Employment Standards TRIBUNAL

An appeal

- by -

Donald Brydon
Operating as Victory Square Kitchen and Gifts
("Brydon")

- 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: Cindy J. Lombard

FILE No.: 2000/670

DATE OF HEARING: February 23, 2001

DATE OF DECISION: March 12, 2001

DECISION

APPEARANCES

The Appellant/Employer, Don Brydon (operating as Victoria Square Kitchen & Gift) appeared on his own behalf ("Brydon").

No one appeared on behalf of the Respondent employees, Sheila J. Krischke ("Krischke") and Mari-Anne Warner ("Warner").

OVERVIEW

This is an appeal by the employer Brydon pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination which was issued September 8, 2000, finding that the employer Brydon had dismissed them without just cause and without reasonable notice in lieu of notice as required by Section 63 of the *Act* and were therefore entitled to compensation in lieu of notice plus vacation pay and interest determined by the Delegate of the Director as follows:

Krischke

Average hours worked per week	15.31	
Hourly wage	$7.15	
Average weekly earnings 15.31 x $7.15 =	$109.965	
Two weeks notice x $109.965 =		$218.93
Vacation pay 4%		$ 8.76
		$227.69
Interest pursuant to S. 88 of the *Act*		$ 10.87
Due to Krischke		$238.56

Warner

Average hours worked per week	12.5	
Hourly wage	$7.15	
Average weekly earnings 12.5 x 7.15 =	$89.375	
Two weeks notice x $89.375 =		$185.90
Vacation pay 4%		$ 8.84
Due to Warner		$194.74

ISSUES TO BE DECIDED

1) Is the employer Brydon liable to pay compensation in lieu of reasonable notice or is the employer excused from liability pursuant to Section 63(3)(c) of the *Act* on the grounds that the employer had just cause;

2) If the employer did not have just cause and the employees, Krischke and Warner, are due reasonable notice, did the Delegate of the director correctly determine their average weekly wage according to Section 63(4) of the *Act*?

The onus is on the Appellant Brydon to show that the Determination was wrong.

FACTS AND ANALYSIS

Krischke was employed by Brydon as a salesclerk in his store located in Penticton, British Columbia, from June, 1997, to December 29, 1999, at a wage of $7.15 per hour.

Warner was also employed as a sales clerk from November 1997, until December 30, 1999, at an hourly wage of $7.15 per hour.

Both were given written documents entitled "Notice of Lay Off" and signed by Brydon. Both notices read as follows:

> "Please be advised as of January 22, 2000, your services with Victoria Square Kitchen & Gift will no longer be required.
>
> Sales have dropped below the level at which we can maintain a large part time staff. Preference has been given to employees that have demonstrated the ability to work any shifts during normal mall operating hours including holiday periods.
>
> Please consider this written notice of permanent layoff, without possibility of recall.
>
> Signed "Don Brydon""

Neither was ever called back to work.

First Issue

Is The Employer Brydon Liable To Pay Compensation In Lieu Of Reasonable Notice Or Is The Employer Excused From Liability Pursuant To Section 63(3)(C) Of The Act On The Grounds That The Employer Had Just Cause;

Krischke and Warner advised the Delegate of the Director that difficulties began when the manager of the Penticton store in which they both worked resigned and was replaced with a manager from the Kelowna store, Carol Kellan ("Kellan").

Kellan told the Delegate that she had to commute from Kelowna and was therefore not readily available if an employee did not show up for work. She therefore handed out forms in November 1999 to all employees asking them to indicate in writing the hours they were available.

Warner advised the delegate that she verbally informed Kellan of the hours that she was available to work in December 1999 and January 2000.

Krischke says that she did fill out the form for December 1999 but she did not do so for January 2000.

The Lay Off Notices were dated January 7, 2000.

Brydon says that the refusal of Warner and Krischke constituted just cause for their dismissal.

The onus is on the employer Brydon to establish on a balance of probabilities that the employees conduct justified dismissal without notice or compensation in lieu of as required by Section 63 of the *Act*.

The Tribunal finds that that onus has not been discharged based on the following evidence:

1. The Notices of Lay Off dated January 7, 2000, give as a reason only a slow down in sales;

2. The allegation of insubordination for failure to complete the forms came only after Warner and Krischke made their complaint to the Director of Employment Standards.

Furthermore, a single act of misconduct or insubordination can constitute just cause only where the *Act* is willfully deliberate and of such consequence as to repudiate the employer/employee relationship. In the absence of such a fundamental breach of the employment relationship, just cause is proved only where:

1. reasonable standards of performance have been set and communicated to the employee;

2. the employee was clearly warned that his or her continued employment was in jeopardy if such standards are not met;

3. a reasonable period of time was given to the employee to meet those standards.

The facts here do not meet this test. The failure of Warner and Krischke to fill out the forms were not of such a serious and continuing nature to repudiate the employer/employee contract. They were not warned that a refusal would jeopardize their employment and as such given no opportunity to treat the form seriously.

Second Issue

If The Employer Did Not Have Just Cause And The Employees, Krischke And Warner, Are Due Reasonable Notice, Did The Delegate Of The Director Correctly Determine Their Average Weekly Wage According To Section 63(4) Of The Act?

Pursuant to Section 63(2)(9) of the *Act*, the employer appellant is liable, as found by the Delegate of the Director, to pay two weeks wages in lieu of notice to Warner and Krischke.

Section 63(4) of the *Act* sets out the formula for calculating an employee's weekly wage as follows:

> *63(4) The amount the employer to pay becomes payable on termination of the employment and is calculated by*
>
> *(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work.*
>
> *(b) dividing the total by 8, and*
>
> *(c) multiplying the result by the number of weeks wages the employer is liable to pay.*
>
> (Emphasis added.)

The Delegate of the Director reviewed payroll records and calculated Warner's average weekly wage to be $89.375 based on 12.5 hours per week at $7.15 per hour and Krischke's weekly wage to be $109.465 based on 15.31 hours per week at a hourly rate of $7.15.

The appellant produced no records to show that the Delegate of the Director made any error in her calculation of the employee's weekly earnings.

In summary, the appeal is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to:

1) Warner be confirmed as issued in the amount of $194.74 plus whatever further interest may have accrued pursuant to Section 88 of the *Act* since its issue.

2) With respect to Krischke be confirmed as issued in the amount of $238.56 plus whatever further interest may have accrued pursuant to Section 88 of the *Act* since its issue.

Cindy J. Lombard

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal