

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 -

Thomas Marsh
("Marsh")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO.: 96/142

DATE OF HEARING: June 18, 1996

DATE OF DECISION: June 20, 1996

DECISION

APPEARANCES:

Thomas Marsh	For the Appellant
Ray Stea	For the Director of Employment Standards
Christopher Considine	For MacNutt Enterprises

OVERVIEW

This is an appeal by Thomas Marsh ("Marsh"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued on February 2, 1996 (Determination CDET #000196) wherein the Director found that the employer had not contravened the *Employment Standards Act* in terminating the employment of the employee, and that severance pay was not owing.

ISSUE TO BE DECIDED

The issue on appeal was whether the Appellant had been dismissed for just cause.

Marsh contended that the Director had not spoken to all parties involved, and that the individuals he did speak to provided him with false information.

FACTS

Mr. Marsh worked as a Truck Driver/Excavator operator for MacNutt Enterprises ("MacNutt") October 26, 1987 until the date of his dismissal on January 20, 1995. On that date, there was an altercation between Mr. MacNutt and Mr. Marsh regarding some tasks Mr. MacNutt asked Mr. Marsh to perform. As a result of the altercation, Mr. Marsh's employment was terminated.

After an investigation, the Director found that Marsh's actions constituted wilful disobedience of a lawful and reasonable order of the employer, and that Marsh's employment had been properly terminated.

ARGUMENTS

Mr. Marsh presented no evidence, but repeated his grounds of appeal that the witnesses interviewed by the Director provided false information. Mr. Marsh also contended that he had no previous warnings about his behaviour, and that if he had been advised his job was in jeopardy, he would have sought alternative employment.

Even though Mr. Marsh presented no evidence, Mr. Considine agreed to call his witnesses to give Mr. Marsh an opportunity to cross examine them on their evidence.

Mr. John MacNutt, owner/operator of MacNutt, testified that he asked Mr. Marsh to fill in a hole, and that Marsh refused. He stated that he asked several times, and that Marsh called him a f... bastard. Mr. MacNutt stated that at that point, he told Mr. Marsh to leave the jobsite.

Mr. Tom Miller and Mr. Roy Haslam, employees of MacNutt Enterprises on the day in question, also gave evidence of what had occurred.

Both witnesses testified that they heard Mr. Marsh tell Mr. MacNutt to, among other things, to f...off, and Mr. MacNutt subsequently tell Mr. Marsh to leave the property.

ANALYSIS

After considering the submissions of the Appellant, Mr. Stea on behalf of the Director, and Mr. Considine, I confirm the decision of the Director.

No new evidence was presented. I have heard the witnesses give their version of what occurred on January 20. Although there was some discrepancies in the evidence as to the location of the equipment, or where the parties may have been when the altercation occurred, I am satisfied that Mr. Marsh's conduct, which formed the grounds for the termination, has been substantiated by both witnesses. I find, on a balance of probabilities, that Mr. Marsh refused to carry out an order to perform a job, and swore at Mr. MacNutt. Despite cross examination of the witnesses by Mr. Marsh, I am unable to conclude that the witnesses were not credible, or that their stories were false.

I am satisfied, on the evidence, that what occurred, was an unfortunate act of wilful disobedience of the Employer's orders. I note unfortunately here, because the evidence is that in many other respects, Mr. Marsh was considered a good backhoe operator.

The Director relied upon Levitt, the 'Law of Dismissal in Canada' in finding that an act of wilful disobedience constituted grounds for termination.

Disobedience by an employee of a reasonable and lawful order constitutes grounds for immediate dismissal, without the need for warnings, as it goes to the root of the

employment relationship. By failing to follow the orders of an employer, the employee repudiates the contract between them, bringing the relationship to an end.

I am satisfied that Mr. Marsh refused to perform a reasonable order, which was clearly identified by the employer. I am also satisfied that the disobedience was deliberate and intentional.

There was also evidence that there had been previous incidents of insubordination, for which Mr. Marsh had been warned. Nevertheless, there is no obligation, in instances of wilful disobedience, that the employer follow progressive discipline procedures, or provide warnings that Mr. Marsh's employment was in jeopardy.

The burden of establishing that the Director's decision was in error in an appeal is on the Appellant. There was no new evidence presented. I am unable to find that the Appellant has discharged the burden of proof, and deny the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that Determination #000196 be confirmed.

C. L. Roberts
Adjudicator
Employment Standards Tribunal

CLR:jel