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 -

Canphil Compressed Air Hydraulics Inc.
(" Canphil ")

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/778

DATE OF DECISION: March 23, 2000

DECISION

OVERVIEW

Canphil Compressed Air Hydraulics Inc. ("Canphil", also, "the employer"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director"). The Determination is dated December 2, 1999, and it orders Canphil to pay David Kuhn compensation for length of service, vacation pay and interest, and to return $59.99 to Kuhn for reason of section 21 of the *Act*, a grand total of $508.81.

There are two conclusions underlying the Determination. The first is that Canphil did not have just cause for the reason that the employee was intoxicated. The second is that the employer did not have just cause for reason of the fact that Kuhn was frequently late for work.

Canphil, on appeal, again claims that the Determination is wrong in that the employee was warned about being late and intoxicated. The employer also raises what appear to be a number of new issues: That Kuhn was insubordinate, dishonest and habitually negligent and careless in his work.

ISSUES TO BE DECIDED

As I understand the employer's appeal, the $59.99 remains an issue. The main issue is, however, the matter of whether the employer did or did not have just cause to terminate the employee. I must decide whether the employer has or has not shown that the Determination must either be varied or cancelled for reason of an error in fact or in law.

An issue which I will not decide is the matter of whether the Determination should be varied so that additional wages are awarded for missed work breaks or for working through scheduled breaks. The issue is not properly before me. Kuhn raises the issue in responding to the employer's appeal. He has not appealed the Determination and the statutory period for an appeal has expired.

FACTS

Kuhn worked as a mechanic for Canphil from May 11, 1998 to November 13, 1998. Even though he had not yet finished his apprenticeship, Kuhn was Canphil's main or primary mechanic and, as such, he was not closely supervised but left to work on his own.

Kuhn took the bus to work. Sometimes he missed a connection and was late for work. According to Canphil, he was late for work 4 times in his first month of the employment. The delegate reviewed payroll records and found that he was late 8 times between the 3rd of June and the 4th of September. The employer, on appeal, alleges that Kuhn was late after the 4th of

September but it does not provide clear evidence of that. Not even the employer claims that Kuhn was late after the 30th of September.

According to Kuhn, he told Eugene Pavon of Canphil that he had to take a bus to work and that he would be late for work on occasion. Kuhn remembers telling Pavon that he was prepared to work later on the days that he was late as a way of making up for being late. I am not shown that Pavon agreed to that, nor am I shown that Kuhn did in fact work late on any of the days that he was late. But it is a point on which nothing turns.

The employer has claimed all along that the employee reported for work in a state of intoxication. Kuhn denies having done so. I find that all the employer does on appeal is claim, once again, that the employee was intoxicated. It has not provided me with proof of that.

According to Canphil, Kuhn was habitually negligent and careless in his work. The employer does provide evidence of damage to vehicles. Kuhn himself accepts that he broke a tie rod and a brake rotor. He broke a brake rotor while heating it so that he could remove it. Kuhn thought that he paid $59.99 towards the cost of buying a new brake rotor for the customer (with the customer picking up 50 percent of the cost and Canphil another $59.99). He now realizes that he was in fact charged only $35 for rotor and that he paid $22.27 for a tie rod.

Canphil complains that Kuhn ordered parts without permission. Only a single instance of that is alleged by the employer.

It is now alleged that Kuhn was insubordinate. According to Canphil, it gave strict instructions that overtime had to be authorised and that absolutely no one was to order parts or tools for private use without prior authorization. It is clear that Kuhn did work overtime. It is not clear that he ordered parts or tools without permission. There are not written warnings, orders and instructions on either point. And I find that Canphil has not in some other way shown that it issued any order or instructions that overtime had to be approved, nor has the employer shown that Kuhn wilfully disregarded an order or instructions on ordering parts and tools.

The employer has never said that it was on discovering dishonesty that it terminated Kuhn. And Canphil is not claiming that there was some sort of attempt to deceive the employer. It raises the issue of dishonesty on the basis of the Determination. Kuhn, on filing his Complaint, made a claim for some overtime pay. On investigating matters, the delegate found that he had been paid for all of his overtime work. According to Canphil, that shows that the claim was false and dishonest. The employer also claims dishonesty for reason of Kuhn's denial of being warned by Pavon and intoxicated. It is for those three reasons, and those alone, that Pavon claims dishonesty.

The Determination draws attention to the employer's need to plainly and clearly warn the employee that his job was in jeopardy for reason of his misconduct and unless his performance improved. Pavon, in appealing the Determination, does nothing more than claim warnings of a sort. There are no written warnings in this case. And I find that Canphil has in no other way shown that Kuhn was actually told that his job was on the line for reason of misconduct or poor performance.

Canphil issued a memo dated January 28, 1998 and in that memo Canphil outlines shop policies and procedures. It begins with the statement that "everything seems to be fine, however, we have some concerns that need to be addressed immediately". The memo then goes on to deal with payroll problems, invoicing problems, the need to gain prior approval before disbursing petty cash, warn of the need to work with extra care, the need to compare delivered parts as so as they come in, and the need to be at work on time and clean the shop every day. The memo does not set out that all overtime is to be authorised, nor does say that employees must first gain Canphil's authorization before ordering parts and tools for personal use. The last paragraph of that document states:

> "We expect a great deal of improvement and productivity and strict implementation of these policies and procedures. Failure to comply and follow these procedures will result to disciplinary action or termination of employment. …"

Kuhn was paid $8.00 an hour at the start of his employment. In August, Canphil agreed to a raise and it began to pay him $10.00 an hour.

ANALYSIS

The Tribunal is not obligated to hold a hearing in each and every appeal. Section 107 of the *Act* allows the Tribunal to decide certain matters on the basis of written submissions.

> **107** Subject to any rules made under section 109 (1) (c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

As matters are presented to the Tribunal in this case, I am satisfied that this is a matter which may be decided on the basis of written submissions.

The Determination does not address claims that Kuhn was insubordinate, dishonest and habitually negligent and careless in his work. That leads me to believe that each of those accusations is newly made but, that not being entirely clear, nothing has been heard from the delegate on that, I have decided to deal with each and every issue raised by the employer. That is done with a view to efficiently bringing closure to the Complaint.

The Order to Pay $59.99

Canphil appears to believe that it is entitled to deduct, from wages, the cost of a vehicle part broken or damaged by an employee during the course of their work. It is not. An employer may only make those deductions which are permitted by the *Act*, and that sort of deduction is not permitted. Moreover, an employer may not require that an employee pay any of its business costs. Canphil has violated both section 21 (1) and (2) of the *Act*.

> 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.

(my emphasis)

Employees naturally make mistakes. They are human beings, not machines. It is plainly unrealistic to expect that an employee will never break a part and never make a mistake, and that is especially true of a mechanic. Mistakes are to an extent inevitable and unavoidable and an employer must allow for a certain number of mistakes. The employer is, for that reason, expected to assume the cost of paying for broken auto and truck parts and similar damage. It is part of being in the car and truck repair business. (The deduction is not permitted under the *Employment Standards Regulation*.)

The employer identifies an error in the Determination: That the amount that Kuhn paid for the brake rotor was not $59.99 but less than that. But it has not shown me that the Determination is actually wrong and in need of variation. As another of the Tribunal's Adjudicators noted in the decision, *Mykonos Taverna operating as the Achillion Restaurant*, BCEST No. D576/98:

> After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Dockers's Pub and Grill*, BCEST No. D511/980. (pages 6-7)

In this case, I am shown that Kuhn claimed $59.99 for a brake rotor as that was his recollection of matters and that Canphil actually did pay that amount towards the part. It cannot be said that the delegate just plucked that figure out of thin air. Moreover, it has come to light on appeal that in fact it is not just one deduction or payment that is contrary to section 21, but at least two, the other being the $22.27 that Kuhn paid towards a tie rod. On that basis one has to wonder if even more deductions or payments were made contrary to the *Act*. I find that Canphil has not shown that the order to pay Kuhn $59.99 is either manifestly unfair or clearly unreasonable.

The Liability to Pay Compensation for Length of Service

Section 63 of the *Act* imposes the liability to pay compensation for length of service. Subsection 63 (3) establishes that the liability may be discharged in certain circumstances.

> **63** (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) 2 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**. (my emphasis)

A single act of misconduct may be of such a serious nature that immediate dismissal is justified. Termination of an person's employment may also be justified for reason of minor misconduct when it is repeated, or for reason of an employee's chronic inability to meet the requirements of a job.

In cases where just cause is alleged for reason of repeated misconduct of a less serious nature, or generally unsatisfactory work, the Tribunal has said [see, for example, *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that in order to show just cause, the employer must show the following:

a) That reasonable standards of performance were established and communicated to the employee;
b) the employee was plainly and clearly warned that his or her employment was in jeopardy unless such standards were met;
c) the employee was given sufficient time to improve; and
d) the employee did not meet those standards.

The Determination is that Canphil was not justified in terminating Kuhn's employment on the basis that he was intoxicated. Canphil, on appeal, alleges once again that Kuhn was intoxicated but it has failed to establish that he was in fact intoxicated, never mind that he went so far as to put the safety of his fellow workers, a customer or the public at risk. As such, I find that the employer has failed to show serious misconduct. He may have smelled of liquor but it does not follow that he was intoxicated. A person may, for example, smell of liquor and yet be legally fit to drive.

I have found that as the facts are presented to me that there is no evidence of insubordination. The employer has not shown me that Kuhn was given a specific order or instructions and that Kuhn wilfully or intentionally disregarded the order or instructions.

Canphil claims dishonesty. But it does not provide evidence which shows that Kuhn acted fraudulently or that he did anything or said anything in an attempt to deceive the employer. It is utter nonsense for the employer to claim that it was entitled to dismiss Kuhn for reason of dishonesty which is after the point of termination. And there is not clear evidence of any dishonesty. It may be only that Kuhn mistakenly believed that he was owed overtime wages. And while he clearly denies that he was warned by Pavon and intoxicated at work, one cannot on that basis leap to the conclusion that the employee was dishonest for, as matters are presented to me, it is not shown that he was in fact warned and/or intoxicated. It is, moreover, conceivable that his denials are for reason of nothing more than an inability to remember being warned or that did not understand that he was being warned.

Kuhn was late for work over and over in the first three months of the employment but rather than terminating him, Canphil gave him a raise. Had it terminated him in the first three months of the employment, it would not have had to pay Kuhn compensation for length of service, whether it gave the employee 'notice', or had just cause, or not. But Canphil did not do that. It condoned the fact that Kuhn had been repeatedly late for work and whatever were his other failings at that point. The employment continued and as it entered four months, Canphil acquired the liability to pay length of service compensation.

Should an employer not have just cause for reason of serious misconduct, as is the case here, an employer may be found to have just cause for reason of minor misconduct, being repeatedly late, that sort of thing. But it must show that the employee failed to meet some reasonable standard(s) of work performance, even though he or she had been given plain, clear warning that his or her employment was in jeopardy for their failure to meet the standard(s), and even though he or she was given sufficient time to improve. Canphil has not shown that to me. As such, I am confirming the order to pay compensation for length of service.

There is, in this case, neither reason to cancel, nor a reason to vary the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 2, 1999 be confirmed in the amount of $508.81 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal