

An appeal

- by -

Finlay Contracting Ltd.  
("Finlay")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Norma Edelman

**FILE No.:** 2001/203

**DATE OF HEARING:** July 5, 2001

**DATE OF DECISION:** July 19, 2001

## DECISION

### APPEARANCES

Sandra Sundby on behalf of Finlay Contracting Ltd.

Bud Colebank on his own behalf

### OVERVIEW

This is an appeal by Finlay Contracting Ltd. ("Finlay") 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 December 1, 2000.

The Delegate determined that Finlay owed its former employee, Bud Colebank ("Colebank"), the sum of \$3,341.19 representing unpaid wages and interest.

This appeal was heard by way of an oral hearing held on July 5, 2001 in Prince George at which time I heard evidence from Sandra Sundby ("Sundby"), Colebank and Colebank's witness, Mel Harper ("Harper").

### ISSUES TO BE DECIDED

Is Colebank entitled to wages and interest in the amount of \$3,341.19?

### FACTS AND ANALYSIS

Finlay is a logging contractor. Colebank worked from July 12, 1999 to March 17, 2000 as a log truck driver at the rate of 30% of the gross of the truck.

Colebank filed a complaint with the Director alleging that he was owed regular wages, statutory holiday pay, a bonus, and compensation for length of service. He also alleged that an illegal deduction had been taken from his wages.

On December 1, 2000 the delegate issued a Determination in which he concluded that Colebank was not owed regular wages but he was owed statutory holiday pay, compensation for length of service, a bonus, and was entitled to be reimbursed for an illegal deduction.

Finlay appealed the Determination on January 8, 2001, after the appeal deadline had expired. In a Decision issued on March 7, 2001, the Tribunal extended the appeal deadline and allowed the appeal to proceed on its merits (*Finlay Contracting Ltd.* BCEST #D115/01).

Finlay does not appeal the Determination as it relates to statutory holiday pay and the illegal deduction. It has paid these outstanding amounts to Colebank. Finlay does appeal the Determination as it relates to compensation for length of service and the bonus.

Sundby is Finlay's bookkeeper. She works in town and was not present at the camp where Colebank worked. The information she has about events at the camp comes from Pat Baines ("Baines"), the General Manager of Finlay. Sundby said Baines was not able to attend the hearing due to work commitments.

Sundby said Baines told her that Dave Watt ("Watt"), the person responsible for the running the camp, advised him there was too much drug use in the camp and he should speak to the persons involved, including Colebank, and if it did not stop, the offenders would be thrown out of the camp. Baines spoke to Colebank about this matter on March 17, 2000, at the end of his 10 day shift. Colebank was then scheduled to be off work for 4 days. He failed to return to work on March 22, 2000. Baines phoned Colebank several times between March 22 and March 25 to find out if he was coming back to work, but the line was busy or there was no answer. As a result, Baines concluded Colebank quit his job.

Sundby said that Colebank's truck did not run on March 22, 2000. On March 23, 2000 the truck was driven by their spare driver, Mike. On March 25, 2000 Finlay hired a new driver, Ron. According to Sundby, if Colebank had been fired (and Baines denies this), Finlay would have arranged to have a driver take his place at his regularly scheduled return time and not on March 25, 2000.

Sundby said that Colebank came to see her a few days before the season ended and said he was done and wanted his Record of Employment. She thought he meant the whole crew was done for the season. She gave him a Record of Employment which showed "shortage of work" as the reason for issuance. At that time, she had no idea that Colebank had quit his job. Baines later told her this.

Sundby said that given Colebank quit he is not entitled to compensation for length of service or his bonus. Keeping the same drivers throughout the season is more productive for the company. As a result, drivers hired at the beginning of the season were promised a 2% bonus if they stayed until the end of the season. Colebank did not stay until the end of the season. He quit and therefore is not entitled to any part of the bonus. She said if Colebank did not quit and was unjustly fired, then he is entitled to the bonus.

According to Colebank, he had an argument with Baines at the start of his shift on March 17, 2000 regarding his pay. He then completed his shift and went back to camp to get some of his gear as he was off for 4 days. Baines caught up with him and said, "pack your stuff you're finished". Colebank said he packed all his gear and got a ride home. Just before he left, he told a co-worker, Mel Harper ("Harper") that he had just been fired. Harper replied "you're kidding me". A few days later, Colebank went to get his cheque and Record of Employment from Sundby. He did not dispute the reason for issuance as it allowed him to receive employment

insurance benefits. He does not believe that Baines phoned him between March 22 and March 25. He said he has an answering machine and a second line and he received no messages. He said if Baines had phoned him and asked him back to work he would have returned to work. As it turned out, he got another job at the beginning of June. He said the fact that his truck sat idle on March 22 doesn't prove anything. Trucks often sat idle because Baines fired so many people. Further, the two drivers (Ron and Mike) who drove his truck after March 22 knew he had been fired. He also said that Baines talked to him about pot smoking around the end of February, but this issue had nothing to do with their discussion/argument on March 17. It is Colebank's position that he was fired without cause and he is owed compensation for length of service and his bonus. He was aware that if he quit he would not be entitled to the bonus.

Harper said he saw Baines and Colebank speaking on March 17. Baines was pointing his finger at Colebank. Colebank later told him he had confronted Baines regarding hold backs and they had an argument. He next saw Colebank at the end of his shift and Colebank told him he had just been fired. Harper asked him the reason and Colebank said it must have been caused by their argument.

The burden is on the Appellant to show that the Determination is wrong. In this case, I am not satisfied that Finlay has met that burden.

I am satisfied that Baines dismissed Colebank. Sundby does not have first hand knowledge of what transpired between Colebank and Baines. Baines, who has first hand knowledge, chose not to attend the hearing. As a result, Colebank's direct evidence was not contradicted. I find Colebank's version of events is the more likely to have occurred in the circumstances. First, Harper confirmed that Colebank told him at the end of his shift on his last day of work he had been fired. Second, Colebank said he did not get another job until June. It was not disputed that Colebank had no job to go to at the time he ceased working at Finlay. Colebank also was aware he would forfeit his bonus if he quit his job. Given these circumstances, and the fact he only had two more weeks of work, I find it unlikely Colebank would quit his job at that time. Third, although the truck that Colebank drove sat idle for one day and a new driver was not hired right away, these facts do not establish that Colebank quit his job. Colebank said the trucks often sat idle. Again, this was not disputed. Further, there was no evidence provided to substantiate that the hiring process for a new driver commenced after and not before March 22. Finally, Colebank's explanation for why he did not dispute the reason for issuance on the Record of Employment is plausible.

Under Section 63 of the Act an employer is liable to pay an employee compensation for length of service (or notice in lieu) unless the employee quits, retires or is dismissed for just cause. There is no evidence Colebank retired or was dismissed for just cause. Nor, as indicated above, do I accept that he quit his job. Therefore, Finlay is obliged to pay Colebank compensation for length of service. I also accept that Colebank is entitled to the bonus. Sundby was dismissed two weeks before he would have earned his bonus. Sundby was clear that if Colebank was found to

be unjustly dismissed then he was entitled to the bonus. I agree with her position. Accordingly, given my conclusion Colebank was dismissed without just cause, he is entitled to the bonus.

**ORDER**

I order under Section 115 of the Act that the Determination be confirmed.

---

**Norma Edelman**  
**Vice-Chair**  
**Employment Standards Tribunal**