Employment Standards TRIBUNAL

An appeal

- by -

Actton Super-Save Gas Stations Ltd.
("Super-Save")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/28

DATE OF DECISION: May 4, 2004

DECISION

SUBMISSIONS

James R. Kitsul	on behalf of Actton Super-Save Gas Stations Ltd.
Ross Gould	on behalf of the Director

OVERVIEW

This decision considers an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Actton Super-Save Gas Stations Ltd. ("Super-Save") of a Determination, dated February 13, 2004, issued by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Super-Save had contravened Part 8, Section 63 of the *Act* in terminating the employment of Meghan Henderson ("Henderson") and found Henderson entitled to wages, in the form of compensation for length of service, vacation pay and interest, in the amount of $272.64. The Determination also imposed an administrative penalty of $500.00 on Super-Save under Section 29 of the *Employment Standards Regulation* (the *"Regulations"*) for a contravention of Section 63 of the *Act*.

A suspension request under to Section 113 of the *Act* has been made by Super-Save and has been considered by the Tribunal. A decision on that request has been communicated to the parties in a letter from the Tribunal dated March 23, 2004.

In this appeal, Super-Save contends the Director erred in law in finding Super-Save had not shown there was just cause to dismiss Henderson and improperly imposed an administrative penalty under Section 29 of the *Regulations*.

The Director has filed a response to the appeal and has provided a record of the documents that were considered in making the Determination. No issue relating to the sufficiency of the record provided has been raised by any party. The Tribunal has carefully the reviewed the submissions and materials on file and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issues in this appeal are whether Super-Save has shown the Director erred in law in concluding Henderson was terminated without just cause and whether the imposition of the administrative penalty was improper, or inappropriate, in the circumstances.

THE FACTS

On October 2, 2003 Henderson filed a complaint with the Director alleging that she had been dismissed without cause by her former employer and was, accordingly, entitled to length of service compensation under the *Act*. On January 13, 2003, the Director held an oral hearing on the complaint. The Determination indicates that Jolene Hawkins attended the hearing on behalf of Super-Save, that Henderson attended on her own behalf and both gave evidence.

The Determination sets out the following background facts:

- The Complainant, Meghan Henderson (Henderson) was employed as a Service Station Attendant/Clerk between May 01 2003, and August 08 2003, by the employer, Actton Super-Save Gas Stations Ltd. (Actton) where Jolene Hawkins (Hawkins) is the local manager.
- Henderson's shifts were Thursday to Monday – 10:00 AM to 6:00 PM or 7:00 AM to 3:00 PM.
- Henderson was paid $8.00 per hour.
- Henderson was terminated on August 08, 2003.

There was no dispute that Henderson was terminated without notice or compensation in lieu of notice. Rather, Super-Save contended Henderson was not entitled to either notice or compensation in lieu, as there was just cause to terminate her. On that issue, the Director made the following findings after hearing from Ms. Hawkins and Henderson:

- Henderson was terminated because she refused to follow Ms. Hawkins instruction to clean the washrooms;
- This refusal by Henderson was properly considered by Super-Save to be misconduct;
- Super-Save did not advise Henderson about her misconduct or warn her of its consequences;
- Super-Save did not show Henderson's refusal was a serious breach, justifying summary dismissal, that Henderson's refusal to follow instructions was a repetitive problem or that her misconduct had serious consequences for the business.

Based on the above findings, the Director concluded Super-Save had not established just cause for dismissal under the *Act*.

On the matter of the administrative penalty, the Director found Super-Save had contravened Section 63 of the *Act*. In its appeal, Super-Save requested the Director provide reasons for imposing the administrative penalty. Without responding directly to that request, the Director took the position in her reply that once a contravention of the *Act* is found, the Director is obliged to impose mandatory penalties in the amounts fixed by the *Regulations* and there is no discretion in the Director to alter or amend either the requirement to impose a penalty or the amount of the penalty.

ARGUMENT AND ANALYSIS

The burden is on Super-Save, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.

The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

In its appeal on the conclusion of the Director that Super-Save had not established just cause to terminate Henderson, Super-Save has done little more than re-state the position it took before the Director. Super-Save argues that the single act of misconduct – refusing to clean the washrooms – was sufficient justification for Henderson's dismissal. No additional evidence is sought to be introduced nor is there any analysis demonstrating the factual conclusions and the reasoning of the Director based on those conclusions is incorrect.

A decision about whether just cause exists is essentially a question of fact applied to principles which have been expressed in several decisions of the Tribunal (see, for example, *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97). The Tribunal has also been consistent in stating that the objective of any analysis of just cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relation, effectively depriving the employer of its end of the bargain. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST #D643/01 (Reconsideration denied in BC EST #RD092/02), the Tribunal made the following comment:

> While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract" (see *McKinley v. B.C.Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

Based on the evidence provided to the Director, I am unable to find any error was made on the issue of whether Super-Save had met the burden of showing there was just cause to summarily dismiss Henderson. This aspect of the appeal is dismissed.

On the issue of the administrative penalty, Super-Save challenges the validity and application of Section 29 of the *Regulations* in the circumstances, arguing that a provision which imposes a mandatory monetary penalty on an employer for being wrong about whether there was just cause to terminate an employee is inconsistent with the purpose set out in Section 2(b) of the *Act*, which says:

> *2. the purposes of this Act are as follows:*
>
> *(b) to promote the fair treatment of employees and employers; . . .*

Super-Save argues that it is unfair, and therefore absurd – in the sense of being repugnant or inconsistent with the purposes of the *Act*, to impose an administrative penalty – to require an employer to predict, with virtual certainty, what the Director's response might be to a complaint from the dismissed employee. Super-Save relies on a decision of the Tribunal, *Summit Security Group Ltd.*, BC EST #D059/04, in support of this argument. In the *Summit* decision, a panel of the Tribunal varied a conclusion by the Director that the employer had contravened Section 18 of the *Act* on the basis that "wages owing", for the purpose of that provision, must be those wages about which the employer was aware or ought reasonably to been aware. The Panel's interpretation of Section 18 was fundamentally grounded in a perceived unfairness created by accepting an employer could be penalized for an inadvertent or unintentional contravention of the requirements found in that provision.

That decision does not assist Super-Save in this appeal. An application of the *Summit* decision would require me to find the Director erred in deciding that Super-Save had contravened Section 63 of the *Act* by failing to pay Henderson compensation for length of service. As I have indicated above, Super-Save has not shown any error in the Determination on that point. Notwithstanding Super-Save's argument that it believed the termination of Henderson was justified, there is no suggestion in their argument that they were not "aware or ought reasonably to be aware" the Director might disagree with their perspective on just cause and hold them liable for length of service compensation. In fact, Super-Save clearly accepts the right of Henderson to challenge their decision to dismiss for cause and the possibility that the Director may not accept there was just cause to dismiss:

> Henderson, as is her right, disagreed with Super-Save's assessment of just cause and brought her complaint to the Employment Standards Board [sic] to adjudicate the question of whether or not she was entitled to be paid for length of service after being let go by Super-Save.

In my view, if the *Summit* decision is correct it should be confined to its particular facts considered in the context of Section 18 of the *Act*. I reject the suggestion by Super-Save that the statutory scheme of mandatory administrative penalties is generally inappropriate in circumstances that involve subjective decision making by the employer, such as decisions to terminate the employment of an employee for cause. There is no support in the *Act* for such a suggestion. The words of subsection 29(1) of the *Regulations* are clear: *"a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act,* ***must*** *pay the following administrative penalty: . . ."* (emphasis added). The provision provides for mandatory administrative penalties without any exceptions such as those suggested by Super-Save.

Nor is it relevant that the legislative penalty scheme might be perceived to be unfair in some circumstances, and arguably inconsistent with the stated purposes of the *Act*. Such considerations do not allow either the Director or the Tribunal to ignore the clear direction in the legislation. It is trite that expressions of statutory purpose, while an important element in statutory interpretation, cannot override the plain meaning of the text of legislation. As the Tribunal noted in *Douglas Mattson*, BC EST #RD647/01 (Reconsideration of BC EST #D148/01):

> Principles of statutory interpretation are not licence for a Court or Tribunal to ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on that body's judgment about what is 'fair', 'logical' or 'rational', or what 'should be'. In *Office and Professional Employees' International Union, Local 378 -and- British Columbia (Labour Relations Board)*, [2000] B.C.J. No. 1225; [2000] BCSC 939, the Court said, at para. 24:
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> > However, the permitted ambit of interpretation is not infinite. The Board may not under the guise of interpretation substitute its own policy judgment for that of the Legislature.

Super-Save's concerns about the ability to administer its right to dismiss an employee for just cause in the face of potential, and increasing greater, administrative penalties is of no relevance to the propriety or appropriateness of imposing an administrative penalty in the circumstances of this case. Those concerns are a component of the "fairness" argument and stand on the same footing from an interpretive perspective – which is that the legislation does not recognize such considerations as providing exceptions to the mandatory administrative penalty scheme.

This aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 13, 2004 be confirmed in the amount of $772.64, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal