An appeal

- by -

M & H Logging 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.:	2001/881
DATE OF HEARING:	April 3, 2002
DATE OF DECISION:	April 8, 2002

DECISION

APPEARANCES:

Clayton Mattson	on behalf of the Appellant Employer
Doris Prytula	on behalf of the Employee
Joe LeBlanc	on behalf of the Director

OVERVIEW

This is an appeal based on an oral hearing and written submissions by M & H Logging 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 December 3, 2001 wherein the Director's 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 sufficient notice and ordering the Appellant to pay to the Employee $7,182.12 inclusive of interest.

ISSUE

Was the Director's delegate correct in finding that the Appellant had disciplined the Employee in the form of a two week suspension such that the Employer had foregone any right which may otherwise have existed to dismiss the Employee for just cause?

ARGUMENT

The Position of the Appellant

In an appeal form dated December 21, 2001 and filed with the Tribunal on December 24, 2001 the Appellant appeals the Determination on the basis that there was an error in the facts found, there is a different explanation of the facts, and that there were other facts which weren't considered during the investigation. The Appellant expanded on these reasons in a further three page written summary filed with the appeal. The Appellant seeks to have the Determination cancelled.

In the written submission with the appeal form, the Appellant says that the Employee's performance progressively deteriorated over the space of two years to the point where he was endangering the lives and safety of others and that he was given numerous verbal warnings, including a major demotion, before he was finally terminated. The Appellant alleges that the Employee had a significant drinking problem which affected his performance at work. The Appellant says that the delegate erred in finding that the Employee was "disciplined" by being sent home for two weeks immediately prior to his termination. He says "the real fact is that he was paid to stay at home in order to consider his situation." The Appellant further objects to the fact that letters submitted by the Appellant to the delegate from various other employees relating to the Employee's performance were found by the delegate to not be of assistance.

The Appellant further objects that this matter was initially investigated by another employee of the Branch who indicated that the Employee was not entitled to compensation.

The Appellant reiterated these submissions at the oral hearing..

The Employee's Position

In a written submission dated January 21, 2002 the Employee, George Thierbach (the "Employee") provided a copy of the Record of Employment ("ROE") dated November 10, 2000 completed by the Appellant with respect to the Employee's termination, a hand written fax letter from the Appellant apparently sent by facsimile on January 15, 2001 to Linda Nass at the Employment Standards Branch. In the written submission the Employee denies that he was ever given any warnings, verbal or written, prior to his dismissal and that there were never any threats of "or else". He further alleges that he did not receive a demotion prior to his dismissal. Rather, he says that he asked for a demotion. He further alleges that the Appellant gave him two weeks paid time to come up with a good reason that he should continue in his employment and that when he contacted the Appellant within that two week period the Appellant told him that they had decided not to allow him to fulfill that request. The Employee takes the position that the determination was correct and that it should be upheld.

At the oral hearing, Ms. Doris Prytula (sister of the Employee), appeared on behalf of the Employee and reiterated the submissions which had been made in writing by the Employee. The Employee attended the hearing but did not testify or call any other evidence.

The Director's Position

In a written submission dated January 18, 2002 and filed with the Tribunal on the same date the Director's delegate supports the determination on four grounds. The delegate submits that, first of all, this was a case of progressive deterioration of job performance and progressive discipline and that, as the Appellant has not provided any evidence to establish any prior warnings were given and the Employee has denied he was ever warned, the Employer fails to meet the onus upon it to demonstrate that the requirements of progressive discipline were met to justify dismissal. Secondly, the delegate says that the "two weeks at home with pay" prior to the termination was a suspension and, as the Appellant failed to provide any evidence of any further problems with the Employee's performance which either came to light during that two week period or further problems with his performance during that two week period, there was no cause to further discipline the Employee or to "convert the two week paid holiday into a permanent unpaid holiday (termination)".

Thirdly, the delegate states that the "letters of explanation" by other employees with respect to poor job performance of the Employee were not viewed to be of much probative value as they arrived almost six months after the termination and the Appellant must have solicited them. Fourth, the delegate says that although, the matter was initially investigated by another employee of the Branch who indicated that the Employee was not entitled to any compensation, on further investigation this delegate rendered the actual Determination based on all the information received.

The Director's delegate attended the oral hearing and reiterated the written submissions made to the effect that the Determination should be upheld.

THE FACTS

The Appellant operates a specialized logging operation in the Invermere, B.C. area. The Employee worked for the Appellant from October 1992 to November 10, 2000 in a variety of positions from faller to crew foreman.

In mid February, 2000 the Employee was demoted to general faller. The Appellant says that this was a demotion imposed as disciplinary action for poor work performance including coming to work hungover, losing his temper and screaming at workers, sleeping in the crewcab, and general difficulties relating to alcohol abuse. Mr. Mattson and a number of other employees of the Appellant gave evidence confirming substandard performance on the job. Mr. Mattson further gave evidence under oath at the oral hearing that this demotion was disciplinary action. Nothing was ever put in writing with respect to this demotion. Although the Employee says in his written submissions that he took this demotion voluntarily, I prefer the sworn evidence of Mr. Mattson in regard and find that this was a demotion imposed for poor performance.

The Appellant called a number of witnesses at the oral hearing including a director of the Appellant company, Clayton Mattson, and a number of employees including Dave Ruault, Ken Hatt, Robert Hemmelgarn, Akie Pronk, and Sean Todd. Under oath or solemn affirmation all of those witness adopted written letters they had written and the Appellant had filed essentially confirming the Appellant's assertion of poor job performance related to alcohol abuse which translated in to verbal abuse of other employees, absenteeism, and conduct which could have endangered the Employee and other employees. They all indicated the Appellant is a good and fair employer.

The Appellant says that the Employee was verbally warned that if his performance did not improve he would be terminated and that, when his performance did not improve, he was terminated for just cause on about November 10, 2000. In the ROE the Appellant wrote under comments, "Last day worked was October 30, 2000. Paid to November 10, 2000 to come up with a good reason why I should keep him employed. Agreed in the end to seek employment elsewhere as it would not work out if he were to come back." That is dated November 10, 2000. In a written submission filed with the appeal form dated December 21, 2001 the Appellant says "the real fact is that he was paid to stay at home in order to consider his situation." Further, in a letter to Linda Naso, then of the Employment Standards Branch, the Appellant wrote "I phoned him that evening after giving it a lot more thought, and told him to start looking for another job and that I would pay him for two more weeks. I explained again that things just weren't working out but, if he could come up with a reason why I should keep him on to come and talk to me. At the end of two weeks he told me he would like to stay on. But by then I told him I didn't think things would work out and that we should go our separate ways….".

In his written submissions, the Employee denies that he was ever warned verbally or in writing or that his job was in jeopardy due to poor work performance, but he did not testify at the oral hearing.

The delegate found in the Determination of December 3, 2001 that the Appellant suspended the Employee and, as no further evidence of other problems at work came to light after the suspension, this was disciplinary action other than termination such that the Employer had foregone any right to dismiss for just cause which may have otherwise existed. The delegate found that the Employee was entitled to eight weeks compensation for length of service and, after deducting the amount of pay for the two week

suspension, awarded $6,720.00 for compensation for length of service plus $462.12 interest for a total amount due to the Employee of $7,182.12.

ANALYSIS

The onus is on the 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:
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> 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
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> a) is given written notice of termination as follows:
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> i) one week's notice after 3 consecutive months of employment;
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> 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:
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> 1) reasonable standards of performance have been set and communicated to the Employee;
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> 2) the Employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
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> 3) a reasonable period of time was given to the Employee to meet such standards; and
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> 4) the Employee did not meet those standards.
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> 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, although Mr. Mattson testified under oath on behalf of the Appellant and the Employee did not testify with respect to what was said in any discussions relating to warnings and the final termination, Mr. Mattson was asked in cross-examination if he'd given the Employee two weeks to think about a good reason he should be kept on and he responded "that was the latter part of it, yes". Further, in earlier written communications by the Appellant, the Appellant himself acknowledged that the

Employee was sent home with two weeks pay being told to come up with a good reason why he should be kept employed. This was recorded in the ROE of November 10, 2000. Also, in the letter to Linda Naso of January 15, 2001 the Appellant acknowledged that near the end of this two week period, after being told by the Employee that he would like to stay on, the Appellant said, "but by then I told him I didn't think things would work out and that we should go our separate ways…". Lastly, in the written submission filed with the appeal on December 21, 2001 the Appellant said "the real fact is that he was paid to stay home in order to consider his situation."

I cannot find that the Director's delegate erred in finding that this two week period was discipline in the form of a suspension. Although the Appellant may well have had just cause to dismiss prior to this two week suspension being imposed, I agree with the Determination wherein the delegate quotes from the text, The Law of Dismissal in Canada, Second Edition by Howard Levitt at page 218 as follows:

> "If an employer, having learned of an employee's misconduct, decides to take some disciplinary action, other than discharge and communicates that decision to the employee it cannot then change it's mind and terminate the employee for the same misconduct."

As the delegate said in his Determination, "so there was no justification as far as I can see to administer any further discipline. Thus this made the termination of the claimant without just cause."

Notwithstanding the Appellant's good reputation with its other employees and its efforts to deal fairly with this Employee, the Appellant's own written submissions and comments after the fact of this dismissal do not support a contention that the Employee was warned clearly that his continued employment was in jeopardy if certain standards were not met, that a reasonable time was given to meet those standards, and that they were still not met. The Appellant's own evidence indicates that, at best, an equivocal statement was made to the Employee which was clearly open to an interpretation that he may be terminated unless a good reason was provided that he shouldn't be.

The Appellant failed to meet the onus upon it to demonstrate an error in the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated December 3, 2001 and filed under number 104-995, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal