the Determination. In the absence of any objection by or prejudice to the respondents, I allowed the appellants to lead evidence and make submissions on this particular ground.

I propose to deal with each of these grounds in turn.

BIASED INVESTIGATION

During the course of his testimony before me Sigfried Lauser repeatedly stated that, in his view, the Director's delegate:

- tried to “twist my words”;
- “only sees the employee’s side of things”;
- “was not looking for the truth”; and
- believes that “the employer is always wrong”.

Mr. Lauser, who is of German descent, also stated that “we as Germans are often discriminated against and the only reason is that we are Germans”.

Ms. Dust also testified that the Director’s delegate was biased stating that, in her view, he was “very aggressive” during their two meetings; that he “tried to make us say we would fire Tran”; and that he “didn’t accept our answers”.

The role of an investigating employment standards officer is a difficult one. When investigating a complaint the officer is obliged to give the party under investigation a reasonable opportunity to respond to the complaint (see section 77 of the *Act*). An officer who is investigating a complaint also knows that, ultimately, he or she will have to issue a decision with respect to that complaint--a decision that invariably leaves one side or the other dissatisfied. When an officer is investigating a complaint he or she is engaged in a pursuit of the truth; unfortunately, not all complainants or respondents are truthful. Even when parties are relating what they believe to be the truth, it is appropriate to test their statements and recollections and, in so doing, the officer may, on occasion, act in a way that might be perceived (especially by a party who has never been involved in such a process) to be overly aggressive. However, I do not believe that such an approach betokens bias.

The investigation process usually proceeds such that the complainant and respondent are not questioned by the officer in the presence of each other. Thus, the officer has some obligation to test the evidence and recollection of the parties in the same manner that parties themselves test each other’s evidence during the course of an appeal hearing. For example, during the appeal hearing in this very matter Mr. Christie conducted a thorough (and some might fairly characterize his questioning as “aggressive”) cross-examination of the complainant. In so doing Mr. Christie was not displaying any bias toward the complainant and I would wholeheartedly reject any contrary opinion.

I have read the Director's delegate's Reason Schedule several times--in my view, his report displays a careful attention to the submissions of the parties and sets out a reasoned conclusion, albeit one that is completely rejected by the appellants. The Director's delegate summarized the parties' respective positions, reviewed the evidence that was before him and came to a conclusion in favour of the complainant employee. In so doing, I cannot see any evidence that his decision was motivated, either in whole or in part, by some sort of animus toward this employer, or towards employers in general.

THE LIABILITY OF DUST AND LAUSER

Section 96 of the *Act* creates a statutory vicarious liability. The only exceptions to this liability of which I am aware are contained in section 96(2) of the *Act* and section 45 of the ESA Regulation, neither of which is relevant here. The fact that one or both of Dust and Lauser were not "operating minds" of L & D stores is irrelevant (and in any event, the evidence does not unequivocally establish that is so). Both Dust and Lauser were directors or officers of L & D when Tran's claim for unpaid wages and termination pay crystallized. In such circumstances, so long as it can be shown that L & D is liable to Tran, both Dust and Lauser are equally liable up to the statutory ceiling of two months' unpaid wages.

TRAN'S CLAIM FOR TERMINATION PAY

There is no evidence before me upon which I can reasonably conclude that the employer had just cause to terminate Tran because of his consistent falsification of his time records. Apparently, one of Tran's co-workers, a gentleman named Amarjit Tumber, told the Lausers and Ms. Dust that on several occasions Tran left work early only to return at the end of his shift to "punch out" his time card. Tran denies this allegation. Neither the Lausers nor Ms. Dust have any personal knowledge that Tran falsified his time records.

Although Tumber was summoned to appear at the appeal hearing by the appellants, he did not attend. Although I offered to adjourn the hearing so that the appellants could take whatever steps they deemed appropriate to compel Tumber's attendance, the appellants advised, through their counsel, that they wished to proceed with their case in the absence of Tumber's evidence.

In the face of only hearsay evidence regarding Tran's alleged misconduct and Tran's apparently credible denial of such misconduct, I must conclude on a balance of probabilities that the employer did not have just cause to terminate Tran.

As noted above, during the course of the appeal hearing (and perhaps because of Tumber's failure to attend the hearing) the appellants maintained that Tran quit his employment a day or so after leaving work early on the evening of January 15th, 1996. Tran testified that he did not quit; he says he was fired.

On the balance of probabilities, I am satisfied that Tran did not quit but, rather, was terminated on or about January 16th, 1996.

Tran's evidence is that he fell ill during his shift on January 15th, 1996 and left early without punching out his time card. His evidence in this respect is corroborated by a certificate from Tran's physician (Dr. Pengilly) which states that the doctor saw Tran on January 16th, 1996, that Tran was ill and was, therefore, "advised to stay off work an at (sic) rest from this date until January 22, 1996". According to Tran, on the morning of January 16th he called Ms. Lauser and informed her that he would not be reporting for work that day due to illness. He called Ms. Lauser again the following day and again said he would be off work due to illness. Later that afternoon Tran's co-worker, Mr. Nguyen, telephoned and told Tran that their pending purchase of the bakery was in jeopardy due to the "time card" allegation. Tran attended the L & D premises on the afternoon of January 18th when he was told by Mr. Lauser that he was fired and was then asked to surrender his key to the L & D premises, which he did.

The appellants related a very different story. Mr. Lauser says that Tran, faced with the evidence of his fraud, resigned in disgrace. Mr. Lauser says that he did not fire Tran and that Tran stated that he was quitting during a telephone conversation with Ms. Lauser. Mr. Lauser stated that Tran never told him (Lauser) that he was quitting. Ms. Dust testified that Ms. Lauser told her on the morning of January 16th that Tran had quit. Ms. Dust acknowledged that Tran never told her directly that he was quitting. Ms. Lauser testified that Tran told her during a telephone conversation the morning of January 16th or 17th, 1996 that "I don't work for you anymore".

Ms. Lauser did acknowledge that Tran telephoned her to say that he would not be reporting for work due to illness. Mr. Lauser also acknowledged that Tran raised

the matter of his illness during their meeting on January 18th and that he did ask Tran to surrender his key to the premises.

The appellants' case is predicated on the theory (expressed by Mr. Lauser during his evidence and reiterated by Mr. Christie during his final submissions) that Tran quit his job because he had "lost face" by reason of having been "found out" with respect to his falsification of time records. However, there is absolutely no evidence before me upon which I can reasonably conclude that Tran, in fact, falsified his time cards as alleged. Tran says that he did not quit, but merely was off-work due to illness. His evidence in this respect is corroborated by the doctor's medical report, the evidence of Nguyen and, indeed, the evidence of Mr. and Ms. Lauser who testified that Tran did say he was away from work due to illness. I am satisfied that Tumber may well have told the appellants that Tran falsified his time records on a number of occasions; I am further satisfied that the appellants believed that allegation and that is why they terminated Tran.

However, it does not follow from the mere fact that the employer *believed* it had just cause that it had, in fact, a legally sufficient reason to unilaterally terminate Tran's employment contract. The burden of proving just cause rests with the employer; in this case the employer has simply failed to meet its burden of proof.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination Nos. CDET 004610, DDET 000524 and DDET 000537, issued as against L & D Stores Ltd., Gertrud Dust and Marianne Lauser, respectively, be confirmed as issued each in the amount of \$2,411.56 together with whatever further interest may have accrued pursuant to section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal