

An appeal

- by -

Chris J. Bespalko dba Iron Works

- 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: John M. Orr

FILE No.: 2001/336

DATE OF HEARING: August 30, 2001

DATE OF DECISION: September 4, 2001

DECISION

APPEARANCES:

Chris Bepalko

On his own behalf

OVERVIEW

This is an appeal by Chris J. Bepalko operating as Iron Works (“Bepalko”) pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a determination dated December 1, 2000 by the Director of Employment Standards (“the Director”).

Bepalko employed Bill Evans (“Evans”) from March 1999 to March 24, 2000 as a laborer in his iron fabrication and installation business. On March 24 Bepalko was upset with some unsatisfactory work done by Evans and another employee, Lorne Lindsay (“Lindsay”). Evans was sent home and did not work again for Bepalko. Some 4 months later Evans put in a claim to the Director for compensation for length of service.

The Director found that Evans had been dismissed without cause and that he was indeed entitled to compensation for length of service in the amount of \$746.33. Bepalko appeals on the grounds that the director’s delegate made an error in fact in finding that Evans was dismissed. Bepalko submits that Evans was “laid- off” and declined to return to work when recalled.

FACTS

Evans did not appear at the hearing and no one attended on behalf of the Director. Bepalko testified under oath at the hearing and called Lindsay as a witness, who also testified under oath.

Bepalko agreed that on March 24 he told both Evans and Lindsay to pack up their stuff and they were “out of there”, in other words they were fired. However he testified that all three of them then returned to the office. He testified that he spoke to both Evans and Lindsay back at the office. Bepalko testified that he spoke to Evans for about 1.5 hours and he apologised to Evans for getting angry. He recounted some of the difficulties he had with Evans’ performance. However he acknowledged that Evans was a hard working and valuable employee. Bepalko says that he told Evans that there would be no work for a few days but that he would call him as soon as some work was available.

Bepalko testified that it was normal in his business to have to let Evans stay home for short periods of time but he usually tried to find some office or shop work to tide him over. Bepalko testified that at the end of the meeting they had patched things up and were again on good terms. Evans was not at that point dismissed and had not chosen to consider the employment terminated.

Lindsay confirmed that they had both been fired but he testified that Bepalko had done that on several occasions in the past when he was angry. Lindsay testified that it was common for Bepalko to apologize later the same day and all would be well again. Lindsay confirmed that on March 24 that Bepalko apologized to him and told him to come in to work the next day. Lindsay says that everything was resolved before he went home.

Lindsay further testified that after the meetings in the office he met up with Evans and they went for a beer together at Lindsay's house. Lindsay says that Evans was in a good mood. He never mentioned being fired and talked about being laid off for a while until new work came in.

Lindsay testified that he knew that Bepalko had tried to recall Evans because they had work for him in the shop.

Bepalko testified that he tried to recall Evans but Evans said that he was planning to take a training program and wanted a R.O.E. so that he could apply to Employment Insurance for funding for his retraining. Bepalko says that he called Evans on 2 or 3 occasions as there was work for him and he was a good worker. However, Evans declined to return to work and his employment was terminated after a couple of weeks.

ISSUE

The issue to be decided in this case is whether the employment was terminated by the employer or whether the employee was laid off and declined the recall thereby terminating the employment.

ANALYSIS

Given the sworn evidence of Bepalko and Lindsay and having no such sworn evidence by or on behalf of Evans, I am inclined to accept the testimony of Bepalko that Evans was laid off and declined a recall to work. I do take into consideration the findings of the Director's delegate and the written submissions of the respondent but must weigh that evidence against the sworn evidence given to me at the hearing.

I am also mindful of those principles enunciated by the British Columbia Court of Appeal in *Faryna v. Chorney* [1952] 2 D.L.R. 354:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily

recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick minded, experienced and confident witnesses, and those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

It is consistent with the written presentation of Evans that Bespalko was inclined to speak in haste and tell his employees that they were fired but then to regret his words and correct the problem before the end of the workday. That pattern is consistent with the evidence given by both Bespalko and Lindsay about the events of March 24.

I am cognizant that Lindsay is still employed by Bespalko, which might give rise to some suspicion of bias. However he was questioned about this possibility under oath and he appeared to give reasonable and credible evidence.

Lindsay's testimony that he had spent time with Evans after work on March 24 and that Evans was in a good mood and confirmed that he was laid off for a few days is consistent with Bespalko's evidence. I find that this evidence is in harmony with the likelihood that Evans had accepted the apology from Bespalko and understood that he was commencing another short period of lay-off and had not been fired. I am satisfied that Evans was initially fired at the job site but upon return to the office the dismissal was withdrawn by mutual consent.

Certainly Evans could have accepted the dismissal and Bespalko would have been liable to pay him compensation for length of service. However, I am satisfied that Evans accepted the apology and that at the end of the working day he was simply laid off for a few days until further work came into the shop.

I am also satisfied on the evidence of both Bespalko and Lindsay that there was work available in the shop for Evans and that he was asked to return to work on more than one occasion. Evans confirms that he was considering going into a training program and this is consistent with the evidence given by Bespalko that Evans declined to return to work because he wished to collect Employment Insurance to go to school.

Having considered carefully all of the evidence, both written and sworn, I am satisfied that Bespalko has met the onus of establishing on a balance of probabilities that Evans was not fired and that Evans refused a recall to work. The refusal of the recall offer constitutes a "constructive resignation" and since the resignation occurred within the 13-week temporary layoff period the employer was not obliged to pay any compensation for length of service, *Re: Wong* [1999] BCEST #D048/99.

ORDER

Pursuant to section 115 of the *Act* the Determination dated December 01, 2000 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal