Employment Standards TRIBUNAL

An appeal

- by -

Joey Enterprises Ltd
(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2002/617

DATE OF HEARING: March 14, 2003

DATE OF DECISION: April 1, 2003

DECISION

APPEARANCES:

Bruce F. Fairley, Solicitor	on behalf of the Appellant Employer
Randy W. Ball	the Employee on his own behalf

No one appearing on behalf of the Director

OVERVIEW

This is an appeal based on written submissions and with an oral hearing by Joey Enterprise Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on November 28, 2002 wherein the Director's Delegate (the "Delegate") found that the complainant was terminated without just cause and was entitled to compensation for length of service in the sum of $1,200.00 plus interest of $64.13 for a total due of $1,264.13.

ISSUE

Did the Appellant have just cause to dismiss the Respondent such that the Respondent was not entitled to notice or compensation for length of service.

ARGUMENT

The Appellant's Position

In an appeal form dated December 10, 2002 and filed with the Tribunal December 12, 2002 the Appellant asserts that the Delegate erred in the facts found and in interpreting the law and seeks to vary or cancel it. In further written submissions filed with the appeal form the Appellant says that the Delegate erred in law in finding that the only hard copy evidence on hand relating to the investigation was the Record of Employment issued on September 14, 2001 and failed to take account of the affidavit evidence of the Employer. Further, the Appellant says that the Delegate erred in finding that there was no hard copy evidence to support the Employer's allegation that the Employee had been smoking marijuana on the Employer's premises or to support the Employer's assertion that the Employee had a poor attitude and removed the Employer's tools from the property without permission. The Appellant says that the complainant's own evidence that, when confronted with shoddy work performed, the Employee said to the Appellant "if you don't like my work, give me two weeks notice and let me go", to which the Employer agreed but returned a short time later saying that the Employee should leave now. The Appellant says that this evidence corroborates the Appellant's assertion that the Record of Employment which indicates being laid off for lack of work was completed in error. The Appellant says that the Delegate failed to assign proper or any weight to the affidavit evidence of Cam Colonna on behalf of the Appellant.

In a further written response dated February 3, 2003 filed with the Tribunal the same date in reply to the Respondent's submission the Appellant further says that the Delegate erred in failing to properly address the level of evidentiary burden and what was required to discharge that evidentiary burden. The Appellant says that the allegation by it under oath of the commission of a criminal code offence by the Respondent which behaviour could materially affect the Employer's business is not a minor instance of misconduct and should have been accepted as just cause for dismissal without notice or compensation for length of service. The Appellant submits that the Delegate failed to properly determine issues of credibility.

In his oral submission Mr. Fairley reiterates that the Delegate failed to properly weigh the evidence which was before him or to weigh it at all. He notes that this was particularly of concern where one body of evidence (the Appellant's) was sworn in affidavit form and the Employee's was not. Mr. Fairley notes that the correct approach to determining credibility is set out in the case of *Faryna vs. Chorney* (1951) 4WWR (NS) 171 (BCCA). The Appellant further submitted that the Respondent simply didn't have the qualities required of a person working in a body-shop such as this and that, as the Respondent acknowledged, he was not prepared to do the "supplementals" (paperwork required to bill for overages in time). The Appellant notes that at least on one occasion the Respondent took the Employer's reciprocal saw home for two weeks before returning it after the Employer had made it clear that this was unacceptable. He says that the Appellant dismissed the Respondent for just cause because the Respondent couldn't competently meet the requirements of a body-man. The Appellant characterises the paint problem with the Expedition vehicle as the "culminating incident" resulting in termination. The Appellant acknowledges that the evidence regarding the consumption of marijuana or intoxication by marijuana at the workplace was not completely conclusive, but the evidence of Mr. Gluns does not rule out that the Respondent was consuming or intoxicated by marijuana on the job. The Appellant says that the *Employment Standards Act* does not exist to shield incompetent employees. The Appellant says that it is an implied term of any employment contract that one requires an employer's consent to take tools off the employer's premises. The Appellant says that the removal of Employer tools and consumption or intoxication by marijuana at the workplace prior to the termination contribute to the deficiencies in the Respondent's work performance which add up to just cause. The Appellant's counsel acknowledged that the Respondent was never told he'd be terminated if he did not bring up the standard of the quality of his work performance within a particular time.

The Respondent's Position

In a written reply dated January 6, 2003 and filed with the Tribunal on the same date the Respondent states that the Determination is correct and that the Delegate did a complete and thorough job of investigating his complaint as an unbiased third party. The Respondent submits a further copy of the Record of Employment which was issued to him indicating the reason for his termination was layoff due to lack of work. The Respondent submits that the Determination should be upheld.

At the oral hearing the Respondent submitted that the Determination was correct and ought to be upheld.

The Director's Position

The Delegate did not attend the oral hearing. However, a Delegate on behalf of the Director did file a written submission dated December 20, 2002, filed the same day with the Tribunal. In that submission the Delegate says that during the course of the investigation and in the appeal submissions provided the Employer raised three grounds on which it asserts there was just cause to terminate the Respondent. The

Appellant says that these were the poor attitude of the Respondent who did not meet the Appellant's performance standards, that the Respondent smoked marijuana on the Appellant's premises and that the Respondent removed tools that belonged to the Appellant without consent or authorization. The Delegate says that, in the Determination, the evidence was properly weighed with the Delegate concluding that the evidence provided by the Appellant was insufficient to discharge the liability to pay compensation for length of service.

The Delegate refers to the case of *Kenneth Kruger* BCEST #D003/97 with respect to the tests commonly applied in determining whether just cause exists to terminate an employee. The Delegate goes on to submit that the burden of proof to substantiate that just cause existed to terminate an employee without compensation for length of service clearly rests with the employer. The Delegate says that the Appellant failed to demonstrate that performance standards were clearly articulated to the Employee and that the Appellant failed to demonstrate that the Employee was warned that his performance was unsatisfactory and that his job was therefore in jeopardy if he failed to meet performance standards. With respect to the issue of smoking marijuana, the Delegate says that the only evidence in support of this allegation was the affidavit and assertion by Mr. Colonna that he smelled the odour of marijuana in the workshop on more than one occasion and warned the Employee though no disciplinary records were kept or formal discipline imposed. Further, in that affidavit, the Delegate notes that the Appellant asserted that the Employee arrived at work on more than one occasion under the influence of marijuana and the Delegate notes that the Employee was permitted to work in that condition nonetheless. The Delegate notes that the Appellant did not provide any dates or times of any of these incidents or corroborating evidence and that the complainant denied the use of marijuana at any time. Finally, with respect of the issue of removing tools from the Employer's premises the Delegate notes that the only evidence of this was from Mr. Colonna who's statement was not corroborated by other supporting evidence.

In conclusion, the Delegate notes that the Record of Employment indicated the reason for dismissal was lack of work and that no amended Record of Employment was ever provided. The Delegate says that the Determination should be upheld.

THE FACTS

The Appellant operates an auto-body shop and towing service in Golden B.C. The Respondent worked for the Appellant from August 1, 2000 to September 12, 2001 as an auto-body man at the rate of $15.00 per hour.

At the oral hearing Mr. Cam Colonna, president and owner of the Appellant, testified on behalf of the Appellant. He hired the Respondent having known him for many years since the early 70's. He'd seen from previous vehicles that the Respondent had worked on that he was capable of doing the work and hired him to do the fine body finish work and painting. The Appellant was satisfied with the quality of the Respondent's work over the year of employment on most jobs, however, there were a few jobs that he wasn't satisfied with. The main problem was a job performed on a Ford Expedition. He also had problems on a Toyota Camry and at least four other vehicles. He testified that he "mentioned it to him". When asked in direct examination what he had told him he replied, "he didn't care, said I was making enough money. That was his attitude."

Mr. Colonna testified that he had problems with both the time it took the Respondent to perform his work and the quality of his work. He said that he brought his dissatisfaction to the Respondent's attention a couple of times saying "I know he knew I wasn't happy". He testified that the Respondent took more hours to perform the work than ICBC authorized which resulted in the Appellant losing money through not getting paid for all of the hours the Respondent worked on vehicles. He further testified that, when this occurred, there is an opportunity for the Appellant to submit "supplementals" to ICBC, being documents seeking extra pay for the further hours required, provided they could be justified by the information in these "supplementals".

With respect to the particular problems with the Expedition vehicle, Mr. Colonna said that after repairing work on the clear-coat which was not the Respondent's fault, the Respondent failed to properly match the paint. He told the Respondent "I'm sorry, I can't absorb this anymore. Roll your toolbox to the door. You're finished".

Mr. Colonna said that he believed the Respondent smoked marijuana while he was in his employ. He said he once walked into his shop when the Respondent and another employee named Murray were the only two there and he could smell marijuana and found a marijuana "butt" at the end of the paint table. He said that this was about one month before he terminated the Respondent. He said that the Respondent and "Murray" also smoked it at lunch and that this was about four months before he terminated the Respondent. Lastly, he said that the Respondent came to work under the influence of marijuana and that he could tell this by his glassy eyes and mood. He said that this occurred many times and was unclear as to when the last time was prior to his dismissal of the Respondent. After some hesitation he said that the last occasion would have been around the same time he was dismissed. When asked if he mentioned his concern about the use of marijuana to the Respondent he said "I didn't think I had to".

Mr. Colonna also testified that there was a problem with the Respondent removing tools from his premises. The only specific time that he testified to was an occasion when the Respondent took a reciprocal saw home for a few days. He said there were many other things which were never returned with a total value of about $4,000.00, though he did not testify to a single incident which he points specifically to the Respondent being responsible for.

Mr. Colonna also filed as an exhibit his affidavit sworn October 31, 2002 which was also before the Delegate in the investigation of this matter. Attached as exhibit B to that affidavit were Mr. Colonna's notes regarding deficiencies on a Malibu automobile that the Respondent had worked on. Mr. Colonna said that he wrote these notes after he decided to dismiss the Respondent and that he didn't discuss these notes with the Respondent.

After the Respondent was terminated he was issued a ROE dated September 14, 2001 which was entered as exhibit 2 at the hearing and was also before the Delegate in the investigation. The Appellant's accountant had indicated code "A" ("shortage of work") as the reason for issuing the Record of Employment. Mr. Colonna says that this was an error and his wife normally does the ROE's. He did not know why his wife had not done the ROE in this instance or why the accountant had filled in shortage of work as the reason for issuing it. However, Mr. Colonna testified that another ROE was issued dated February 3, 2003 which was marked exhibit 3 at the hearing and in which the reason for issuing the ROE was indicated as code "N" ("dismissal"). This document was also signed by the accountant. Mr. Colonna said that he never intended to rehire the Respondent and that there was lots of work.

In the cross-examination of Mr. Colonna he was asked if he had ever given a verbal or written warning about the Respondent's work. He said that he'd given lots of verbal warnings but he didn't have to waste his time writing down all the problems. He said that he let the other employee "Murray" go because he was caught stealing tools. He said that "piles" and many people came in out of his shop in a day. He acknowledged that the other employee was present when the Respondent was let go and that he had told this other employee, Murray, that he could pack his tools too if he wanted to "for the reason that, if I couldn't make money with you guys, I could with others, as I am now".

The Respondent testified as well. He noted that the other employee named Murray was in the room when the Respondent was told he was laid off. The Respondent says that the Appellant told him he was laid off and he asked if that was to be 2 weeks from that day to which the Appellant said "yes". The Respondent said that then, after about 15 minutes, the Appellant returned and told him he was fired, to take his tools and leave. The Respondent says that there was no written policy regarding the removal of tools from the premises and that he and the other employees brought their own tools there and everyone used everyone else's tools. The Respondent denied that he ever smoked marijuana during him employment with the Appellant. The Respondent acknowledged that, from time to time, his jobs were not performed within the time allotted by ICBC and agrees that he wasn't always diligent in completing the supplemental documents required for the Appellant to obtain payment for the Respondent's overages in time. He agrees that he was significantly over budget in terms of the hours of work on the Expedition vehicle, but denies that there was a problem with the match of paint. He agrees that he did remove a reciprocal saw belonging to the Appellant from the workplace and that he never had permission to do so. He said that he returned it after a couple of weeks. He denied that he had borrowed or taken any other tools of the Employer's. He agreed that the Expedition was the "culminating event" that led to his dismissal. He said that it was the first time that the Appellant had expressed dissatisfaction with his work. He said that he was never warned verbally or in writing that if he didn't raise the quality of his work or improve on the paperwork required that he'd be terminated.

The Respondent also called Murray Gluns who was employed for 2 years by the Appellant before and continuing until after the Respondent was employed there. Mr. Gluns said that he was not aware of any verbal or written warnings given to the Respondent. He had no knowledge of approximately $4,000.00 of tools missing from the Appellant's shop. He said that he was in the room when the Respondent was "laid off" by the Appellant. He said that he heard Mr. Colonna express his dissatisfaction with the Respondent's performance and that the Respondent then said "if you're not happy with my work then lay me off". The Appellant then said that he might just do that to which the Respondent said "when are you going to lay me off, today, in two weeks, are you going to give me any notice?" Mr. Gluns described this as a loud argument and quite a confrontation, but he said that was almost a daily event with Mr. Colonna. He said that a few minutes later Mr. Colonna told the Respondent to pack up his stuff and leave right now. He said that Mr. Colonna told him that he could do the same so Mr. Gluns went back to work.

Asked to comment on the Respondent's competence as a painter Mr. Gluns said that, given what the Respondent had to work with, he did the best he could though he'd seen better and he'd seen worse.

In cross-examination Mr. Gluns said that the Appellant did express concerns or dissatisfaction with the Respondent's work to him, but he didn't know that the Appellant ever told this to the Respondent. Mr. Gluns said that Mr. Colonna never said in his presence that he threatened to fire the Respondent if his work didn't improve. He said regarding a reference at page 3 paragraph 4 of the Determination that suggests he told the Delegate that the Employer "was constantly threatening him", by "him" he was referring to himself, Gluns, not the Respondent.

With respect to the paint on the Expedition vehicle Mr. Gluns said that there was a problem with the match of paint. He said that when the Respondent was terminated that he helped the Respondent put his tools in his truck and that it was clear within about 15 minutes that the Respondent wasn't coming back. He said that he had never seen or had any reason to believe that the Respondent had consumed marijuana or was under the influence of marijuana on the Employer's premises but on occasion he did smell marijuana in the shop. He said that he didn't know if that was the Respondent or that it may have been people who came to visit the Appellant.

ANALYSIS

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

> ***Section 63***
>
> *(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 1 additional week's wages for each additional year of employment, to a maximum of 8 week's wages.*
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *a) is given written notice of termination as follows:*
> *i) one week's notice after 3 consecutive months of employment;*
> *ii) two weeks' notice after 12 consecutive months of employment;*
> *iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
>
> *b) is given a combination of notice and money equivalent to the amount the Employer is liable to pay, or*
>
> *c) terminates the employment, retires from employment, or is dismissed for just cause.*

Thus, section 63 (3)(c) provides that an Employer may avoid liability for compensation or notice for length of service if the Employee is dismissed for just cause.

In the case of *Silverline Security Locksmith Ltd.*, BCEST #D207/96, this Tribunal delineated a four part test for determining whether just cause exists or not. In that case it was said as follows:

> Paragraph 11. The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
>
> Paragraph 12. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an Employer must be able to demonstrate "just cause" by proving that:

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

Paragraph 15. The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally 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.

While it is preferable (because it is easier to prove) that a warning be in writing, it is not required: Re: *Beaver Landscapes Ltd.*, BCEST #D035/98 (Peterson, Adjudicator). As stated in *Employment Standards in British Columbia Annotated Legislation and Commentary*, the Continuing Legal Education Society of British Columbia, 2000, at page 8-31 "The *Act* does not require that warnings be in writing. Nevertheless, from an evidentiary standpoint, if the warnings are in writing it is obviously easier for an employer to prove the circumstances of the warning and the consequences of repeating the conduct.": Re: *Paul Creek Slicing Ltd.,* BCEST #D132/99 (Peterson, Adjudicator).

In the present case, the Appellant has not demonstrated that reasonable standards of performance were set and communicated to the Employee and that, if those standards were not met, the Employee was warned clearly that his continued employment was in jeopardy. The Employee denied that such a clear and unequivocal warning was given to him. In responding to a question put to counsel for the Appellant in his closing submissions, it was acknowledged that there is no evidence the Respondent was told what he had to do to improve the quality of his work and that he'd be terminated if he didn't bring up the standard of the quality of his work. I cannot find an error in the Determination in the finding that no such warning was given.

Regarding the consumption of marijuana, there is nothing further on appeal that adds to the Appellant's assertion and the Respondent's denial of this during the investigation. There is no evidence that establishes on a balance of probabilities that the Respondent used or was under the influence of marijuana while on the job. Also, whatever belief the Appellant had of the Respondent using marijuana, no action was taken at the time. The Appellant's further belief that the Respondent removed (indeed stole) other tools does not establish this was done. Assertions in the face of denials without a single piece of corroborating evidence do not establish the Respondent committed these acts. As no policy was communicated to the Respondent that removal of shop tools for personal use would be grounds for dismissal, the use of the reciprocal saw for 2 weeks does not, in and of itself, amount to just cause.

I am satisfied that the ROE of September 14, 2001 indicating "shortage of work" as the reason for issuing the ROE was done in error. I am also satisfied that there were deficiencies in the quality of the Respondent's painting, time to perform work, and completion of documents required for the job. However, the Appellant has failed to demonstrate on a balance of probabilities that the Employee committed fundamental breaches of the employment relationship such as criminal acts which would amount to just cause in and of themselves or that the Respondent was clearly warned that he would be dismissed if he didn't bring up the standard of his work.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated November 28, 2002 and filed under number 110-616, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal