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 -

Beaver Landscape Ltd.
("Beaver Landscape" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	97/769
DATE OF HEARING:	December 19, 1997
DATE OF DECISION:	January 22, 1998

DECISION

APPEARANCES

Mr. Grant Cameron	on behalf of Beaver Landscape
Mr. Glen Teager Ms. Lila Skeats	on behalf of the Complainant

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on September 30, 1997. In the Determination, the Director's delegate found that the Employer had terminated Mr. Teager's employment without "just cause" and ordered that the Employer pay compensation for length of service. The Employer was also ordered to pay an amount on account of special clothing. The Employer says that Mr. Teager was terminated with "just cause" and denies that he was required to wear special clothing.

ISSUES TO BE DECIDED

The issues to be decided in appeal are:

(1) whether the Employer had just cause to terminate Mr. Teager's employment?

(2) whether the Employer required Mr. Teager to wear special clothing?

FACTS

Mr. Cameron testified on behalf of the Employer. As indicated by the name, the Employer is in the landscaping business and employs, from time to time, 16 employees.

Mr. Teager was employed from October 5, 1992 until April 1, 1997. He was employed as a landscaper, doing installation work. As such, he directed the work of two employees.

On April 4, 1997, Beaver Landscape terminated the employment of Mr. Teager. The reason for the termination, among others, was stated to be his "lack of initiative, negative attitude and difficulties in following instructions."

Mr. Cameron testified that he reprimanded Mr. Teager on several occasions. He further testified that he made notations in Mr. Teager's payroll records at the time on each of those occasions. He did not issue any warning letters because, in his view, Mr. Teager was not receptive to letters and documents. In Mr. Cameron's characterization, Mr. Teager had "minimal verbal and comprehension skills" and had "minimal retention".

Beaver Landscape produced Mr. Teager's payroll sheets for 1995, 1996 and 1997. Apart from the note concerning the dismissal itself on the 1997 sheet, there were notations only on the sheets for 1996. These notations included:

- in January, 1996, "reprimand, doesn't listen. Didn't do salting as asked"
- in February, 1996, "concerned about Glen - not doing what is asked"
- in March, 1996, "continued complaints from staff. Can't work with Glen. Too moody. Miserable"
- in October, 1996, "reprimand. Attitude"
- in November, 1996, "serious attitude problem. Won't do as told"

Mr. Teager's evidence was that he had reviewed the payroll sheets on several occasions and that he had not seen the notations on the documents until the hearing.

Mr. Cameron's evidence was that he told Mr. Teager that his employment was in jeopardy if his performance did not improve. He did not use the exacts words that Mr. Teager would be fired, but stated that "if he <Mr. Teager> couldn't follow instructions, he <Mr. Cameron>would have to find someone else" or he "would have to let <Mr. Teager> go." Mr. Cameron also testified that he felt he had to give written detailed job specifications to Mr. Teager because he was not able to work without detailed instructions. Mr. Teager denied that the written job specifications had anything to do with his performance.

The notations also included reference to the following increases in compensation:

- in April, 1996, "hoped gas card would help. No change in work habits"
- in October, 1996, "reprimand. Attitude. Raise did not help attitude problem"

The employer's evidence was that he had serious concerns with respect to Mr. Teager over a long period of time. Mr. Cameron explained the gas card, which was for Mr. Teager's personal use, and the raise in October of 1996, as an attempt to improve Mr. Teager's performance, as discipline had not worked. Mr. Teager, on the other hand, testified that the Employer improved his compensation because he had received a job offer from another employer.

Mr. Teager denies that the discipline ever took place, except for the one occasion in January of 1996. He admitted that he at that time received a "talking to" by Mr. Cameron. On that occasion Mr. Teager had received specific instructions to do salting at the premises of several customers of the Employer. Mr. Teager admitted that he did not do it. However, he explained the failure to follow instructions with respect to the salting. He said that it rained on the day and that salting would be inappropriate.

Mr. Cameron also testified that he had been told by other employees that Mr. Teager had berated Beaver Landscape in front of these other employees. Mr. Teager, on the other hand, denied this and stated that, in fact, these other employees had berated the company.

Mr. Cameron also testified that a sweat shirt with the Employer's logo was not required special clothing. The company supplied three t-shirts with logos to its employees and subsidized the purchase of a sweat shirt with company logo for employees who wanted it. The employees paid $20.00, which was half of the cost. Mr. Teager agreed that he was not told to wear it.

As is evident from the above, there are essentially two conflicting versions of the events leading up to the termination of Mr. Teager's employment.

ARGUMENT

The Employer argues that it had just cause to terminate the employment of Mr. Teager because he fell below the standards expected of him, and communicated to him, on numerous occasions. The Employer argues that it warned him that his employment would be in jeopardy if he continued to fail to meet the standards. The Employer suggested that Mr. Teager had made "slanderous statements" against Beaver Landscape. With respect to the special clothing, Mr. Camaron argued that the sweat shirt was optional and not requirement of the job.

Mr. Teager denies that Mr. Cameron ever disciplined him, except on one occasion, in January of 1996. He denies that the Employer ever warned him that his employment was in jeopardy.

ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal has been summarized as follows (*Kruger* , BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;

    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

In the absence of a fundamental breach of the employment contract, a warning must inform the employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the standard will result in dismissal (*Chamberlin and Chamberlin*, BCEST #D374/97). While it is preferable (because it is easier to prove) that a warning be in writing, it is not required (*Sambuca Restaurants Ltd.*, BCEST #D322/97).

As mentioned above, there are essentially two conflicting versions of the events leading up to the termination of Mr. Teager's employment.

I am prepared to accept that the Employer was not satisfied with the performance of Mr. Teager. However, on the facts of this appeal, even if I accept the notations on the payroll records as authentic, I am not persuaded that the Employer warned Mr. Teager "clearly and unequivocally" that his employment was in jeopardy. The notations, taken by themselves, do not indicate that Mr. Teager was warned in a "clear and unequivocal" manner. At most, the notations speak to Mr.

Cameron's different concerns with Mr. Teager--for example, his attitude and occasional failure to follow instructions. The notations do not substantiate the allegation that Mr. Teager was warned in a "clear and unequivocal" manner that his employment was in jeopardy if he continued to fail to meet standards.

While Mr. Cameron's oral evidence was that he several times told Mr. Teager that "if he (Mr. Teager) couldn't follow instructions, he (Mr. Cameron) would have to find someone else" or he "would have to let (Mr. Teager) go", Mr. Teager unequivocally denies that he was warned that his employment was in jeopardy.

Moreover, I am troubled by the explanations on two issues. First, the explanation offered by the Employer for failing to provide written warnings to Mr. Teager. Mr. Cameron explained that he did not issue written warnings to Mr. Teager because he had "minimal verbal and comprehension skills" and had "minimal retention". Yet, he also testified that Mr. Teager required detailed written instructions with respect to his work. A selection of these detailed instructions--Mr. Teager called them "blueprints"--were entered as evidence by the Employer to demonstrate the level of supervision required of Mr. Teager. In my view, it does not make sense that Mr. Teager could read and comprehend the detailed instructions and yet not read and comprehend a written warning.

Second, I am troubled by the explanation offered by the Employer for increasing Mr. Teager's compensation. Mr. Teager was employed for a period of approximately four and a half years. He supervised two other employees. If his performance was as bad as the Employer now says, surely it does not make sense to me that the Employer improve Mr. Teager's compensation.

Mr. Cameron also testified that he had been told by other employees that Mr. Teager had berated the company in front of these other employees. Mr. Teager, on the other hand, denied this and stated that, in fact, these other employees had berated the company.

It is trite law that the burden of proving just cause is on the appellant, in this case the Employer. In my view, where there are two equally credible versions of the facts, I am not required to go further than to go further. In the circumstances of this case, I conclude that the Employer has discharged the burden and that the appeal, therefore, must fail with respect to "just cause".

Finally, I turn to the issue of "special clothing". Section 25 of the *Act* provides that an employer who requires an employee to wear special clothing must provide it to the employee without charge.

Mr. Cameron testified that the sweat shirt was not required special clothing. The company supplied three t-shirts for its employees and subsidized the purchase of a sweat shirt with company logo for employees who wanted it. The employees paid $20.00, which was half of the cost. Mr. Teager agreed that he was not told to wear it. In the circumstances, I find that the sweat shirt was not required "special clothing".

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated September 30, 1997 be varied in the amount of $2080.00, plus interest at the prescribed rate from the date of the termination of Mr. Teager's employment until the date of the Determination, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal