BC EST #D132/99

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 -

Paul Creek Slicing Ltd.
("Paul Creek" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/69

DATE OF DECISION: April 29, 1999

DECISION

SUBMISSIONS

Mr. Bob Fraser	on behalf of Paul Creek
Mr. Ken Copeland	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on January 26, 1999. In the Determination, the Director's delegate found that the Employer had terminated Mr. Paul Knighton's ("Knighton") employment without "just cause" and ordered that the Employer pay $752.67 as compensation for length of service. The Employer says that Knighton was terminated with "just cause" because he was late, and absent from work on numerous occasions, and was warned about that.

FACTS AND ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
>
> 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:
>
> 1. A reasonable standard of performance was established and communicated to the employee;

2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

The burden of proving just cause is on the Employer. In my view, the Employer has not discharged that burden and the appeal, therefore, must fail. As indicated above, the Employer says it had cause to terminate Knighton's employment because of his poor attendance which he had been warned about. The Employer point to Knighton having missed a substantial number of hours and says that its verbal warnings should be sufficient.

I agree with the Employer that absences without leave, and not attending work on time, may provide cause for termination. I also agree that a verbal warning may be sufficient. There is no requirement under the *Act* that warnings be in writing. Nevertheless, from an evidentiary standpoint, it is obviously easier for an employer to prove the circumstances of the warning, the nature of the warning and the consequences of repeating the conduct. In the circumstances of this case, the appeal falls far short of that. First, there are no particulars with respect to the alleged warnings: what did the Employer say to Knighton and when did the Employer warn him. The fact that the Employer posted generic notices to "all employees", warning that employment may be terminated for missing shifts and being late, is, in my view, insufficient: the Employer must prove that the particular employee was warned. In my view, this is sufficient to dismiss the appeal.

Second, while the Employer points to an--apparently--substantial number of hours of work missed during Knighton's employment, the delegate responds that Knighton and other employees were sent home early on a number of the occasions referred to by the Employer. The Employer does not dispute this.

In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated January 26, 1999 be confirmed in the amount of $752.67 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal