

An appeal

- by -

Broadway Brake & Muffler Ltd.
("BB&M")

- 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: Carol L. Roberts

FILE No.: 2001/560

DATE OF HEARING: November 20, 2001

DATE OF DECISION: November 27, 2001

DECISION

APPEARANCES:

For Broadway Brake & Muffler:	Clarence Fehr
For the Director:	No one appeared
For David Pearce:	On his own behalf

OVERVIEW

This is an appeal by Broadway Brake & Muffler Ltd. ("BB&M"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 23, 2001. A delegate of the Director found that BB&M contravened Section 63 of the Act in failing to pay David W. Pearce ("Pearce") compensation for length of service, and Ordered that BB&M pay \$2,540.33 in wages, vacation pay and interest to the Director on Pearce's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining Pearce was entitled to compensation for length of service.

FACTS

Pearce worked as an Auto Technician for BB&M from August 1994 to July 15, 1998. Pearce claimed he had been dismissed without notice. The delegate sought production of records, and after an investigation, concluded that Pearce had been dismissed without notice, just cause, or compensation for length of service. That investigation included a review of documents and letters from the parties, telephone conversations with both parties, interviewing one witness, and one fact finding conference which Pearce did not attend because of a death in his family.

BB&M contended, in separate documents, that Pearce quit, and that he was "dismissed", and that he was "let go". The Record of Employment ("ROE") showed that Pearce had been dismissed. The delegate reviewed conflicting evidence from Pearce and Fehr about whether Pearce had been given warnings, and an ultimatum to "shape up or ship out", and concluded that, while BB&M did have "performance issues" with Pearce, no written warnings were given. She also concluded that Pearce was dismissed without cause because of a conversation he and Fehr had near the end of his period of employment relating to his performance.

ARGUMENT

In its notice of appeal, BB&M contended that Pearce quit his employment, and that he had a new job before he quit BB&M. Fehr also contended that the ROE was incorrectly completed.

Fehr also argued that Pearce failed to appear at the fact finding meeting, and that the delegate failed to convey to Pearce his settlement offer. Fehr contends that, had the settlement offer been put to Pearce, this appeal would be unnecessary.

The second ground of appeal is not a ground at all. No error of fact or law has been made out, and whether a settlement offer has been made, or accepted, is irrelevant to the correctness of the Determination.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

I find that the delegate fairly considered all of the evidence before her. She concluded that Pearce had not quit, based on material written by Fehr that indicated he had dismissed him, and that he "laid him off". There is no dispute that Fehr told Pearce that his performance was not satisfactory, and that there were issues surrounding his continued employment. No documents were produced to support BB&M's position that Pearce's job performance was not satisfactory.

Fehr explains that the ROE was prepared incorrectly, and offers, as evidence, a letter over his name, but signed by the company bookkeeper, that states that Pearce left BB&M of his own accord. Fehr states that this letter was prepared by the bookkeeper, and shows that the box indicating that Pearce was dismissed was a mistake.

I do not find that the letter supports Fehr's argument. He acknowledged that the bookkeeper had no independent knowledge of whether Pearce was fired or quit or not. Thus, even if I were to accept that this letter was prepared by the bookkeeper, which I do not, I attribute little weight to it. I accept that the bookkeeper completed the ROE based on information provided to her by Fehr, and that this provided additional support to the delegate's conclusions.

I am unable to find that the delegate erred, and dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated July 23, 2001 be confirmed in the amount of \$2,540.33, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal