

**EMPLOYMENT STANDARDS TRIBUNAL**

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

*Employment Standards Act*

-by-

Dura-Flow Products Inc.

(“Dura-Flow”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/407

**DATE OF HEARING:** November 18th, 1996

**DATE OF DECISION:** November 25th, 1996

## DECISION

### APPEARANCES

Charles Burns                    on behalf of Dura-Flow Products Inc.  
Daniel A. Goy                    for Morgan Heaster  
Steve Mattoo                    for the Director of Employment Standards

### OVERVIEW

This is an appeal brought by Dura-Flow Products Inc. (“Dura-Flow”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 003012 issued by the Director of Employment Standards (the “Director”) on June 25th, 1996. The Director determined that Dura-Flow owed its former employee, Morgan Heaster (“Heaster”) the sum of \$1,111.23 on account of two weeks’ wages as compensation for length of service [section 63(2)(a)] together with concomitant vacation pay and interest.

Dura-Flow appealed the Determination on the ground that Heaster was not entitled to termination pay pursuant to section 63 of the Act because Heaster was terminated for just cause [section 63(3)(c)].

An oral hearing of this appeal was conducted in Surrey, B.C. on November 18th, 1996. At the appeal hearing I heard testimony from Charles Burns (a shareholder, director and the president of Dura-Flow--“Burns”), Guy Olsson and Mike Enns on behalf of Dura-Flow; Heaster testified as the sole witness called on his behalf.

### FACTS

Dura-Flow is a small manufacturer of parts that are used in concrete pumping equipment. The firm has ten employees and is situated in Langley, B.C. Heaster, who had responded to a notice posted in a local Canada Manpower office, was hired as a machinist in January 1995. Heaster is not, and never held himself out to be, a certified machinist. At the point of hiring, Heaster had recently completed

(May 1994) a millwright/machinist's pre-apprentice certificate program at the Newton campus of Kwantlen College.

Burns testified that there problems with Heaster's work quality during the latter's employment which eventually led to his termination. Burns says that a "verbal warning" was given to Heaster in March 1995, and another verbal warning was given in late April 1995, regarding the quality of Heaster's work. There is no evidence before me of any further warnings regarding Heaster's work performance until October 4th, 1995 when a written warning was issued which stated as follows (full text):

I take this opportunity to inform you that in the past several months there have been many occasions where we have had very costly machining errors. These were due to miscalculations and oversights.

You are hereby put on notice that this cannot be tolerated.

Future misconduct will result in your dismissal.

This letter (Exhibit 1) was signed by Burns; Heaster also signed the letter to acknowledge receipt.

On February 2nd, 1996 Heaster was terminated. An "Employee Warning Report" (Exhibit 2) was given to Heaster when he was terminated. Burns says that Heaster was also given a termination letter but was unable to produce any such letter; Heaster denies that he received any form of termination letter other than Exhibit 2. Heaster's termination appears to have been precipitated by a problem with a particular parts order for "wear plates" that had been returned by the customer. As Burns put the matter, this particular problem with the wear plates was the "last straw" and that, but for the returned parts on February 2nd, Heaster would not have been terminated.

Although I heard some evidence regarding Heaster's attitude at work, it is abundantly clear that Heaster was terminated, not for any disciplinary matter, but rather for his alleged poor work performance. Exhibit 2 states on its face that Heaster received a verbal warning in May 1995 and a written warning on October 4th, 1995--both warnings related to work quality. On Exhibit 2, which is a pre-printed form, there is a space where the "Type of Violation" is to be described by checking the appropriate box. The box for "Work Quality" is marked with an "X" but none of the other boxes labelled "Attendance", "Carelessness", "Disobedience",

“Safety”, “Tardiness” or “Other” is marked. Further, in Exhibit 2, in the space provided for a “Company Statement”, the following is set out: “Customer complaints on workmanship and quality consistency on carbide wear rings and wear plates” [sic].

In his testimony, Burns admitted that for the most part, Heaster’s work was satisfactory--Burns testified that about 5% of the parts that Heaster machined were returned. Heaster, for his part, agrees that there were customer returns but says that the figure was less than 5% and that, in any event, the problems with the parts were not attributable to his own performance. Rather, Heaster testified that the lathes that he used to machine the parts were old and not properly seated or levelled. Heaster testified that he was forced to use substandard cutting tools and that, particularly in the case of the wear plates, he did not receive proper blueprints from the customer and, therefore, was working from his own drawings. Lastly, in many cases, the raw steel from which the parts were being machined was rusted and pitted making it more difficult to machine a high-quality part that met all customer specifications.

### **ISSUE TO BE DECIDED**

Did Dura-Flow have just cause to terminate Heaster’s employment on February 2nd, 1996?

### **ANALYSIS**

The concept of progressive discipline is not relevant in a case of discharge based on incompetence or poor work performance unless the poor performance is, in truth, a form of insubordination (that is, the employee *can* do the work, but *refuses* to do so). In this case, I am satisfied that this is a pure case of alleged incompetence, not insubordination disguised as poor work performance. Accordingly, before Dura-Flow’s discharge of Heaster can be upheld as lawful, Dura-Flow must prove that:

1. Heaster was made aware of the objective standard of performance to which he would be held;
2. In the event that Heaster failed to meet this standard, Dura-Flow made reasonable efforts to assist (by training or otherwise) Heaster to achieve the appropriate performance standard;

3. Despite Dura-Flow's reasonable efforts to assist Heaster, Heaster nonetheless continued to fall below a minimally acceptable standard of performance; and

4. Heaster was specifically told that his continued failure to perform would result in dismissal.

In this case I am not satisfied, on the evidence before me, firstly, that there has been a significant performance failure, and secondly, even if there was, that the employer has fulfilled its obligations as set out in numbers 1 through 3, above.

The employer's own evidence was that there was a problem with returns in only about 5% of the parts that were machined by Heaster. Both the employer and Heaster agree that there was a problem with the "wear plates" but Heaster has advanced a satisfactory explanation for these problems--poor raw steel, old lathes that were not properly seated or levelled, poor quality tools--and that explanation has not been seriously undermined by the employer. In any event, it must be remembered that Heaster is not, and never held himself out to be, a certified machinist--he held a pre-apprentice certificate and had little, if any, prior employment experience working as a machinist.

There is no evidence before me that the employer provided any training for Heaster by a qualified machinist. Indeed, if Heaster had a problem there was no qualified machinist on staff from whom Heaster could seek advice or assistance.

While the employer clearly was dissatisfied with Heaster's work, I cannot accept that this dissatisfaction amounted to just cause to terminate. In cases of dismissal for incompetence or poor work performance, the employer bears a heavy burden and, quite simply, the employer in this case has not met that burden.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003012 be confirmed as issued in the amount of \$1,111.23, together with whatever further interest that may have accrued since issuance pursuant to section 88 of the *Act*.

**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**