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 -

Philip McNulty
(" McNulty ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 1999/631

DATE OF HEARING: December 15, 1999

DATE OF DECISION: January 24, 2000

DECISION

APPEARANCES:

Philip McNulty	On his own behalf
Bruce Helgason	For Yellow
Peter Kinloch	Witness for the employer

OVERVIEW

Philip McNulty ("McNulty", also, "the employee") has appealed a Determination which is issued under the authority of the Director of Employment Standards (the "Director") and dated September 22, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

McNulty was fired from his job as a taxi driver for the Yellow Cab Company Ltd. ("Yellow" or "the employer"). He complained of that. The Determination is that McNulty's termination was for just cause and that Yellow's liability to pay compensation for length of service was, for that reason, discharged. In giving reasons for the Determination, a Director's delegate states that there were complaints against McNulty, he received warnings, and he then reported for work in a state of intoxication.

McNulty, on appeal, claims that the delegate is wrong on the facts. He claims that he was not intoxicated but has a medical condition that would lead people to think that he was intoxicated. He claims wrongful dismissal and length of service compensation.

The Director's delegate argues that the evidence is that McNulty "did smell of alcohol" and that he did not object to being sent home.

The employer, on appeal, claims that McNulty was clearly under the influence of alcohol on the 30th of January, 1999; that McNulty never said anything about suffering "ataxic gait disorder"; and that "other matters of maleficence" formed part of the decision to fire McNulty.

ISSUES TO BE DECIDED

What I must decide in this case is the matter of whether or not the employee shows that the Determination ought to be varied or referred back to the Director for reason of an error in fact or in law.

FACTS

McNulty has driven cab for a great part of his life. His employment by Yellow was for more than 6 years, January of 1993 to February, 1999.

McNulty's work performance was satisfactory at the outset of the employment but Yellow, in the last months of the employment, became completely dissatisfied with him as a driver. His employment records shows a complaint from a customer regarding service, a complaint from a hotel doorman regarding McNulty's failure to find a switch which released his car's door locks, and that McNulty failed to respond to radio calls, was cited for dress code violations, and had a below average take in cab fares. The record lists only two complaints which are prior to 1998. There is a 1995 reference to below average cab fares and reference to the fact that McNulty improperly parked his car on one occasion in 1996 with the result that it went rolling down a hill while unattended.

The particular incident which led Yellow to consider whether or not it should discharge McNulty was on January 30, 1999. When McNulty reported for work he was found to smell of liquor and have trouble walking. Peter Kinloch, a cab driver; Bruce Helgason, Yellow's Operations Manager; and a cashier, Sudesh Malawarair, observed McNulty and they all concluded that he was intoxicated. Malawarair refused to give him the keys to a cab. Helgason administered what was once the roadside test for intoxication. McNulty could not walk a straight line while walking heel to toe. I am also told that he was unable to touch his nose with eyes closed and that he had trouble focussing. To what extent McNulty had trouble with the latter is not shown. I accept that he could not touch his nose and that it was because Helgason thought that McNulty was in no condition to operate a vehicle that he sent him home.

McNulty claims that if he did smell of liquor that it was for reason of an upset stomach and undigested beer which had been consumed on or about the 27th of January. I am given no reason to believe that. The likely explanation for the fact that McNulty smelled of alcohol is that he had recently consumed some amount of alcohol. The evidence does not allow me to reach any conclusion in respect to the quantity of liquor consumed or the precise time of McNulty's last 'drink'.

McNulty suffers from a medical condition which affects balance and walking. Dr. Bin K. Lim writes to say that McNulty's condition makes it appear that he is intoxicated. Dr. Milton J. Wong, a specialist in neurology, writes to say that McNulty suffers from an ataxic gait disorder which accounts for his loss of balance.

McNulty worked both the 1st and the 2nd of February. A customer complained that he, on the 1st, appeared to fall asleep. Another customer complained that he missed his plane because it was 14 minutes before McNulty picked him up and that, on finally arriving, his car's windows were so badly fogged that additional time was spent defogging them.

According to Yellow, a supervisor discussed each of the complaints with McNulty. According to both the employer and the Director's delegate, McNulty was warned to improve. All that I am shown, beyond the above employment record, is a "Complaint Report" dated July 5, 1998,

apparently signed by McNulty, that indicates that he failed to answer radio calls and was found to be improperly dressed. That report makes no mention of disciplinary action taken. There is no evidence whatsoever that McNulty was at any point told that his job was in jeopardy.

ANALYSIS

Section 63 of the *Act* imposes the liability to pay compensation for length of service. Subsection 63 (3) establishes that the liability may be discharged in certain circumstances.

> **63** (3) The liability is deemed to be discharged **if the employee**
>
> (a) is given written notice of termination as follows:
>
> (i) one week's notice after 3 consecutive months of employment;
>
> (ii) 2 weeks' notice after 12 consecutive months of employment;
>
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
>
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
>
> (c) terminates the employment, retires from employment, or **is dismissed for just cause**. (my emphasis)

A single act of misconduct may be of such a serious nature that immediate dismissal is justified. Termination of an person's employment may also be justified for reason of minor misconduct when it is repeated, or for reason of an employee's chronic inability to meet the requirements of a job.

In cases where just cause is alleged for reason of repeated misconduct of a less serious nature, or generally unsatisfactory work, the Tribunal has said [*Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that in order to show just cause, the employer must show the following:

> a) That reasonable standards of performance were established and communicated to the employee;
>
> b) the employee was plainly and clearly warned that his or her employment was in jeopardy unless such standards were met;
>
> c) the employee was given sufficient time to improve; and
>
> d) the employee did not meet those standards.

Did Yellow have just cause for reason of serious misconduct? I find that it did not. All that I have been shown is that McNulty smelled of liquor and that he consumed an amount of alcohol not long before coming to work. That is not to show that McNulty put the safety of his fellow workers, a customer or the public at risk. Indeed, it is not show that McNulty was even intoxicated. The mere smell of liquor on a person's breath does not necessarily mean that the person is intoxicated and legally unfit to drive. Kinloch, Helgason and Malawarair thought that McNulty was intoxicated but they did not know that McNulty suffers from a medical condition that would make him appear intoxicated. The medical condition affects balance and that would explain why McNulty could not touch his nose with eyes closed, could not walk heel to toe, and was generally unsteady. As matters are presented to me, I find that it has not been shown that there was serious misconduct by McNulty.

I do accept that it is an act of minor misconduct for a taxi cab driver to report for work smelling of liquor. And from what I can see, McNulty is guilty of several acts of minor misconduct. But contrary to what Yellow, and apparently the Director's delegate may believe, it is not enough that there are complaints with a person's work and that the employee is warned to improve. As noted above, an employer must show that a reasonable standard(s) of performance has been set and that the employee was given plain, clear warning that his job was in jeopardy for reason of his failure to meet that standard(s) and unless there is improvement. There is no evidence that that was done in this case.

McNulty's termination was not for just cause. Yellow's liability to pay compensation for length of service has not been discharged. McNulty is entitled length of service compensation which is equal to 6 weeks wages in that he was employed for more than 6 years. The matter of the calculation of that compensation, plus interest, is left to the Director.

ORDER

I order, pursuant to section 115 of the Act, that the Determination dated September 22, 1999 be varied. Yellow Cab Company Ltd. must pay to Philip McNulty 6 week's compensation for length of service plus interest.

The matter of the calculations is referred back to the Director.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal