EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Houweling Nurseries Ltd.
("Houweling ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/385

DATE OF DECISION: August 31, 1996

DECISION

OVERVIEW

The appeal is by Houweling Nurseries Ltd. ("Houweling") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination No. CDET 002527 issued by the Director of Employment Standards (the "Director") on June 7, 1996. The Determination, issued as a result of a complaint by Barry J. Botterill ("Botterill"), a former employee of Houweling, awards compensation for length of service and interest in the amount of $304.86. Houweling claims that the Determination is in error, that it was justified in terminating Botterill's employment.

FACTS

Botterill was employed as a shipper for Houweling from May, 1995 until mid-January, 1996. Botterill was repeatedly late for work, on that the parties agree. Houweling says Botterill was late 26 times. Botterill gives no indication of the number of times he was late. He agrees that he was warned about being late but says that he was late because he was given too little notice of shift changes. He also says that he was not the only employee that was late, just the only one "disciplined".

Botterill received no written warnings. There is no evidence of any discipline beyond verbal warnings.

The employer also alleges that Botterill is guilty of theft: That he took $10,000 worth of equipment from the nursery. Houweling says he boasted that he had stolen the equipment.

ISSUES TO BE DECIDED

The issue is, Did Houweling have just cause in terminating the employment of Botterill?

ANALYSIS

The onus is on the employer to show just cause.

The employer has suspicions in regard to missing equipment but submits no solid evidence in support of the allegation. It presenting no proof that Botterill is guilty of the theft, Houweling has

failed to show that it had just cause by reason of a serious breach of the employment relationship.

The employer says that Botterill was late 26 times and argues that is reason enough for the termination. Relatively minor infractions, when repeated, may amount to just cause but the employer must show that its rules are clear and reasonable, that they have been made known to the employee, that they have been applied in a consistent fashion, that the employee broke a rule despite having been clearly warned that the consequence of any further breaking of the rules was going to be termination, and despite being given an opportunity to improve. In deciding whether an employer has made it clear to an employee that his or her job is in jeopardy, Adjudicators will look for the application of progressive discipline and clear written warnings.

In the case of Houweling's termination of Botterill, there is a question of whether its 'late' rule was consistently applied to employees. There is also a question of whether Botterill's being late for work was his fault, or due to a lack of notice on the part of the employer, or a combination of the two. The submissions of the parties do not allow me to reach a conclusion on either matter but for the purpose of this appeal I need not do so.

Botterill was late, if not 26 times, then certainly a great many times, I accept that, but Houweling has not shown that it applied any sort of progressive discipline, that Botterill was properly warned of the consequences of his continuing to be late, or that he was given a chance to improve.

Houweling says, in its appeal, that "as a matter of principle" it must be demonstrated that "Crime and tardiness do not pay!" (The employer's emphasis.) But its response to Botterill's being late, repetitious verbal warnings, I think sent a rather different message, that for being late one got just another verbal warning. I am not at all certain that it was made clear to Botterill that his employment was in jeopardy given Houweling's verbal warnings. And the evidence is that Houweling failed to issue clear written warnings and apply progressive discipline. I am led to the conclusion that Houweling Nurseries did not have just cause in terminating Botterill.

The employer has failed to show that the Determination is in error by virtue of its having just cause in terminating the employment of Botterill. In the absence of just cause, the *Act* provides that an employer is liable for compensation for service. That liability can be discharged if the employee is given written notice of termination but none was given.

I agree with the Director's Delegate, compensation for service is owed Botterill.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 002527 be confirmed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel