

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

H.R.D. Haul Rite Disposal Inc.

(“Haul Rite”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorna Pawluk

FILE NO.: 96/691

DATE OF HEARING: March 21, 1997

DATE OF DECISION: April 4, 1997

DECISION

APPEARANCES

Sandra Moore	For Haul Rite
Loriann Moore	For Haul Rite
Rick L. Barnett	On his own behalf

OVERVIEW

This is an appeal by H.R.D. Haul Rite Disposal Inc. ("Haul Rite") pursuant to Section 112 of the Employment Standards Act (the "Act") against Determination #CDET 004482 of the Director of Employment Standards (the "Director") issued on October 29, 1996. In this appeal, the employer claims that it had just cause to dismiss Rick Barnett ("Barnett") from his position as a driver.

ISSUE TO BE DECIDED

The issue is whether the employer has just cause to dismiss Mr. Barnett from his position as a driver.

FACTS

On September 17, 1996, Haul Rite dismissed Rick Barnett from his position as a driver. He had been employed in that capacity since May 27, 1996. Haul Rite said that initially Barnett was a good employee but subsequently deficiencies appeared in his work. This included such problems as failing to chain up the bins on the back of the vehicle, which was the subject of a letter of warning dated August 19, 1996. They also said that he failed to keep the truck assigned to him in good repair. (He also failed to check the gas gauge and on at least two occasions ran out of gas.) In particular, he would not fill out and turn in his "pre-trips". The latter is an inspection report filled out by the driver after he or she walked around the vehicle to check the mechanical workings of the vehicle.

In a letter dated September 19, 1996, Sandra Moore, dispatcher and part owner of Haul Rite, advised that Mr. Barnett was fired for not turning in his pre-trip sheets to the office and for not reporting mechanical problems immediately as he was required to do. The letter included an example where he drove the truck for two days with a slipping clutch before letting the shop know. This caused more damage.

On September 19, 1996, Mr. Barnett lodged a complaint with the Employment Standards Branch, alleging that he had been wrongfully dismissed from Haul Rite. The Director's delegate agreed and ordered that he be paid one weeks wages in lieu of notice. Haul Rite was also ordered to repay \$100 wrongly deducted from Mr. Barnett's paycheque for damage done by his truck to a customer's property.

The employer appeals, arguing that the worker's performance was generally unsatisfactory. In particular, however, the employer had a problem with the worker's continual failure to turn in his pre-trips. Mr. Barnett testified that he thought that pre-trips were necessary only if the truck was pulled over for inspection by the police. He said he would fill in the form, but would leave the date blank and fill it in, if and when he was pulled over. He admits that he was told on the first day of his employment that the pre-trips were to be handed in every day. He said he stopped after the first two and a half weeks because he was always pointing out the same mechanical flaws which were not fixed despite his reports.

Both parties described several unpleasant conversations and meetings following the termination. Because these incidents occurred after the termination, they have no bearing on my deliberations and will not be recounted here.

Mr. Barnett says that the employer failed to establish just cause as there was no progressive discipline in this case.

ANALYSIS

Section 63 of the *Act* permits an employer to dismiss an employee for just cause, on notice, or with payment in lieu of notice. It imports the common law notion of "just cause" and, as at common law, the onus rests with the employer to establish just cause. The test is whether the employee "conduct[ed] himself in a manner inconsistent with the continuation of the contract of employment". (*Stein v. British Columbia Housing Management Commission* (1992) 65 B.C.L.R. (2d) 181 (B.C.C.A.) at 183)

It is clear that Mr. Barnett was a less than exemplary employee; there were a great many deficiencies in his work. But the employer has not convinced me to interfere with the Determination under appeal. The employer is limited to those grounds set out in the letter of dismissal; in this case, the letter relies on two problems with Mr. Barnett's work performance: failure to maintain the equipment and not turning in his "pre-trips". It does not refer to the empty gas tank incidents discussed above nor the failure to secure the bins. The letter sets out an incident where Mr. Barnett failed to report a slipping clutch for two days; this delay caused even further damage to the vehicle. In testimony before me, Mr. Barnett said that he did have the clutch checked by a shop and was told it was not a problem. While it is arguable that Mr. Barnett should have reported it to the office nevertheless, this incident fails to establish just cause and there were no other mechanical report problems relied upon. (The employer did not rely on the worker's failure to fill the

gas tanks.) As for the failure to turn in his pre-trips, I was also not convinced that it established conduct inconsistent with the continuation of the employment contract. While I have difficulty believing Mr. Barnett's explanation that he thought these reports were important only if he was stopped for an inspection, I also cannot find that this failure was of sufficient gravity to constitute just cause. On the evidence before me, I was not convinced that handing in these reports was crucial to employer's operations.

Mr. Barnett argued that there was no progressive discipline so that just cause has not been established. There is no requirement at common law for progressive discipline; a single incident can be sufficient, provided that it is "inconsistent with the continuation of the contract of employment" as provided for in *Stein*.

With respect to the return of money withheld from Mr. Barnett's paycheque for damage caused by an incident involving a customer's building, I find that it does not fit any of the exceptions to Section 21 which prohibits an employer from withholding or deducting wages from an employee.

Finally, I find that Haul Rite withdrew its offer of one week's employment following the termination so that the question of mitigation does not arise.

ORDER

Pursuant to section 115 of the *Act* I hereby confirm Determination #CDET 004482.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal