



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

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**