Employment Standards TRIBUNAL

An appeal

- by -

Allen's Scrap & Salvage Ltd.

- 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: Norma Edelman

FILE No.: 2001/789

DATE OF DECISION: January 16, 2002

DECISION

OVERVIEW

This is an appeal by Allen's Scrap & Salvage Ltd. (the "Employer") under Section 112 of the Employment Standards Act (the "Act") against a Determination, which was issued on October 31, 2001 by a delegate of the Director of Employment Standards. The Determination found that the Employer did not have just cause to terminate the employment of Frank Stevens ("Stevens"). As a result, the Employer was required to pay to Stevens compensation for length of service. The Employer 's appeal, in effect, seeks to have the Determination cancelled.

ISSUE TO BE DECIDED

Is Stevens entitled to compensation for length of service?

FACTS

Stevens worked for the Employer from May 4, l999 to August 10, 2001.

Stevens was given written warnings on February 7, 2001 and February 10, 2001 regarding absenteeism and tardiness. These warnings stated that a third warning would result in termination of employment. Stevens received a third warning on March 1, 2001, but he was not dismissed at that time. Stevens continued to be absent or late on 13 occasions after March 1, 2001 He received verbal warnings for these incidents. On August 10, 2001, Stevens left work during his lunch hour and did not return to work. His employment was terminated after this occasion.

The delegate found that the Employer did not have just cause to dismiss Stevens. According to the delegate, when Stevens was given verbal warnings for absenteeism and tardiness after March 1, he was led to believe his employment was not going to be terminated if he was late or absent again, rather he would be given a verbal warning and another chance to improve. The Employer demonstrated to Stevens that the consequence of further absenteeism and tardiness was not termination of employment but verbal warnings. By allowing the behavior to continue, the Employer allowed Stevens to believe that the behavior was acceptable and without consequence. When Stevens left work during his lunch hour and did not return without reason or notice, he was to understand that there would be no consequence to this behavior given the previous consequences to similar behavior. Accordingly, the delegate found that when the Employer dismissed Stevens after the August 10 incident, it did so without just cause and therefore owed him compensation for length of service in the amount of $583.17.

The Employer says Stevens was permitted numerous absences with only a stern verbal warning with the hope he would chance his ways, but in the end it had no choice but to dismiss Stevens.

His numerous absences resulted in other employees having to do his job as well as their own. Further, his continuing behavior began to erode the morale of other employees causing them to mock the company's dismissal system. When Stevens failed to return to work on August 10 and did not report to work for his next two shifts, he was dismissed for cause. The Employer say due to the poor economy it tried to be lenient with Stevens, who after being late or missing work would say, "please don't fire me". The Employer says it explained to Stevens that eventually he would be fired if he continued with his poor ethics. When it could no longer tolerate his tardiness, he was let go. The Employer asks what other corrective discipline was available for it and why, due to its leniency, has it lost its right to dismiss an employee.

ANALYSIS

Section 63 of the Act establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the Act. The employee may also be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

The Tribunal has addressed the question of dismissal for just cause on many occasions (see for example *Kenneth Krueger* (see BC EST #D 003/97). The Tribunal has said that where there are instances of misconduct, like the ones in this case, the employer must show, in order to establish just cause, that a reasonable standard of performance was communicated to the employee; the employee was given a sufficient period of time to meet the required standard of performance and had demonstrated an unwillingness to do so; the employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and the employee continued to be unwilling to meet the standard.

In this case, the Employer acted within the above principles by setting a reasonable standard of performance and advising Stevens that a third warning regarding his performance would result in dismissal. However, the main question to answer in this appeal is whether the written warnings have no effect because the Employer did not dismiss Stevens after the third incident of absenteeism, but rather, over a period of approximately 5 months, allowed further instances of misconduct before it dismissed Stevens. That is, did the Employer condone Stevens' misconduct with the result that it cannot be said it had just cause to dismiss Stevens (see for example *Reycraft (c.o.b.Creative Embroidery West*) BC EST #D236/97).

I accept that the Employer in this case condoned the misconduct of Stevens. Had Stevens been dismissed at the time of the third incident, the Employer would not be liable for compensation for length of service. However, he was not dismissed until about 5 months later even though he continued to miss work. While I am sympathetic to the Employer's position, the law is clear. By being lenient and allowing Stevens to continue working for such a period of time after the third

incident amounts to condonation, which renders meaningless the written warnings. Stevens could reasonably infer forgiveness from these circumstances. There is nothing, which prevents an employer from dismissing an employee at any time. However, if the employer does not have just cause for the dismissal, then it is obliged to pay the employee compensation for length of service. Dismissing Stevens for absenteeism in August after allowing him to be habitually absent for the previous 5 months does not amount to just cause for dismissal. Consequently, I concur with the delegate's conclusion that the Employer owes Stevens compensation for length of service.

ORDER

I order under Section 115 of the Act that the Determination dated October 31, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal