

**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 -

Homestake Canada Inc.  
("Homestake")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ian Lawson

**FILE NO.:** 98/303

**DATE OF HEARING:** October 16, 1998

**DATE OF DECISION:** January 13, 1999

**DECISION**

**APPEARANCES**

For the Appellant: Linda Hodgson, Personnel Administrator

The Respondent: In person

**OVERVIEW**

This is an appeal by Homestake Canada Inc. ("Homestake") pursuant to s. 112 of the *Employment Standards Act* (the "Act"). The appeal is from a Determination issued by John Dafoe, a delegate of the Director of Employment Standards on April 23, 1998. The Determination found Homestake did not have just cause to dismiss Richard Hulse ("Hulse") from his employment and ordered Homestake to pay compensation for length of service in the amount of \$6,419.43. Homestake filed an appeal on May 19, 1998. The appeal was heard by way of a telephone conference hearing on October 16, 1998.

**ISSUES TO BE DECIDED**

This appeal requires me to decide whether Homestake had just cause to terminate Hulse and so whether it is liable to pay compensation for length of service.

**FACTS**

Homestake carries out mining activities on its Snip Mine site at a remote location to which employees must fly in and out on three-week rotations. Hulse had been employed by Homestake at the Snip Mine for more than 6 years prior to his dismissal on March 5, 1997. Hulse was dismissed on account of an allegation by Homestake that he had been involved in a fight with a co-worker after closing of the mine's recreation facility, which serves alcoholic beverages. Prior to this alleged incident, Hulse had no record of prior discipline of any kind by Homestake.

When the employer became aware of the possibility that a fight had occurred, Hulse and the other combatant were called up from the mine and interviewed by the General Manager and Personnel Administrator. Both Hulse and his co-worker admitted to having been in a fight, but apparently they were reticent about how the altercation arose. The employer conducted an investigation, but was unable to uncover any more details about the incident. Both Hulse and his fellow combatant were then dismissed later in the same day.

## **ANALYSIS**

The employer did not call any witnesses at the appeal hearing to support its attack on the Determination. Homestake relies on limited admissions made by Hulse and his co-worker that some sort of physical altercation had occurred. Homestake places particular reliance on its policy against fighting, which is expressed in its employee handbook and quoted in the Determination as follows:

Aside from unsatisfactory performance in the work place the following six acts of personal conduct will result in immediate termination of employment: .... fighting on site or in transit..."

Homestake also relied on section 3.1.3 . of the Health, Safety and Reclamation Code for Mines in British Columbia, which provides:

3.1.3 No person shall engage in any improper or foolhardy behavior such as horseplay, scuffling, fighting, playing practical jokes, or other conduct that might create or constitute a hazard to himself or any other person.

As noted, the employer was unable to determine exactly what caused the fight, or whether there were any mitigating circumstances. There is some dispute as to whether Hulse was actually dismissed on the day of his interview, or whether he was dismissed three weeks later when he was told not to return to the mine site. Given my findings in this decision, it is not necessary that I resolve that issue.

In its Employee Handbook, Homestake pronounces a "Corrective Action Program" which has not been filed with the Tribunal and which does not appear to have been considered by the Director's delegate in making the Determination. At the conclusion of the appeal hearing, I asked Homestake to provide me with a copy of its Corrective Action Program policy. The relevant portions read as follows:

### **CORRECTIVE ACTION PROGRAM**

The Company recognizes that there may be times when employee conduct or performance will require corrective action. The purpose of this policy is to provide an early opportunity for employees to alter behavior or improve performance when it is determined that the standards of the Snip Mine are not being met.

#### Procedure

When required, supervisors will meet with employees in a counseling session to ensure that the employee is aware of the standards expected,

and then an action plan will be developed with the employee to help the employee attain the standards of the Snip Mine.

Where failure to improve after the counseling session is evident, the supervisor then commences corrective action.

At the Snip Mine the process of progressive corrective action is as follows:

**Step 1** The employee's immediate supervisor will outline the problem, referring to previous counselling session(s). The employee will be given the opportunity to explain his/her actions. The supervisor then will explain what is expected of the employee and what corrections are required to meet the expectations. The supervisor may have more than one session with the employee. Before the process goes to Step 2, this session must be documented with a copy issued to the employee.

**Step 2** If counselling sessions by the supervisor prove to be ineffective, the employee will meet with his/her supervisor and with the next level of supervision in another effort to discuss and correct the problem. This session is followed with a letter to the employee, again outlining the problem, and what corrective action is required.

**Step 3** Should the problem continue, a further discussion will take place with the supervisor and the next level of supervision, again followed by a letter to the employee outlining the problem and what corrective action is required. This letter further advises the employee that failure to correct the situation may result in termination of employment. Where it is determined it is in the best interest of the Company and/or the employee, the employee may be suspended without pay at this step.

**Step 4** Termination. If discharged, an employee will be provided with a letter indicating the reason(s) for the discharge.

Depending on the amount of time which has elapsed between incidents and the severity of each incident giving rise to corrective discipline, steps 1, 2 and 3 may be repeated or bypassed. Any record of discipline has less significance with time. Therefore, employees who have experienced "corrective action" in the past may have it reduced one step at a time if the Supervisor is satisfied that the problem has been

corrected. Reductions in the level of corrective action may be made one step at a time in intervals of not less than 6 months.

**Note:** In situations where corrective action applies to company members who do not have at least 3 levels of supervision above them, steps 2 and 3 may be administered by the same Supervisor who administers step 1.

The Company also recognizes that there are certain serious actions against good business practices and consideration of fellow employees which will result in termination without the three (3) step process. Typical examples of such actions (and this is not designed to be a complete list) are:

1. theft of or willful [*sic*] damage to another person's or Company property;
2. sexual harassment of fellow employees;
3. fighting on site or in transit;
4. possession or use of illegal drugs on site or in transit;
5. unauthorized possession of firearms on site;
6. consumption or possession of alcohol on the job;
7. insubordination.

To assure everyone fair play, consistency, and job security, no one will be terminated without a thorough investigation by members of management which may include the Personnel Administrator and the General Manager or his designate.

Considering the language used in its corrective action policy, Homestake appears to have left itself with no option but to terminate an employee who commits any of the seven enumerated wrongdoings, including the matter of fighting. A terminated employee, however, is not bound by the company's expression of policy and may challenge the termination by filing a complaint with the Employment Standards Branch or by filing an action in court. The employer must then establish, on the particular facts of the case, that it had just cause for dismissal.

The Director's delegate notes, however, the following in his Determination: "Although the Employer has stated that the strict application of the "no fighting" rule is necessary, they have also acknowledged that certain circumstances could lead to a mitigation of the discipline to something less than termination." The employer argued, however, that it was unable to consider any mitigating factors due to Hulse's lack of cooperation with their investigation.

The employer's lack of knowledge about the incident is indeed troubling, especially when Homestake has elected the ultimate discipline of termination in Hulse's circumstances. There are, however, several important facts which are not in dispute and which in my view

establish mitigating factors favorable to Hulse. These facts were known by the employer at the time of termination. They are:

1. The incident occurred when Hulse and his co worker were off-duty.
2. The incident took place outside the recreation facility, in which alcoholic beverages
3. were served on company premises.
4. Alcohol was a factor in the altercation.
5. Hulse is an employee of long service.
6. Hulse has no record of previous discipline by the employer.

At the appeal hearings Hulse stated that his co-worker had become belligerent on account of excess consumption of alcohol, and that resulted in their subsequent altercation. Although Homestake allows alcohol to be consumed on its premises, its policy is to summarily terminate an employee who possesses or consumes alcohol "on the job." I can only presume that Homestake is aware of the problems associated with excess consumption of alcohol, foremost being the loss of control over impulses when an inebriated person is confronted by stress or conflict. Having accepted that its employees may consume alcohol on company premises while off-duty, it is my view that Homestake should consider alcohol to be a "mitigating factor" when deciding the discipline to be imposed on employees fighting outside the recreation facility.

Hulse stated he expected his co-worker to tell the employer how the fight started, and that is why he was reticent when interviewed. His dismissal occurred shortly after he was called up from the mine, and it appears he was not given an opportunity to respond to whatever statement was made to the employer by his co-worker. Had Hulse known the explanation given by his co-worker, he might well have been more forthcoming in explaining his conduct to his employer. While Homestake professes that termination will be employed only after a "thorough" investigation, I find its investigation was carried out too quickly, and Hulse was not given a fair opportunity to provide more information about the incident before being dismissed. As an employee of long service without any previous discipline, Hulse could well have received a form of discipline short of dismissal if Homestake had known that Hulse's co-worker instigated the fight. The fault for Homestake's ignorance of this fact cannot be visited upon Hulse, as he was not able to respond to the story given by his co-worker.

I note that "insubordination" and "sexual harassment" are in the employer's list of seven examples of wrong doing which will result in summary dismissal. One can imagine acts committed by employees which could correctly be described as insubordination or sexual harassment, but which could be of such mild consequence as to render summary dismissal an unreasonably harsh form of discipline. Similarly, there could be instances of fighting which lack sufficient seriousness to warrant termination and instead merit the use of progressive discipline. Had the fight occurred while Hulse was on duty without the influence of alcohol, Homestake could well have established just cause for dismissal.

There are sufficient mitigating circumstances surrounding the incident in question, however, to warrant a form of discipline short of dismissal. For those reasons, I find the Determination under appeal to be correct.

**ORDER**

After carefully considering the evidence and argument, I find that the Determination made by Mr. Dafoe is correct and the appeal should be dismissed. Pursuant to Section 115 of the *Act*, I order, that the Determination dated April 23, 1998 be confirmed, together with interest pursuant to Section 88 of the *Act*.

**Ian Lawson**  
**Adjudicator**  
**Employment Standards Tribunal**

IL:sa