

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C. 38

- by -

Kevin Bernard
("Bernard")

- of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO: 96/249

DATE OF HEARING: July 5, 1996

DATE OF DECISION: July 21, 1996

DECISION

OVERVIEW

This is an appeal by Bernard pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director issued on March 29, 1996. In this appeal Bernard claims that he did not resign from his employment and is therefore entitled to severance pay owed to him by the employer, Hydraulics Unlimited ("H&B"). Further, Bernard says there should not be a set-off or deduction from any severance pay to which he is entitled due to wage advances at the time of his termination of his employment in the amount of \$2,300.00.

A hearing was held in Cranbrook, British Columbia, on July 5, 1996. Ms. Baylis-Smith appeared as counsel for Bernard. Harry Haigh ("Haigh") appeared on behalf of H & B Hydraulics Service Ltd. ("H & B"). Karen Madsen represented the Director. Bernard gave evidence via telephone pursuant to prior arrangements with the Tribunal.

FACTS

Bernard commenced employment for H & B as a machinist on June 4, 1991. His last day of employment was November 11, 1995. In September of 1995, H & B agreed with its employees, including Bernard, that in lieu of a raise H & B would pay money into RRSPs on behalf of its' employees. Pre-clearance was obtained from Revenue Canada and payment by H & B into Bernard's RRSP in the amount of \$2,496.00 was arranged.

Bernard from time to time required advances from his employer to keep ahead of his expenses. By the date of the termination of his employment on November 11, 1995, the advances had reached a total of \$2,300.00.

After the termination the employer, by letter of December 5, 1995, took the position with the Director as the consequence of Bernard's complaint that "Mr. Bernard owes the company \$1,274.34. This is the difference between the unpaid advances of \$2,320.00 and the severance pay of \$1,045.66." Said letter goes on to attempt to enlist the assistance of the Director to collect the alleged amount owing by Bernard to H & B. This letter does not dispute Bernard's is entitlement to severance pay

Inexplicably on December 16, 1995, H & B wrote to Employment and Immigration Canada with respect to an appeal by Bernard for Unemployment Insurance benefits saying in part as follows:

"You see I had given him a \$2,500.00 loan for him and his kids to go out east for a reunion. I said

that I felt that he really did not owe me anything and I did not owe him anything because I also had given everybody an RRSP worth about the same thing. But I had not yet transferred it yet so he just wouldn't get it."

I am troubled by the apparent reversal of the employer's position on the issue of the overpayment. Haigh's explanation at the hearing was that while he agreed fully with the content of the December 16, 1995 letter, the December 5, 1995 letter to Employment Standards was not drafted by him although he did sign it. .

Bernard's employment came to an end under circumstances that are by no means agreed upon between the parties. What is agreed upon is that Bernard worked on Friday, November 10, 1995 and did not complete a project that was apparently due early the following week. Haigh asked him whether he would be returning to work on the weekend. Haigh says that Bernard said he would report to work the next day, Saturday, November 11, 1995. Bernard testified he did not say he would come to work on Saturday but would come to work on one of Saturday or Sunday to finish the project. As it turned out Bernard did not report to work on Saturday and efforts were made by Haigh and Bernard to contact each other without success until approximately 6 p.m. that evening. It is common ground that Haigh phoned Bernard at approximately 6 p.m. that evening to discuss Bernard working that weekend. Bernard clarified that he would come to work the following day and Bernard then said words to the effect that if Haigh had not interfered in his work on the previous Friday weekend work would not have been required. Haigh does not recall all the specifics of the conversation. Bernard was confident that he did remember the specifics of the conversation.

Haigh testified that he told Bernard that he should "stay home". Bernard says that Haigh told him that "if you don't want to work then don't bother coming to work". Haigh then hung up the telephone. Haigh admits that he was very angry when he spoke these words.

Bernard understood that he was fired. Haigh says that all he intended was that Bernard should not bother turning up for work the next day.

Bernard did not return to work other than to pickup his tools the next Monday evening after all employees had left. When Haigh saw that Bernard had picked up his tools he concluded that he had quit.

Bernard then went to Employment Standard's branch for advice about his situation. He was advised to call Haigh.

Bernard testified that he that same week called Haigh. Unfortunately the conversation was not as direct as it might have been- i.e. there was no discussion of whether indeed Bernard had quit or been fired. Bernard

asked "Harry, what are we going to do about the situation". The conversation got heated again - it was stated by Haigh that he didn't owe Bernard anything.

Haigh has a less precise recollection of this phone call. He does recall Bernard calling to ask how much money he owed Haigh.

There were no more conversations between Haigh and Bernard. Bernard did attend at the Machine shop to pickup his record of employment. The record of employment is dated November 17 and indicates that Bernard quit his employment.

Prior to incident of November 11 Haigh and Bernard had a good relationship and they had not had any verbal or other altercations.

ISSUES TO BE DECIDED

There are two issues:

- a) did Bernard resign or quit;
- b) does Bernard have any liability to H&B for unpaid wage advances;

ANALYSIS

The advance issue

I am troubled that \$2300 sum is more in the nature of a loan as opposed to an advance against wages, however, I have concluded that I needn't decide that issue because it is clear that H&B has admitted that Bernard was entitled to an RRSP advance in an equivalent amount. H&B's letter to Employment and Immigration Canada confirms that it did not consider that the \$2300 advance was repayable.

Was Bernard fired or did he quit

I am forced to comment on the credibility of Bernard and Haigh. Given the reversal of field by H&B when it suited the company on the issue of whether severance pay was payable and the on the issue of Bernard's liability to repay the advance I am not comfortable in resolving any disputed evidence other than in

accordance with Bernard's version of the events. I will in the event of any conflict accept Bernard's evidence.

I have also taken into account that Bernard had a more detailed recollection of the events.

That, however, does not end the matter. Bernard has not been able to provide any evidence that he was fired. He submits that his assumption that he was fired was reasonable and that for this reason the Directors determination should be set aside.

I accept that the test for determining the legal effect of the words and conduct in this case are as stated in Raiput v. Menu Foods Ltd. (1984) 5 C.C.E.L. 22 at p. 27:

What would a reasonable man understand form the words use in the context in which they were used in the particular industry, in the particular working place, and in all the surrounding circumstances.

What are the circumstances?

a) Bernard was employed in a small machine shop where one would expect informality and closer personal relationships than with a larger employer;

b) Bernard and Haigh had not had previous altercations and got along well;

c) Haigh did not often lose his temper and had not lost it with Bernard;

d) Bernard knew that Haigh was very angry when he invited him not to come to work.

e) Bernard was frustrated with his work - he felt that Haigh was interfering with him and was perhaps not as qualified as he was;

In all of the circumstances I am not satisfied that it is more likely than not that the Director's determination on this issue is wrong. I have no doubt that Bernard thought he was terminated on November 11, however, I do not believe it was reasonable for him to make that assumption without making further inquiries. He knew that Haigh was very upset. On any interpretation of the words spoken it cannot be said that they clearly amounted to a firing.

It is just as likely that Bernard interpreted the words as a firing because he was frustrated and angry at Haigh. Otherwise, he would have talked to Haigh before he removed his tools.

When he removed his tools from the workplace Haigh was entitled to assume that Bernard had quit. He should not have removed his tools until his employment situation had been clarified with Haigh.

ORDER

In summary, I order under Section 115 of the Act, the Determination #001803 be confirmed subject to my finding regarding the advance as referred to above. Mr. Bernard is not entitled to severance pay.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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