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 -

James Stephens –and- Chamberlain Spring Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alison H. Narod

FILE No.: 1999/709

DATE OF DECISION: March 17, 2000

DECISION

OVERVIEW

The Appellant, James Stephens, appeals a Determination of a delegate of the Director of Employment Standards dated October 29, 1999 in which the delegate determined that Mr. Stephens was not entitled to termination pay pursuant to Section 63(2) of the *Employment Standards Act* (the "Act") because he had been terminated with just cause.

The Appellant is in his fifties. He was employed by the Employer from April 13, 1993 to March 25, 1999 as a forklift operator. His employment was terminated by the Employer on March 26,1999 as a result of incidents that occurred on March 24th and 25th, 1999.

The issue is whether or not the Appellant was entitled to termination pay on the basis that his employment was terminated without just cause.

The Appellant gave evidence on his own behalf. Ray Webber, General Manager, and Mark Dueckman, the Appellant's Supervisor, gave evidence on behalf of the Employer.

Prior to March 24, 1999, the Appellant had been having problems with his forklift. In particular, it had been overheating and breaking down. Despite the breakdowns, he kept receiving requests from co-workers to perform work for which he required the forklift. In the morning of March 24, 1999, the forklift problems continued, and the forklift again became overheated and broke down. The Appellant says that he was feeling frustrated, stressed and angry. He decided to leave his machine to go to the office, and get some coffee and calm down. The Appellant says that the General Manager, Ray Webber, had previously told staff that when they are upset or angry, they can go for coffee, and try to calm down. Mr. Webber agreed with this.

On his way to the office, the Appellant passed by two co-workers and his Supervisor, Mr. Dueckman. Mr. Webber, who was also Mr. Dueckman's superior, was not on the premises on March 24th and 25th, 1999.

Mr. Dueckman recalled that as the Appellant passed by he heard the Appellant make disparaging comments about the Company and the forklift, punctuated by expletives. As the Appellant did so, he was looking at Mr. Dueckman and, as a result, Mr. Dueckman concluded that the Appellant was angry with him. Mr. Dueckman called to the Appellant, raising his voice for the only time during the series of incidents, and suggested that the Appellant should not talk to him like that. He also suggested that the Appellant could have a talk with him. The Appellant agreed and they went to the office to talk.

The Appellant's recollection was that as he walked passed Mr. Dueckman, Mr. Dueckman asked him to come back and talk to him like a man instead of whining like a baby. In a letter of apology written shortly afterwards, the Appellant stated that Mr. Dueckman yelled at him to come back and talk to him like a man, not storm off like a child. He noted that he felt belittled in front of the crew by these comments. The Appellant asked if Mr. Dueckman wanted to talk and, together, they went to Mr. Dueckman's office.

Mr. Dueckman said that while they walked to his office he told the Appellant that he did not appreciate being sworn at, that the Appellant clarified that he was not directing his comments at Mr. Dueckman, and Mr. Dueckman accepted this and let it drop.

Mr. Dueckman said that once they were in the office, he let the Appellant vent. The Appellant complained about the forklift and that the Company had not replaced it, again punctuating his comments with expletives. Mr. Dueckman explained the Company's reasons for not replacing the forklift at that time and told the Appellant that a man of 50 years old ought to be looking at this differently. If he got angry, he should get over it. That was why he had taken the Appellant to the office and had let him vent.

The Appellant's recollection was that Mr. Dueckman told him a 50 year old should not talk like that. The Appellant responded by saying he used to work on the waterfront where this was how they talked.

The Appellant then said he was going to have coffee until someone came to fix the forklift (describing it with expletives). Mr. Dueckman told him that it was not time for coffee and told him to grab a broom and clean up instead as it was not coffee time. At this point, the Appellant said "You've got guys standing around picking their asses and you haven't got a hope in hell of getting me to pick up a broom." The Appellant then went to the office and told his wife, who was also an employee of the Employer, and the Sales Manager that he was going home. Mr. Dueckman followed the Appellant as he walked to the time clock and punched out. Mr. Dueckman asked him if he was punching out and leaving and the Appellant said, "Yes". He did not order the Appellant to stay. After the Appellant left the premises, Mr. Dueckman removed his time card from the time clock because he thought the Appellant had quit. He acknowledged that the Appellant had not said he was quitting.

The Appellant did not deny behaving in the manner described. He said that he behaved that way because he was stressed by the demands of his job and the forklift breakdowns, and he lost his temper and broke down. He thought it was best that he leave because of the condition he was in. He went to see his doctor the same day. His blood pressure was high and he was still upset. The doctor prescribed tranquilizers for him, calmed him down, and told him not to return to work.

The Appellant said that he had seen at least two other co-workers get angry and frustrated and leave the premises only to return the next day. They had not been terminated. Mr. Webber denied this. He said that the first person mentioned was verbally disciplined for throwing tools down and swearing, but he had not left the premises. He did not recall the second one leaving, at all.

After leaving work on March 24, 1999, the Appellant commenced writing an apology letter which he finished later and handed in to his Employer in the morning of March 26, 1999, before the Employer made its decision to terminate his employment.

In the evening of March 24, 1999, the Appellant spoke with his wife, who has been a bookkeeper working for the General Manager for many years. She convinced him to go to work the next day

because she was aware there was a truckload arriving and the Employer would need his services.

Although the Appellant did not feel well the next morning and despite his doctor's advice not to work, he went in to work the next morning. When he arrived, he went to punch in, but could not find his time card. Nonetheless, he commenced working.

According to the Appellant, Mr. Dueckman came to see him. The Appellant said "Good Morning". Mr. Dueckman replied by saying "What's good about it?" Mr. Dueckman said he did not recall this part of the exchange but acknowledges that it could have happened. The Appellant's recollection was that Mr. Dueckman then asked him why he was there and told him he was not sure he wanted the Appellant there. The Appellant told Mr. Dueckman he was here to do his job in good faith, although he was sick and did not feel like being there.

Mr. Dueckman recalled saying, "Did I miss something yesterday". The Appellant asked what he meant. Mr. Dueckman replied "Did you not punch your time card and leave after refusing to work?" The Appellant answered affirmatively. Mr. Dueckman told the Appellant that he did not know what to do with him. He said the Appellant told him not to play mind games (using expletives) and Mr. Dueckman denied doing so. The Appellant then said, "You better making up your f___ing mind now" about whether or not he was to stay or leave. Mr. Dueckman told the Appellant that he gave him no choice and then waved his hand as an indication that he was to leave. The Appellant told Mr. Dueckman that Mr. Webber hired him and Mr. Webber should be the one to fire him.

Mr. Dueckman said that he did not, in indicating to the Appellant that he should leave, fire the Appellant. The Appellant, however, took this as a dismissal. He did not recall everything that happened in the meeting, but acknowledged that he had used foul language and said that they had ended up shouting. Mr. Dueckman denies shouting.

Afterwards, the Appellant went to the office and insisted that a notation be made on his time card that he had come to work in good faith on that day. He then left the premises.

Mr. Webber returned to work on March 25th, 1999 after these events had transpired. He spoke to the individuals who had been involved in the events, but not to the Appellant. He was concerned that the Appellant had refused to do work, as directed, that he had sworn at his superior, and that he had left the premises. He concluded this could not continue. Mr. Webber acknowledged that he had the Appellant's letter of apology prior to making his decision to terminate his employment. He also acknowledged that there was no discipline on the Appellant's file.

With respect to the Appellant's prior conduct, the Appellant acknowledged that approximately 5 years before, he had yelled at the Shop Foreman in an outburst he described as somewhat similar to the March outbursts. However, he did not leave the premises and he was not disciplined for this outburst. In my view, this is some evidence of condonation.

The Appellant also acknowledged that approximately 2 years before, he had been in the Employer's lunchroom, on the second story of the Employer's building, when a broken window fell on his head. He took the window and threw it outside to the ground from where he stood on the second floor. Mr. Dueckman said that he had a disciplinary discussion with the Appellant about this in his office. The Appellant acknowledged that Mr. Dueckman had told him that he did not appreciate his throwing the Employer's equipment around, but said that was the extent of the discussion, and that this discussion was not disciplinary. In my view, this conduct is of a different nature than the conduct for which the Appellant was terminated. It cannot therefore be relied on as evidence of a prior related offence.

Mr. Webber said that he had other discussions with the Appellant about being the type of individual who allows small things to build up until he finally explodes and then confronts someone. However, he said that the Appellant had not had one of these "explosions" while employed by the Employer.

On March 26, 1999, Mr. Webber issued a letter of termination which contained the following comments:

> This is the direct result of the way in which you conducted yourself with Mark on March 24th when the forklift was in need of repair. Your insolent treatment of Mark as a Supervisor is unacceptable behaviour (swearing, display of anger and refusal to do what he asked you to do, sweep the floor, while you waited for the forklift to be repaired). You punched out a (sic) 7:31 AM and left your job. On March 25, 1999 you came to work in the morning and when confronted by Mark in Vince's office you again responded by swearing and anger and left again.

As noted above, the reason why the Appellant left on March 25, 1999 was at Mr. Dueckman's direction, but the letter of termination does not reflect this.

At the hearing, Mr. Webber said that the Appellant was terminated for: profanity, abuse of his foreman twice and refusal to sweep the floor as directed. He said the Employer could not have employees refuse to do work as directed or this would result in anarchy.

The Appellant acknowledged having lost his temper but attributed it to the job-related stress he was under and said that he was emotionally broken down. He pointed out that he had never left work before and had never previously refused to do a job. He supplied a letter from his doctor confirming that when he was seen on March 24, 1999 he had high blood pressure, was quite agitated and anxious, was put on tranquilizers and was unable to work for a couple of months afterwards. He had not previously had problems of his sort and had not previously had to be on medication and off work.

The delegate agreed with the Appellant that he had been in a stressful situation at work. However, he concluded that the Appellant was not behaving calmly and was swearing "most of the time" during the incidents of March 24th and 25th, 1999. The crucial issue was whether there was wilful misconduct on the part of the Appellant. The Appellant was told to sweep the floor while waiting for the forklift to be fixed, ignored the instruction and left the workplace.

This, the delegate found, was an obvious wilful act of disobedience. It constituted just cause for summary dismissal. The delegate said that the Appellant's stressed state of mind had already been allowed for in considering his improper behaviour towards his supervisor. He stated, "the ultimate factor in deciding is that he wilfully disobeyed a reasonable instruction from the Employer and abandoned his job". On the second morning, the Appellant continued to challenge his Supervisor's position. This was again wilful misconduct. He walked off and abandoned his job again. The fact that the Appellant saw his doctor on March 24th did not relieve him of his irresponsible behaviour. It corroborated his lack of cooperation with the Employer. The delegate concluded that it was appropriate for the Employer to terminate his employment soon after the incidents had happened. Therefore, the Employer terminated the Appellant for just cause and was not liable for termination pay.

The delegate's determination discloses that he concluded that the Appellant abandoned his job twice. However, the evidence before me is that he left work the second time because he was directed to do so by Mr. Dueckman.

ANALYSIS AND REASONS

It is clear from the circumstances that the reasons for the Employer's termination of the Appellant were those set out in the termination letter of March 26, 1999. The Appellant was terminated because of the following: on March 24, 1999, he had a verbal altercation with his supervisor in which he used profane language, he refused to comply with his supervisor's direction to sweep the floor while he waited for the forklift to be repaired and he left the work site without permission; and on March 25, 1999, he had a second verbal altercation with his supervisor in which he used profane language and left the work site without permission.

The evidence clearly establishes that the Appellant did not walk off the work site on March 25th of his own volition, but was directed by his supervisor to leave that day. I therefore cannot consider this an act of insubordination or misconduct.

With respect to the balance of the alleged acts of misconduct, I have considered the jurisprudence respecting wilful disobedience. The following summary of the law regarding "Wilful Disobedience", found in Levitt on The Law of Dismissal in Canada, Second Edition, at pages 142 to 148 is of assistance:

> In order for wilful disobedience to constitute cause for discharge, the following elements must exist:
>
> > (1) The order must be either clear and specific or must be a breach of policies and procedures well known by the employee….
> >
> > Orders need not be openly refused; ignoring directives is sufficient.
> >
> > (2) The order must be in the scope of the employees' job duties….

(3) The order must be reasonable and lawful.

(4) The disobedience must be both deliberate and intentional.

(5) The order must involve some matter of importance.

This requirement allows some discretion for the trial judge to make a determination as to the significance of the act of disobedience….

(6) Unless the act of disobedience is particularly serious it has to be repeated, rather than be an isolated act of disobedience, in order to constitute cause.

Accordingly, repeated disobedience to minor orders can be cause for dismissal. An employee can be terminated for one act of disobedience only if that act can be interpreted as a repudiation of one of the essential terms of the employment.

The criteria in which one act of disobedience will be cause for dismissal has been described as follows:

> I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and a serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that you find in the passages I have read that the disobedience at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions. [*Laws v. London Chronicle,* [1959] 1 W.L.R. 698 at p. 701, [1959] 2 All E R 285 at p. 288].

The plaintiff's deliberately retaining too many men in violation of both the collective agreement and continuing orders and his refusal to complete a mining infraction report occurred so close in time as to be a single incident rather than repeated misconduct. The court found the misconduct not to be sufficiently serious, given that it was viewed as being one incident, as to justify discharge without warning.

(7) It must be shown that as a result of the disobedience the relationship was so damaged that it could not be carried on….

(8) It must be shown that the employee understood or should have understood that he ran the risk of being terminated for disregarding the order.

(9) If there is a reasonable explanation for the disobedience, it will not be cause for discharge….

An excuse or explanation for disobedience will, however, be scrutinized very carefully.

> An excuse which is offered after the fact to disguise what is actually an act of defiance is not a genuine excuse and will be rejected. However, an excuse personal to the employee which has some credibility will not be rejected as unreasonable. Regard must be had to the surrounding circumstances in every case. In the instant case the plaintiff was ordered to work overtime when he was emotionally upset. The ultimatum was delivered at the close of business on a day when he had made plans to accompany his wife to an appointment with her doctor. That excuse was given substance by the evidence that he did in fact go to the doctor's office that evening. Similarly, an employee's failure to understand instructions, will cure his alleged disobedience.

(10) There will be more latitude shown to long-service employees.

The B.C. Court of Appeal considered the law regarding wilful disobedience in *Stein v. British Columbia (Housing Management Commission)* 65 B.C.L.R. (2d) 181. In that case, Madam Justice Southin approved the law as set out in *Laws v. London Chronicle, supra.* She noted that the *Laws* case was itself a single instance case whereas as in the case before the Court of Appeal, the allegation was that the employee had engaged in a continuing course of conduct and a number of breaches of duty. Southin J. stated that the essential principle applies in both cases. In particular, an employee will not be found to have engaged in an act of disobedience where he refuses to do something not within the ambit of his job or where he ignores a direction to do something of little or no importance. Southin J. stated:

> I begin with a proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee is hired. It is not for the employee nor for the Court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

> It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it."
>
> But it may be an answer, on the question of whether disobedience is repudiatory, that the employer so conducted himself that the reasonable man would included, and the employee did, in fact, conclude, that the employer considered the rule of little or no importance. For instance, if an employer had a rule that equipment was to covered at the end of the day and the rule was ignored by the employees to the knowledge of the employer, he could hardly come to work one morning and discharge the lot for failing to obey the rule.

In the instance case, I find the events were so close in time that they are a single incident rather than repeated ones. Therefore, to justify summary dismissal without warning it must be of such a nature that it shows the employee is repudiating his contract of employment or one of its essential conditions. For instance, the Appellant must have refused an order to do something of importance that was within the scope of his duties.

I find that the Appellant's refusal to sweep the floor as directed by his supervisor was not an act of wilful disobedience constituting cause for discharge. Firstly, there is no evidence that sweeping the floor was in the scope of the Appellant's job duties as a fork lift driver. Rather, he was unable to perform his duties as a fork lift driver because the fork lift had broken down and his supervisor was merely finding work for him to do as an alternative to allowing the Appellant to go for a coffee so that he could calm down from his upset state in conformity with the Employer's accepted practice. Secondly, the supervisor's order did not involve a matter of importance. Sweeping the floor was not a matter which could be construed in the circumstances as being a matter of importance, given that it was not only not within the Appellant's job duties, but also it was something that the Employer only asked unoccupied employees to do on a sporadic and irregular basis.

The surrounding circumstances indicate that the direction to sweep the floor was given to the Appellant at a time when he was clearly emotionally upset. The Supervisor acknowledged in evidence that he invited the Appellant to his office because he was upset, in order to allow him to "vent". In the circumstances, the Appellant was given an order to do something not within his job duties rather than allowing him to calm down according to the accepted practice at a time when the supervisor knew that the Appellant was upset and this order exacerbated the Appellant's upset.

In addition to the Appellant's refusal to sweep the floor, he was verbally abusive of this supervisor. As noted, the evidence indicates that the Appellant was upset when he encountered his supervisor and was on his way to take a coffee break and try to calm himself down, as his Employer had advised staff to do when they were upset or angry. The supervisor observed that he was upset and acted in a provocative manner by yelling at him to come over and talk to him like a man, instead of whining like a baby and in so doing belittling him in front of co-workers. The supervisor and the Appellant went to the office where the supervisor proceeded to let the

Appellant "vent", thereby impliedly giving the Appellant permission to speak freely. The Appellant spoke freely, and in so doing used a variety of profanities. The Employer later purported to discipline him for taking advantage of the "venting" session. While I agree that the Appellant went too far in his comments when his supervisor directed him to sweep the floor and I agree that the Appellant's conduct warranted discipline, I do think that in all the circumstances this amounted to cause for summary discharge without warning.

With respect to the Appellant's departure from the work site, in my view this was a serious act of misconduct which, however, in the circumstances did not amount to cause for dismissal. The following passages are cited from a decision of Mr. Justice Houghton in *Barkley v. Weyerhaeuser Canada Ltd.* [1987] B.C.J. No. 1731. Mr. Justice Houghton cited with approval the comments of Mr. Justice Finch in *Ozzie Jimmo v. Harnesh Figure Corporation of Canada Limited*, unreported, Vancouver Registry No. C835107, June 17, 1985, at page 4:

> Dismissal for an isolated incident of disobedience is justified only where the employee's conduct would interfere with or prejudice the safe and proper conduct of the employer's business. In such circumstances immediate dismissal may be justified.

Mr. Justice Houghton also quoted with approval the following comments of Le Bel J. in *Stilwell Audio Pictures Limited* [1955] O.W.N. 793 at 794:

> It is only in exceptional circumstances that an employer is justified in summarily dismissing an employee upon his making a single mistake or misconducting himself once. The test in these cases is whether the alleged misconduct of the employee was such as to interfere with and prejudice the safe and proper conduct of the business of the company, and, therefore, to justify immediate dismissal.

In the *Barkley* case, the Plaintiff refused to attend a management training seminar despite having been given a clear order to do so. In that case, it was noted that the act of disobedience, whilst involving a matter of importance, did not directly involve the supervision of the garage which was the Plaintiff's job. Management had an alternative means of disciplining the Plaintiff, such as a suspension or strong reprimand. The judge concluded that the refusal to go to the seminar, an isolated act of disobedience was seriously regarded in isolation, but should not have been regarded as a deliberate flouting of the essential contractual terms.

In the instance case, the Appellant's departure from the work site on March 26, 1999 did not, in the circumstances, interfere with the safe and proper conduct of the Employer's business. His fork lift was broken down and there is no evidence that there was alternate work within his job duties for him to do. There is no evidence that the Appellant had previously engaged in this kind of conduct, i.e., walking off the job. The Employer did not order the Appellant to stay. Nor did it direct him to perform work that fell with in the scope of his job while his forklift was inoperable. The Employer had alternative means of disciplining the Employee, but did not utilize them. The Appellant's acts were not so serious that they amounted to the type of circumstances for which an Employer is entitled to conclude that the employee has repudiated his contract of employment and summarily dismiss the employee without warning.

With respect to the Appellant's conduct on March 25th, as noted, I have found that the Appellant's departure from the work site that day was caused by his supervisor. He did not walk off the job. With respect to his verbal altercation with his supervisor that day, it is clear from the evidence that the verbal altercation was provoked by his supervisor. The discussion in and of itself or as part of the previous day's events was not so serious as to warrant summary dismissal without warning.

In reaching these conclusions it should not be assumed that I condone the Appellant's conduct. It was deserving of discipline. However, in the peculiar circumstances of the case, it did not amount to just cause for summary dismissal without warning.

ORDER

Pursuant to Section 115 of the Act, I order that the determination of the Director dated October 29, 1999 be cancelled. The Appellant is entitled to compensation for length of service pursuant to Section 63(2)(b) of the Act. I refer the calculation of wages and interest thereon to the Director.

Alison H. Narod
Adjudicator
Employment Standards Tribunal