

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Fluid-Tech Hydraulics Ltd.

(“Fluid-Tech”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/390

DATE OF HEARING: September 9, 1996

DATE OF DECISION: September 23, 1996

DECISION

APPEARANCES

Josephene Harvey &
Jim Kiriluk for Fluid-Tech Hydraulics Ltd.

Gordon Wilson for Scott Burchett

Lynne L. Egan for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Fluid-Tech Hydraulics Ltd. (“Fluid-Tech”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 002508 issued by the Director of Employment Standards (the “Director”) on June 6, 1996. The Director determined that Fluid-Tech owed its former employee, Scott Burchett (“Burchett”), the sum of \$1,100.77 on account of two weeks’ severance pay in lieu of notice, additional vacation pay and interest.

Fluid-Tech maintains that it had “just cause” to terminate Burchett and thus, in accordance with section 63(3)(c) of the Act, was not obliged to pay any severance pay to Burchett.

TIMELINESS OF THE APPEAL

A Notice appearing at the bottom of the Determination states that: “An appeal of this Determination must be received by the Employment Standards Tribunal not later than 1996/Jul/02”. In fact, the appeal was filed at 12:12 P.M. on July 3, 1996. As the appeal was, on its face, filed out of time, I inquired at the outset of the appeal hearing as to the circumstances surrounding the late filing of this appeal.

I was advised by the employment standards officer, Ms. Egan, that the Determination was served by certified (registered) mail and a card was produced evidencing receipt by Fluid-Tech on June 10, 1996. Thus, pursuant to section 112(2)(a) of the Act, the appeal should have been filed on or before June 25, 1996.

In light of the foregoing, and in view of the fact that Fluid-Tech was not fully prepared, on the day set for the appeal hearing, to argue the “timeliness issue”, I proceeded with the appeal hearing but reserved my decision as to whether or not the appeal was filed out of time and, if so, whether this would be an appropriate case to extend the appeal period under section 109(1)(b) of the Act. I further ordered that Fluid-Tech file with the Tribunal whatever further written submissions it wished to make on the timeliness issue on or before 4:00 P.M. on September 13, 1996.

Fluid-Tech submitted two letters to the Tribunal, dated September 9 and 13, 1996, respectively. In the first letter, under the signature of Ms. Harvey, she states that her colleague, Mr. Kiriluk may have received the Determination on June 10, 1996 but that he would have left it for Ms. Harvey to deal with. On June 14th, Fluid-Tech’s bookkeeper (who works for Fluid-Tech on a part-time independent contractor basis) obtained an appeal form from the Tribunal. The appeal document was in the hands of Ms. Harvey throughout the ensuing week and she says that she sent the completed appeal form, by fax, to the Tribunal on June 27, 1996.

There is no documentary evidence to corroborate that the appeal was faxed to the Tribunal on June 27th and, as noted above, the Tribunal’s records indicate that the appeal was not filed until July 3, 1996. Ms. Harvey also stated in her September 9th letter that on June 27, 1996 she mailed a copy of her appeal, by registered mail, to Mr. Burchett. A copy of a Canada Post receipt has been filed to corroborate this latter mailing.

Throughout this process, Fluid-Tech has evidenced an ongoing intention to appeal; the Determination indicated that the company had until July 2, 1996 to file an appeal; and Fluid-Tech says that it actually filed its appeal on June 27, 1996 and not July 3, 1996. However, even if the appeal was filed on July 3, 1996, in light of the circumstances I have outlined above, I do believe that this is an appropriate case to exercise my discretion under section 109(1)(b) of the Act and, accordingly, I hereby order that the time for filing an appeal be extended to 1:00 P.M. on July 3, 1996.

Hence, Fluid-Tech’s appeal was filed within the extended time period ordered.

ISSUE TO BE DECIDED

The issue to be decided in this case is, simply, did Fluid-Tech have just cause to terminate Scott Burchett on March 4, 1996?

FACTS

At the appeal hearing I heard testimony from Ms. Harvey, Mr. Kiriluk and Ms. Katherine Yvonne Jensen on behalf of Fluid-Tech, and from Mr. Burchett on his own behalf.

Fluid-Tech is a manufacturer of hydraulic systems for industrial customers. It is a small operation that has been in business for about 3 1/2 years. The firm employs three full-time and two part-time employees at its Surrey shop.

As summarized in the Reason Schedule attached to the Determination, Mr. Burchett's employment commenced in March 1995 and relations between the parties appeared to be quite good throughout 1995. Mr. Kiriluk characterized Mr. Burchett as a good worker who was being trained for greater responsibilities with the firm. Mr. Burchett received three separate wage increases during 1995.

Fluid-Tech says that Burchett's duties included opening up the shop each morning (and for this purpose, he was given a shop key), accepting cash payments from customers, answering the phone and dealing with customers, and generally learning the mechanics of the firm's business. Both Mr. Kiriluk and Ms. Harvey characterized Mr. Burchett's job as a "training position".

In early 1996, according to Kiriluk, Burchett's attitude began to deteriorate. Apparently, Burchett asked for another wage increase and this was turned down. Fluid-Tech says that during this time Burchett was not arriving to work on time, taking overly long coffee and lunch breaks and spending too much time attending to personal concerns on the telephone. Matters came to a head on March 1, 1996. At the end of that day, at approximately 5:00 P.M., Ms. Harvey met (for about five to ten minutes) with Mr. Burchett and presented him a letter dated February 29, 1996 and referenced "Adherence to Shop Policy". In this letter, signed by Ms. Harvey, Burchett's working hours, break times and certain other work rules are set out. Mr. Burchett was asked to sign this letter so as to acknowledge its receipt, which he did. Neither Ms. Harvey nor Mr. Burchett characterized the March 1st meeting as a disciplinary meeting; rather, according to Harvey, the focus of the meeting was to "get Scott back as a team player".

Burchett testified that after the meeting he went home and wrote out his response. Burchett did not believe that many of the criticisms levelled at him were fair or accurate and he intended to set out his position in writing. Burchett's written response came in the form of a memorandum to Kiriluk dated March 1, 1996 which he gave to Kiriluk the following Monday morning, March 4th. In this memorandum, Burchett set out his position with respect to the various matters that were delineated in Harvey's February 29th letter. Of particular concern to the employer, Burchett stated the following:

- "I feel that I am not obligated to answer the phones for Fluid-Tech Hydraulics";
- "I will no longer be responsible for anything to do with petty cash";
- "Furthermore I will not handle the petty cash or any monies with regards to customers"; and
- "As of Monday, March 4, 1996 I will return hand in [sic] my shop keys and will not be responsible for opening or locking the shop".

Burchett gave his memorandum to Kiriluk, who in turn telephoned Harvey. A decision was then made to terminate Burchett at the end of the day for insubordination, but the decision was actually communicated to Burchett at about 11 A.M. when Burchett, according to the employer, refused to unload a forklift saying that the machine was unsafe. A formal letter of termination, dated March 4, 1966, was subsequently issued by Fluid-Tech to Burchett in which the employer took the position that Burchett was terminated for cause, namely, a concerted refusal to carry out certain aspects of his work duties.

Burchett asserts that he was terminated in retaliation for filing an overtime claim and for asserting his right to refuse to work with unsafe equipment. It would appear that the particular forklift in question was not being properly maintained according to a Workers' Compensation Board inspection report dated March 8, 1996. On the other hand, Burchett maintained at the appeal hearing that all of the actions that he proposed to take in response to the employer's February 29th letter were entirely appropriate.

ANALYSIS

I am satisfied that Burchett was not terminated for refusing to drive a forklift; that was merely a precipitating event that moved the termination forward from the end of the day. It may be that if the refusal to drive the forklift was the basis for the

termination, the employer would not have had just cause. However, Burchett's employment was terminated as a result of the matters set out in his March 1st memorandum.

The investigating employment standards officer stated in the Reason Schedule that "Burchett's refusal to perform certain job duties may be interpreted as an incident of insubordination". I agree. However, I do not agree that, in this case, the employer was "obliged to inform the employee that termination will occur if performance is not improved". Nor do I agree that this was a case that called for, as suggested by the employment standards officer, the application of progressive discipline.

In my view, the officer has blended certain legal principles that relate, on the one hand, to dismissal for incompetence (i.e., the need to inform the employee that his or her job is in jeopardy) and, on the other, to termination for misconduct other than insubordination, say tardiness or absenteeism (which latter misconduct calls for progressive discipline), into the analysis of a dismissal based on insubordination.

A single act of insubordination can justify termination, especially when the behaviour amounts to a fundamental refusal to carry out usual work duties. In this particular case, Burchett acknowledged that handling cash was a usual aspect of his daily work routine (three to four transactions per day); as was answering the telephone (usually, ten to fifteen calls per day); as was opening up the shop each morning. And yet, Burchett in his March 1st memorandum unilaterally announced that, henceforth, he would no longer undertake any of these tasks.

I would characterize Burchett's conduct as insubordination; a concerted and deliberate refusal to carry out important duties that he was hired and paid to do. I would particularly note that this refusal was not a momentary reaction to a disciplinary meeting; rather, Burchett considered his position over the weekend, and indeed, even at the appeal hearing, maintained that his refusal to carry out these particular tasks was appropriate and entirely justified. I simply cannot agree. I am of the opinion that Fluid-Tech had just cause to terminate this employee and was, therefore, not obliged to give him notice of termination or to pay severance pay in lieu thereof.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 002508 be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal