

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-

North Shore Auto Towing Ltd.
(the “employer”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/358

DATE OF HEARING: August 24th, 1998

DATE OF DECISION: September 1st, 1998

DECISION

APPEARANCES

Saeed Budaghzadeh for North Shore Auto Towing Ltd.
Del Pullen on his own behalf
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by North Shore Auto Towing Ltd. (the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 15th, 1998 under file number 68082 (the “Determination”).

The Director’s delegate determined that the employer owed its former employee, Del Pullen, (“Pullen”), the sum of \$806.99 representing two weeks’ wages (plus concomitant vacation pay and interest) as compensation for length of service payable pursuant to section 63(2)(a) of the *Act*.

The appeal hearing was held at the Tribunal’s offices in Vancouver on August 24th, 1998 at which time I heard evidence and submissions from both the employer and Mr. Pullen.

ISSUE TO BE DECIDED

The employer does not challenge the delegate’s *calculation* as to the amount of termination pay owed; rather, the employer’s appeal is with respect to Pullen’s *entitlement* to termination pay. Specifically, the employer says that it had just cause to terminate Pullen’s employment and thus, by reason of section 63(3)(c) of the *Act*, is not obliged to pay Pullen any termination pay.

FACTS AND ANALYSIS

Mr. Saeed Budaghzadeh, the employer’s principal director, officer and shareholder, appeared as the employer’s sole witness. Mr. Budaghzadeh testified that Pullen’s employment as a dispatcher was terminated, on January 11th, 1998, for several reasons including Pullen’s failure to abide by company rules and procedures, too many customer complaints and for Pullen’s failure to carry out his assigned duties.

The employer does not have a formal performance appraisal system in place and admits that Pullen was never warned, in writing, about his alleged performance deficiencies. Indeed, Pullen says, contrary to the employer's evidence, that he never received *any* verbal warnings regarding his performance prior to being terminated.

One of the main problems that I have in assessing the employer's evidence is that it consists entirely of hearsay evidence. For example, the employer asserted that Pullen antagonized a customer in the spring of 1997 and that, as a result, an RCMP officer had to attend. Mr. Budaghzadeh frankly conceded that he was unable to say, since he never witnessed the incident, who was at fault. Pullen for his part, testified that it was the customer who instigated the dispute and that the RCMP officer was called at Pullen's request. Even if I was satisfied that Pullen was substantially at fault in the foregoing situation--something I cannot find--I must query why Pullen was not terminated until January 1998, several months after the incident in question.

The employer also alleged that there were ongoing problems between Pullen and other company drivers but again I have no concrete evidence before me of any particular default on Pullen's behalf. None of the drivers allegedly involved in altercations with Pullen, or who could verify his poor work performance, were called as witnesses at the appeal hearing.

Mr. Pullen denies having ever precipitated a dispute with a customer or a tow-truck driver; he denies having ever received any written or verbal warnings about his job performance. He maintains that his work performance was entirely satisfactory.

On an appeal such as the present one, the employer bears the burden of proving, by credible evidence--not mere assertions--that it had just cause to terminate the employee. Quite simply, the employer has manifestly failed to meet its burden of proof in this case.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$806.99** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal