

An appeal

- by -

Witmar Holdings Ltd. operating as Big White Motor Lodge and Dilworth Joint
Venture operating as Dilworth Motor Lodge
("Witmar" and "Dilworth")

- 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: Cindy J. Lombard

FILE No.: 2001/269

DATE OF HEARING: July 13, 2001

DATE OF DECISION: July 25, 2001

DECISION

APPEARANCES:

Tony Wiestock on behalf of Witmar Holdings Ltd. and Dilworth Joint Venture

Darrel Wiebe on his own behalf (“Wiebe”).

OVERVIEW

This is an appeal by Witmar Holdings Ltd. operating as Big White Motor Lodge (“Witmar”) and Dilworth Joint Venture operating as the Dilworth Motor Lodge (“Dilworth”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the Director of Employment Standards (the “Director”) on March 12, 2001 (the “Determination”).

An oral Hearing took place on July 13, 2001, and the following witnesses testified on behalf of Witmar and Dilworth:

Angela McConnell, Manager of the Big White Motor Lodge

Angie Stewart, Manager of the Dilworth Motor Lodge

The Determination found that:

- | | | |
|----|---|-----------------|
| 1) | Overtime wages were owed to Wiebe pursuant to Section 40 of the <i>Act</i> as follows: | |
| | a) by Witmar (Big White Motor Lodge) | \$998.97 |
| | b) by Dilworth Joint Venture (Dilworth Motor Lodge) | \$335.69 |
| 2) | Termination pay in lieu of reasonable Notice or just cause for dismissal pursuant to Section 63 of the <i>Act</i> was due by Witmar (Big White Motor Lodge) to Wiebe (one week’s wages) | <u>\$687.59</u> |
| | TOTAL WAGES OWED: | \$2,042.25 |
| 3) | Interest pursuant to Section 88 of the <i>Act</i> to the date of the Determination | <u>\$66.30</u> |
| | TOTAL: | \$2,108.55 |

ISSUES TO BE DECIDED

The only issue raised by the Appellant on appeal is:

Is Witmar (Big White Motor Lodge) liable to pay one week's wages as compensation in lieu of reasonable notice or is the employer excused from liability pursuant to Section 63(3)(c) of the *Act* on the grounds that the employer had just cause for the dismissal of Wiebe?

FACTS AND ANALYSIS

Witmar Holdings Ltd. ("Witmar") owns and operates Big White Motor Lodge in Kelowna, B.C. ("Big White").

The Dilworth Joint Venture ("Dilworth Joint Venture") comprised of Witmar and Tony Wiestock own and operate the Dilworth Motor Lodge ("Dilworth") also located in Kelowna.

On June 6, 2000, Wiebe was hired to work as a front desk clerk at Big White at an hourly rate of \$9.50.

Between June 6, 2000, and September 2, 2000, Wiebe worked shifts at both Big White and Dilworth although the majority of his hours were performed at Dilworth during that period. Separate cheques were issued by Witmar and the Dilworth Joint Venture for wages earned at their respective premises.

On September 2, 2000, Wiebe commenced working solely at Dilworth until he was dismissed on October 3, 2000. The Determination found that the Appellant's dismissal from Dilworth was for just cause and Wiebe has not appealed that decision.

The Determination found, however, that Wiebe's termination by Witmar (Big White) was without cause or reasonable notice and he was therefore due one week's wages in lieu thereof. It is this decision that the employer Witmar (Big White) appeal.

According to Witmar

Tony Wiestock on behalf of the employer, Witmar (Big White), gave evidence that Wiebe was warned that the quality of his work was not acceptable prior to his dismissal and departure to Dilworth on September 2, 2000. Mr. Wiestock stated that at first he had discussions with Wiebe in the nature of suggestions about how to correct his mistakes but that later his discussions became more "assertive". Mr. Wiestock could not recall any dates of those discussions nor any conversation in which a clear warning was given to Wiebe that his employment was in jeopardy if his performance did not improve nor were any written warnings given.

Mr. Wiestock stated that when Wiebe didn't perform well, Angie Stewart, the Manager at Dilworth who had originally recommended Wiebe for the job, offered to have him there full-time.

Angela McConnell was Wiebe's supervisor at Big White advised that Wiebe made a lot of small mistakes on a day to day basis such as not balancing his night audit and erroneously returning a deposit to a customer who had not paid one. Ms. McConnell stated that in the beginning Wiebe's mistakes were infrequent but became more frequent as the summer business became busier.

Angie Stewart, who is manager of Dilworth, also gave evidence as to Wiebe's job performance during the month he was solely at Dilworth, for example, failure to properly reconcile the night audit and not taking identification as required from customers which she described as small things which escalated and required the time of other staff members to rectify.

According to Wiebe

Mr. Wiebe presented as a honest, straightforward witness who gave evidence that he was not the best night auditor. He stated that he came to the job with a background not in bookkeeping but in advertising and graphics. He received on the job training.

Mr. Wiebe stated that during his three months at Big White, errors were brought to his attention but never he says with any indication that his employment was in jeopardy. Mr. Wiebe says that he never knowingly submitted audits that didn't balance and was not aware that they didn't balance until he received a telephone call from Mr. Wiestock shortly before his departure from Dilworth describing them as terrible. Prior to that conversation he says that clerical errors were brought to his attention from time to time however it was his impression that everything was "OK".

Wiebe was unaware that the reason for the transfer of his employment from Big White to Dilworth was job performance.

LAW

Section 63 of the *Act* provides:

The onus is on the employer, Witmar (Big White) to establish on a balance of probabilities that Wiebe's conduct justified dismissal without notice or compensation in lieu of as required by Section 63 of the *Act*.

In the case of termination based on the alleged poor job performance of the employee the onus is on the employer to show:

- 1) the standards of performance expected by the employer were reasonable and clearly communicated to the employee;
- 2) in the case of minor problems warnings were given to the employee including a statement that his job was in jeopardy;
- 3) the employee was given a reasonable period to correct the problems; and
- 4) still failed to meet the expected standards.

See for example: *Re: Morrey Nissan, a division of White Spot Service Ltd.* [1997] B.C.E.S.T.D. No. 44(QL), January 24, 1997.

The employer, Witmar (Big White) has not met that onus. During Wiebe's employment at Big White, there was no clear communication of the standards to Wiebe, he was not warned that the standard was not being met nor that his employment was in jeopardy.

For these reasons, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated March 12, 2001, be confirmed plus whatever further interest which has accrued pursuant to Section 88 of the *Act* since its issue.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal