

An appeal

- by -

Maurer Construction Ltd. operating Maurer Log Homes
("Maurer")

- 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: David B. Stevenson

FILE No.: 2001/339

DATE OF HEARING: September 17, 2001

DATE OF DECISION: October 17, 2001

DECISION

APPEARANCES:

on behalf of Maurer Construction Ltd.	Fred Maurer Kalman Szel
on behalf of the individual	In person
on behalf of the Director	Karen Madsen

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Maurer Construction Ltd. operating Maurer Log Homes (“Maurer”) of a Determination that was issued on April 10, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Maurer had contravened Part 8, Section 63 of the *Act* in respect of the termination of the employment of Robert Varey (“Varey”) and ordered Maurer to cease contravening and to comply with the *Act* and to pay an amount of \$675.87.

Maurer challenges the conclusion of the Director that Varey was entitled to length of service compensation. Maurer contends they should have been deemed discharged from any liability to pay Varey length of service compensation under subsection 63(3) of the *Act* for two reasons: first, because Varey was excluded from entitlement to length of service compensation under Section 63 by operation of Section 65(1)(e) of the *Act*, and second, because Varey’s conduct gave Maurer just cause for his dismissal.

ISSUE

The issue is whether Maurer has shown the Director erred in finding that Varey was not excluded from Section 63 of the *Act* or, alternatively, that there was no just cause to terminate Varey.

THE FACTS

Varey was employed by Maurer as a Log Home Builder. He was employed from March 1, 2000 until January 24, 2001. Maurer operates from a 4.8 acre site in Penticton, B.C. It is primarily in the business of building log and timber frame homes and commercial buildings. It also has a crane division operating from the same site and keeps on the site a variety of vehicles used to transport men and material to or from the locations on which the homes are erected. The site was described to me by Mr. Alfred Maurer, the owner of the business.

As indicated, it is comprised of 4.8 acres located in Penticton. Part of the site is a log sort area for the material used in making log and timber frame homes. There is a portable sawmill on the site where logs used in the homes are cut. There is a mechanical shop on site, a small and rudimentary wood shop used for fabricating some of the railings and staircases used in the homes and an office. Mr. Maurer also described the process of making log and timber homes. The log and timber homes built by Maurer are built “on demand”. When a customer wishes a home to be built by Maurer, representatives of Maurer will meet the customer, review the site on which the home is to be finally located, perform geo-technical engineering and do the designing/engineering of the house. Typically, the home will be fabricated at the business site because it is an easier process to build the home in the Penticton yard, dismantle the home, move it to the customer’s site and erect it there than to build on the customer’s site.

The logs are hand peeled, cut, trimmed and assembled by Maurer employees. When the house is transported to the customer’s site, Maurer employees accompany the home and participate in erecting the house at that location. Some of the work that goes into the completion of the home on the customer’s site, such as mechanical and electrical, is typically contracted out. Arrangements are somewhat modified if the home is being built for an American customer.

During his employment, Varey worked for five days at a customer’s site participating in erecting a home near Osprey Lake.

On December 11, 2000, Varey arrived for work. Before commencing work he was given a notice of lay off. Varey was upset by both the decision to lay him off and by the timing of it. He left the business site, but returned later in the day. He went into the office of the General Manager, Jack Semenoff. A yelling match ensued. Mr. Semenoff was in his chair and Varey was standing. After a period of time, Mr. Semenoff got up and went towards the door, indicating to Varey he was leaving. As he approached the door, Varey pushed him, causing him to take a large step down two stairs. Mr. Semenoff turned quickly and came back up the steps, meeting Varey chest to chest at the top. Varey said words to the effect, “go ahead, do it, make my day”. Mr. Semenoff turned, went to his truck and left the yard. Varey stood in the office for a brief period, before commenting to Kalman Szel that he was not angry with him and leaving the yard as well.

Varey remained on lay off until January 24, 2001. On or about that day he received a letter over the signature of Mr Semenoff stating:

Subsequent to your temporary layoff on December 11th, 2000, we have considered your further employment and have determined that we no longer require your services. Please consider this letter as formal termination of employment with Maurer Construction Ltd.

The Determination concluded that while the misconduct displayed by Varey was a serious matter, Maurer had effectively condoned it by waiting approximately six weeks before terminating him.

ARGUMENT AND ANALYSIS

I will first address the argument that Section 63 of the *Act* does not apply to Varey by application and operation of Section 65(1)(e) of the *Act*. That provision states:

- (1) Sections 63 and 64 do not apply to an employee
 - (e) employed at a construction site by an employer whose principal business is construction, . . .

Maurer argues that it operates as a construction company. Its business is project based. When it secures a project, it hires employees for that project and when the project is completed, the employee may move to another project that has also been secured or be laid off. The argument, as I perceive it, is that the site in Penticton should be viewed as “*a construction site*” for the purpose of the *Act*, because the home is effectively constructed at that location before it is disassembled, transported and re-assembled at the final location.

Maurer argues that the decision of the Tribunal in *Re Darryl-Evans Mechanical Ltd.*, BC EST #D442/00 (Reconsideration of BC EST #D153/00) was wrongly applied by the Director.

The Director argues that Maurer is not a company whose principal business is construction nor was Varey employed “*at a construction site*”.

It is not necessary, in deciding the first ground of appeal, to determine whether Maurer is “*an employer whose principal business is construction*”, as I agree with the conclusion that Varey was not “*employed at a construction site*” as that phrase has been interpreted and applied by the Tribunal. As stated in *Re Darryl-Evans Mechanical Ltd.*:

. . . [Section 65(1)(e)] is designed to provide relief from the termination pay provisions for employers to the extent that they employ workers to work on a single construction project. However, where an employer has many construction and renovation projects, and an employee is continuously employed by that employer . . . the exception from the termination provision does not apply.

The evidence was clear that Varey was employed by Maurer through a succession of projects at the Penticton site doing the initial assembly and, on one occasion, at a customer’s site doing the final assembly. The exception does not apply.

On the issue of whether there was just cause, I agree with the Determination that the misconduct exhibited by Varey was serious. I am unable to agree, however, that the delay in dealing with the incident was unreasonable and had the effect of condoning the misconduct.

I agree there is an obligation on an employer to respond to employee misconduct in a timely way and an unreasonable delay in responding nullifies the ability of an employer to terminate an

employee for just cause. This obligation, however, is not a substantive obligation. Rather, it is a procedural one based on the impact the delayed response can have on the affected employee. It will, in large measure, depend on the facts.

In order to justify a conclusion that Maurer had condoned Varey's misconduct, at least three matters should be considered:

1. the length of the delay and whether there is any explanation for it;
2. whether the employer implicitly or explicitly condoned the conduct for which it now seeks to terminate the employee; and
3. whether the delay has denied the employee a fair opportunity to present his version of the events.

There is no doubt that Varey knew the seriousness of what he had done. He stated in his evidence that he would not have been surprised to have been terminated on the spot. Mr. Maurer testified that he had discussed the incident with Mr. Semenoff, had recommended to him that Varey be fired, but left the final decision on that to Mr. Semenoff. He does not know why Mr. Semenoff did not communicate his decision to Varey before January 24, 2001. The Determination noted the following explanation given by Mr. Semenoff:

When asked why it took approximately six weeks to terminate Varey after his abusive remarks and uncalled for behaviour, Semenoff stated he does not terminate people lightly. He stated he wanted time to consider whether or not it would be possible to recall Varey from his temporary lay-off. In other words, Semenoff stated, he wanted to be absolutely certain he wanted to terminate Varey before he did so.

It should be added here that Mr. Semenoff was no longer employed by Maurer at the time of the hearing.

There is no indication that Maurer had explicitly condoned Varey's misconduct. Varey was off work from December 11, 2000 to January 24, 2001, so there is also no suggestion that Maurer had implicitly condoned his misconduct by returning him to work. There is no evidence that Varey was prejudiced in any way by the delay in being notified of his termination. He has had an opportunity to present his side of the story. In fact, he substantially agrees with the events as outlined by Maurer. In such circumstances, and overall, I do not view the delay in responding to Varey's misconduct to have been so unreasonable as to nullify Maurer's ability to respond to it.

In my view, Varey's misconduct justified dismissal and discharged Maurer's statutory obligation to pay length of service compensation.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 10, 2001 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal