# 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 -

Vitrum Industries Ltd.
("Vitrum")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thronicroft

**FILE No.:** 2000/243

**DATE OF HEARING:** August 4, 2000

**DATE OF DECISION:** August 14, 2000

## DECISION

## APPEARANCES

| | |
|---|---|
| S.H. (Hank) Goodman, Agent | for Vitrum Industries Ltd. |
| Royce Y. Francisco | on his own behalf |
| Reynaldo Q. Bautista | on his own behalf |
| No appearance | for the Director of Employment Standards |

## OVERVIEW

Vitrum Industries Ltd. ("Vitrum") appeals, pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 17th, 2000 under file number ER 099-001 (the "Determination"). The Director's delegate determined that Vitrum owed each of its former employees, Royce Y. Francisco ("Francisco") and Reynaldo Q. Bautista ("Bautista"), three weeks' wages as compensation for length of service (see section 63 of the *Act*). The Director's delegate awarded Francisco the sum of $1,387.71 and Bautista the sum of $1,489.95 (both sums include concomitant vacation pay and interest).

This appeal was heard at the Tribunal's offices in Vancouver on August 4th, 2000. Vitrum called three witnesses, namely, its president Thomas Martini, the shop foreman, Piero Fedele, and a "lead hand", Lee Boyd. Both complainants testified on their own behalf with the assistance of a certified interpreter. The complainants also called two other witnesses—former Vitrum employees Rock Mescardo and Romeo Dorres—neither of whom was in a position to testify about the material facts in dispute. In the case of Mr. Dorres, his employment ended about 1 year prior to the events in question. The Director was not represented at the appeal hearing.

## ISSUE ON APPEAL

This appeal concerns only the question of Vitrum's liability to pay compensation for length of service to each of the two complainants. Vitrum accepts the delegate's finding regarding the two complainants' length of service. Vitrum says that Francisco "abandoned" his employment, or, alternatively, that it had just cause to terminate his employment. Vitrum's position vis-à-vis Bautista's claim is that it had just cause to terminate his employment.

## FACTS AND ANALYSIS

Vitrum manufactures sealed glass window units and has some 90 employees. Both complainants worked weekdays on the afternoon shift (3:30 P.M. to midnight). Bautista was dismissed on

August 23rd, 1999 for insubordination; Francisco's employment ended in mid-January 2000 following a period of unexcused absences.

Although the two complainants' claims were originally addressed in a single Determination, the claims are quite independent and thus I propose to deal with each claim separately.

**Royce Francisco**

As noted above, Vitrum's principal position is that Francisco "abandoned" (this was the precise phrase used in the record of employment issued to Francisco by Vitrum on January 13th, 2000) his employment. In other words, Vitrum says that he quit. I note that Vitrum did not report on Francisco's record of employment (as it *did* on Bautista's) that Francisco had been dismissed (code M). In any event, Vitrum's alternative position is that it had just cause for termination.

Francisco admits that he did not fully comply with Vitrum's absenteeism policy. The company's policy regarding absenteeism is spelled out in a document that was signed by Francisco on May 1st, 1996. Under this policy, an employee must telephone in daily and report both the fact of, and the reason for, the absence. Vitrum's shop foreman (and Francisco's immediate supervisor) Piero Fedele testified that Francisco was absent during the workweek commencing January 4th, 2000 and that he telephoned in each day saying that he was ill with the "flu". The following week, Francisco did not report for work—or telephone in—until the Thursday afternoon, however, a decision had already been taken that morning to refuse to allow Francisco to return to work since he had, in the employer's view, already quit. Mr. Fedele testified that he told Francisco that the latter's position "was no longer available" and that Vitrum "took the position that he quit" and that when Francisco failed to report for work earlier in the week he "made the assumption" that Francisco had quit.

Francisco, for his part, says that he *did* call Mr. Fedele at about 7 or 8 P.M. on the Monday of the second week to advise that he was still ill and unable to report for work but admits that he did not telephone in on Tuesday, Wednesday or Thursday. He says he did call in on the Friday—to report that he was feeling better and expected to return to work on the following Monday—only to be informed that his employment had been terminated.

If an employee voluntarily quits his or her employment, the employer is not obliged to pay any compensation for length of service [see subsection 63(3)(c)]. However, a lawful quit consists of both a subjective intention to quit coupled with some objective evidence that is consistent with an employee having quit (see *Valley Alarms and Communications Ltd.*, B.C.E.S.T.#D080/97). It is the employer's burden to raise at least a *prima facie* case that an employee voluntarily quit.

In this instance there is no evidence before me which would suggest that Francisco had any intention of quitting. Francisco was away from work due to illness and the employer was well aware of that fact. The *bona fides* of Francisco's illness has not been challenged by the employer and, in any event, his illness (from January 4th to 14th) is corroborated by a medical report. I find it surprising, to say the least, that when Francisco did not report for work during the second week of January that *no one* from the employer contacted Francisco to inquire about his absence or his health; I would have thought it a reasonable and, indeed, humanitarian gesture for the employer to have called Francisco to inquire about his health when he failed to report for work or call in.

Should Francisco have called in on those days when he was absent but did not call in? Yes, he should have. Does his failure in this regard suggest, to a reasonable person, that he thus intended to quit his employment? I hardly think so.

In my view, the employer has completely failed to prove that Francisco voluntarily quit his employment.

As for Vitrum's alternative plea, namely, that it had just cause for termination, I do not accept that assertion particularly given that Francisco was never warned that if he failed to telephone in when absent due to illness he would be terminated. It should have been obvious to Vitrum that Francisco was absent from work due to illness. Francisco's failure to report in by telephone on a few days of the days he was away due to a *bona fide* illness does not amount, in my view, to a fundamental repudiation of his employment contract—the essence of just cause. Indeed, the evidence clearly suggests that Vitrum was not all that bothered by Francisco's failure to telephone in until the third or fourth day when at that point it took the precipitous position (in my opinion), that Francisco had quit.

Accordingly, the appeal is dismissed as it relates to the award in favour of Francisco.

**Reynaldo Bautista**

It was suggested in the Determination that Bautista's termination may have been linked to his support of a union organizing drive—there is absolutely no evidence before me to support that assertion and Bautista did not press the point at the appeal hearing.

The events that triggered Bautista's termination occurred on August 19th, 1999 and are not in dispute. Bautista worked on the second shift; there are no maintenance personnel working on the second shift. When Bautista reported for work on August 19th, he discovered that the saw that he would ordinarily use was broken—apparently, the trigger mechanism was malfunctioning. Bautista reported the matter to his supervisor, Mr. Lee Boyd, who told Bautista to use another saw and advised Bautista that the saw would be repaired the next morning. Bautista ignored this direction. Some twenty minutes later, Mr. Boyd returned to Bautista's work area to discover that Bautista—together with another employee—had dismantled the saw and was attempting to repair it.

Mr. Boyd told the two employees to put the saw back together and also advised Bautista that he would be "written up". Subsequently, Boyd prepared a document entitled "Employee Report" which recorded that Bautista had been issued a "verbal warning" (rather than a "written warning") because Bautista "specifically was told not to take the saw apart, wasted over ½ hr. taking it apart, then putting it together after I caught him doing it". Clearly, Bautista did not follow a specific direction given to him by his supervisor—he candidly admits as much.

The disciplinary report prepared by Mr. Boyd was delivered to Mr. Fedele, the shop foreman, who in turn discussed the matter with Mr. Martini, Vitrum's president. After discussing the matter between themselves—with no further input (other than the report) from Mr. Boyd—Mr. Martini decided to terminate Bautista's employment.

I have before me two separate sets of "Health and Safety Rules" both of which are undated. The second set contains some 15 rules and a space for the employee to sign an acknowledgement that he has read and understood the policies. There is no evidence before me that Bautista was ever presented with, and signed a copy of, the second set of rules. At page 4 of the Determination, the delegate specifically referred to the first set of rules (11 in number) and, in particular Rule 2 that states: "No worker shall operate or use any equipment in a manner that endangers himself or any other worker". However, the nub of Bautista's offence was not in misusing equipment but, rather, in failing to follow an order *not* to use equipment and in proceeding to attempt to repair equipment after having been told not to do so.

In my view, the more directly applicable work rule is Rule 2 of the second set of rules (*not* referred to in the Determination): "No worker shall operate, dismantle, or use any equipment in a manner than endangers herself/himself or any other workers/visitors". The last paragraph of the second set of rules states that the rules are "mandatory" and that contravention "will result in immediate disciplinary action and/or termination of active employment" and that "each incident will be subject to review by management on a case to case basis".

The delegate appears to have accepted that Bautista ought to have been disciplined but, in light of the company's policy set out in the first set of rules ("Failing to abide by these rules will result in one verbal warning, one written warning and then termination"), concluded that Bautista should only have been given a verbal warning. I am not satisfied that the company's policy so limited its right to impose discipline, particularly, in light of the wording set out in the second set of rules. Further, and quite apart from the two sets of "health and safety" rules—and recall that there is no evidence before me that either set of rules was ever presented to Bautista—an employer has the right to issue lawful directions to its employees and employees are obliged to follow such directions. As noted by our court of appeal in *Stein v. British Columbia Housing Management Commission* (1992), 65 B.C.L.R. (2d) 181 at page 185 (per Southin, J.A.):

> "...an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
>
> It is not an answer for the employee to say: 'I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it'."

As Bautista himself freely admits, he was told by his supervisor not to use the broken saw and that it would be repaired the next morning by the regular maintenance personnel. He was told to continue his work using another available saw. Contrary to his supervisor's express and lawful directions, Bautista attempted to repair the saw on his own. Bautista is not a certified repairman. Bautista might have damaged the saw in his attempts to repair it (although there is no evidence before me that he did so). Further, while he was attempting to repair the saw, Bautista was, of

course, not carrying out his usual duties and thus productivity was inevitably affected. Further still, Bautista persuaded another employee, from another department, to assist him in his repair efforts thus affecting that other department's productivity.

Unlike a grievance arbitrator, neither the delegate nor this Tribunal has the jurisdiction to substitute some lesser penalty when an employee has been terminated for some misconduct; in cases such as this, the only issue to be determined is whether or not the employer had just cause to terminate the complainant. In this case, by reason of Bautista's clear insubordination, I am of the opinion that Vitrum had just cause to terminate his employment.

## ORDER

Pursuant to section 115 of the *Act*, I order that the Determination, as it relates to Royce Y. Francisco, be confirmed as issued in the amount of **$1,387.71** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Pursuant to section 115 of the *Act*, I order that the Determination, as it relates to Reynaldo Q. Bautista, be varied to indicate that Vitrum had just cause to terminate Bautista's employment. Accordingly, Vitrum was not obliged to pay Bautista any monies on account of compensation for length of service.

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