

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 -

Veikle International Supply
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE NO.: 97/649

DATE OF DECISION: January 7, 1998

DECISION

OVERVIEW

This is an appeal brought by Veikle International Supply (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a Delegate of the Director of Employment Standards on July 31, 1997. The Determination found that the Employer had failed to pay the complainant, Todd Taylor (“Taylor”), overtime as required by the *Act* and that Taylor had been terminated without just cause, in contravention of Section 63 of the *Act*. The appeal by the Employer concerned only the issue of Taylor’s termination. The Employer argued that it had applied progressive discipline prior to terminating Taylor. The appeal was decided on the basis of written materials submitted by the Employer and the Director.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Taylor was terminated for just cause.

FACTS

Taylor began work for the Employer on August 8, 1995. The Employer terminated him on November 22, 1996, based on what it considered to be a poor work record. Taylor filed a complaint with the Employment Standards Branch on December 11, 1996. On May 22, 1997, Ms. Hélène Beauchesne (“Beauchesne”), representing the Director, spoke by telephone with Mr. Boyd Shanks (“Shanks”), the Employer’s manager. Shanks informed Beauchesne that he believed that Taylor was terminated for just cause. In a letter dated the same day, Beauchesne requested that the Employer supply her with the details behind Taylor’s termination, as follows:

please supply me with the details regarding the reason for his termination on November 22, 1996, plus the details of any warnings he received. If warnings were given verbally, I require the date given, the reason for the warning, the detail of what was said to the employee, who gave the warning and the names of any witnesses present.

On May 30, 1997, the Employer sent Beauchesne information regarding Taylor’s shifts and a typed document entitled “Plant Manager Ken Ackerman’s log on Todd Taylor.” The log contained nine entries about Taylor, beginning on October 20, 1995 and ending on

November 22, 1996, i.e., the date of Taylor's dismissal. The first three entries concerned warnings to Taylor for talking back to supervisors, arguing and swearing at other employees. He was also warned about his absenteeism. On February 27, 1996, the log recorded a disciplinary suspension imposed on Taylor for talking back to his supervisor. On July 17, 1996, the log recorded that Taylor was told that he would be dismissed if he continued swearing at other employees. On September 16, the log stated that Taylor was told that if he again argued with his supervisors, he would be terminated. The note for November 21, 1996 described an argument between Taylor and a supervisor that arose when Taylor requested time off because he was not feeling well as the result of having teeth pulled "a few days earlier." The following day, Taylor was terminated.

Beauchesne discussed the log with Taylor on July 21, 1997 and recorded notes of her conversation. Taylor gave his version of some of the events recorded on the log. In three instances, he did not recall the incidents. On other points, he disagreed with the facts in the log. In particular, Taylor stated that he had an operation on his wisdom teeth on October 18, 1996 and was not in any pain on November 21. Taylor admitted having been warned about talking back to supervisors, but he denied having been told that further incidents would result in termination. He also denied having received a disciplinary suspension. Taylor stated that he jokingly told a forklift driver to shut up on November 21. A supervisor overheard the remark and initiated termination.

The day after her conversation with Taylor, Beauchesne wrote to the Employer, asking for the "original notebook in which your disciplinary notes were made." The Employer did not supply the original version of the notes on Taylor's discipline. Taylor supplied receipts from his dentist showing that his oral surgery had occurred on October 18, 1996. Beauchesne called the Employer's attention to this fact in a telephone conversation on July 21, 1996. The Employer's representative then stated that the immediate cause of Taylor's termination was his failure to follow instructions of the forklift driver and arguing about the matter.

Beauchesne issued the Determination on July 31, 1996, based on her conversations with representatives of the Employer, the typed log book and her conversations with Taylor. She found that the Employer had failed to provide sufficient information about Taylor's discipline and had not provided the original documentation. In addition, she pointed out that some of the information provided was inconsistent. In particular, there was no corroborating evidence of the warnings of possible termination delivered to Taylor.

In its appeal, Shanks reiterated that the Employer had applied the principles of progressive discipline to Taylor. He stated that the Employer could provide witnesses of Taylor's suspension and that failures to follow through on warnings to Taylor were due to changes

in the shift assignments of supervisors. He also re-submitted the typed version of the log book, stating that “hand written notes constitute our original log book.”

ANALYSIS

In cases of termination, the Employer bears the onus of demonstrating that it had just cause for the action it took. When an employee’s conduct is particularly outrageous, such as theft or assault on another employee, an employer may terminate an employee without any prior warning. Clearly, there was no such allegation in this case. A more complex requirement arises when an employer wishes to dismiss an employee for a series of incidents of misconduct which taken together, constitute a record justifying termination.

The Tribunal addressed this issue in *Hall Pontiac Buick Ltd.*, BC EST #D073/96, which set out the standards that an employer must follow to demonstrate just cause to dismiss an employee for poor performance:

1. That reasonable standards of performance have been set and communicated to the employee;
2. That the employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. That a reasonable period of time was given to the employee to meet such standards; and
4. That the employee did not meet those standards.

If the employer wishes to rely on the concept of progressive discipline to demonstrate that it met these requirements, it must provide adequate evidence to support its contention.

Under the terms of the Tribunal’s proceedings, the party launching an appeal bears the onus of persuading the Tribunal that the Determination is incorrect.

In this case, the record provided by the Employer in support of Taylor’s termination is unconvincing. Before and after the Determination, it declined to provide the original documentation in support of Taylor’s alleged disciplinary record. On its face, the record that the Employer provided contained contradictions. In particular, the glaring error regarding Taylor’s complaints on November 21, 1996 about the pain he suffered as a result of his dental work was never explained adequately. Taylor denied several of the statements in the typed log, and the Director’s Delegate acted properly when she sought the

original document to ascertain which version of the events was correct. The Employer offered to provide witnesses in support of its appeal, but never suggested such evidence to the Director's Delegate during her investigation, when she tried to obtain additional information on the circumstances of Taylor's termination.

If a party to such a proceeding wishes to rely completely on documentary evidence in support of its actions, it should be prepared to provide the original documents for examination by the Director's Delegate and subsequently the Tribunal. Moreover, an appeal should not provide an opportunity for the appellant to introduce evidence that was withheld from the director's delegate when the Determination was issued.

In the first instance, the Employer did not meet the tests necessary to support its assertion that it terminated Taylor for cause. In addition, the appeal did not provide any additional evidence or argument to justify canceling the Determination.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, I order that the Determination of July 31, 1997 be confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal