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 -

Gleeson Holdings Ltd. operating as Petro Canada
("Gleeson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/224

DATE OF DECISION: May 21, 1998

DECISION

OVERVIEW

This is an appeal by Gleeson Holdings Ltd. operating as Petro Canada ("Gleeson"), under Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination which was issued on March 24, 1998 by a delegate of the Director of Employment Standards. The Determination requires Gleeson to pay the sum of $185.88 to Fiona Henderson (a former employee) on account of compensation for length of service, vacation pay, improper deductions and interest payable as of the date of the Determination.

Gleeson makes its appeal for several reasons: Ms. Henderson did not discharge her duties in the proper manner; an employer should have the right to dismiss an employee without penalty; and, the dismissal was fair and unbiased and required for the business' survival.

I have reviewed and considered all of the documents and written submissions in making this decision.

ISSUES TO BE DECIDED

1. Did Gleeson have "just cause" to terminate Henderson's employment without notice?

2. Did Gleeson make unauthorized deductions from Henderson's wages, contrary to Section 21 of the *Act*?

FACTS

There is no dispute that Ms. Henderson was employed by Gleeson from June 19, 1997 to October 5, 1997 as a part-time gas station attendant. She worked two shifts per week: Saturday (evening) and Sunday (day).

Following his investigation of Ms. Henderson's complaint, the Director's delegate made the following findings of fact in the Determination:

> Ms. Henderson was dismissed mainly as a result of a least two silent shopper surveys, which indicated Ms. Henderson was not following proper Petro Can procedure. No evidence was provided to show that she knew her job was in jeopardy prior to dismissal. Progressive discipline was not evident. Written Notice of one week was not given. The performance issues noted by the employer did not constitute "just cause" for dismissal.

He also found that "...amounts totaling $94.99 were deducted from her pay, and all were referred to by the employer as advances. The employer could provide no evidence to prove that these amounts were in fact cash advances, as alleged."

Gleeson's appeal offers several reasons why the Determination is wrong: Ms. Henderson did not " ... discharge her duties in the proper manner as she was trained"; she showed " ... outright neglect to her duties and total disregard for ... service standards"; and, her dismissal was "fair and unbiased" because she was trained " ... at least 4 times in a group" and on "individual basis". Gleeson submitted with its appeal copies of several "Quality of Service" reports which identified service deficiencies that were identified by Petro Canada's "secret Shopper Net".

Gleeson's submission to the Tribunal does not provide any evidence which establishes that it gave Ms. Henderson a clear and unequivocal warning that her employment was in jeopardy for failing to meet its performance standards. It submits that during a performance appraisal in September, " ... she was told her performance needs improvement."

Ms. Henderson challenges Gleeson's submissions concerning her training and failure to meet its performance standards.

ANALYSIS

Just Cause

Section 63 of the *Act* establishes a liability for employers to pay compensation for length of services after three consecutive months of employment. That liability may be discharged by an employer by giving written notice (see: Section 63(3) of the *Act*) by giving the employee a combination of notice and pay in lieu thereof, or by establishing that it has dismissed the employee for "just cause".

This tribunal has addressed the issue of "just cause" on many occasions and has adopted the following principles consistently (see: *Kenneth Kruger*, BC EST #D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
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 in fact instances of minor misconduct, it must show:

    a. A reasonable standard of performance was established and communicated to the employee;

    b. 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;

c. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

d. The employee continued to be unwilling to meet the standard.

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.

When I review all of the documents and submissions I am unable to find any evidence that Gleeson notified Ms. Henderson that her employment would be terminated if she failed to meet its standards of performance. The only "Shop Detail Report" which suggests Ms. Henderson's performance was below standards is dated October 5, 1997 - her last day of work. The other "Shop Detail Reports" pertain to other employees.

I find that the document titled "Fiona Henderson - Performance Review", which is dated October/97, cannot be given very much weight. Irrespective of how much weight it can be given, I note that it does not contain any warning that her employment would be terminated if performance standards were not met.

Deductions from wages

The statements of earnings which Gleeson issued to Ms. Henderson show clearly that $94.00 was deducted from her wages for "Advances". Gleeson's appeal alleges that the payroll deductions represent " ... cash advances taken and items taken from the convenience store for personal use."

Section 21(1) of the *Act* establishes that the only deductions which an employer may make from an employee's wages are those required by statute. Section 22 (4) of the *Act* allows an employer to honour a "written assignment of wages to meet a credit obligation." Gleeson has not submitted any written assignment to support the deductions it made from Ms. Henderson's wages.

ORDER

I order, under Section 115 of the *Act*, that, the Determination dated March 24, 1998 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr