

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Little Mountain Contracting Ltd.
(" Little Mountain ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/117

DATE OF DECISION: April 30, 1996

DECISION

OVERVIEW

This is an appeal by Little Mountain pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 000823 issued by the Director on January 18, 1996. In this appeal Little Mountain claims that no compensation for length of service is owed to Paul Barber (“Barber”) under section 63 of the *Act*.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

(3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint under this Act.

I have completed my review of the written submissions made by Little Mountain and the information provided by the Director.

FACTS

Barber was employed as a cook by Little Mountain from May 23, 1994 to August 18, 1995. Barber filed a complaint with the Employment Standards Branch (“the Branch”) on August 22, 1995 alleging that he was owed compensation for length of service.

The Director investigated Barber’s complaint and, subsequently, determination # CDET 000823 was issued.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer’s liability to pay compensation for length of service has been discharged under Section 63(3)(c) of the *Act*. That is, has Little Mountain demonstrated, on the balance of probabilities, that Barber was dismissed for just cause.

ARGUMENTS

Little Mountain argues that Barber is not entitled to compensation as he was drunk on the job twice, for which he was warned, and he then reported for work late and smelling of alcohol.

The Director contends that Little Mountain has not furnished any proof that Barber had been disciplined for being “drunk” on the job and that he knew that his job was in jeopardy.

ANALYSIS

The burden of proof for establishing that Barber was dismissed for just cause rests with Little Mountain. There was no evidence to support Little Mountain's contention that Barber had been "verbally warned" with respect to his being "drunk" on the job. Little Mountain admits in its submission that on the second occasion that Barber was "drunk" on the job, they did not dismiss him as he was their only First Aid Attendant and they were unable to obtain a replacement at that time. There was no evidence provided that Little Mountain afforded Barber an opportunity to explain his actions in being late before he was dismissed, in fact, Little Mountain submits that on Barber's last day of employment, when he was late, the decision had been made to dismiss him when he showed up at the camp. Little Mountain has not provided sufficient evidence to substantiate its contention that Barber was "drunk" on the job, had been warned with respect to his conduct and was aware that his job was in jeopardy. Furthermore, Little Mountain admits that it condoned such action on Barber's behalf because it was "expeditious" for them as they could not find a replacement.

For the above reasons, I conclude that Little Mountain owes compensation pay to Barber in the amount calculated by the Director.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000823 be confirmed in the amount of \$2,033.11

Hans Suhr
Adjudicator
Employment Standards Tribunal

April 30, 1996
Date

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