BC EST D#079

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

-by-

Glenwood Label & Box Mfg. Ltd.
("Glenwood")

-of a Determination issued by-

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: LORNA A. PAWLUK

FILE NO.: 96/755

DATE OF DECISION: **February 20, 1997**

DECISION

APPEARANCES

Terry Lawrence	for Glenwood
Jeff Holden	for himself

OVERVIEW

Glenwood appeals Determination CDET #004763 dated November 21, 1996 of the Director of Employment Standards ("Director") under section 112 of the *Employment Standards Act ("Act).* The Director's delegate found that Glenwood owed $366.99 in back wages and expense reimbursement to a former employee, Jeff Holden ("Holden").

ISSUE TO BE DECIDED

The issue is whether Glenwood dismissed Holden for just cause and whether Glenwood owes Holden $28.00 for wrongly withheld gas allowance.

FACTS

Holden was hired to work as a salesperson for Glenwood. He began work on October 19, 1995; his employment was terminated on February 7, 1996. The relationship between the parties was governed by a written contract of employment which provided for a probationary period of 6 months "during which period the Company many, in its absolute discretion, terminate your employment for any reason." Holden was paid a monthly base salary of $1700.00 for the first three months and $1200.00 thereafter, and a monthly car allowance of $300.00. He also was to receive additional remuneration for commission sales, but the specifics are not relevant here.

On Monday February 5, 1996, Holden phoned work to say that he would not be coming in because he did not have enough money to put gas in his car. (He lived in Vancouver and worked in New Westminster). It is unclear who he spoke to but it was either his immediate supervisor Tom Campbell or the regional sales manager Mr. White and was, apparently, told to come in as soon as possible. Much the same conversation took place on Tuesday, February 6th and again on Wednesday February 7th. On Wednesday, February 7th, the president of the company Terry Lawrence also became involved when he called Holden at home. There is a difference of opinion as to what was said: Lawrence claims that he told Holden to

report for work immediately or be replaced; Holden says that Lawrence simply asked when the company materials (such as customer lists, sales books and catalogues) would be returned to the company. Regardless of what was said, it is agreed that at the end of the conversation, Holden had been dismissed.

Lawrence argues that the employer must be able to rely on the attendance of its employees and that Holden's absence provided Glenwood with just cause for termination.

Holden says he did not refuse to work, but could not come in because he did not have gas money for his vehicle, fare or any other way to get into the office. Glenwood would have allowed Holden to vary his normal routine somewhat, to remain in the office until he could get the money to put gas in his car. (Holden would work in the office from time to time, but it is unclear whether he would have had sufficient work to keep busy in the office for three days. He also maintained that he made some phone calls to customers from home.)

Holden claims that he is owed $28.00 for gas allowance wrongly withheld by the employer. Ordinarily, new employees undergo a 3 day orientation in the office and the company withholds the gas allowance ordinarily paid to for those three days. At $14 per day, a total of $42 is withheld. Holden was previously employed by Glenwood and attended only one day of the orientation, so that only $14.00 should have been withheld. Instead the company withheld $42.00. He says he is owed the difference, $28.00. He argued that if the company had paid him this sum, as he requested repeatedly and in at least one of the conversations with his supervisors on February 5, 6 or 6, he would have been able to put gas in his car.

In reply, Lawrence said the company was unaware that Holden was owed this sum as no written request reached payroll. He denies that this sum is owed.

In the Determination under appeal here, the Employment Standards Officer concluded that Glenwood did not have just cause for termination:

> The Complainant had a duty to report for work. There is no dispute that the Complainant called in to his supervisor each morning. Should the employer have wished to terminate the employment of the Complainant, the employer could have given the Complainant one week's written notice. The Complainant could have then made the choice to appear or not to earn the week's wages.
>
> In the alternative, the employer could have exercised the process of progressive discipline.

In a letter dated October 24, 1996 to the employer, the Employment Standards Officer stated that Holden "should have been advised that his failure to appear will result in termination" and that this "would have been achieved via registered mail for verification of receipt." The "Calculation Schedule" to the Determination

concludes that total wages owing was $287.99, plus $28.00 gas allowance and $51.00 pager deduction. The latter amounts are not referred to or explained in the "Reasons Schedule". The Pager Deduction was not appealed by the employer.

ANALYSIS

Section 63 of the *Act* permits the dismissal of an employee on notice, for salary in lieu of notice or for just cause. After three months of employment, an employee is entitled to one week notice or salary in lieu of notice, with the notice period increasing with the length of employment. That section imports the notion of "just cause" for termination from the common law. In Stein v. British Columbia Housing Management Commission (1992) 65 B.C.L.R. (2d) 181 @183, the Court of Appeal described the test this way:

> Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

Glenwood and Holden agree that the terms of the written contract apply to their relationship, but that document was not made available to the Employment Standards Officer investigating Holden's complaint. A similar issue was faced by this tribunal in *Tri-West Tractor Ltd.* BC EST No. D268/96 where the employer sought to rely on certain information it did not submit to the Director during investigation of the complaint. There it was determined that the employer could not rely on those documents at the appeal, even though it was the fault of its lawyer that they were not submitted to the Director in the first instance. Glenwood offered no reason as to why the document was not submitted to the Employment Standards Officer during investigation of the complaint and thus cannot rely on it before this tribunal. In any event it is unclear whether the conract can supplant the provisions of the *Act* requiring notice after three months of employment. Thus, the onus on the employer here is to show just cause in keeping with the test outlined in Stein by the Court of Appeal.

The specific issue is whether this worker's failure to attend work because he did not have enough money to put gas in his vehicle is just cause for dismissal.

> Absence from work without the employer's permission may amount to just cause, depending on the circumstances. The cases seem to focus on the reasonableness of the employee's decision to take time off, as well as the harm done to the employer. (Butterworth's Wrongful Dismissal Practice Manual, Vol. 1, para 4.195)

I find that Holden's failure to report for work because he did not have money to put gas in his car was conduct inconsistent with the continuation of the contract of employment and as such was just cause for dismissal under section 63 of the *Act.* Holden said that the employer had shut down for 10 days over the Christmas period and that since he was not paid for this period, he was short of money. He says that

after he paid his rent and other fixed expenses he did not have enough money for gas in the car. While I sympathize with the difficulty in making ends meet, this was not a valid reason to be absent from work. He should have ensured that he had enough money to meet the fundamental obligations of his employment. The seriousness of this conduct is compounded by the $300 monthly car allowance paid to him for car expenses. The employer said that many of Holden's customers were calling the office and while Holden said he returned some of those calls, I am satisfied that the employer was prejudiced by Holden's absence from his regular sales duties and the office.

Holden maintained that if the employer had paid him the $28.00 owed for gas allowance, he would have been able to report for work as required. However, I was not persuaded by this argument as it was unclear to me how he would have been able to get to work to pick up this money if he could not get to work in the first place. He said that he could have borrowed money from a friend, but again, why was this money not available to him to report for work. This explanation did not meet the test of credibility:

> ...the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (See Faryna v. Chorney (1951), 4. W.W.R. (N.S.) 171 @174.)

Under the circumstances, I am satisfied that the the employer exercised its right to dismiss for just cause.

The Employment Standards Officer suggested that it was necessary for the employer to demand the employee's attendance at work by registered mail, or to use progressive discipline to establish just cause. I disagree. Attendance at work is an obligation fundamental to the employment contract; an employer need not enforce this requirement via written notice. And as long as the employer can establish "conduct inconsistent with the continuation of the contract of employment" it is unnecessary to show progressive discipline.

The “Calculation Schedule” in the Determination indicates that Glenwood owes Holden $28.00 for gas allowance. This sum cannot be the subject of the Determination as “allowances or expenses” are excluded from the definition of “wages” under section 1 of the *Act.* Thus that aspect of the Determination is outside the jurisdiction of the delegate to either investigate or enforce payment. Also, the explanation of why that sum is owed is not included in the “Reasons Schedule” so that the basis for the original decision is unavailable. Ordinarily, the onus on the appellant to establish grounds for the appeal but where as here the basis of the original decision is not set out, the relevant portion of the Determination will be cancelled.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 004763 be cancelled.

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Lorna A. Pawluk
Adjudicator
Employment Standards Tribunal