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-

International Plastics Ltd.
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 97/106

DATE OF HEARING: May 26, 1997

DATE OF DECISION: June 26, 1997

DECISION

APPEARANCES

Mrs. Kelly Kosta	for the Employer
Mr. Michael Sydor	for himself

OVERVIEW

This is an appeal by International Plastics Ltd. (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") dated January 28, 1997. The employer appeals the Determination on the basis that it had just cause to terminate Mr. Sydor.

ISSUE TO BE DECIDED

Is Mr. Sydor entitled to compensation for length of service pursuant to Section 63(2)(b).

FACTS

International Plastics Ltd. is a wholesale distributor of PVC pipe and fittings used for the transportation of water. Primary uses of these products include irrigation systems and municipal water supply. The Employer has eight branches in British Columbia. Four of those branches are located in the Lower Mainland in Richmond, Coquitlam, Abbotsford and Cloverdale. The Employer has approximately 98 employees. Mr. Sydor was employed as a truck driver / warehouseman at the Cloverdale location. Mr. Sydor had been an employee for approximately six years at the time of his termination.

The evidence disclosed that on Friday, March 22, 1996 Mr. Sydor attended a going away party for a fellow employee which was being held at a local pub. The employees had gathered at the pub after work. Mr. Sydor had signed out a company vehicle for personal use that weekend. The proper procedure had been followed in signing out the vehicle and Mr. Sydor was in lawful possession of it. It is admitted by Mr. Sydor that he did consume alcohol while at the pub. It is Mr. Sydor's position that he was not impaired when he left the pub and that his behavior that evening did no harm to his relationship with his employer or to the employer's reputation in the community.

On Monday March 25, 1996 the employer learned through other employees that Mr. Sydor had been in the pub on Friday evening. The employer was aware that he had signed out the vehicle. On information supplied by other employees the employer drew the conclusion that Mr. Sydor's behavior that evening violated company policy and that his poor judgment was a basis for termination. On Tuesday, March 26, 1996 the employer called Mr. Sydor into a meeting. In the meeting the employer asked Mr. Sydor if he had borrowed the company truck on the previous Friday, whether he attended the party at the pub, whether he consumed any alcohol while at the pub and whether he drove the vehicle home that evening. Mr. Sydor candidly answered "yes" to all of the questions. He also stated in the meeting that he had consumed only a couple of beers and he was sober when he left. The employer's representative in the meeting responded that the employer had a zero tolerance policy for alcohol consumption particularly when use of a company vehicle was involved. Mr. Sydor became very upset and asked to speak to the president of the company. He spoke to the president of the company and when he returned to the termination meeting he was handed his termination letter and told to clean out his desk and the truck of personal items.

Mrs. Kosta testified that the decision to terminate Mr. Sydor was based on company policy. She referred to the policy manual and to sections entitled Company Vehicles and Employee Conduct and Termination. The section referred to under Company Vehicles reads:

> It is presumed that an employee who borrows a company vehicle is in possession of a valid drivers license at the time of usage.
>
> It is expected that any employee who borrows a company vehicle for personal use will give the same care and attention as he/she would to their own vehicle.
>
> If an employee requires the use of a company vehicle, the request must be made in writing and approved by management at least one (1) day in advance.

Under the heading Employee Conduct and Termination the policy manual reads:

> The Company has a policy of progressive discipline. However, certain conduct warrants immediate termination. Grounds for immediate termination include but are not limited to the following violations:
>
> f. Serious unlawful improper conduct on company premises or during non working hours which affects the employees relations with the company or its reputation in the community.

It is the employer's position that taking the company vehicle to the pub and driving it after having consumed alcohol was not giving the company vehicle the same care and attention as an employee would give to his/her own vehicle. Furthermore, the employer viewed the consumption of alcohol and the driving of the company vehicle afterwards as serious unlawful
improper conduct during non working hours which affected the employee's relations with the company and the company's reputation in the community.
The employer lead evidence of enforcement of its zero tolerance policy. In particular, the employer lead evidence of notices that had been sent out to the employees requiring employees to use the company provided limousine service for transportation to and from the Christmas party. The notice stated that there was to be no drinking and driving and that if an employee chose to do that the employee would be terminated the following Monday. The notice also implied that if other arrangements needed to be made management would be willing to discuss the matter. Evidence was also lead that the employer had supplied alcohol at a Christmas Eve luncheon which was held at the Richmond location. It was noted that employees who attended that luncheon did consume alcohol and that management was aware that

many of the employees drove vehicles home afterwards. In other words management made no effort to supply transportation from that party nor did management state that consuming alcohol and driving personal vehicle afterwards would be a basis for discipline. Evidence of a further incident of alcohol consumption was also lead. That evidence was that the employer had convened an evening meeting shortly after work hours for certain drivers at a hotel in Richmond. Mr. Sydor testified that prior to the meeting he met the other drivers in the lounge and that the employees were having a beer. He further testified that after the meeting certain of the employees returned to the lounge but that he proceeded directly home. Mrs. Kosta candidly admitted that she was one of the employees that went to the lounge afterwards and that she and one other management person stayed for one drink before leaving.

The company policy that the employer relies on is set out as previously stated in the manual. However, Mrs. Kosta could not state that the employee manual had been distributed to the employees or particularly that the manual and the sections relied on had been brought directly to the attention of Mr. Sydor prior to March 22, 1996. If an employer relies on company policy to support a termination for cause it is incumbent on the employer to show that the company policy is reasonable, that it was clear and unequivocal, that it was brought to the attention of the employee before the company acted on the policy, that the employee had been notified that breach of the policy could result in serious disciplinary action up to and including dismissal and that the rule has been consistently enforced. By the reasons set out above I am not satisfied that the company policy had been brought to the attention of Mr. Sydor, that it had been made clear to him that a breach of the policy could result in termination nor that the policy had been consistently enforced. I am cognizant of the real concern the employer has raised regarding its potential liability if an employee were to be charged with an alcohol related offence while operating a company vehicle. However, if the company is to institute a zero tolerance policy then that policy must be clearly and unequivocally communicated to the employees along with the consequences of a breach of the policy.

The employer's case does not rest solely on the breach of the company policy. The employer argues that the incident itself was serious enough to merit termination. It is the employer's position that consuming alcohol in the pub and driving the company vehicle home was "serious unlawful improper conduct . . . during non working hours which affect(s) the employee's relations with the company or its reputation in the community." To substantiate this basis for termination the employer referred to and relied upon letters that were submitted by employees who were at the pub that evening. These letters were not considered by the Director's Delegate in making the Determination. The letters were not considered by the Director's Delegate because they were submitted after he made his Determination. Mrs. Kosta stated that the letters were not submitted but that they should be considered now because the employer had been made aware of their existence and the fact that the employer had relied on the statements made by the employees in its investigation prior to making the termination decision. Secondly, the employer, through its legal counsel, had made the Director's Delegate aware of the allegations in the letters. Generally speaking, the letters raised issues of the amount of alcohol that was consumed and the amount of time Mr. Sydor spent in the pub. The employer further testified that it had relied on a statement that was made to its legal counsel by the Director's Delegate to the effect that he had all the information necessary to make his decision.

Turning to the admissibility of the letters the Director's Delegate stated in a letter dated May 2, 1997 that the letters should be ruled inadmissible for the purposes of this hearing because they were not provided during his investigation and prior to the issuance of his Determination. The Director's Delegate quoted *Tri-West Tractor Ltd.* (1996) BC EST No. D268/96 in which the adjudicator stated:

> "This Tribunal will not allow Appellants to "sit in the weeds", failing or refusing to cooperate with the Delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it"

The Director's Delegate notes that the Appellant did cooperate with the investigation but that it appeared it did not produce all the evidence on which it intended to rely and that therefore the aforementioned principle should apply. I agree with the Director's Delegate on that point. However, there is a second reason why I cannot rely on the letters. That reason is that the letters are offered in evidence as proof of the truth of their contents. The authors of the letters were not produced as witnesses at this hearing. The letters are hearsay and carry with them the problems associated with the probity of hearsay evidence ie. the author of the statement is not under oath and is not subject to cross-examination. Hearsay evidence by its nature is not the best evidence available in a matter and accuracy tends to deteriorate with each repetition of the statement. Furthermore, allowing the introduction of such documents has a tendency in and of itself to lengthen the proceedings. For the above reasons I am not prepared to give any evidentiary consideration to the letters.

Finally, the employer alleges that the employee committed serious unlawful improper conduct ie. consuming alcohol and driving the company vehicle. Mr. Sydor admits to the consumption of alcohol and driving the company vehicle but states that he was not impaired and that he was a long term responsible employee who would not have acted so irresponsibly. The consumption of alcohol and operation of motor vehicles is not an offence per se in Canada. It is an offence if one is impaired or if one's blood alcohol reading exceeds the specified statutory level. The employer is alleging criminal conduct and in doing so must lead clear and cogent evidence if it relied on that activity to substantiate its decision to terminate. There is no objective evidence in this case that Mr. Sydor was too impaired by alcohol to operate the motor vehicle or that his blood alcohol level exceeded the statutory standard. This is an appeal and the onus is on the employer to show just cause. On the evidence before me I cannot find that Mr. Sydor committed such serious unlawful and improper conduct during non working hours to affect his relations with the employer or the employer's reputation in the community. For the above reasons the appeal is dismissed.

ORDER

I hereby confirm the Determination dated January 28, 1997.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal