Employment Standards TRIBUNAL

An appeal

\- by -

Bryan Vogler
(“Vogler”)

\- 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: Ian Lawson

FILE No.: 2003A/208

DATE OF DECISION: September 24, 2003

Employment Standards Tribunal
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DECISION

OVERVIEW

This is an appeal by Bryan Vogler ("Vogler") under s. 112 of the *Employment Standards Act* ("Act"). The appeal is from a Determination issued by Joanne Kembel as a delegate of the Director of Employment Standards on June 2, 2003. The Determination required Mandair Distributors Ltd. ("Mandair") to pay vacation pay and interest to Vogler in the amount of $172.61. Vogler's claim for compensation for length of service was denied. Vogler filed this appeal on July 15, 2003, and it is now decided without a hearing, on the basis of written submissions.

FACTS

Mandair operates a florist business known as Flowers Flowers/Florimport. Vogler was a flower deliverer, and performed this service for Mandair between September 16, 2000 and January 15, 2001, when he was allegedly dismissed. Vogler's complaint was made on January 23, 2001, and it is a mystery why more than two years went by before a Determination of the complaint was made. Vogler was given a company vehicle to use for deliveries, which he also used for personal errands. Vogler was one of several drivers who were required to report three times per day to receive flowers for delivery. He could otherwise come and go as he pleased. He was paid $350.00 for September, $1000.00 for each of October, November and December, and $500.00 for January, 2001. No records were kept of Vogler's hours of work, as Mandair was of the view Vogler was an independent contractor and not an employee. Vogler presented a calculation of the hours he worked in support of his complaint that he was not paid the minimum wage, but in a curious exchange with the Director's delegate, he refused to swear to the accuracy of the hours he claimed. In the absence of any reliable evidence of Vogler's hours of work, the delegate awarded vacation pay alone, at 4% of Vogler's gross earnings.

On Vogler's last day of work, he was called in and was asked to return the company vehicle. He was not at this point dismissed, but Vogler argues the request to give up the vehicle was preliminary to a dismissal he thought was impending. Vogler apparently wished to drive home with the vehicle and return it later, after he had removed personal belongings from it. Mandair's manager named "Bill" did not want Vogler to leave with the vehicle. The Director's delegate found that although there is conflicting evidence about what happened inside the store, both parties agree that Vogler disregarded Bill's direction, got into the vehicle and proceeded to leave. Bill then jumped in front of the vehicle and told Vogler to stop. When Vogler refused to stop, Bill grabbed the window and started yelling. Vogler continued to drive away, leaving Bill behind. Vogler emptied the vehicle at home, and called to arrange its return to Mandair. This episode, alleged Mandair, amounted to just cause for Vogler's dismissal. The Director's delegate agreed with Mandair and dismissed Vogler's claim for compensation for length of service.

ISSUE

Whether Vogler is entitled to wages beyond the vacation pay ordered in the Determination, and whether he was dismissed for just cause. An issue preliminary to both is whether he was an employee.

ANALYSIS

This Tribunal considered whether flower delivery drivers similar to Vogler were employees in *444 Flowers Flowers Ltd. v. Director*, BC EST #D455/97. Adjudicator Suhr applied the standard common law tests and concluded such drivers were employees. In *Jasta Holdings Ltd. v. Director*, BC EST #D085/99, Adjudicator Stevenson considered whether bulk newspaper delivery drivers were employees, where they had been designated as dependent contractors under the *Labour Relations Code* and where they were required to report to receive deliveries at a specified time but otherwise had no assigned hours of work. In deciding the bulk newspaper delivery drivers were employees, adjudicator Stevenson reviewed the definitions of "employee" and "employer" in the Act and stated:

> Both of those definitions are inclusive, not exclusive. I refer again to *Machtinger v. HOJ Industries Ltd.* [(1992), 91 D.L.R. (4th) 491 (S.C.C.)], where the Court stated that:
>
> > ... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.
>
> Common law tests used to identify employment status, while a helpful guide, are not determinative when the question of employment status is considered in the context of the definitions and objectives of the Act (see also: *Project Headstart Marketing Ltd.*, BC EST #D164/98). In the context of the Act, a broad and remedial approach is both justified and directed.

I find these remarks applicable to the present appeal. The Director's delegate undertook the standard common law analysis of whether Vogler was an employee, and I see no reason to doubt her conclusion that he was. A remedial approach to identifying his employment status would yield, in my view, the same conclusion.

Appellants who fail or refuse to present their best evidence to the Director's delegate do so at their peril (*Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97). Vogler's refusal to satisfy the delegate as to the accuracy of the hours of work he claimed – in whatever form she may have requested it – can only serve to cast doubt on his claim. His appeal of that issue now is no more than a second effort to persuade a decision-maker in the absence of acceptable proof (Vogler filed no further evidence in support of his hours of work). The Director's delegate stated the following in her Determination:

> 2. *If Mr. Vogler was an employee, whether he is entitled to wages as claimed under the Act.*
>
> Mr. Vogler is entitled to the provisions of the Act. He is entitled to 4% vacation pay on all gross earnings of $3,850.00 for an entitlement of $154.00.
>
> However, other than vacation pay, quantifying his entitlement is impossible. The Employer failed to keep a record of the hours Mr. Vogler worked each day. The record Colleen and Brian Vogler kept cannot be relied upon. I find the record far too incomplete, showing none of the breaks or personal time taken throughout the day. Mr. Vogler himself refuses to swear that the records they kept were an accurate reflection of the hours he worked.

I find no error in this decision, and in fact no other decision was possible in these unusual circumstances.

Regarding the dismissal, Vogler's notice of appeal does not mention the incident involving the vehicle and Bill. Instead, the notice of appeal states the following:

> I dispute the dismissal on poor performance. The performance was good, however the minimum wage exceeds a thousand a month. Being an employee he is obligated to pay the Provincial standard for delivery work, not including the car. Mr. Mandair has yet to produce records to show poor performance. He did admit he did not always have the product there to supply for deliveries, and that is why he made the flat rate deal with me. In one sense Mr. Mandair had calculated below minimum wage in the flat wage knowing that would happen in the first place. The business flow was huge at certain points of the year and desert dry in others. Mother's Day, Easter and Christmas were very busy, yet in January it fell right off, to the point of stopping. However Mr. Mandair continued to advertise flowers anytime anywhere. It was during the slack time in January I was fired because he had no orders. This has nothing to do with my performance.

Vogler does not, therefore, directly challenge the finding of the Director's delegate that his refusal to stop the vehicle and follow the employer's instructions amounts to just cause for dismissal. The delegate commented that had Vogler followed direction and got out of the vehicle, and had he then been dismissed, she would have found no just cause for that dismissal. In my view, Vogler's conduct does cross the line and puts his insubordination in the category of acts which go to the heart of the employment relationship and destroy it. As the Tribunal held in *Re Kenneth Kruger,* BC EST #D003/97:

> In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

There was no reason for Vogler's insistence on driving home in his employer's vehicle, and no urgency which could justify his refusing to follow a clear direction from the manager. Vogler's conduct could have caused injury and is not excusable. As Vogler does not appear to challenge this part of the Determination, I need go no further and I find no merit to his appeal.

ORDER

I find the Determination made by Ms. Kembel is correct and the appeal should be dismissed. Pursuant to s. 115 of the Act, I order that Determination #060-249 made on June 2, 2003 be confirmed, with interest pursuant to s. 88 of the Act.

Ian Lawson
Adjudicator
Employment Standards Tribunal