

An appeal

- by -

Alum-Tek Industries 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.:** 2001/858

**DATE OF DECISION:** April 4, 2002

## DECISION

### OVERVIEW

This is an appeal based on written submissions by Alum-Tek Industries 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 14, 2001 wherein the delegate ruled that the Appellant had contravened Section 63 of the *Act* by failing to pay compensation for length of service as a result of terminating the Employee without just cause and ordering the Appellant to pay to the Employee \$1,426.76.

### ISSUE

Was the Director’s delegate correct in finding that the Appellant did not have just cause for terminating the Employee and that the Appellant was, therefore, liable to pay compensation for length of service?

### ARGUMENT

#### *The Position of the Appellant*

In an appeal form dated December 4, 2001 and filed with the Tribunal on December 6, 2001 the Appellant appeals the determination alleging an error in the facts and that a different explanation of the facts exists. The Appellant says that this was a “justifiable termination and that no compensation be paid”. In a letter attached to the form of appeal the Appellant recites a history of the Employee with the Appellant business. In summary, it is stated that, after an initial period of employment in which the Employee progressed well, he then became comfortable with his position and started to miss entire days and not call in. He was told that he must obtain better transportation to remedy his absenteeism or he would be let go. The Employee’s attendance then became progressively better and he was ultimately promoted to a position of lead-hand. Subsequent to this, however, there were several requests from other employees not to work under the direction of this Employee such that this Employee was once again warned of his misconduct and that if he did not control his temper he would be let go. There was then a further incident where he allegedly threatened bodily harm to another employee resulting in his being demoted from his lead-hand position and placed on a night shift. There was discussion between management, but it was decided to keep the Employee on. Next another incident occurred where the Employee is alleged to have been found smoking marijuana on the Employer’s premises with two others. The Employer says that all three Employees were terminated with records of employment being issued on that day. Nonetheless, after a meeting was subsequently held with the Employee he was rehired “on the understanding that his attendance and his attitude must be perfected or there will be no other chances”. The Employer notes that the Employee then did well and was in good spirits but that this

lasted only a short time when he began missing work again and not calling in such that his employment was terminated.

### *The Position of the Employee*

The Employee did not file any submission.

### *The Director's Position*

In a written submission dated December 31, 2001 and filed with the Tribunal on the same date the delegate of the Director notes that no new evidence or information has been raised in the appeal that was not considered or addressed in the determination except that the Employer has alleged that the Employee was employed for less than 3 years. The delegate also notes that the delegate obtained records of employment for the Employee which say that on November 16, 2000 the Employee was not fired (on February 26, 2000) as alleged by the Employer and was laid off with reason for separation shown as "shortage of work" and brought back to work on March 13, 2000. The Employee continued to work for over 7 months until October 22, 2000 when he was terminated with the record of employment showing reason for separation as "dismissal".

The delegate goes on to state that the layoff from February 25, 2000 to March 11, 2000 falls under the provisions required of a temporary layoff under the *Act* such that the return to work of the Employee on March 10, 2000 constitutes a continuation of his employment from June 29, 1998 to October 22, 2000.

The delegate goes on to say that the Employer has not shown that the Employee was made aware that he would be terminated if his attendance and attitude did not improve and the Employer's statements show that the behaviour were condoned. The delegate goes on to say that, as mentioned in the determination, the Employee's supervisor advised that no disciplinary procedures were taken with this or other employees for attendance problems. Finally, the delegate says that no evidence was submitted to prove that the Employer had just cause to terminate the Employee and therefore requests that the determination be upheld.

## **THE FACTS**

The Appellant is an aluminum and steel fabricating company, operating in British Columbia and under the jurisdiction of the *Act*. The Employee worked for the Appellant from June 1, 1998 to October 23, 2000 as a welder at the rate of pay of \$16.00 per hour with normal work hours of 8 hours a day, 5 days per week. The Employer took the position at the investigation stage that the Employee was dismissed for just cause. The Employer was represented in the investigation by Clint Powell ("Powell"), a supervisor of the Employee. Jim Butler ("Butler") also appeared for the Employer at the investigation stage.

In the investigation Powell stated that Alum-Tek management had wanted to "get rid of" the Employee on several occasions as he had personality conflicts with various co-workers and due

to perceived abusive absenteeism. Powell stated to the delegate that the Employee had missed a number of days due to sick leave but nothing was done to correct the situation. Powell also mentioned an incident where the Employee was alleged to be smoking marijuana on the Employer's premises but that it was decided to keep him on in spite of this incident. No disciplinary letter was issued for this incident or for any of the personality conflicts with other staff other than demoting the Employee from a supervisory position to regular employee status.

Powell stated in the investigation that the Employee's last day of work was Friday, October 13, 2000. He indicated that the Employee then phoned prior to Monday, October 16, 2000 requesting sick leave due to personal problems and that he would be back to work the following Thursday. Powell states that the Employee did not return to work until the following Monday at which time he was terminated. The delegate confirmed with both Powell and Butler that no written reprimands were ever given to the Employee.

The Employee stated in the investigation that he was fired without warning or notice because he took a week off due to personal problems and that he had requested this leave from Powell who had told him "no problem". The Employee stated to the delegate that he had received no disciplinary letters for anything nor prior warning that this absenteeism was a problem or that it would lead to his termination.

The delegate noted in his investigation he learned from the Employer that absenteeism had been a problem with many employees and the delegate found that the Employer had developed a practice of condoning other employees unannounced absenteeism by booking extra staff to compensate and no written policy was in place, including forewarnings that contravention could lead to termination, which did not support the Employer's claim of just cause.

The delegate found that there was not just cause for terminating the Employee and that Section 63 of the *Act* was contravened. The delegate ordered the Employer to pay compensation for length of service pursuant to Section 63 of the *Act* as follows:

2 weeks compensation for length of service	\$1,280.00
4% Vacation Pay	\$ 51.20
Sub Total	\$1,331.20
Interest	\$ 95.56
TOTAL	\$1,426.76

## ANALYSIS

The onus is on an Appellant to establish on a balance of probabilities an error in the finding of the Delegate.

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:

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.

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.

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.

In this case the allegation of the Employee smoking marijuana on the premises may have amounted to just cause as criminal behaviour, but it is apparent that this incident was not relied upon as grounds for dismissal. It is apparent by the Appellant’s own admission that the Employee continued in his employment after this incident, but other problems of absenteeism continued.

There is a conflict in the evidence of the Employee and the Employer as to whether or not the Employee was given any verbal notice of the absentee problems and that failure to address these concerns would result in termination. I agree with the delegate wherein he stated in his determination that, “the termination of an employee without written working notice for just cause is a serious allegation that requires convincing proof to support one position over another.”

I find that the Appellant has not met the onus upon him to establish on a balance of probabilities an error in the finding of the delegate. There is not compelling evidence, such as a written notice and record that the Employee was warned that his employment was in jeopardy if standards, which had been communicated to him, were not met and that a reasonable period of time was given to him to comply with those standards as required by the *Silverline* case. The allegations of absenteeism do not amount to a fundamental breach of the employment relationship.

**ORDER**

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated November 14, 2001 be confirmed.

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**W. Grant Sheard**  
**Adjudicator**  
**Employment Standards Tribunal**