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 -

Cost Less Express Ltd. - and - Curtis: Cory

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alison H. Narod

FILE No.: 1999/670

DATE OF DECISION: March 1, 2000

DECISION

OVERVIEW

Cost Less Express Ltd. (the "Employer") appeals a Determination dated October 15, 1999 made by a Delegate of the Director of Employment Standards. The Delegate concluded that the Employer did not have just cause to terminate the employment of Cory Curtis (the "Employee") and therefore was required to pay termination pay to him pursuant to Section 63 of the *Employment Standards Act* (the "Act"). The Delegate also concluded that the Employer had made deductions from the Employee's wages, contrary to Section 21 of the Act.

ISSUES

The first issue in this appeal is whether or not the Employer had just cause to terminate the Employee's employment. If so, it was under no obligation to pay him termination pay. Section 63 of the *Employment Standards Act* provides that an employee with Mr. Curtis' length of service (slightly in excess of two years), is entitled an amount equal to two weeks wages on termination of employment as compensation for length of service if the employee is terminated without notice. Section 63(3)(c) deems the employer to be discharged from this liability if it terminates the employee's employment for just cause.

The second issue is whether or not the Employer made deductions from his wages to recoup fines paid for parking tickets incurred by the Employee, contrary to Section 21 of the Act.

Section 21 of the *Employment Standards Act* states:

> 21(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs, except as permitted by the regulations.
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> (3) Money required to be paid contrary to sub-section (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

THE FACTS AND ANALYSIS

The Employer is in the business of home and office deliveries. The Employee was employed as a delivery driver from July 15, 1996 to July 20, 1998. The Employer contended to the Delegate that it terminated the Employee's employment for just cause due to inadequate performance. In support of its position, it provided copies of written warnings and notes of verbal warnings it said it gave him for violation of company policies and misconduct, such as not locking a company

truck, excessive parking tickets, tardiness, poor use of work time, and not returning keys and a pager when requested. The Delegate noted that the Employer had not provided a submission with respect to the allegation that deductions had been made from the Employee's wages, contrary to Section 21.

The Employee acknowledged to the Delegate that the Employer had spoken with him on a number of occasions regarding its expectations but contended he had never been told by the Employer that his employment was in jeopardy. He alleged that a total of $210.00 was deducted from his wages for parking tickets.

The Delegate stated that the following requirements must be met by an Employer to establish just cause for termination of employment without notice or payment of compensation for length of service. The Delegate stated:

> …an employer must:
>
> - establish and communicate a reasonable standard of performance.
>
> - give the Employee an opportunity to meet the required standards and show that he was unwilling to do so.
>
> - notify the Employee that he had failed to meet the standards and that his employment was in jeopardy because of that, and
>
> - dismiss only when the employee fails or is unwilling to meet those standards.

The Delegate found that the second and third requirements had not been met. That is, the Employer had not given the Employee an opportunity to meet the standards required and shown that he was unwilling to meet those standards. Nor had the Employer shown that it had notified the Employee that he had failed to meet the required standards and that his continued employment was in jeopardy because of this failure. The Delegate stated that this latter requirement was particularly crucial, because "it notifies the Employee that cessation of employment will result if improvement is not noted."

At the hearing of the Appeal, evidence was given on the Employer's behalf by Calvin Johnson, President of Cost Less, and Ken Sakara, Operations Manager. Mr. Sakara had been the Employee's former supervisor. Cory Curtis gave evidence on his own behalf.

The Employer submitted that the Employee had been given numerous warnings, from minor verbal ones to full written ones, during the course of his employment. On each occasion, he was advised what the warning stood for and it was made clear to him that, depending on the circumstances, a repeated violation might result in suspension, demotion or termination. The Employer also asserted the Employee had demonstrated an unwillingness to change his performance.

The Employer said that the culminating events occurred in August, 1998 and related to the Employee's failure to return his pager while he was off work for a week, despite three verbal warnings to do so during that week. Additionally, the Employer asserted that during this period of time, Mr. Johnson paged the Employee late in the evening on a Saturday night and the fact that the Employee responded to this page by telephoning the caller was evidence that he was using the pager for personal purposes contrary to company policy.

The Employer contended that it is important to the Employer's operation that company property, such as pagers, be left at the Employer's premises so other drivers can use them on days when the driver who was using them is off work.

The Employer supplied documentation of written warnings and notes of oral warnings given to the Employee. None of this documentation recorded that the Employee had been given a warning that if his performance did not improve he would be terminated.

The Employee denied receiving all but three written warnings, those being the ones he signed. He had explanations for incidents the Employer contended were the subject of warnings, including, for example, that he attended to personal matters during his lunch breaks. He strenuously maintained that he had never been told that his job was in jeopardy.

