

An appeal

- by -

Charles E. Balint
("Balint")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2003A/10

DATE OF DECISION: March 25, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Charles E. Balint (“Balint”) of a Determination that was issued on August 22, 2002 by a delegate of the Director of Employment Standards (the “Director”). Balint complained he had been terminated without just cause or notice and had not been properly compensated for overtime by his employer, Imperial Security & Protection Services Ltd. (“Imperial Security”). The Director found that Balint had given Imperial Security just cause to terminate his employment and was not entitled to compensation for length of service. The Director also found Imperial Security had contravened Part 2, Section 18(1) of the *Act* and that Balint was owed overtime wages. The Determination ordered Imperial Security to cease contravening and to comply with the *Act* and to pay an amount of \$320.71.

Balint has appealed the Determination on the ground that evidence has come available that was not available at the time the Determination was made and which Balint says shows the Director was wrong in concluding Imperial Security had just cause to terminate his employment.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether Balint has shown the Director erred in concluding he was terminated for just cause.

FACTS

The Determination provided the following background information:

Imperial Security & Protection Services Ltd., hereinafter referred to as the Employer, is under the jurisdiction of the Act. The claimant worked from November 14, 2001 to June 8, 2002 as a Field Support Security Officer at the rate of \$10.50 per hour.

The Determination made the following findings:

The standards for employees employed with security companies is somewhat higher than that of employees working in areas where their functions do not impact on the security and/or, well-being of other persons. As a result, more is expected of these employees in the form of reliability, honesty and the ability to follow standard policies and procedures, especially if the function of the employee is to check up on other security employees, and/or to inspect security devices while on patrol.

In addition, I find the claimant’s evidence conflicting with the witness statement, in that the claimant claims the witness, on June 8, 2002, tried the wand and found it was not operating, but the witness states that the claimant told him the wand was not working and therefore did not try using it.

Based on a balance of probabilities, I accept the Employer's evidence that the claimant had contravened the Employer's policy and procedures regarding security methods and while the Employer's process of discipline could be fine tuned to accelerate the process, I find the Employer had just cause for termination and is not liable for compensation for length of service.

According to the Determination, Balint was terminated following three incidents which Imperial Security felt demonstrated a failure or refusal by Balint to meet the requirements of his job. In the first incident, Balint had failed, or refused, to write up an employee for not following the company's uniform policy and when spoken about it, told his employer the employee was in proper uniform. In the second incident, Imperial Security claimed Balint had breached company policy and procedure by leaving a 'site details book' in the office when he went on mobile patrol. In the third incident, Balint failed to scan his patrol locations at the premises of a client of Imperial Security, saying the scanning instrument provided to him was not working. Imperial Security said the system was working fine.

ARGUMENT AND ANALYSIS

In his appeal, Balint says there are inaccuracies in the Determination and has provided some new information.

There are two factual matters raised in the appeal which are not considered in the Determination or included in the record. The first is Balint's contention that he was never given a copy of the 'Mobile Patrol Duty Procedures', which were central to the warning he received for failing to have the 'site details book' with him on June 7, 2002. The second is whether there was, in fact, a malfunction in the scanning equipment. He claims that two other employees also notified the company of an apparent malfunction with the scanning system. In my view, these two matters are important factual considerations. The absence of any consideration of these matters casts some doubt on the investigative process and indicates a need for further investigation.

As well as obvious gaps in the factual matrix, the Determination contains no analysis of Balint's dismissal in the context of well established principles identified by the Tribunal as being applicable to questions of just cause for dismissal. These principles were set out in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97, and have been confirmed, and applied, in numerous other decisions:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 1. A reasonable standard of performance was established and communicated to the employee;
 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

This case is clearly one involving minor instances of misconduct and a demonstrated failure to meet the requirements of the job. Balint says he was “ambushed” on June 12, 2002, when he was presented with three written warnings and told he was dismissed. It is not difficult to appreciate why he may have felt that way. There is no indication in the Determination or the record that Balint had received any previous warnings or had been put on notice that his job was in jeopardy. Nor has the Determination provided any reason why it was appropriate to ignore those requirements. Simply saying that Balint, as a security company employee, could be held to a higher standard is not a reason for avoiding the basic obligation of communicating that standard in a way that would have brought home to Balint the consequences of failing to meet it.

The Determination, and the material on the record, does not support or justify the conclusion reached on the issue of just cause. The just cause issue requires further investigation and consideration.

One final comment. I find it curious that the Director, in responding to the appeal, says the investigating delegate “based his findings on the credibility of the parties based on his numerous conversations with them”. If that were so, and if the alleged conversations were considered when the Determination was made, those conversations should have been included in the record provided to the Tribunal. I can find no such documents in the material filed by the Director. If the Director seeks to rely on verbal communications when making the Determination, those communications must be transcribed in some way and included with the record.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 2, 2002 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal