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-

Black & Lee Formal Wear Rentals Ltd.
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	97/77
DATE OF HEARING:	May 13, 1997
DATE OF DECISION:	May 30, 1997

DECISION

APPEARANCES

Patrick Rattenbury	for Black and Lee Formal Wear Rentals Ltd.
Jim Rentmeester	for Black and Lee Formal Wear Rentals Ltd.
Kevin Jacob	for himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Black and Lee Formal Wear Rentals Ltd. from a Determination dated January 17, 1997. Black and Lee Formal Wear Rentals Ltd. (the "Employer") appeals the Determination ordering it to pay $2482.90 as compensation for length of service for Kevin Jacob (the "complainant") as well as $734.49 for an unauthorized deduction.

ISSUES TO BE DECIDED

1. Was there just cause for terminating Mr. Jacob's employment thereby relieving the employer of the obligation to pay compensation for length of service?

2. Did the employer make an unauthorized deduction from Mr. Jacob's final paycheque?

FACTS

The employer operates a chain of formal wear stores in the Lower Mainland. The flagship store is located on Seymour Street in downtown Vancouver. Mr. Jacob commenced work on May 21, 1991 as a stock boy. He was terminated on October 28, 1996 and by that time had risen through the ranks to the position of supervisor in the flagship store. The evidence indicates that he was being groomed for a managerial position.

The incidents leading to Mr. Jacob's termination occurred on October 23 and 25, 1996. Mr. Jacobs was late for work on both days. On October 23, 1996 Mr. Jacobs was scheduled to commence work at 8:30 a.m. but did not arrive until 11:19 a.m. On October 25, 1996, Mr. Jacobs was scheduled to commenced work at 11:00 a.m. and did not arrive until 2:00 p.m. On October 23, 1996, Mr. Jacobs worked the remainder of his shift. On October 25, 1996, Mr. Jacobs was sent home and told to think about the situation and report back to the employer "first thing Monday morning." Monday is a usual day off for Mr. Jacobs. Mr. Jacobs did arrive to meet with his

employer later in Monday morning rather than the 9:00 a.m. time which the employer felt was "first thing in the morning."

The employer lead evidence of repeated tardiness on behalf of Mr. Jacobs. The employer lead evidence that Mr. Jacobs had been spoken to on several occasions about his tardiness. However, the employer was not able to specifically point out the number of times or the dates that these discussions about tardiness took place. Furthermore, the employer admitted that there had been no written notations or warnings regarding tardiness and that it had not been drawn to Mr. Jacob's attention that failure to correct this behavior could lead to more serious discipline up to and including discharge. For his part Mr. Jacobs admitted that the employer had spoken to him on occasion about his tardiness but stated that he could not provide any specifics. He further stated that at no time was he informed that repeated tardiness would put his employment in jeopardy.

The employer entered as evidence copies of employee manuals. Section 1(e) of the 1996 employee manual states:

> "If tardiness is a problem, you will receive one warning from either the manager or one of the owners. If tardiness is still a problem you will not get another warning."

Further, Section 5(e) of the employee manual enumerates causes for dismissal, one of which is "tardiness/absences unless a doctors note detailing the absences is provided". The employer testified that the manuals were revised regularly and that a manual was supplied to the manager of each store. It then became the manager's responsibility to draw the contents of the manual to the attention of each employee. It should be noted that each employee does not receive a manual. Furthermore, no specific direction is given to the store managers as to how to ensure the employees to read the manual. With respect to Mr. Jacobs, the evidence given by Mr. Musaerts, the retail general manager, was that he had not specifically provided a copy of the employee manual nor had he drawn to Mr. Jacob's attention the relevant sections regarding tardiness.

The employer lead further evidence regarding an incident about harassment of employees by the complainant. Two female employees had complained about inappropriate comments and touching by Mr. Jacobs. Upon receiving the complaint the owners called a meeting with Mr. Jacobs. The issue was addressed forthrightly and immediately. As a result of that meeting, Mr. Jacobs called a meeting with the two employees at closing time that day in which he apologized for his actions. The witness testified that the female employees were satisfied with the manner in which the employer handled the incident and with Mr. Jacobs' sincere apology.

The employer lead further evidence of other incidents in Mr. Jacobs' work history. These were incidents of failure to secure the store properly at closing, evidence of the manner in which Mr. Jacobs handled customer complaints and incidents of employees being locked in the store. The employer alleged that these incidents form part of the work record which should be considered in determining whether there was just cause to terminate Mr. Jacobs. However, the employer candidly admitted that at the time these incidents occurred they were dealt with verbally and at no point was Mr. Jacobs put on notice that his employment was in jeopardy. It is significant to note that the evidence also disclosed that the employer had issued written warnings on occasion to

other employees. In other words, the employer did utilize a system of progressive discipline in its work place.

The second issue that arose centered on the clothing allowance. During the course of Mr. Jacobs' employment the employer had a policy of allowing employees to purchase clothing at cost. The employer testified that such a policy is an industry standard. The employees would be allowed to charge the clothing and pay for it on a credit basis. Mr. Jacobs paid $25.00 per week on his account. The employer also testified that the policy was made known, verbally, to employees that if they were terminated and owed money on their clothing accounts that the balance of the account would be deducted from the final paycheque. In Mr. Jacobs' case the outstanding balance was $734.49 at the time of termination. The evidence also disclosed that the employer did not require employees to sign a written form authorizing the deduction for the clothing allowance from regular or final paycheques. Mr. Jacobs did not sign such an authorization.

Turning to the final incident, the employer's evidence was that Mr. Jacob's tardiness in his final week of employment was due to partying and irresponsible behavior that was inconsistent with the employment relationship. In particular, on October 25, 1996, the employer's evidence was that one of the owners telephoned Mr. Jacob's house and spoke to his roommate's mother. She stated that Mr. Jacobs had not been home that night and that she didn't know where he was. The employer also heard from other employees that Mr. Jacobs had been drinking with them and had told them when they had decided to go home that he was going to continue to party. Unfortunately, I did not have the benefit of hearing direct evidence from the roommate's mother. Mr. Jacobs testified that the reason he was late on October 23, 1996 was that he had simply overslept and that he proceeded to work as quickly as possible when he awoke. On October 25, 1996 Mr. Jacobs testified that he had taken medication on the evening before and than he had once again overslept and that was the reason that he was late. Mr. Jacobs further admitted that he had been having a "bad week" that week. Mr. Jacobs denied that his tardiness was due to the fact that he had partied to heavily too report to work.

ANALYSIS

I am satisfied that Mr. Jacobs was not dismissed for just cause. I accept that the evidence shows that Mr. Jacobs had been late on occasion during his employment. However, the evidence also discloses that at the time the incidents were not viewed as serious disciplinary matters. At no point was Mr. Jacobs informed that his employment was in jeopardy if the tardiness continued. Furthermore, I am satisfied that although the employee manuals were distributed to the stores, the contents of the manuals have not been brought to the attention of Mr. Jacobs. If an employer wishes to rely on company policy to support a discharge it must show that the policy is reasonable, has been clearly brought to the employee's attention, has been consistently applied and that the employee was put on notice that breach of the policy could lead to serious disciplinary consequences. That has not occurred in this case. Furthermore, the incidents regarding the store security, the complaints by the customers and the complaint by the female employees are not a basis upon which this termination can be justified. They were not considered disciplinary at the time of occurrence. Those incidents were dealt with at the time in a manner that appeared satisfactory to the employer, those concerned, and Mr. Jacobs. I note as well that this employer

had issued written warnings to other employees and was an employer that was familiar with the concept of progressive discipline.

Turning now to the incidents of October 23 and 25, 1996. If the incident of October 23, 1996 could be viewed in isolation I would not see it as warranting serious disciplinary action. However, the two incidents having occurred in close proximity leads me to conclude that some disciplinary action was appropriate. However, my task is to determine whether there was just cause for termination not whether a lesser penalty could be substituted. In this case I find that termination for the tardiness on October 23, and 25, 1996 does not constitute just cause. Therefore, the employer is obligated, under Section 63, to pay five weeks' compensation for length of service to the complainant.

I turn now to the deduction of the $734.49 from the final paycheque. The employer testified that as a result of Mr. Jacobs complaint it has discontinued the policy. That is unfortunate as I see the policy having some benefit to the employees and to the employer. The employees had the opportunity to purchase "high line" clothing at a substantially reduced cost from the retail price. However, the parties are bound by the provisions of the *Act.* Section 21 reads:

1. *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

2. *An Employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

3. *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

The *Act* clearly does not allow for deductions from paycheques unless such deductions are made in writing. Both the employer and Mr. Jacobs agree that at no point had he authorized in writing the deduction from his earnings. For that reason I find that the employer has breached Section 21 of the *Act.* The employer is obligated to pay the $734.49 to Mr. Jacobs and the parties must treat the matter as an outstanding debt.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination of the Director dated January 17, 1997 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal