

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 -

Anser Industries Inc.
(“Anser”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/545

DATE OF HEARING: October 31, 2000

DATE OF DECISION: December 8, 2000

DECISION

APPEARANCES:

on behalf of Anser Industries Inc.	Veronica Ukrainetz, Esq. Mr. Dan Chambers
on behalf of the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Anser Industries Inc. (“Anser”) of a Determination which was issued on July 17, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Anser had contravened Section 63 of the *Act* in respect of the employment of Chris Pottie (“Pottie”), and ordered Anser to cease contravening and to comply with the *Act* and to pay an amount of \$6,888.64.

The appeal identifies the Grounds for Appeal:

It is respectfully submitted that the Delegate’s Determination has a serious factual error; specifically, that the finding that “Pottie believed he had approval to bring staff in on overtime” is not supported by the evidence.

Counsel for Anser says the key issue behind that ground of appeal is whether there was any basis for Pottie to believe he had authority to require the crew to work overtime on September 4, 5 and 6, 1999.

ISSUE

There are two issues that arise in this appeal. The first issue is whether Anser has shown that the conclusion in the Determination that “Pottie believed he had approval to bring staff in on overtime” was not supported by the evidence. The second issue arises only if I agree with Anser on the first issue, and is whether Pottie was dismissed for just cause.

THE FACTS

The facts that are directly relevant to this appeal arise from events that transpired between approximately September 1, 1999 and September 7, 1999.

The Determination notes the following findings of fact in reference to that time frame:

- Pottie did say that the trailer could not be completed on time as evidenced by his verbal statement and the employer’s submission.
- Chambers did tell Pottie in a meeting on September 3, 1999 “to do whatever it takes” and that “someone would be ‘kicking horse turds down the sidewalk (road)’ if it did not happen” (completion of the trailer by September 10, 1999).
- Pottie did authorise employees to work overtime on at least September 4 and 6, 1999.
- Pottie was fired, September 7, 1999 before the trailer was finished on September 10, 1999 because Chambers believed Pottie had authorized employees to work overtime on the Labour Day weekend without following established company policy and lied to Chambers about it.

During the investigation, the Director had the benefit of comprehensive written submissions filed by counsel for Anser on January 28, 2000 and May 19, 2000 and written responses to those submissions from Pottie, one given on or about February 28, 2000 and the other on or about June 21, 2000. In providing Anser’s version of the events as they had occurred over the time period identified above, counsel included the following statements in the January 28, 2000 submission:

15. On Friday, September 3, 1999, Mr. Chambers attended at the office to discuss with the Purchaser and with Mr. Pottie the stage of delivery of the trailer. The Purchaser told Mr. Chambers that the Controller had approved the necessary materials and the material would arrive that day. Mr. Chambers told Mr. Pottie that the trailer could be built by Friday, September 10, 1999 and that someone would be “kicking horse turds down the sidewalk” if it did not happen.
18. The Company’s normal practice and policy, which Mr. Pottie had followed, was to schedule employees in the Manufacturing Department to work Monday to Friday, with weekends and statutory holidays off. There was no need, in these circumstances, to deviate from the normal practice.
19. Mr. Pottie admitted to Mr. Mandalari that he had instructed floor staff to work during the weekend and for the statutory holiday. Mr. Mandalari asked him if this is what he had been told to do by Mr. Chambers, to which Mr. Pottie said “yes”.
20. On Saturday, September 4, 1999, the Controller called Mr. Chambers and asked him if he had told Mr. Pottie to bring a full crew in on overtime through the long weekend. Mr. Chambers said he had not given any such instruction to Mr. Pottie.

26. On Tuesday, September 7, 1999, Mr. Chambers met with Mr. Pottie in Mr. Chambers' office. He asked Mr. Pottie why he directed the crew to work through the long weekend when they would be out of work by the Tuesday.
27. Mr. Pottie told Mr. Chambers that he did not require the crew to work through the weekend. This was Mr. Pottie's second outright lie.
28. Mr. Chambers determined he could no longer trust Mr. Pottie and so terminated his employment, for just cause.

In his reply to the noted paragraphs of the above submission, Pottie replied:

- #15 During this discussion, I asked if working overtime would be a problem. Mr. Chambers said "to do whatever it takes"
- #18 "Anser" did deviate from "normal practice". They worked "split shifts" to complete this unit.
- #19 Mr. Chambers said to do "whatever it takes or someone would be kicking horse turds down the road".
- #20 I had never instructed a "full crew" to work through the entire weekend.
- #26 I explained to Mr. Chambers that I wanted to be sure the trailer would be complete by the due date, and he said to do "whatever it takes".
- #27 This was not a lie, I did not require the crew to work through the weekend.

In the second submission, counsel for Anser addressed the above replies:

15. **Mr. Pottie's statement is not true.** Overtime must be pre-approved by Mr. Chambers or Mr. Mandalari. Mr. Pottie did not ask if working overtime would be a problem. The purchaser, Jesse Davis, was at this meeting and does not believe that Mr. Chambers approved overtime. Mr. Chambers did say "*do whatever it takes*". However, that statement cannot be interpreted as giving Mr. Pottie the right to build a trailer at cost to the Company. . . .
18. We previously stated that "normal practice" involved working Monday to Friday with weekends and statutory holidays off. Anser did not deviate from this practice. . . .
19. For reasons which we have previously given, Mr. Pottie is straining credibility to say that "*do whatever it takes*" constituted permission to bring the entire crew in over the weekend and for the statutory holiday.

20. **Mr. Pottie's statement is not true.** The only men he did not require to work that weekend was the plumbers (lighting and wiring) and the painter. These men were not necessary until the finishing stages of the job. A "full crew" refers to the men who were necessary to complete the initial stages of the job.
26. **Mr. Pottie's response acknowledges that he instructed the crew to work the week, contrary to his previous denials that he did.**
27. **Mr. Pottie's statement is not true, for reasons already given.**

I heard testimony from employees who had worked on Saturday, September 4 or had agreed to work on Monday, September 6, 1999. I also heard from Mr. Dan Chambers and from Mr. Joseph Mandalari. In her opening statement, counsel for Anser indicated that the credibility of Pottie was relevant and that she would show he had lied to the Director when he said he understood that he had approval from Mr. Chambers to bring the staff in on overtime to ensure completion of the trailer and that he had lied to Mr. Chambers on the morning of September 7, 1999 when he told him he had not required a full crew to work through the weekend and the statutory holiday.

None of the witnesses added significantly to the material that was considered by the Director in making the Determination.

Tracy Montezuma, Chris Cleaver and Bruce Nedjelski testified. Their evidence confirmed facts that were not generally in dispute. As it related to the appeal, Mr. Montezuma testified he was one of the employees asked to work Saturday, September 4, 1999. He confirmed Pottie's assertion that he was not ordered to work on the weekend and did not feel compelled to work if he did not wish to. He was not asked whether he was told by Pottie or by anyone else that he would be working through the long weekend. He said he was asked to work on the burn-table until that job was done, but was unclear how long that would have been. Mr. Cleaver testified that he was asked by Pottie to work the Saturday, but told him he couldn't, that he told Pottie he could work Monday, that Pottie agreed he could come in Monday but that when he came in, the shop was locked and he could not gain access. Mr. Nedjelski testified concerning a comment put in a written statement he had provided to counsel for Anser and which was included in the May 19, 2000 submission, that:

"The foreman (Pottie) and lead hand were under a time limit and their attitude was screw Dan were [sic] we are going to milk it for all the overtime we can get".

In his testimony, he said that this statement was not based on anything that was said to him, but was based entirely on his observation of the lead hand, Jerry Horton, on Friday, September 3, 1999. He had not made any observation of Pottie nor heard any comment made by or about Pottie. He could not really say why he included reference to Pottie in the statement. That statement is made even less effective as a condemnation of Pottie by the fact Pottie did not schedule himself for any overtime on the weekend. Mr. Nedjelski's opinion about Pottie's attitude was not communicated to the employer before Pottie was fired. He also acknowledged that he was part of the Manufacturing Shop "crew" at this time, but did not work any part of the weekend.

Mr. Chambers and Mr. Mandalari testified. I have some concern about their evidence, both generally and in the context of the appeal. As noted above, in the first submission filed with the Director on the complaint, counsel for Anser stated:

19. Mr. Pottie admitted to Mr. Mandalari that he had instructed floor staff to work during the weekend and for the statutory holiday. Mr. Mandalari asked him if this is what he had been told to do by Mr. Chambers, to which Mr. Pottie said “yes”.

In the May 19, 2000 submission, counsel for Anser said “Overtime must be pre-approved by Mr. Chambers or Mr. Mandalari”. That is the information available to the Director when the Determination was made. In the appeal, counsel for Anser affirms that point, saying:

6. Overtime must be pre-approved by Anser’s principal, Mr. Chambers or its controller, Mr. Mandalari.

In his testimony, Mr. Chambers said that it was “company practice and policy” that all overtime had to be authorized or pre-approved by Mr. Mandalari. I have three concerns with this evidence. First, this is not the information provided to the Director during the investigation and no explanation was given to explain how the Director was given wrong information, if indeed it was wrong. Second, this evidence is different from the assertion of fact made in the appeal submission and, similarly, no explanation was provided for the difference. Third, the evidence does not accord with the evidence relating to the discussion between Mr. Mandalari and Pottie on Friday, September 3, 1999 and Mr. Mandalari’s subsequent discussion with Mr. Chambers on Saturday September 4, 1999. There is no dispute that Pottie told Mr. Mandalari on the Friday afternoon that he was calling “these guys” in for the weekend and that Mr. Mandalari had called Mr. Chambers on the Saturday to ask whether Mr. Chambers had authorized it. No concern was ever expressed, either by Mr. Mandalari at the time or by Mr. Chambers at any later time, that Pottie had “sidestepped” company policy or Mr. Mandalari’s authority to pre-approve overtime. If Mr. Mandalari’s pre-approval was required before any overtime could be worked, it would have been reasonable, in the circumstances, to have discussed that with Pottie on Friday or, at least, ask Mr. Chambers about it *before* the overtime was worked.

There are, as well, some inconsistencies between Mr. Chambers’ evidence and Mr. Mandalari’s evidence on that point. Mr. Mandalari said, when asked to describe the company policy and practice regarding overtime, that “normally, someone calls me and asks if overtime is possible”. Mr. Mandalari expressed his view that a “full crew” in the Manufacturing Shop was 8 to 10 employees.

In cross-examination, Pottie acknowledged that he was in the best position to know how long it would take to build the trailer. He did not reject the suggestion that four days was a reasonable estimate of the length of time required to manufacture the trailer, but indicated that it wasn’t unreasonable to conclude it could take five days to complete the trailer. He said that in order to ensure the September 10 deadline was met, it was in his decision to get a head-start by having some of the crew work Saturday and Monday to cut, assemble and form some of the components. He also acknowledged that it was open to him to have the crew work split-shifts, but re-affirmed his belief that the comment from Mr. Chambers to “*do whatever it takes*” authorized him to have

employees work on the weekend, which, from his perspective, was the quickest and most effective way to ensure completion by the deadline.

Pottie testified that he did not have a full crew working on Saturday, but did not disagree with the suggestion of counsel for Anser that the four employees working on that day could be characterized as a “full crew” in the sense that four employees were sufficient to perform the work Pottie felt could be done. In my view, that evidence adds nothing to the appeal, as the question the Director addressed was not whether Pottie’s interpretation was more or less reasonable than that of Mr. Chambers, but whether Pottie had lied to Mr. Chambers about whether he had called in the crew to work the weekend. In that context, Pottie’s understanding of what he was being asked is the only thing that is relevant unless it can be shown that his understanding lacks credibility, as counsel for Anser has suggested.

ARGUMENT AND ANALYSIS

Counsel for Anser argues that the Director did not properly assess Pottie’s credibility in the context of the facts and the available evidence before accepting Pottie’s claim that he believed he had approval to bring staff in on overtime. She re-iterates the argument made by Anser during the investigation, that the comment “*do whatever it takes*” could not reasonably be interpreted as approval to work overtime in light of company policy on overtime and other facts and factors and that, in fact, Pottie knew he did not have approval to work overtime and lied about that, initially to Mr. Mandalari and then to Mr. Chambers, and also lied to Mr. Chambers when he told him he did not require the crew to work through the weekend.

In the Determination, the Director noted:

Regarding the September 1999 incident, the employer argues that “to do whatever it takes” cannot be taken to mean that Pottie had authority to bring employees in on overtime. The employer states that the meaning of “kicking horse turds down the sidewalk” is “unmistakable”; Pottie would be fired if he did not finish the trailer on time.

...

On the balance of probabilities, I accept that Pottie, in good faith, interpreted the employer’s instructions as he thought Chambers meant them. Again, on the balance of probabilities, I do not accept that Pottie lied or intentionally misconstrued the truth. I accept that Pottie believed he had approval to bring staff in on overtime.

Chambers and Pottie agree on what was meant by “someone would be kicking horse turds down the sidewalk” (Pottie would be fired if the trailer was not finished on time). Pottie’s actions are, in my opinion, consistent with an employee who is attempting to do what the employer has instructed and avoid being fired.

In *Re World Project Management Inc. and others*, BC EST #D134/97 (Reconsideration of BC EST #D325/96), the Tribunal discussed the nature of an appeal under Section 112 of the *Act*. In the final analysis, the Tribunal concluded that it would not advance the statutory purpose of providing fair and efficient procedures for resolving disputes under the *Act* to define the process as either fish or fowl, and in reaching that conclusion stated:

Clearly, the Tribunal is not limited to a “true appeal”, focussing only on the original decision nor, on the other hand, would it be fair and efficient to ignore the work of the Director. In my opinion the Tribunal should be flexible in its procedure on appeal to ensure that the intent of the *Act* to create a fair and efficient dispute resolution process is fulfilled.

There may be occasions where an appeal may turn simply on the interpretation or legal analysis of a word, phrase, or provision of the *Act* or *Regulations* where witnesses would not be required at all to resolve the matter. However, there may be other occasions where the appeal turns clearly on evidence and the credibility of witnesses where an oral hearing with sworn testimony would be essential to resolve the point in dispute. Nevertheless, even where such oral hearing is called for it should focus only on the issue appealed and should not necessarily require the re-establishment of the balance of the findings of the Director.

Regardless of the process applied to any particular appeal, the appellant retains the burden of persuading the Tribunal that the Determination is wrong. An appeal is not simply an opportunity to re-argue the facts in an effort to convince the Tribunal to reach a different conclusion on the facts than was reached in the Determination.

Having heard the evidence and the argument of the parties, I am not persuaded that the Determination, and more specifically the finding that “Pottie believed he had approval to bring staff in on overtime”, is wrong or, as stated in the appeal, “not supported by the evidence”. The manner in which this appeal has been framed requires Anser to show the Director should not have believed Pottie when he said he believed he had approval to bring employees in to work overtime and had not lied to Mr. Chambers in their meeting on the morning of September 7, 1999.

The Determination plainly sets out the competing positions of Pottie and Anser in this area and indicates that the Director reached a conclusion after considering the competing positions and weighing all of the available evidence and information relative to those positions. Nothing in the evidence presented to me demonstrates any basis for finding there was an error in Determination because Pottie should not have been believed and had lied to Mr. Chambers in their meeting on the morning of September 7, 1999.

It is agreed that Mr. Chambers told Pottie to “*do whatever it takes*”. Anser has not shown that it was either “unreasonable” or was “straining credibility” for Pottie to have interpreted that comment as permission to bring employees in to work overtime. Similarly, Anser has not persuaded me that the Director erred in finding Pottie had not lied or intentionally misconstrued the truth when responding to Mr. Chambers on the morning of September 7, 1999. To the extent

it is necessary or relevant, I found Pottie to be a credible witness and found his evidence to be reasonable and believable.

The appeal is dismissed.

One final word. Counsel for Anser made extensive submissions on whether Anser had just cause to terminate Pottie. Those arguments were predicated, however, on a finding that Pottie had acted dishonestly and/or had shown a total disregard for his employer's clearly established policy and lawful orders. No such finding has been made and, accordingly, it is unnecessary to consider those submissions.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated July 17, 2000, in the amount of \$6,888.64 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal

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