With respect to the culminating incident, the Employee said that he went off work during his last shift because of a work injury. He was driven to the doctor by a co-worker and did not have an opportunity to return his pager. He said his doctor told him he would be off for two weeks. Because of the injury, he could not drive and therefore could not return the pager himself. He said he only had one phone call from Mr. Sakara, not three as contended by the Employer. In that phone call, he told Mr. Sakara he could not drive and therefore could not bring the pager in himself. He asked if Mr. Sakara could make other arrangements to pick up the pager and was told that he would be called back. However, he did not receive another call. When he returned to work, he was fired.

The Employer did not dispute that the Employee was disabled during the period in which the culminating incidents occurred. The specific conversations related by Mr. Sakara about the culminating incident do not establish that a clear warning was given and that the Employee did not comply with it. Mr. Sakara's evidence was that during the culminating incident, he telephoned the Employee three times. The first call was on Monday, August 3, 1998, and was a friendly call. Mr. Sakara did not recall the Employee saying he could not bring in the pager. His recollection was that the Employee said that he would bring the pager in. The second call was on Wednesday, August 5, 1998, and Mr. Sakara told the Employee that if he did not return the pager his job would be in jeopardy. Mr. Sakara said it was "in my mind" that the pager would be returned in a reasonable time, which he considered to be the same day. However, he did not communicate this to the Employee. The Employee was expected to return to work the following Monday. The third call was on Friday, August 7, 1998. Mr. Sakara said he told the Employee his job would be in jeopardy if he did not return with the pager on Monday. The Employee did in fact return to work on Monday with the pager.

As noted, the Employee denies having had three conversations with Mr. Sakara and said he only had one. He also pointed out that the Employer had drivers whose routes took them all over the City and if it wished, it could have had a driver pick up the pager if it was so important. The Employer did not have an adequate explanation for not arranging for someone else to pick up the pager.

Mr. Johnson said that on August 8, 1998, Mr. Sakara told him about the problems he was having in getting the Employee to return the pager. Mr. Johnson said that at midnight that evening he phoned the Employee's pager and left a phone number for a return call. The Employee returned the call and Mr. Johnson immediately hung up the phone. The Employee called him back a second time. Mr. Johnson heard voices in the background and surmised from this that the Employee was not at home when he returned the call. He assumed that he had caught the Employee in an embarrassing situation. Mr. Johnson identified himself to the Employee. The Employee queried whether he was fired. Mr. Johnson told the Employee he would speak to him about this on his return to work the following Monday.

The Employee acknowledged that he had answered the page. He said he was at home, with some friends at the time. When he received the page, he thought it might be his parents, as they were the only ones to whom he had given the pager number. He said he had been told by his Employer that he could give the pager number to his family. This was not contested by the Employer.

Mr. Johnson said that the Employee was terminated because he failed to return the pager after the first two requests and because of the telephone conversation he had with the Employee, when the Employee returned his pages on Saturday night.

I find that I do not have to resolve the conflicts in evidence between the Employer's and the Employee's versions of the August, 1998 events. The Employee clearly had a problematic work history. However, even if I accept the Employer's version of events, I cannot find that the culminating events included a clear warning that the Employee's employment would be terminated if he did not do something which he then failed to do. The Employer knew the Employee was disabled and that he was not expected to return to work until Monday, August 10, 1998. The warning it gave him on Wednesday, August 5, 1998 was insufficient to bring to the Employee's attention that if he did not return the pager the same day, his employment would be terminated. The warning given on Friday, August 7, 1998 specified that the Employee had to return the pager by Monday or his employment would be in jeopardy. The Employee did in fact return the pager as requested.

With respect to the pages and telephone call of August 8, 1998 which the Employer relies on as evidence of the Employee's personal use of the pager, I disagree that it shows that the Employee used the pager for personal business. The evidence solely establishes that the Employee responded to a page from the Employer. It does not establish that the Employee used the pager for personal business.

In view of the foregoing, I conclude that the Employee was not discharged for just cause and, therefore, he is entitled to termination pay pursuant to Section 63 of the Act.

With respect to the issue of deductions from the Employee's pay to reimburse parking tickets, the Employer denied having made such deductions. Mr. Johnson admitted that the handwritten notations on a pay stub attached to a July 31, 1997 cheque showing a deduction of $35.00 for "TIX" was in his handwriting. The Employer said that it could produce the cancelled cheques in respect of the pay stubs the Employee had submitted as evidence of deductions and said that it would do so within a week of the date of hearing. No further documentation was received from the Employer.

In view of the Employer's failure to produce such documentation, I draw an adverse inference that the documentation would not have assisted its position that it made no deductions from the Employee's pay cheques to reimburse itself for parking ticket fines. Therefore, I confirm the Delegate's finding that deductions in the amount of $210.00 were taken from the Employee's wages, contrary to Section 21 of the Act.

The Appeal is dismissed.

ORDER

I order, pursuant to Section 115 of the *Act* that the Determination dated October 15, 1999 be confirmed.

Alison H. Narod
Adjudicator
Employment Standards Tribunal