

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 -

Vector Yacht Services Ltd
("Vector")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 97/185

DATE OF HEARING: August 15, 1997

DATE OF DECISION: August 22, 1997

DECISION**APPEARANCES:**

Kerry Spanier For Vector Yacht Services Ltd
Merlin James Lee For himself

OVERVIEW

This is an appeal by Vector Yacht Services Ltd ("Vector") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No. 079796) dated March 11, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Vector had terminated the employment of Merlin James Lee ("Lee") without notice and without compensation. Vector has appealed on the basis that Lee failed to return from holidays as directed and therefore either terminated his own employment or was dismissed for cause.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the employee's failure to return from holidays and to report to work as directed constitutes termination by the employee himself or is just cause for dismissal by the employer.

FACTS

Lee was employed for about three years as a seasonal and part-time worker at Vector Yacht Services and on February 01, 1997 he commenced full time employment in an apprenticeship program to train as a marine mechanic. Until the incident that gives rise to this appeal Lee was considered a very good and conscientious employee. He was treated very well by his employer who had taken a personal interest in assisting Lee's career.

It was the policy and practice in Vector's business that none of the staff would take more than one week of holidays during the busy summer months and would generally take their holidays in the off-peak season.

In the early summer of 1996 Lee mentioned to Mr Kerry Spanier (Spanier), the owner/manager of Vector, that he was hoping to take a couple of weeks holiday in August as he was planning a driving trip to California. He says that Spanier said they would discuss it when Lee's dates were more clearly identified. About two weeks before August 9, 1996 Lee marked on the office calendar that he would be away from work for two weeks commencing August 9th. When Spanier saw this notation he had a meeting with Lee and told him that he could not have two weeks off in August. Spanier told Lee that he was a valuable employee and was needed during the busy months. Spanier agreed that Lee could have one week's holiday in August.

Lee was told twice by Spanier and once by the company accountant that he was not allowed the two weeks off. At the appeal hearing Lee agreed that he had been told that he was only allowed one week of holidays in August. He claimed that Spanier did agree to give one extra day (Monday August 19th). Lee agreed that he was directed to be back at work at 8:00 am on Tuesday August 20, 1996.

Lee went to California as he had planned. He drove to Los Angeles, spent one day there, and then commenced the return trip via Las Vegas, Utah, Calgary and back through Vancouver to Victoria. He was in Utah on August 16th and claims to have telephoned his girlfriend and asked her to call Vector to say that he would be late returning. Vector has no record of any call being received. Lee did not call Vector nor make any other effort to contact them prior to his return.

Lee arrived back in Victoria late on the 22nd and reported to work on Friday August 23rd. There is some dispute about whether he reported in the afternoon or morning, but at any rate, a letter was waiting for him from Spanier telling him, that because of his failure to return as directed he was not to report in to work until September 4, 1996 at which time the matter would be discussed.

Spanier was very upset about Lee's flagrant disobeying of the instruction about having only one week holiday. Spanier had his accountant prepare a Record of Employment (ROE) showing a dismissal and planned to hand it to Lee on September 4th if Lee did not have an adequate explanation for his failure to return on time. Spanier testified that he valued Lee as an employee and hoped that Lee would have a reasonable explanation and he would just tear-up the ROE and Lee would return to work on September 4th.

Lee did not report to work on September 4th and the meeting with Spanier did not take place. Spanier decided that he had no option but to dismiss Lee. On September 5th, 1996 Lee attended at work but did not seek out Spanier to talk to him. The company accountant handed Lee the ROE showing that he was dismissed and Lee left the premises. He made no attempt to explain the situation to Spanier at any time. At the hearing Lee had no explanation to give as to why he did not report to work on September 4th as directed.

ANALYSIS

The Director's Delegate dealt with the issue as a matter of deciding whether Lee had terminated his own employment by his failure to return from holidays on time or whether he had been dismissed prior to September 4, 1996. The Determination found that Lee did not terminate his own employment and that he had been dismissed and that therefore compensation was payable.

I agree with the Determination that Lee did not terminate his own employment. At no point did he have the subjective intent to quit. There is no doubt, based on the material and evidence before me that Lee was dismissed. However, the Determination did not go far enough. Dismissal does not always result in compensation. The issue, as framed before me, was also whether or not the dismissal was justified on the grounds of Lee's direct disobedience of the employer's specific direction to return to work on a specified date.

Lee was instructed three times to be back at work on August 20th, 1996. He did not do so. The employer set-up an opportunity for Lee to show cause why he should not be dismissed and instructed Lee to attend work on September 4, 1996 to "talk about your future here". Lee did not

attend the meeting on September 4, 1996 and the employer made the decision that Lee's actions were inconsistent with his continued employment.

In the Determination the Director's Delegate was concerned that the ROE was completed and dated prior to the planned September 4th meeting. However Spanier gave a reasonable and, in my opinion, credible explanation. Spanier testified that he had the accountant prepare the ROE in advance of the planned meeting so that if the meeting did not go well he could hand the ROE to Lee on the spot but if satisfied he could destroy it. Likewise the termination of apprenticeship was not completed until September 11th, 1996 but logically dated the end of the apprenticeship August 30th because Lee had not worked at all in September. No adverse inference should have been drawn from either of these two documents.

In my opinion the employer had just cause to terminate Lee's employment. The failure to return to work on the specified date and unexplained failure to attend the meeting with the employer as directed was wilful disobedience and a deliberate breach of the employment contract. Such deliberate disobedience is conduct inconsistent with the continuation of the contract of employment and apprenticeship and as such amounts to just cause for dismissal - *Glenwood Label & Box Mfg. Ltd* [1997] BC EST #D079/97; *Evans* [1997] BC EST #D069/97; *Stein v. British Columbia (Housing Management Commission)* (1992) 65 B.C.L.R. (2nd) 181 (C.A.).

ORDER

I order, under Section 115 of the *Act*, that the Determination is cancelled.

A handwritten signature in black ink, appearing to read 'John Orr', with a long horizontal flourish extending to the right.

John Orr
Adjudicator
Employment Standards Tribunal