BCEST #D208/98

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 -

Ruby Enterprises Ltd.
("Ruby" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 97/943

DECISION DATE: May 13, 1998

APPEARANCES/SUBMISSIONS

Mr. Balwinder Thind	on behalf of Ruby
Ms. Terri Johnson	on behalf of the Complainant
Ms. Judy McKay	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on December 8, 1997. In the Determination, the Director's delegate found that the Employer had terminated Ms. Johnson's employment without "just cause" and ordered that the Employer pay $487.56 as compensation for length of service and vacation pay. The delegate based the Determination on her view that "there is no evidence" that Ms. Johnson received any warnings and that her employment was in jeopardy due to a breach of the Employer's rules. The Employer says that Ms. Johnson was terminated with "just cause".

ISSUE TO BE DECIDED

The issue to be decided in appeal is whether the Employer had just cause to terminate Ms. Johnson's employment.

FACTS

Except on one point, as noted below, the parties are not in dispute with respect to the material facts. Ms. Johnson had been employed by Ruby between September 16, 1995 and October 5, 1997 as a cashier paid on an hourly basis, $7.75 per hour. The Employer operates a gas station which is open on a 24 hour basis. The Employer does not dispute that Ms. Johnson generally was a good employee.

On September 24, 1997, Mr. Thind found that Ms. Johnson had locked up the gas station and was taking a coffee break at the Java Hut, a coffee place on the lot where the gas station is situated. Ms. Johnson explains that she could observe the gas station from the Java Hut. Ms. Johnson agrees that Mr. Thind told her not to do this again. On October 4, 1997, Mr. Thind again found her having coffee at the Java Hut. The parties do not agree on whether Mr. Thind told Ms. Johnson on September 24 that she wold loose her job if she locked up the station and went for coffee at the Java Hut.

In her submission to the Tribunal, Ms. Johnson explains that Mr. Thind told her on September 24 that the reason she could not lock up and go for coffee was "security". She has been locking up and going for coffee for four years. Nevertheless, she explains that she had been following

Mr. Thind's rule since being told and not gone for coffee unless another employee was there. On October 4, she saw Mr. Thind's wife park at the back and believed, therefore, she could go for coffee. The Employer does not dispute Ms. Johnson's explanation.

ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
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> 2. Most employment offenses 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 instances of minor misconduct, it must show:
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> 1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 4. The employee continued to be unwilling to meet the standard.
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> 3. 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.

> 4. 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 a dismissal."

The burden of proving just cause is on the Employer. In my view, Ms. Johnson's conduct may, at most, be characterized as "minor misconduct". Ms. Johnson had been going for coffee throughout her employment until the Employer introduced a new rule in that regard. Ms. Johnson stated that she could observe the gas station from where she was having her coffee and attend to the customers. The Employer does not dispute this. Moreover, while the Employer makes reference to the gas station being open on a 24 hour basis, the Employer does not explain the importance to it of the rule. I do not question the Employer's right to introduce a rule requiring its employees to be at the work place during working hours for which they are paid (as is the case here).

I accept that the Employer told Ms. Johnson that she was not allowed to lock up the gas station and go for coffee. Even if the Employer told her that her employment would be in jeopardy if she went for coffee, I am not convinced that the Employer has demonstrated just cause. The Employer does not dispute Ms. Johnson's explanation that her understanding of the rule was she was not permitted to go for coffee if there was no other employee at the gas station. Ms. Johnson explanation is that she believed that Mr. Thind's wife was present at the gas station when she went to the Java Hut. In my view, Ms. Johnson's explanation, which is not disputed by the Employer, is an indication that the rule was not clear and unequivocal. Ms. Johnson may not have understood the rule and its application. There is no requirement under the *Act* that warnings be in writing. Nevertheless, from an evidentiary standpoint, it is obviously easier for an employer to prove the circumstances of the warning, the nature of the warning and the consequences of repeating the conduct. Similarly, it is not required that rules be in writing. It is simply easier to prove the existence and content of the rule. Given Ms. Johnson's lengthy employment, the nature of the conduct, and the uncertainty of the rule, the Employer's decision to terminate Ms. Johnson was out of proportion with the seriousness of the conduct.

In the result, the Employer has not discharged the burden of proof and the appeal, therefore, must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated December 8, 1997 be confirmed in the amount of $487.56 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal