

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 -

Rene A. Delage

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 98/409

DATE OF HEARING: September 08, 1998

DATE OF DECISION: September 21, 1998

DECISION

APPEARANCES:

Rene A. Delage	On his own behalf
Barry Taylor	On behalf of Fisher Bay Seafood Ltd

OVERVIEW

This is an appeal by Rene A. Delage ("Delage") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No. 087-421) dated June 15th, 1998 by the Director of Employment Standards (the "Director").

Delage was employed by Fisher Bay Seafood Ltd ("Fisher Bay" or the "employer") for approximately two years. On February 13, 1998 he was summarily dismissed without notice and without compensation. The employer alleged that Delage was dismissed for just cause and therefore the requirements for notice or compensation were deemed to be discharged by the operation of section 63(3) of the *Act*. Delage complained and after an investigation the Director found that the employer had established just cause.

Delage appeals on the grounds that the Director's Delegate gave too much credence to the evidence of a single employee and accepted the evidence of an apparent independent witness without giving Delage an opportunity to respond to that evidence.

ISSUE TO BE DECIDED

There are two issues to be decided in this case. The first issue is whether the evidence of an alleged independent witness was persuasive and should have been accepted without giving Delage the opportunity to know and respond to such evidence. The second issue is, if the evidence of the third party was not reliable, did the employer meet the test of establishing "just cause".

FACTS

In the afternoon of February 13, 1998 Delage went to work as usual and approached his supervisor, Mr Barnes, who testified that he told Delage that certain parts of the clean-up job from the previous night had not been done properly. There was a discussion which clearly got heated and there were considerable misunderstandings between Delage and Barnes as to the expectations of the supervisor. Delage and Barnes both claim that the other became heated while they themselves did not. The Director's Delegate relied on the evidence of Mr Heinz, an alleged witness to the scene, who said that Delage "lost it" by telling Barnes to step outside at the same time raising his clenched fists to Mr Barnes. On the basis primarily of this evidence the Delegate

found , on a balance of probabilities, that Delage engaged in gross insubordination thereby giving just cause for dismissal. Delage testified that he was not given the opportunity to respond to the evidence of Heinz prior to the Determination being issued. Heinz was not called to testify at the hearing and the Director's Delegate did not attend the hearing.

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There was some reference in the determination to prior disciplinary warnings but these were not at issue in this case as they were correctional in nature and at no time was it suggested that Mr Delage's job was in jeopardy.

Neither the evidence of Delage nor the evidence of Mr Barnes at the hearing coincided with the alleged evidence of Heinz. Barnes testified under oath that fists were never raised and no threats were made.

ANALYSIS

The onus at an appeal is on the appellant to satisfy the Tribunal that the Determination is in error. The onus in establishing just cause for dismissal is on the employer. In this case it is clear that the evidence of Heinz upon which the Delegate based his decision was unreliable as it did not coincide with the sworn testimony of either Delage or Barnes. Delage should have been given the opportunity to address Heinz's evidence before the Determination was issued. I am satisfied that the appellant has met the first test of showing that the Determination contains a fundamental error in the facts.

Without the evidence of Mr Heinz the issue comes down to establishing which version of the events was most likely to be true in all of the circumstances. In this case, what is clear is that the two parties involved misunderstood each other both in their words and actions. It is not possible to say which version is most consistent with the probabilities of the situation as the situation itself was unforeseeable, improbable and unpredictable. The parties were friends and had worked together for two years without incident.

Without the evidence of Mr Heinz, and the benefits of cross examination of his version, I can not be satisfied that the employer has established just cause for dismissal only on the evidence of Mr Barnes which is directly contradicted by Mr Delage, especially in light of the clear misunderstandings between them.

I conclude that there was not just cause for dismissal and that the appellant is entitled to compensation for length of service together with holiday pay and interest.

ORDER

I order, under Section 115 of the *Act*, that this matter is referred back to the Director to calculate the appropriate compensation, holiday pay and interest due to the appellant.

JOHN M. ORR
ADJUDICATOR,
EMPLOYMENT STANDARDS TRIBUNAL

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