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 -

Dan Foss Industries Ltd. operating Dan Foss Couriers
("Dan Foss Couriers")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Niki Buchan

FILE NO.: 98/88

DATE OF DECISION: May 13, 1998

DECISION

OVERVIEW

This is an appeal by Dan Foss Couriers, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of a delegate of the Director of Employment Standards (the "Director") issued on January 19, 1998. In this appeal Dan Foss Couriers claims that compensation for length of service is not owed to Andreas Nagorr ("Nagorr") because he was terminated for just cause. Also, it requests that the Order to pay two weeks severance pay be revoked. This Decision is based on written submissions.

ISSUE TO BE DECIDED

The issue to be decided on this appeal is whether Nagorr was terminated for just cause.

FACTS

Dan Foss Courier operates a courier service in Burnaby, Nanaimo and Victoria. Nagorr was employed as a driver for the courier service from November 9, 1994 to April 1,1997. His salary was $1900.00 per month.

On March 5, 1997, Nagorr was involved in a motor vehicle accident while driving a company vehicle. A Motor Vehicle Traffic Accident Police Investigation Report was submitted by the employer to the investigating officer. That report indicates that Nagorr was charged a fine of $75.00 as a result of the accident for following too closely. The police report shows that the estimated vehicle damage to the employer's vehicle was $3000.00 with damage estimated at $2500.00 to the other vehicle involved.

Nagorr was injured at the time of the accident and was on W.C.B. from the day of the accident, March 5, 1997, until March 31, 1997.

This was the third motor vehicle accident involving Nadorr while driving a company vehicle. Previous to this accident Nagorr was involved in two other motor vehicle accidents. One of these accidents was non-preventable and the other was a minor preventable accident. The employer decided to terminate Nadorr and contacted W.C.B. to determine the proper procedure for termination. W.C.B. advised that an employer might choose to terminate an employee while he was off work, but the employee would continue to be covered by W.C.B. until he was deemed fit to return to work. Given that information, the employer waited until Nagorr returned to work before terminating his employment on April 1, 1997. He did not receive written notice of termination or compensation for length of service.

In submissions, Dan Foss Couriers claims that Nagorr was told during his interview that "he would be entrusted with a company vehicle and that the vehicle was his responsibility during his employment." Also, he was told "that an accident in a company vehicle may result in termination." The findings set out in the Determination reveal that the employer informed the investigator that it was company policy to terminate employment for involvement in a severe motor vehicle accident resulting in damages. The employer did not provide evidence of this policy or how it was communicated to the employees. Neither did the employer provide information that Nagorr was warned following the previous accidents and that continuation of this behavior would result in termination of his employment.

Nagorr denies that he was told that his employment would be terminated as a result of a motor vehicle accident. He claims that he had not received any prior verbal or written warnings.

ANALYSIS

There is a statutory requirement on an employer pursuant to Section 63 of the "*Act*" to pay compensation for length of service to an employee on termination. This requirement is deemed to be discharged if the employee is given appropriate written notice, is given a combination of notice and money in lieu of notice or if the employee is dismissed for just cause. In this instance, Nadorr did not receive written notice or pay in lieu of notice or compensation for length of service. Dan Foss Couriers relies on the argument that he was terminated for just cause.

The Tribunal has considered and ruled on the question of just cause in many cases before it. In Kenneth Kruger, B.C.E.S.T. D003/97 and 375123 B.C. Ltd, B.C.E.S.T. D536/97 the Tribunal has outlined the principles which apply when considering just cause. Arbitrator Stevenson sets out the principles in Kenneth Kruger (supra) at pages 3 and 4:

1. "The burden of proving the conduct of the employee justifies dismissal is on the employer,

2. Most employment offences 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 in fact instances of minor conduct, 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 had 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.

1. 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.

2. 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 dismissal."

The representative for Dan Foss Couriers makes the following statements and arguments in submissions:

- It is the company policy to terminate employment in a severe motor vehicle accident resulting in damages.
- As we are in the transportation industry, we acknowledge that due to the nature of our business, accidents will occur. Following an accident by an employee in a company vehicle, termination of the employee may occur dependent upon the liability of the accident, the severity of the accident, issuance of violations or charges under the Motor Vehicle Act, length of service of the employee and other mitigating factors.
- Within the transportation industry it is standard practice to terminate drivers for motor vehicle accidents. Neither national nor regional carriers will continue to employ an individual as a professional driver when they have repeatedly demonstrated a lack of care and liability for an accident.
- We could no longer trust Mr. Nagorr with a company vehicle as the risk and exposure to further damage and injury to our company, Mr. Nagorr or a third party was too high.
- There was a single incident which caused an irrevocable rift in the employment relationship such that the continuation of employment through provision of notice was not possible.

The Director states in the Determination that the employer did not provide evidence of the company policy to terminate employment for involvement in a severe motor vehicle accident or how it was communicated to employees. No evidence was produced to indicate that Nadorr was warned before or subsequent to the two pervious accidents that continuation of this behavior would result in termination. Further, the Director determined that involvement in a preventable motor vehicle accident such as the one which occurred on March 5, 197 in which Nadorr sustained injuries, cannot be characterized as an incident causing an irrevocable rift in the employment relationship such that continuation of employment through provision of notice is not possible.

The burden of proof is on the employer to prove the conduct of the employee sustifies summary dismissal. In this case Dan Foss Couriers has not satisfied that burden or proof. It did not provide evidence that a company policy was in existence or communicated to Nadorr or that it is standard practice in the transportation industry to terminate drivers for motor vehicle accidents. In fact, the company admits that it did not terminate Nadorr

immediately but waited until he returned to work, approximately three weeks after the accident, to terminate his employment. There was adequate time to provide a period of notice.

The "*Act*" does not prevent an employer from terminating an employee at any time; it simply sets out certain requirements an employer must discharge when an employee is terminated. In this instance, having not provided notice the employer is required to pay compensation in lieu of notice.

After considering the written submissions, "*Act*", and the precedents, I find the Determination is not unreasonable. The Appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination dated January 19, 1998 be confirmed in the amount of $910.67 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Niki Buchan
Adjudicator
Employment Standards Tribunal