Employment Standards TRIBUNAL

An appeal

- by -

Cannon Industries Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/144

DATE OF DECISION: July 8, 2003

DECISION

OVERVIEW

This is an appeal filed by Cannon Industries Ltd. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on April 9th, 2003 (the "Determination").

The Director's delegate determined that the Employer dismissed its former employee, Antonio Carelli ("Carelli"), without just cause and, accordingly, was obliged to pay him six weeks' wages as compensation for length of service ($3,243.60). In addition, the delegate determined that the Employer had not paid Carelli vacation pay in accordance with the *Act* and thus awarded a further sum on that account ($1,193.18). The total amount awarded to Carelli, including section 88 interest, was $4,666.34.

By way of a letter dated June 30th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I should perhaps add that none of the parties requested that an oral hearing be held in this matter.

GROUNDS OF APPEAL

The Employer concedes that the delegate correctly determined that Carelli was entitled to additional vacation pay (given his service, Carelli was entitled to 6% vacation pay; the Employer only paid 4%--see section 58).

However, the Employer says that the Determination should be varied--by cancelling the award on account of compensation for length of service--because the delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b)].

I shall address each ground in turn, commencing with the second ground.

FINDINGS

Natural Justice

The Employer has not particularized this ground of appeal. While the Employer obviously disagrees with the delegate's legal conclusion that it did not have just cause for dismissing Carelli, the Employer has not advanced any argument that would suggest the *process* followed by the delegate during the course of his investigation amounted to a breach of the rules of natural justice.

There is no suggestion that the delegate was, or appeared to be, biased. Consistent with section 77 of the *Act*, it appears that the Employer was given a fair and reasonable opportunity to respond to Carelli's complaint and, indeed, the Employer availed itself of that opportunity.

In my view, there is no merit to this ground of appeal.

Error of Law

As noted above, the Employer takes issue with the delegate's conclusion that the Employer did not have just cause for dismissal. The delegate's finding in this latter regard could be characterized as an error of law if the delegate's finding was not based on a proper evidentiary foundation or if he misdirected himself regarding, or otherwise misapplied, the relevant legal principles.

I cannot find that the delegate erred in law in this case.

The record before me discloses that Carelli has an alcohol problem. In recent years courts and tribunals have recognized that alcoholism is a treatable illness and thus the conduct of an alcoholic employee is not readily amenable to the disciplinary framework that is typically utilized in the case of culpable conduct, such as, say, willful absenteeism or insubordination. Indeed, the alcoholic employee may well be suffering from a physical disability thus triggering a duty on the employer's part to accommodate (to the point of undue hardship) the employee under human rights legislation (see e.g., *Fraser Lake Sawmills*, B.C.L.R.B. No. B390/2002).

In this case, on January 11th, 2002, the employee was issued a one-month unpaid suspension after he arrived at work "smelling of alcohol" according to the Employer. The legality of this unpaid one-month suspension is not in issue in this case although the Employer may well have exceeded its lawful authority in levying that sanction. That action, of itself, might have been a constructive dismissal under section 66 of the *Act*.

In any event, and as detailed in the Determination, about two weeks into the suspension the Employer terminated Mr. Carelli--allegedly because he did not respond to several telephone messages left by the Employer. The Employer says that the telephone messages were prompted by concerns that Mr. Carelli was not diligently seeking treatment and counselling. The Employer did not have any concrete evidence that Mr. Carelli was not seeking treatment and, indeed, Mr. Carelli's position was that he *was* seeking treatment during his suspension.

The delegate rejected the Employer's "just cause" defence and in so doing noted:

- there was no written agreement detailing the employee's obligations during his suspension;
- the Employer was apparently concerned about Carelli's failure to attend certain "AA" meetings but there was no clear evidence that Carelli was obligated to attend those particular meetings;
- the Employer did not clearly indicate to Carelli what would occur (e.g., that he would be terminated) if there was a failure on the latter's part to do certain things (e.g., attend AA meetings);
- the Employer terminated Carelli (by way of voice mail message) precipitously without giving Carelli a fair opportunity to explain his position or to respond to any allegations made against him;
- Since Carelli was suspended for a one-month period he was entitled to the benefit of the entire month before any adverse decision with respect to his employment could be taken; in short, the delegate concluded that the Employer's action was "premature".

The above findings appear to be supported by the evidence and by relevant legal authorities and in light of these findings, the delegate's conclusion that there was no just cause could hardly be characterized as an error of law. With respect to the Employer's position that Mr. Carelli was under suspension pursuant to the terms of what has been called, in other cases, a "last chance agreement", I would note that the alleged agreement in this case falls well short of satisfying the elements of a valid "last chance agreement" as set out in *Re Steele*, BCLRB Decision No. B546/98. Further, even where there is a breach of a *valid* "last chance agreement", that breach must still be independently evaluated to determine if it constitutes just cause for dismissal--*Castlegar and District Hospital et al.,* BCLRB No. B484/2000.

Finally, I might add that the Employer's present assertion that it had just cause for dismissal is wholly inconsistent with the Record of Employment ("ROE") that it prepared and issued following Carelli's termination. The ROE was signed by Tom Innes, the Employer's principal and the person who has represented the Employer throughout this entire matter. The ROE states, immediately above Mr. Innes' signature: "I am aware that it is an offence to make false entries and hereby certify that all statements on this form are true". The ROE was issued due to "shortage of work" (code A on the form) rather than by reason of "dismissal" (code M). The Employer's ROE is much more consistent with Carelli's evidence than it is with the Employer's evidence.

In light of the foregoing, it follows that this appeal must be dismissed.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued in the amount of **$4,666.34** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal