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-

Boucher Motors Ltd.,
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hugh R. Jamieson

FILE NO.: 99/56

DATE OF DECISION: April 7, 1999

DECISION

OVERVIEW

This appeal was brought by the Employer on February 8, 1999, against a Determination by the Director dated January 18, 1999, wherein the Employer was found to be liable under Section 63 of the *Employment Standards Act* (the *"Act*"), for an amount of $832.00, being length of service wages and vacation pay accruing to a Mr. David Sorretelli (the Employee). The basis for the appeal is the Employer's contention that the Employee is not entitled to any length of service wages as he had been dismissed for just cause. The Tribunal decided to dispose of this appeal without the need for an oral hearing.

ISSUE TO BE DECIDED

The sole isssue here is whether there was just cause for the Employer to have dismissed the Employee without termination notice or wages in lieu thereof as required by Section 63 of the *Act*.

FACTS

The Employee was employed as a mechanic by the Employer from July 13, 1998 to November 6, 1998**,** when he was dismissed.

As indicated above, on January 18, 1999, following an investigation into a complaint from the Employee, the Director issued the instant Determination finding the Employer liable for the amount of $832.00 being length of service wages, plus the corresponding 4% vacation pay accruing to the Employee.

A summary of the relevant facts that lead the Director to the said finding are found at pages 1, 2 and 3 of the Determination:

> " Employer's position
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> The Employer states that the Complainant started working as a mechanic with his company in July 1998, and that performance problems started in mid-August. He states that he warned the Complainant many times about problems with his performance; advising him that he could not afford to keep him if the "comebacks" continued; that he would have to let him go if it didn't improve. He stated that he did not keep any written records, and cannot recall the exact dates of the warnings. "

> " Complainant's position
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> The Complainant does agree that the Employer told him that he did things differently than he would have, however he denies that the Employer ever told him that his performance was bad, and that if he did not improve he would be fired. He stated that the Employer yelled at him, and that he felt verbally abused being called a "goof off", but he denies that he was ever warned that his job was on the line."
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> " Analysis
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> " .....
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> The Employer's evidence demonstrates that he was dissatisfied with the Complainant's performance, however he has been unable to provide any evidence that the Complainant knew about his concerns, knew that his job was in jeopardy, and refused to improve his performance. The Employer was within his rights to terminate the employment relationship. However he has failed to prove that he had "just cause" to terminate the employment relationship."

In addition to the finding that the Employer owed $832.00, the Director also assessed a zero dollar ($0.00) penalty for the violations of the Act that are involved. This penalty is not directly in issue in this appeal.

As mentioned, the Employer raises the defence of just cause to support its denial of liability for length of service wages under Section 63 of the Act. This claim is based primarily on alleged poor work performance. However, in the appeal, the Employer bolsters this by referring to further grounds for dismissal including, the Employee's tardiness in reporting late for work as well as misusing his time by making private phone calls during working hours.

In respect of the poor work performance, the Employer sets out a list of seven jobs that it says were only some of the "comebacks" that the Employee was responsible for. In this regard, the Employer submits that it cost over $3,000.00 to correct the mistakes the Employee made in his five months or so of employment. Consequently, the Employer says it is the Employee who owes the Employer money rather than the other way around. The Employer also expresses its view that the Employee was treated more than fairly and that he had been given more chances than most employers would have given him.

Both the Director and the Employee filed responses to the appeal dated February 12, 1999 and February 17, 1999 respectively. However, for my purposes here, I need not elaborate on their submissions other than to highlight that the Employee remains quite emphatic that although he admits he was spoken to occasionally about his work habits, at no time was he ever told that his job was in jeopardy if he did not improve.

ANALYSIS

The relevant provisions of Section 63 of the Act read:

> " 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.
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> .....
>
> (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:
>
> .....
>
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
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> (c) terminates the employment, retires from employment, or is dismissed for just cause. ....."

Starting from the premise that an employment relationship is a two-sided arrangement where an employer must honour the agreement made with the employee with respect to working conditions and terms of employment and on the other hand, the employee must be able to perform the duties and functions of his/her employment. If the employee is not able to keep his/her end of the bargain and for some reason cannot do the job, the employer is entitled to sever the relationship by giving proper termination notice or wages in lieu thereof. In the Province of British Columbia, Section 63 of the Act sets the statutory minimum length of such notice as well as the amount of wages payable in lieu if termination notice is not given.

In the situation here, where the Employee was only employed for some five months, and it is pretty clear that he was not doing his job up to par, all the Employer had to do to satisfy the requirements of Section 63 of the Act, is to have given the Employee notice in writing that the employment relationship would be ended one week hence. If the Employer did not want the Employee working on its premises for the duration of the one week notice period, and this is not uncommon, the alternative was to give the Employee one week's wages in lieu of the notice period.

The Employer however, chose not to give the Employee termination notice or wages in lieu thereof and relies on just cause to discharge its Section 63 liability. Having done so, and where poor work performance is involved, the Employer carries the burden to satisfy the Director, and in appeal the Tribunal, that a certain standard of work performance had been established and that the Employee

was aware of what standard he had to meet. Also, it has to be shown that the Employee did not meet these standards; that he was so notified; and, that reasonable steps were taken to assist the Employee to achieve the required standard. Further, and probably most important, the Employer has to prove that the Employee was made aware that failure to meet the required standard could result in termination - see *Dura-Flow Products Inc.*, BC EST #D333/96; *E.V. Towmasters Service Ltd.*, BC EST #D020/97; *Claymore Collision Ltd*., BC EST #D031/97; *G.T. Lynch Development Inc*., BC EST #D381/97; 3*33976 B.C.Ltd.*, BC EST #D412/97; and, *Apex Ventures Ltd.*, BC EST #D032/97.

As the Director notes in the Determination, the Employer obviously had sufficient grounds here to terminate the employment relationship based on poor work performance. Where the Employer's case fails however, is its inability in the face of the Employee's denials, to establish that it had adhered to the aforesaid required steps prior to the termination. It was the lack of this sort of proof that left the Director with no option in the first place but to rule against the Employer's just cause claim and to determine liability. In this appeal, the Employer has filed absolutely nothing to change that situation.

Even if it is accepted that some standards did exist at this workplace and that there may have been cautions given to the Employee about there being too many "comebacks". There is still nothing to show that, the Employee was ever warned clearly and unequivoally that any further "comebacks" would result in dismissal. Moreover, there is no proof that following such a final warning, the termination of employment came as a result of a culminating incident involving another instance of poor work performance. Without evidence of that nature, there is simply nothing in this appeal that gives the Tribunal any reason to overturn or otherwise disturb the decision of the Director. It should also be made very clear that even if the Employer had come up with some hard proof of that kind in the appeal, the Tribunal would have asked why it was not presented to the Director in the first place.

The same comment also applies to the Employer's attempts to bolster its just cause claims in the appeal by adding hindsight considerations like the Employee's supposed tardiness or misuse of the company telephone. These are things that ought to have been brought to the Director's attention during the investigation into the original complaint. They were not. Therefore, the Tribunal will not consider them admissable in the appeal.

The appeal is dismissed accordingly.

ORDER

Pursuant to Section 115 of the Act, the Determination dated January 18, 1999, is hereby confirmed.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal