

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Ian Warner
(" Warner " or the "employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 2000/265

DATE OF DECISION: August 8, 2000

DECISION

OVERVIEW

This is an appeal by the employee of a Determination dated March 20, 2000. In the Determination the Delegate refused to investigate a wage complaint made by an employee, who had been dismissed for theft. The Delegate determined that the complaint was frivolous, vexatious, trivial, or not made in good faith. I dismissed the appeal as the employee did not show that the Delegate erred in the Determination.

ISSUES TO BE DECIDED

Did the Delegate err in declining to investigate a complaint on the basis of s. 76(3) of the *Act*?

FACTS

Mr. Warner was employed at Siegal's Bagels Ltd. Mr. Warner was dismissed for theft. The Delegate found that the theft was captured on a video camera located in the shop, and was turned over to Constable Dhaliwal as evidence. Mr. Warner was arrested for theft. In the Determination the Delegate described this as "theft over". I have reviewed the release documents and am satisfied that Mr. Warner was arrested for theft under \$5,000. This discrepancy is immaterial. The Delegate found that Mr. Warner breached the trust of the employer, and refused to proceed further with the investigation, pursuant to s. 76(2)(c) of the *Act*.

In a written submission the Delegate indicated that the Vancouver Police and Crown Counsel confirms that the videotape shows Mr. Warner taking money from customers and putting it under the counter and into a bag. The tape also shows Mr. Warner pressing a "no sale key" on the cash register.

In a written submission the employer verifies that it has a videotape showing clearly the events surrounding the theft, and that the employee had viewed the tape. The employer further states the employee filed an assignment for unpaid wages to Money Mart, in the amount of \$175.75.

In a written submission the employee advances an explanation for the taking of the money, and denies the offence. The employee alleges it was the employer who took money from the till. The employee points out that the employer decided to have him charged one month after the fact, and after the employee was pressing the employer for wages. The employee alleges that the reasons given to him at the time of termination were different than the reasons advanced to the Delegate.

Mr. Warner has not yet been convicted of the offense. Charges have been laid, Mr. Warner has entered a not guilty plea, and at the time of the Delegate's submission a trial date had not yet been set. The charge was laid in this matter on February 27, 2000.

The employer estimates that his losses are in the range of \$9,000 - \$12,000 according to the Delegate's submission of May 1, 2000.

ANALYSIS

The burden is on the employee to demonstrate that there is an error in the Determination such that I should vary or cancel the Determination.

In this case the Delegate made the decision not to investigate the claim further, and found that the complaint was frivolous, vexatious, trivial or not made in good faith. The Delegate is required to investigate complaints made that comply with s. 74 of the *Act*. The complaint must relate to a violation of the *Act*, and must be made on time. The Delegate, however, does have a discretion to refuse to investigate frivolous, vexatious, trivial complaints or complaints lacking in good faith.

The Delegate found that this complaint was lacking in good faith. In the written submission dated May 1, 2000 the Delegate indicated that the normal response of the Delegate would be to enforce payment of a wage claim, and leave it to the employer to seek recourse under the *Small Claims Act*. The Delegate submitted that the case against the employee was a strong case, and it would compromise the integrity of the *Act*, to condone an investigation where the employer's loss due to theft far exceeded the claim for wages earned prior to dismissal. It appears that the Delegate views the complaint of Mr. Warner as trivial, and lacking in good faith.

In my view, there is a case against the employee for theft on a balance of probabilities standard. The employer did have cause to dismiss the employee. The Delegate considered the case against the employee to be a strong case. The investigation of a wage claim may turn on part on the credibility of the parties. Further, it appears that the claimant has not filed any claim for compensation for length of service. The explanation advanced by the employee as explaining the theft, in the submission to this Tribunal, appears to me, to be lacking in substance. This is a factor that I consider in determining that the Delegate did not err in the refusal to further investigate. I note that the complainant is not without remedy. The complainant can file a complaint in small claims court where all matters between the employee and employer can be fully adjudicated.

Given that the employee has raised no error, this appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated March 20, 2000 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal