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 -

Robert Hegyi
("Hegyi")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/924

DATE OF HEARING: March 17, 1998

DATE OF DECISION: April 7, 1998

DECISION

APPEARANCES

Robert Hegyi	On his Own Behalf
Wendy Merler	Office Manager of William F. White Ltd.
Steve Clifford	Witness
Alan Henderson	Witness

OVERVIEW

This appeal is by Robert Hegyi pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and against a Determination of the Director of Employment Standards (the "Director") dated December 5, 1997. The Determination is that William F. White Limited ("White") does not owe Hegyi compensation for length of service because it had just cause for his termination.

ISSUE TO BE DECIDED

The issue is whether or not the employer had just cause. If it did not then the complainant is owed compensation for length of service. Hegyi says that the Determination is in error because the policy, which he is said to have broken, was contrived after he was fired, he received no written warning that he would be fired, and other workers were not fired under exactly the same circumstances as those which led to his termination.

FACTS

White is in the business of renting lighting and other equipment to the film industry. Hegyi was employed in White's maintenance department from March 11 to July 13, 1996, when he was laid off, and then from August 10, 1996 to May 24, 1997 when his employment was terminated. The termination was for his failure to show up for work on May 23, 1997 and because he provided no acceptable reason for being absent.

Hegyi had been absent before. He was absent on November 1, 1996. He called in on the 31st of October and left a message on an answering machine that he would not be at work on November 1st because he had turned into a pumpkin.

Hegyi was reprimanded for missing work on November 1st. On arriving for work on the 4th, he was met by Steve Clifford, the Rentals Manager, the Maintenance Manager being away that day. There is some disagreement on the precise nature of what Clifford said. I find that Hegyi was clearly told that if he ever again failed to show up for work without

good reason that he would be fired. Hegyi accepts that there was at least discussion of his being fired but presents me with no clear account of what was said that day while the testimony of Clifford is clear and supported by a record of his meeting with Hegyi which was placed in Hegyi's personnel file.

On May 22, 1997, Hegyi called White and left a message on an answering machine that he would not be in on the 23rd. He said that he would work Saturday the 24th instead. The shop is closed on Saturdays, maintenance employees work Monday through Friday. His stated reason for his absence on the 23rd is that he was "very unhappy with (his) co-workers" and "problems in the department". On being asked what led him to believe that he could work the 24th rather than his regularly scheduled work day, he has no answer but says that he knew that "there would be consequences".

Alan Henderson, Manager of the Maintenance Department, went to the maintenance shop early in the afternoon on the 24th in order to see if Hegyi had actually shown up for work. On finding him in the shop, Henderson asked him to explain his absence on the 23rd and, on hearing his explanation, which is as above, he told Hegyi that he was fired.

It is the uncontradicted evidence of Hegyi that other workers missed days of work but were not fired. White says, however, that it was in each case satisfied with the reason that the employees provided for being absent. As matters are presented to me, there is no evidence showing that White condoned an absence that was for other than reason of illness or some other acceptable reason.

ANALYSIS

Section 63 of the *Act* sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. That section of the *Act*, at subsection (3) goes on to set out the circumstance under which that liability can be discharged.

> (3) *The liability is deemed to be discharged if the employee*
>
> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment;*
>
> *(ii) 2 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**.* (my emphasis)

A single act may be of such a serious nature that it justifies termination. As may less serious misconduct when repeated, or the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

While Hegyi's conduct, his refusal to work with co-workers on the 23rd and his decision to work on a Saturday, contains elements of insubordination, a single instance of which may justify termination, Hegyi was terminated for repeatedly being unacceptably absent. Where there are repeated examples of such misconduct, it is the well established view of the Tribunal [*Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that just cause requires that the employer show the following:

a) A reasonable standard of performance was established and communicated to the employee;

b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;

c) the employee is given the time to meet the required standard; and

d) the employee continued to demonstrate an unwillingness to meet the standard.

As matters are presented to me, I find that the employer shows all the above. It is certainly reasonable to expect employees to report for work on their regularly scheduled work days and I am satisfied that Hegyi knew full well that he was expected to be at work on the 23rd, as he says, he knew that there would be consequences. Really the only issue, as the delegate has noted, is whether or not Hegyi was given plain, clear warning that his job was in jeopardy. The delegate has found that he was plainly and clearly told in November of 1996 that he faced termination if he ever again failed to report for work without good reason. As noted above, on hearing from Hegyi and from White, I find that as well. I am in full agreement with the delegate's primary conclusion.

Hegyi has complaints with the delegate's Determination. He complains that he was fired while others were not under the same circumstances. I am presented with no hard evidence of that.

Hegyi complains that he was fired for contravening a policy that was developed only for the purpose of justifying his termination. Hegyi was in fact fired for being absent without good reason, despite being told in November of 1996 that he could be fired if he was again unacceptably absent from work.

Hegyi complains of a lack of a written notice that his job was in jeopardy. It is recommended that employers provide employees with written notice that they are failing to work as expected and that they are facing the possibility of being terminated but, strictly speaking, written notice is not required.

In summary, this case is as determined by the delegate. Hegyi was absent on May 23rd, 1997 despite having been given plain, clear warning on November 4, 1996 that should he ever again be absent without some acceptable reason, that he would be fired. His absence

on the 23rd was clearly contrary to that warning and as such White had just cause in terminating Hegyi and his claim for compensation for length of service is without merit.

On hearing from Hegyi, it appears that he may not have fully realized that it is the right of the employer to determine who will be employed and how business is conducted, so long as that is neither contrary to the law, dishonest, nor dangerous, and within the scope of the job for which the employee was hired. It is not for the employee to consider the wisdom of how the company is run, *Stein V. British Columbia (Housing Management Commission)* (1992) B.C. Court of Appeal, 65 B.C.L.R. (2d) 181. Hegyi would do well to keep all of the above in mind.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 5, 1997 be confirmed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal