

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-

Profit Products Ltd.
("Profit")

-of a Determination issued by-

The Director of Employment Standards
("the director")

Adjudicator:

96/289

File Number:

July 5, 1996

Date of Hearing:

July 10, 1996

Date of Decision:

David Stevenson

APPEARANCES:

Cathy Andersen	For the appellant
no one appearing	For the complainants
Pat Douglas	For the director

DECISION

OVERVIEW

This appeal is brought by Profit Products Ltd. (“Profit”) under Section 112 of the *Employment Standards Act* (the “Act”) of Determination number CDET #002012, made by a delegate of the Director of Employment Standards (the “director”) on April 19, 1996. That Determination found Profit liable to pay length of service compensation to Brad Tutkaluk (“Tutkaluk”) and Wes Digby (“Digby”) in an aggregate amount of \$1347.61. Profit says it had just cause to terminate Tutkaluk and Digby and its liability should be discharged. Cathy Andersen appeared on behalf of Profit and gave evidence. Neither of the complainants appeared. I was satisfied both complainants were properly notified of the hearing.

FACTS

Profit is a wholesale distributor of custom wheels and automotive parts. In December 1995 Profit employed 10 persons in their distribution warehouse in Delta British Columbia, including Tutkaluk, Digby and three of their friends, who I shall refer to simply as B, R and N. In early December 1995 one of Profit’s regular customers advised Mr. Dane Andersen of an attempt by B to sell him some custom wheels which he claimed he had purchased at cost from Profit for his own use and now didn’t need. The wheels offered by B did not have the identifying mark placed by Profit on products sold from their warehouse. Mr. Andersen sought the assistance of the police who interviewed B. In the interview B confessed that he had stolen the wheels from Profit. He has since been charged with a criminal offence.

When Mr. Andersen was advised B had confessed to the theft of the wheels he terminated him. In the termination meeting, as well as in his confession to the police, B implicated four other employees in the theft, Tutkaluk, Digby, R and N. Mr. Andersen decided to interview the four employees and ask them if they were involved. Each employee was interviewed separately by Mr. Andersen in the presence of Mrs. Andersen. Three of the employees, including Tutkaluk and Digby, denied any involvement or knowledge of the theft. The fourth employee, like B, confessed his part in the theft and, independently of B, also implicated the other four employees in the theft, including Tutkaluk and Digby. He was terminated by Mr. Andersen.

On the basis of the information received from B and N and from other information acquired by Mr. and Mrs. Andersen, Tutkaluk, Digby and R were terminated. Following the terminations Profit conducted an inventory of its product and found approximately \$10,000 of product, all custom wheels, had disappeared since March, 1995. Tutkaluk, Digby and the others had been hired in March and April, 1995.

ISSUE TO BE DECIDED

The issue to be decided is whether the employer has established just cause to terminate Tutkaluk and Digby.

ANALYSIS

The burden in this appeal is on Profit to demonstrate on a balance of probabilities the existence of facts supporting just cause for termination. Proof on a balance of probabilities of the complainants' involvement in the theft of product would satisfy that burden. While there is no direct evidence linking either Tutkaluk or Digby to the theft of product at Profit there is a significant body of circumstantial evidence supporting an inference that both were involved in the theft of product from Profit. This evidence includes:

the independent confessions of B and N implicating both in the thefts;

the evidence of Mrs. Andersen, which I accept, that the five employees associated very closely while at work and were also known to associate closely away from work;

the evidence that the method used by the thieves to remove the wheels from the warehouse required the involvement and participation of more than two employees; and

information acquired through access to the police investigation and the opinions of the police officers based upon their investigation and their general knowledge of the activities of the five employees.

In fairness to the complainants, the evidence is also open to other inferences which are more favourable to them. The question I must decide is whether I may draw the less favourable inference against the complainants. In deciding whether I may do that it is open to me to consider the failure of the complainants to attend the proceeding and answer the allegations made against them and used by the employer to justify their terminations. Both had full knowledge of the reasons which Profit gave for their terminations and both were fully aware of the basis for the appeal. The evidence presented by Profit to support their terminations requires an answer. The complainants are in the best position to establish their non-involvement in and lack of knowledge

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of the thefts. Their silence, amply demonstrated by their absence from the proceedings, in the face of circumstances that cry out for an explanation justifies my adopting the inference which is less favourable to the complainants.

I conclude Profit has met its burden and has established it had just cause to terminate Tutkaluk and Digby.

Order

Exercising my jurisdiction under Section 115 of the *Act*, I order Determination number CDET 002012 be cancelled.

David Stevenson
Adjudicator
Employment Standards Tribunal