BC EST #D174/98

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 -

Tom's Custom Auto Body
("Tom's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/76

DATE OF HEARING: April 9, 1998

DATE OF DECISION: April 29, 1998

DECISION

APPEARANCES

Tom Radonjic — the Appellant

Reece Lipkewich — the Complainant

OVERVIEW

This appeal is by Tom's Custom Auto Body ("Tom's") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and it is against a Determination by a delegate of the Director of Employment Standards (the "Director") which is dated January 14, 1998. The Determination is that Reece Lipkewich was dismissed without just cause and that as such Tom's must now pay him compensation for length of service.

ISSUE TO BE DECIDED

The issue is whether or not the employer had just cause in terminating the employee. According to Tom's, it had just cause for reason of dishonesty.

FACTS

Reece Lipkewich was hired by Tom Radonjic, owner of Tom's auto-body, in February of 1996. He left the company for another job but was re-hired by Radonjic on the 3rd of July, 1996. He was fired on September 3, 1997.

While neither Lipkewich or Radonjic are able to tell me the precise date, both agree that Lipkewich stopped work one Saturday so that he could work on his own car using Tom's facilities. That was a ten o'clock in the morning but Lipkewich failed to punch out at that time. He punched out at noon. That was discovered by Radonjic and he spoke to Lipkewich about his error in punching out.

The two have very different ideas of their conversation. Radonjic says that Lipkewich was clearly told that if he ever again made such a false entry on his time card that he would be fired. But according to Lipkewich, once his error was pointed out to him, he realised his mistake and apologised for it, and that was the extent of matters. He does not recall any talk of his being fired. I accept that Radonjic takes a dim view of incorrect time cards where the error is significant and that he tried to convey that to Lipkewich. Radonjic

considers what Lipkewich did as "stealing time". But I am unable to establish whether Lipkewich was plainly and clearly warned that he faced termination if he ever again made that sort of time card error. No written warning was ever issued. No one other than Radonjic and Lipkewich was a party to their conversation.

Lipkewich was fired for dishonesty, what Radonjic views as deliberate overstatement of the amount of work performed on August 29, 1997. Radonjic makes that perfectly clear.

Lipkewich worked the morning of the 29th and left for lunch. On his return from lunch he failed to punch in and he also failed to punch out at the end of the day.

September 2nd was the next work day. On looking at Lipkewich's time card on that day, Radonjic noticed that no entries had been made for the afternoon of 29th. He asked his shop manager whether Lipkewich worked that afternoon. According to Radonjic, the shop manager told him that Lipkewich had returned to work after lunch, at 1:30 p.m.. Radonjic presents me a letter which he says is from the shop manager. It states that Lipkewich returned to work at 1:30. That is the extent of the employer's evidence in respect to when it was that Lipkewich returned to work in the afternoon of the 29th.

On September 3, 1997, Radonjic noticed that Lipkewich had written 12:30 and 5:00 as the start and finish times of his work for the afternoon of the 29th. That led Radonjic to challenge the authenticity of the 12:30 entry. Unhappy with Lipkewich's response, Radonjic fired him.

Radonjic is entirely convinced that Lipkewich began work at 1:30, not 12:30, and also that Lipkewich knew full well, on filling out his time card, that he did not resume work at 12:30, but an hour later. Lipkewich, on the other hand, says that he was at work at 12:30. He says that he reported for work at that time and that on his way to the time clock, someone got his attention, and either told him to help someone, move a car, or get a customer's car, and that as a result he was distracted and just forgot to punch in.

The delegate found that Lipkewich had demonstrated a forgetfulness with the 'Saturday incident' and that, in filling out his time card days after the event, he very likely did not remember when it was that he resumed work on returning from lunch on the 29th. The delegate concludes with the statement, "Having a poor memory is not 'just cause' for termination".

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.

Where there are repeated examples of less serious 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 an employer will have just cause where it shows 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.

Lipkewich was fired for dishonesty. According to Radonjic, in entering 12:30, rather than 1:30, as the time he restarted work in the afternoon of the 29th, Lipkewich knowingly lied and that he attempted to obtain pay through fraudulent means. But as matters are presented to me, it is neither established that there was any deliberate attempt to deceive on Lipkewich's part, nor is it shown that he in fact began work at 1:30, not 12:30. The evidence before me falls well short of proving that Lipkewich resumed work at 1:30 as alleged. But even if it were shown that Lipkewich began work at 1:30, it simply does not logically follow that in entering 12:30 on his time card that he engaged in an act of dishonesty. Dishonesty is a possibility but so is poor memory, as the delegate has found, or an absentmindedness on the employee's part. The employer simply fails to show that Lipkewich is guilty, not of an inadvertent error, but a deliberate act to deceive and to defraud the employer of funds.

An employer may be found to have just cause where reasonable standard of performance is not met or where there is a repeated failure to follow reasonable rules but the employer must then show that the employee received a plain, clear warning that his or her job was in jeopardy unless there was improvement. There is no evidence of that in this case.

In summary, the employer fails to show just cause for reason of dishonesty or any other reason. The Determination is accordingly upheld. Compensation for length of service is owed as set out in the Determination, as is interest.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 14, 1998 be confirmed in the amount of $888.97, together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal