

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 -

Horseshoe Press Inc.
("Horseshoe Inc.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/626

DATE OF HEARING: February 17, 1997

DATE OF DECISION: February 26, 1997

DECISION

APPEARANCES

Dickey Tam	on behalf of	Horseshoe Press Inc.
Craig Barrett	on his own behalf	
Ivy Hallam	on behalf of`	Director of Employment Standards

OVERVIEW

This is an appeal by Horseshoe Press Inc. (“Horseshoe Inc.”), under Section 112 of the *Employment Standards Act*, (the “*Act*”), against Determination No. CDET 004260 which was issued by a delegate of the Director of Employment Standards on October 8, 1996. The Determination found that Horseshoe Inc. owed compensation for length of service to a former employee, Craig Barrett (“Barrett”), in the amount of \$1,986.22 plus interest. Horseshoe Inc. seeks to have the Determination cancelled on the ground that it had just cause to terminate Barrett’s employment.

A hearing was held on February 17, 1997, at which time evidence was given under oath. Ms. Theresa Ching was sworn in as the official interpreter at the beginning of the hearing.

ISSUE TO BE DECIDED

Did Horseshoe Inc. have just cause to terminate Barrett’s employment?

What is Barrett’s length of service for purposes of the *Act*?

FACTS

Barrett was employed by Rolland Mansell doing business as Horseshoe Press effective July 4, 1991. His employment continued, without interruption, when the business was sold to Horseshoe Press Inc. on March 25, 1996. Barrett’s employment was terminated on August 6, 1996.

In the Reason Schedule which was attached to the Determination, the Director’s delegate notes Horseshoe Inc.’s argument that Barrett’s effective date of employment should be March 25, 1996 rather than July 4, 1991. The Director’s delegate also recorded Horseshoe Inc.’s submission that Barrett had been “warned verbally on many occasions” concerning his unsatisfactory work performance and that he was dismissed on

August 6, 1996 because he was “...caught making a copy of another employee’s time sheet without authorization.”

The Director’s delegate found that “...there is no evidence to prove that the complainant (Barrett) had received warnings that his work performance was so poor that his job was in jeopardy. There was no written warning.” She also found that “...the copying of another employee’s time sheet without authorization is not serious enough to dismiss an employee who has five years of seniority in the company.”

As a result of making these findings, the Director’s delegate determined that Horseshoe Inc. owed Barrett five weeks’ compensation for length of service under Section 63 of the *Act*.

Dickey Tam, the principal shareholder of Horseshoe Press Inc., wrote a letter to Barrett on June 26, 1996 which states, in part, “This is to confirm that Craig D. Barrett is employed by Horseshoe press Inc. from March 25, 1996.” (sic) Tam testified at the hearing that the purpose of that letter was to establish that Horseshoe Inc. had “...settled Barrett’s vacation pay” with the previous owner and that Barrett was a “new employee” of Horseshoe Inc.

Tam testified that Barrett had photocopied another employee’s time sheet without authorization and had “...destroyed any trust that I had in him.” According to Tam’s testimony, that unauthorized photocopying and Barrett’s unsatisfactory work performance were the reasons that he decided to terminate Barrett’s employment.

When asked, under cross-examination, if Barrett had been told that his work was so unsatisfactory that he could be dismissed, Tam testified: “ I did not state specifically that I would fire him.” He also stated that there was “...only one reason for firing him - he stole a time sheet to protect his own interest.”

Barrett does not deny that he copied the other employee’s time sheet nor that Tam had expressed dissatisfaction with some of his work quality. However, he testified that he did not receive a formal warning or a reprimand concerning his work performance.

ANALYSIS

Liability resulting from length of service

Section 63 of the *Act* creates a liability for employers:

- (1) *After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
- (2) *The employer's liability for compensation for length of service increases as follows:*

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

This liability is deemed to be discharged if an employee is given written notice or is dismissed for just cause[see Section 63(3)(c)].

The burden of proof for establishing that there is just cause rests with Horseshoe Press Inc., the employer.

It is generally accepted in common law that , in the absence of a fundamental breach of the employment agreement, for an employer to establish that there is just cause to dismiss an employee it must meet the following four-part test:

1. That reasonable standards of performance have been set and communicated to the employee;
2. That the employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. That a reasonable period of time was given to the employee to meet such standards; and
4. That the employee did not meet those standards.

It is clear from the evidence that Tam did not find Barrett's work performance to be satisfactory. However, there is nothing in the evidence which shows that Barrett was warned clearly that his failure to meet Tam's performance standards would result in his employment being terminated.

The concept of "just cause" requires an employer to inform an employee, clearly and unequivocal, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

For these reasons I conclude that Horseshoe Inc. has not demonstrated that Barrett's employment was terminated for just cause.

Duration of employment

Section 97 of the *Act* states:

If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

There is no dispute that Horseshoe Press Inc. purchased the assets of “Horseshoe Press” from Mansell on March 25, 1996. There is also no dispute that Barrett’s employment was not interrupted as a result of that transaction. For that reason, there is no doubt in my mind that Section 97 of the *Act* serves only to confirm that, for purposes of this *Act*, Barrett’s employment was continuous and uninterrupted between July 4, 1991 and August 6, 1996. That is, Barrett’s employment exceeded five consecutive years in length. Thus, I agree with the finding made by the Director’s delegate that Barrett is entitled to the equivalent of five weeks’ wages in compensation for length of service under

ORDER

I order, under Section 115 of the *Act*, that Determination No. 004260 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal