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-

Performance Development Ltd.

("Performance Development" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/62
DATE OF HEARING:	July 28th, 1997
WRITTEN SUBMISSIONS RECEIVED:	August 15th, 1997 (Parties) August 20th, 1997 (Director)
DATE OF DECISION:	October 15th, 1997

DECISION

APPEARANCES

Lawrence W. Coulter	for Performance Development Ltd.
Neville Jewell	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Performance Development Ltd. ("Performance Development" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by the Director of Employment Standards (the "Director") on January 9th, 1997 under File No. ER:067-579 (the "Determination").

The Director determined that Performance Development terminated the employment of Neville Jewell ("Jewell) because he filed a complaint under the *Act* claiming unpaid overtime pay. Accordingly, the Determination was issued against Performance Development under sections 79 and 83 of the *Act*. The Determination, in the amount of $6,569.96, represents lost wages during the period October 21st, 1996 to November 29th, 1996 (including 4% vacation pay) and interest.

In the original Determination, the wage loss was stated to span the period October 21st to December 27th, 1996, however, the Director's delegate advised the Tribunal, by way of memorandum dated May 15th, 1997, that the Determination should have only referred to the period ending November 29th, 1996. So far as I am able to ascertain, the Director has not formally varied the Determination pursuant to section 86 of the *Act*.

The following notice appears at page 2 of the Determination:

> "Please note that further determinations will be issued for additional wages losses [sic] until Neville Jewell secures full employment."

Although the Director indicated that further determinations would be issued, as at the date of the appeal hearing, the Director had not issued any other determinations against the employer.

The appeal hearing was held at the Tribunal's offices in Vancouver on July 28th, 1997 at which time I heard testimony from nine witnesses--Jack Bray, Dennis Moroney, Blair Rampling, Mike Kovalick, Desmond Murphy, Philip Scyner, Sukh Cheema, Paul Martin and Derek Rampling--on behalf of the employer, and from Jewell on his own behalf. The Director did not appear at the appeal hearing.

Due to the lateness of the hour, at the conclusion of the hearing it was agreed that, rather than reconvene on another day for final submissions, the latter would be submitted in writing. In light of the fact that Jewell had been, during the course of the hearing, in contact with someone at the Director's office, I also indicated to the parties that I would be inviting written submissions from the Director, which I subsequently did on July 30th, 1997 by way of a letter faxed to the Director's delegate who issued the Determination. I received written submissions from both the employer and Jewell prior to the agreed August 15th deadline; the Director's legal counsel also filed a written submission which I received prior to the August 20th deadline which I had fixed for receipt of the Director's submission. The Director's submission only dealt with the appropriateness of the remedy ordered in this particular case.

It is common ground that Jewell's employment with Performance Development was terminated on or about October 21st, 1996, allegedly for cause. It is also common ground that even if the employer did not have just cause to terminate, leaving aside for the moment the provisions of sections 79 and 83 of the *Act*, Jewell would not have a claim under the *Act* for compensation for length of service. Jewell, an employee having slightly more than one year's service at the point of discharge, was given two week's wages as severance pay. Thus, the employer met its obligation under section 63(2)(a) of the *Act* in the event that it did not have just cause for dismissal.

ISSUES TO BE DECIDED

The employer has advanced two principal grounds of appeal:

First, it says that it did not terminate Jewell's employment because he filed a complaint under the *Act.*

Second, and in any event, the actual remedy, as well as the proposed additional remedies, set out in the Determination are inappropriate remedies that are not authorized by any provision of either the *Act* or the accompanying *Employment Standards Regulation.*

FACTS

Performance Development is a "high-technology" machine shop located in Delta. The company produces products that are used in, for example, laser imaging equipment and other aeronautical applications. The company's products, sold all over North America, are machined within very small tolerances. At present, the company employs about 15 people.

Jewell was first hired as a shipper in mid-October 1995 at an hourly rate of $12. At the time of his termination, on or about October 21st, 1996, Jewell's responsibilities had increased, as had his pay (to $26 per hour).

The Complainant Employee's Evidence

Jewell testified as follows:

• in late August 1996 Jewell learned, apparently for the first time, that he might be entitled to claim overtime pay under the *Act.*

• Jewell returned to work in mid-September, after having been off work for a short period following the birth of his daughter, and approached the company president, Derek Rampling, about the matter of overtime and was rebuffed.

• Jewell spoke with Derek Rampling about his overtime claim on 2 or 3 other occasions between the middle and end of September 1996 but to no accord; Derek Rampling was "approachable" but unwilling to agree to the payment of any overtime wages.

• On October 1st, Jewell signed a complaint in which he claimed unpaid overtime; this complaint was filed on October 7th, 1996 with the Surrey office of the Employment Standards Branch. Jewell never told anyone at Performance Development that he had, in fact, filed a complaint and never pursued the matter of unpaid overtime with the employer after filing the complaint. He sought, and was apparently given, an undertaking that his anonymity would be preserved.

• On October 11th, 1996, an Employment Standards Officer wrote to Performance Development stating that "We have received information indicating that your company does not pay your employees proper overtime rates as required by the *Employment Standards Act.*" The letter continues:

> "You are required to show evidence that you have been complying with these requirements by auditing your payroll records for the past two years covering all your employees.
>
> If any overtime is owing to any employees you should immediately issue a cheque to the individuals concerned and provide the Employment Standards Branch with evidence of these payments and copies of your payroll records.
>
> Your response should be forwarded to this office within fifteen days. Failure to do so will result in formal action being taken to ensure compliance with the *Act.*"

• The October 11th letter from the Employment Standards Branch was then posted on a company bulletin board and a staff meeting was called on October 16th at which time the employees were given a form to complete if they believed they were entitled to overtime. This "overtime claim form" states, in part:

> "I note below what my overtime hours are for this period from my records, and the month and year of this work. I understand that this overtime will be paid on receipt and confirmation of the claim by management.

> I also understand and consent to this letter being forwarded to [sic] Employment Standards Branch of the Ministry of Labour for records regarding overtime in the period noted."

• By Friday, October 18th Jewell had not yet completed the "overtime claim form"; Derek Rampling told Jewell that "he needed the form right away". Jewell replied that he couldn't fill out the form as he didn't have all his payroll records and that Derek Rampling then turned abusive and said words to the effect "You're making me angry; you're fucking sacked!" but that this purported dismissal was rescinded a few minutes later. The foregoing events took place about 9:00 A.M.; around 10:00 A.M. Jewell met with the company accountant for about 20 to 30 minutes to review payroll records and Jewell's overtime claim at which time a cheque, in the approximate amount of $8,000 (gross) was issued to Jewell on account of his overtime claim. The balance of the day was uneventful.

• On the following Monday, October 21st, Jewell says that he was fired and that Derek Rampling told Jewell "fuck off you're sacked; I'm not paying some bastard who goes to the labour board". Jewell was given a letter, dated October 21st, which does not purport to be a letter of termination although it could, perhaps, be construed as a constructive dismissal. In any event, the October 21st letter sets out the employer's position that Jewell's wages were being reduced due to Jewell having misled the employer regarding his academic qualifications and to better reflect his current job duties.

On cross-examination, Jewell acknowledged that he and the company's accountant met on October 18th and *agreed* on a figure regarding his unpaid overtime. He also testified that "I was satisfied that I got my overtime; that it was broadly in line with what I expected". Finally, Jewell also acknowledged that prior to his termination on October 21st, he knew that his job was at risk because of certain matters unrelated to his overtime claim.

The Employer's Evidence

As might be suspected, the employer presented an entirely different view of the events in question.

The principal witness for Performance Development, Derek Rampling, the company president and majority shareholder, testified as follows:

• Jewell was hired in the fall of 1995, as a shipper-receiver, on the understanding that he held a mechanical engineering degree. His hourly wage was $12.

• In December 1995, Jewell's hourly wage was increased to $26 when he took over the job responsibilities of a former employee who left the firm to establish his own computer consulting business. Jewell's mechanical engineering degree was a critical factor in his being given the increased pay and job responsibilities at that time.

• Although there were some customer (and fellow employee) complaints regarding Jewell's performance, matters more or less proceeded apace until the company learned, while in the process of obtaining ISO 9001 certification, that Jewell did not hold an engineering

degree, only a one-year engineering diploma from a trade school in Wales. This discovery was made during the summer of 1996.

• In October 1996, the company decided to reduce Jewell's wages to a level it believed to be commensurate with his academic qualifications. Jewell balked at this and was, in light of his refusal to accept the proffered pay cut, terminated.

• It was never the company's intention to terminate Jewell; rather, he was to be demoted and would have to report to Sukh Cheema. Jewell absolutely refused to report to Cheema, saying that "he was not going to report to anybody"; about a week earlier Jewell had asked to be laid off although this request had been turned down.

Several current and former Performance Development employees testified as to Jewell's performance deficiencies as did a former Performance Development customer. The evidence before me unequivocally shows that Jewell's job responsibilities were progressively increased following his hiring in the fall of 1995 and then, commencing in early 1996, these increased responsibilities were systematically stripped away because of perceived problems regarding Jewell's job performance.

I accept that Jewell misrepresented his educational qualifications--stating he held an engineering degree when he did not--but I am also satisfied that this circumstance, standing alone, did not give the employer just cause for termination. The company's chartered accountant, Paul Martin, testified that on his recommendation a decision was ultimately reached to retain Jewell but to have him more closely supervised by either a new employee (at least one potential supervisor was interviewed after having been flown in from Calgary) or, as things turned out, by Mr. Cheema.

Sukh Cheema testified that about one week prior to Jewell's termination, he witnessed Jewell asking Derek Rampling for a notice of layoff. On October 21st, after having been given notice of his demotion, Cheema was present when Jewell indicated to Derek Rampling that he (Jewell) would "refuse to take a paycut" and report to a "guy like Cheema". Almost immediately, Derek Rampling replied that "I've had enough, you're fired".

As noted earlier, it is common ground that Jewell was given two weeks' wages as severance pay.

ANALYSIS

This is not a case about whether or not the employer had just cause for dismissal. Rather, the issue before me is whether or not retaliatory measures were taken against Jewell "because a complaint or investigation may be or has been made under [the] *Act* (see section 83).

Thus, I must be satisfied that the employer's actions in unilaterally reducing Jewell's wages, and then terminating him when he refused to accept the wage cut, were motivated, at least in part, because Jewell had filed a complaint under the *Act*. In other words, the employer must have acted with some sort of *mala fides*.

My task is complicated by the fact that the Determination itself does not set out any rational basis for concluding that the employer was acting in bad faith and the Director chose not to attend, call evidence, or make submissions on the evidence, at the appeal hearing. The Director appears to have drawn the inference that because the complaint was filed prior to Jewell's termination, the employer must have been acting in bad faith. I cannot accept, absent any other evidence, that because some disciplinary or other action follows the filing of a complaint, section 83 of the *Act* has been breached.

The evidence before me clearly discloses that from early January 1996 the employer repeatedly made known to Jewell its dissatisfaction with his job performance. This dissatisfaction resulted in a gradual, but continual, "stripping away" of the additional responsibilities that had been given to him in late 1995 when his wage rate was more than doubled to $26 per hour. I accept that Jewell misrepresented his educational qualifications in order to secure the additional responsibilities that he ultimately proved unable to handle.

There is absolutely no evidence before me upon which I can reasonably conclude that the employer knew or suspected that Jewell had filed an overtime complaint and that, in turn, this complaint motivated the employer's actions. None of the Director's correspondence refers to Jewell being the complainant; Jewell sought from the Director, and was given, a promise of confidentiality. If the employer knew or suspected that Jewell was the complainant--the employer's evidence, which I accept, is that the suspected complainant was a former employee who had recently left the firm on bad terms--why would the employer call a staff meeting? Why not simply confront Jewell directly? Why would the employer almost immediately have its accountant meet with Jewell to sort out his overtime claim and immediately issue him a cheque for an amount that Jewell believed to be "in line with what I expected"?

It may be true that the employer was in an agitated state and was demanding particulars regarding Jewell's overtime claim, but that agitation must be considered in light of an Employment Standards directive that the matter had to be dealt with "within fifteen days" or else "formal action" would be taken under the *Act*. It should also be noted that the effect of the employer's October 21st letter was only to return Jewell to the wage level (in fact, slightly higher) he started at in the fall of 1995 when he was hired to do, essentially, the same job he was now doing in the fall of 1996. His termination ensued only when he refused to accept the pay cut. As I noted above, whether or not the proffered pay cut constituted, as a matter of law, a constructive dismissal, is not the issue. The key point is that the employer believed that it had just cause to act as it did and the employer's rationale for acting did not include the knowledge or suspicion that Jewell had filed a complaint under the *Act*.

Prior to filing his complaint, Jewell knew that his employment was at risk; he admitted as much during the hearing. His performance deficiencies and misrepresentation of educational qualifications were well-known to the employer prior to the fall of 1996. One could just as easily characterize Jewell's complaint as part of an overall attempt to leverage his position so as to secure the maximum advantage for himself should he be terminated. Why, for example, did he not call the employment standards officer on the morning of October 18th when his overtime claim was, apparently, resolved to his satisfaction? He was certainly quick to telephone the officer on the morning of October 21st when he was terminated.

In light of my conclusion that the employer did not take any retaliatory action against Jewell because he filed a complaint under the *Act, I* do not find it necessary to deal, at any length, with the issue concerning the appropriateness of the remedy ordered in this case. I would say this, however: I did carefully consider the submissions of all parties on the "remedy" issue and, on balance, I am inclined to the view espoused by counsel for the Director in her written brief.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination issued in this matter, dated January 9th, 1997 and filed under number ER:067-579, be cancelled.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal