

An appeal

- by -

Frederick Bruce Waters and Shawn Waters Operating as United Plumbing & Heating

("Waters")

- 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.: 2000/761

DATE OF HEARING: March 27, 2001

DATE OF DECISION: April 3, 2001



DECISION

APPEARANCES:

Bruce Waters On his own behalf

David Duncan On his own behalf

No one appeared on behalf of the Director

OVERVIEW

This matter involves an appeal filed on behalf of Bruce Waters and Shawn Waters operating as United Plumbing and Heating ("Waters") pursuant to section 112 of the *Employment Standards Act* ("the *Act*") from a determination dated October 13, 2000 (#ER 094939) by the Director of Employment Standards ("the Director").

David Duncan ("Duncan") was employed by United Plumbing and Heating ("United") from September 15, 1999 to February 14, 2000 as a gas fitter. On February 14th Duncan gave two weeks notice that he intended to leave his employment with United to go to work for a another firm called Hector's Heating ("Hectors"). The Director determined that shortly afterwards Duncan was told to go home and not to return to work. The Director determined that Duncan's employment was terminated by United without just cause. He was entitled to one weeks pay as compensation for length of service.

Bruce Waters ("Waters") appeals the determination on the basis that the Director's delegate was wrong to conclude that Duncan was dismissed. Waters submits that Duncan simply failed to show up for work after February 14th.

FACTS

The parties agree without October 14, 2000 Duncan gave the company two weeks notice that he was quitting. What happened later that day is in dispute. The facts and presentation given at this hearing did not differ substantially from the evidence gathered by the Director's delegate.

Duncan says that after giving his two weeks notice on February 14th he was told by Shawn Waters to clean out his van and leave. Duncan says that Shawn Waters said to him "we can't have Hectors Heating around here".

Bruce Waters says that they accepted Duncan's two weeks notice but that after he finished his four-hour shift that day Duncan did not return to work out his notice. Bruce Waters says that Duncan was never dismissed.

ANALYSIS

In this case there has been nothing new presented at the appeal that was not before the Director. I am being asked to substitute my assessment of the facts for that of the Director's delegate. In my opinion that is simply not appropriate. There is no indication that the Director's delegate made any mistake in law or made unreasonable findings of fact. I could, and probably should, simply dismiss the appeal on the basis. However, having heard the parties I intend to make some comments on the assessment of the facts in this case.

One aspect of the evidence that was not addressed in the determination was the role of Shawn Waters in the business. Shawn Waters is the son of Bruce Waters. Bruce Waters is the real owner of the business but Shawn is an adult and works closely with his father. Many aspects of the business are carried out by Shawn. Shawn's wife, Kim, was the bookkeeper for the business.

When Duncan was hired Bruce Waters was out of the country on holidays. Duncan always believed that Shawn Waters had hired him although Bruce Waters says that he approved the hiring over the telephone. Nevertheless, it is clearly apparent that Shawn Waters had ostensible authority to give directions to other employees such as Duncan.

Duncan says that the conversation between himself and Shawn Waters about "Hectors Heating" took place in the presence of Kim Waters. Bruce Waters was not present. Duncan says that it was in this conversation that Shawn Waters told him to clean out his van and that he should go home because "We can't have Hector's Heating around here". Duncan says that he twice asked Shawn to confirm that he wanted him to leave. He says that Shawn repeated the same comment and told him to go home.

Neither Shawn Waters nor Kim Waters attended the hearing. There was no explanation for their absence. Bruce Waters was not in a position to deny this conversation because he was not present at the time.

It is always difficult to assess evidence that is directly contradictory when both witnesses give the evidence in what appears to be a fair, honest, and credible manner. I accept that Bruce Waters honestly believes that Duncan simply never returned to work after he had given his notice. On the other hand, I also accept that Duncan honestly believed that Shawn Waters dismissed him.

In the absence of any evidence from Shawn or Kim Waters to deny or explain the conversation that occurred between Shawn and Duncan I must accept the evidence as given by Duncan. In my opinion it was reasonable for Duncan to accept that he had been dismissed. Shawn Waters had hired him and Shawn Waters was an integral part of the management structure of the business. Shawn Waters had ostensible authority to dismiss him.

The burden of persuasion is on the appellant to satisfy me that the Director's delegate was wrong in his assessment of the evidence. I am not persuaded that the delegate was wrong. Bruce



Waters has an honest but mistaken belief about what happened at the workplace on February 14, 2000. I conclude, as did the Director's delegate, that Duncan was in fact dismissed and is entitled to his one week's compensation.

ORDER:

Pursuant to section 115 of the Act I order that the determination is confirmed.

JOHN M. ORR

John M. Orr Adjudicator Employment Standards Tribunal