

An appeal

- by -

Jimmy D's Auto Parts & Service Centre Ltd.
("Jimmy D's")

- 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: Cindy J. Lombard

FILE No.: 2001/787

DATE OF HEARING: April 5, 2002

DATE OF DECISION: June 17, 2002

DECISION

APPEARANCES:

Kent Burnham, Counsel
Steve Berlinski
Denise Berlinski
Jim Abel

For Jimmy D's Auto Parts & Service Centre Ltd.:

Joe Arih

on his own behalf

Ive Mlinac

on his own behalf

OVERVIEW

This is an appeal by Jimmy D's Auto Parts & Service Centre Ltd. ("Jimmy D's") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued on October 23, 2001 (the "Determination") by a Delegate of the Director of Employment Standards (the "Director").

The Determination found that Joe Arih ("Arih") and Ive Mlinac ("Mlinac") were owed wages and vacation pay as compensation in lieu of notice of the termination of their employment plus interest pursuant to Section 88 of the *Act* as follows:

Joe Arih

Compensation for length of service in lieu of notice *	\$720.00
Vacation pay @ 4%	\$28.80
Sub-total	\$748.80
Plus interest pursuant to Section 88	\$22.31
Total	\$771.11

*(8 weeks earnings divided by 8 x 2)

Ive Mlinac

Compensation for length of service in lieu of notice **	\$1,440.00
Vacation pay @ 4%	\$57.60
Sub-total	\$1,497.60
Plus interest pursuant to Section 88	\$44.67
Total	\$1,542.27

** (8 weeks earnings divided by 8 x 2)

ISSUES TO BE DECIDED

Whether Arih and Mlinac are entitled to compensation for length of service in lieu of notice of termination or whether the employer, Jimmy D's, was exempt from liability on the grounds that Arih and Mlinac quit their employment.

FACTS

Arih was employed by Jimmy D's from January 1, 2001, to May 3, 2001, as a mechanic earning \$18.00 per hour.

Mlinac was also employed as a mechanic between April 1, 2000 and May 3, 2001, at a rate of \$18.00 per hour.

According to Jimmy D's

Steve Berlinski ("Berlinski") a director of Jimmy D's gave evidence that he had purchased the business from the previous owner, Mr. Dunbar ("Dunbar") effective April 16, 2001.

Berlinski says that he first heard that Arih was leaving Jimmy D's from Dunbar on the morning of May 1, 2001. At 5:30 p.m. the same day, Berlinski says that he met with Arih who told him that he was looking at buying a business but if that occurred he would give him two weeks notice.

Two days later on May 3, 2001, Berlinski says that Mlinac left work with a toothache. Later that evening Berlinski says that he telephoned Mlinac's home to see whether he wanted to take the next day off because work was slow. Berlinski did not speak with Mlinac who did not come to the phone but did speak to his wife. Mlinac's wife stated that Mlinac couldn't come to the phone because his tooth hurt. Berlinski says that he did not tell Mlinac's wife that he was fired but simply that he could leave the job early if he wished to get started on his business and that Mrs. Mlinac misunderstood him if she thought that he was firing Mlinac.

The following morning Berlinski says that Arih came to see him about 9:30 a.m. and said that he had to respect his partner, i.e. Mlinac's decision and leave as well. Mlinac then asked whether he was interested in sharing the cost of purchasing a computer program.

According to Mlinac

On Wednesday, May 2, 2001, he gave Mr. Berlinski two weeks notice that he would be leaving the employ of Jimmy D's to start his own business. That same day he went home with a bad toothache. In the evening Mlinac says that his wife answered a call from Berlinski who wished to speak to him but he did not as he felt too poorly. Mlinac says that when his wife got off the telephone she said that Berlinski told her to tell her husband that "his services were no longer required and that he could come and pick up his tools". The next day Mlinac went in to collect his tools. Berlinski was present but at no time came to him and asked him why he was collecting his tools and leaving or to talk with him at all.

According to Arih

On May 2, 2001, Mlinac and he both talked with the former owner Dunbar who he had known for 15 or 20 years and told him that they were planning to start their own business.

At approximately 5:30 p.m. Arih spoke with Berlinski and advised him that he would be leaving to start his own business and gave two weeks notice of his departure.

That evening he received a call from Anna, Mlinac's wife advising that Berlinski had called and fired Mlinac.

The next day Arih went into work. He went in to speak with Berlinski who said that he feared that Arih would steal Jimmy D's client list if he stayed. Berlinski told him that he could finish working the day or leave right away as he did not want him to continue working there. Arih did speak with Berlinski about sharing the cost of a computer software program.

On May 25, 2001, Arih and Mlinac entered into a lease and opened their business on June 1, 2001.

Arih states that not being able to work through their two week notice period given to Jimmy D's was hard on them as they needed the income.

ANALYSIS

The relevant portions of Section 63 of the *Act* provide:

63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
- (3) The liability is deemed to be discharged if the employee
 - (c) terminates the employment, retires from employment, or is dismissed for just cause.

In order to rely on Section 63(3)(c), the onus is on the employer Appellant, Jimmy D's, to show on a balance of probabilities that the employee quit. The Appellant has not satisfied that onus. I accept the evidence of Mlinac and Arih that Berlinski asked them to leave once they gave him two weeks notice of their intention to leave and start their own business as he was concerned, particularly in circumstances where he had just purchased the business, that Mlinac and Arih would steal customers.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated October 23, 2001, is confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal