

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 -

Kustom Towing Ltd
("Kustom")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	97/465
DATE OF HEARING:	August 29, 1997
DATE OF DECISION:	September 17, 1997

DECISION

APPEARANCES:

Wilfred Semple and
Patricia Semple

For Kustom Towing Ltd.

David Reside

For Himself

OVERVIEW

This is an appeal by Kustom Towing Ltd. ("Kustom") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination (File No. 081648) dated May 26, 1997 by the Director of Employment Standards (the "Director").

The Determination found that when Kustom suspended the employee, David Reside ("Reside"), for 60 days as a disciplinary action it was excessive and constituted constructive dismissal and that therefore compensation for length of service was owed to Reside.

Kustom has appealed on the basis that the Director's delegate failed to take into account that there had been progressive discipline leading up to the suspension and that therefore the suspension was reasonable. In addition Kustom states that the Director's Delegate did not take into consideration the position of the employer that Reside self terminated by refusing to fulfil the conditions of the suspension.

ISSUES TO BE DECIDED

The issues to be decided in this case are firstly whether the suspension imposed by Kustom on Reside was a reasonable progression of discipline or was it excessive and therefore constructive dismissal and, secondly, whether Reside self terminated by refusing to comply with the terms of the suspension.

FACTS

Reside worked as a driver for Kustom, a small family owned trucking business, from September 1994 until August 22nd 1996 when he quit for reasons not relevant to this case. As a result of several meetings Reside returned to work for Kustom on September 3, 1996. He was required to provide a copy of his drivers extract which he did. Mrs Semple claimed at the hearing that she had prepared and delivered to Reside a two page document setting out the conditions of his employment. The document also stipulates that Reside's employment was to be a three month

probationary period and that any suspension would be the last step before dismissal. Reside denies ever seeing such a document or any discussion about probation or the terms set out in the document.

Between September and the end of November, 1996 Reside had three accidents in the Company vehicles. The cost of these accidents was not substantial. In the first case there was damage to a fender on the truck and Reside reimbursed the company for the repair. In the second some wires were pulled down by the truck but no action was taken to recover from Kustom. The third accident was more serious and occurred when Reside had driven the truck into an intersection and then attempted to back-up, colliding with a van behind him. The damages were covered by insurance and did not affect the company rates.

Mr and Mrs Semple were out of town when the third accident occurred but when they returned on December 2, 1996 Mr Semple suspended Reside for 60 days without pay. Conditions were placed upon Reside's return to work that he enrol in and complete a defensive driver's course and that he obtain a class three drivers licence. Obtaining a class three drivers usually involves taking a 6 week course and costs approximately \$1200.00. Reside protested at the time that he shouldn't have to spend his own money to obtain a licence which was not required by the Department of Motor Vehicles and had not been a previous requirement of his employment.

Reside could not easily afford to be without an income in December and January so he planned to apply for assistance from Employment Insurance. He approached Mrs Semple for a Record of Employment (ROE) but when he received it the ROE indicated that he had "quit" his employment. Mrs Semple agreed that at no time did Reside tell her that he was quitting. In fact at the hearing she stated that the suspension could have been shorter than 60 days if Reside completed the courses required. Mr Semple said that the suspension was for the full 60 days regardless.

Reside did not complete the required courses because, without any income, he could not afford to take them and the 6 week class three course did not commence until mid January, 1997. At the completion of the 60 days Reside called in to Kustom to see when he should recommence work. He was asked if he had done the courses and he acknowledged that he had not. He was told that he could not work until they were completed. Reside's employment terminated at that time, February 3, 1997.

ANALYSIS

The relevant provisions of the *Act* are as follows:

63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(3) The liability is deemed to be discharged if the employee

(c) terminates the employment ...

66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

In this case the Director's Delegate found that the 60 day suspension was excessive and, without confirmation of progressive discipline, amounted to constructive dismissal. The appellant was unable to produce any substantial evidence of progressive discipline and, in fact, admitted that they were not sure of the proper steps to take. The two page document which purported to be a probationary document was not persuasive because there was no evidence that Reside ever agreed to the terms contained in it or ever was given a copy of the document.

I am not satisfied that Reside ever voluntarily resigned from his employment. Although he was seeking help from Employment Insurance he never stated that he was quitting and I am satisfied that he did not have the intention to quit. He certainly protested the terms of his suspension in no uncertain language but was still prepared to return to work at the conclusion of the suspension.

The terms imposed by Kustom amounted to a substantial alteration in the conditions of employment. Reside had not previously been required to have a class three licence and was not required by law to have one. The imposition of this requirement was virtually impossible in the time frame and while Reside was without pay. I must agree with the Director's Delegate that these conditions amounted to a constructive dismissal.

ORDER

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



John Orr
Adjudicator
Employment Standards Tribunal