Employment Standards TRIBUNAL

An appeal

- by -

North Road Enterprises Ltd. operating as Nakusp Esso
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2002/197

DATE OF DECISION: June 17, 2002

DECISION

OVERVIEW

This is an appeal based on written submissions by the Employer, North Road Enterprises Ltd. operating as Nakusp Esso (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on March 22, 2002 wherein the Delegate ruled that the Appellant had contravened Section 63 of the Act by failing to pay compensation for length of service after terminating the Respondent without notice. The Delegate ordered the Appellant to pay $1,128.03 including interest. A separate Delegate decided not to assess a penalty.

ISSUE

Was the Director's Delegate correct in finding that the Appellant did not have just cause for termination of the Respondent without notice or compensation for length of service?

ARGUMENT

The Appellant's Position

In an appeal form and written submission dated April 6, 2002 and filed with the Tribunal April 10, 2002 the Appellant says that she believed she was following the Delegate's instructions with respect to the termination of the Respondent based on advice received from the Delegate. The Appellant also submitted a copy of a letter dated March 19, 2002 which she had sent to the Delegate just before he rendered his decision where she noted she followed the advice of the Delegate "not to give him notice but to document everything but only with JUST CAUSE dismiss Allan." In her appeal form the Appellant further states that she "made notes when talking to (the Employee) and was 'extreme' in being specific". She states that, if she had understood from the Delegate's advice that she could have given the Respondent notice she definitely would have. She further submits that "only because Allan wrote to the MLA this was brought up again after six months".

The Appellant submits that the Determination should be cancelled.

The Respondent's Position

In an undated written submission received by the Tribunal on April 24, 2002 the Respondent replies to the appeal submitting that, inferentially, the appeal should be dismissed and the Determination confirmed. The Respondent reiterates a number of submissions which were apparently made prior to the Determination. For example, the Respondent says that he did ask for help with respect to the procedures surrounding the use of credit card vouchers. He says that the Employer was not discreet in dealing with him and he says that he was never warned about "body odour". He says that he did not defy the rules or procedures of the Employer and in fact, "we honestly tried our hardest to do a good job". The Respondent says that his termination without notice or compensation for length of service has caused him untold monetary hardship.

The Director's Position

The Director did not respond to the invitation to provide a written submission.

THE FACTS

The Appellant operates a Gas Station/Convenience Store/Laundromat in Nakusp, BC. The Respondent worked for the Appellant from October 1996 to September 16, 2001. The Employer began to document the performance of the Respondent in about August 2001 and provided several pages of detailed written notes of shortcomings in the Respondent's work performance to the Delegate. Between August 4, 2001 and the Respondent's dismissal on September 16, 2001 the Appellant notes such deficiencies as charging customers erroneous prices, not entering charges properly, closing five minutes before closing time, being short on the cash-out between $3.15 and $11.00 on at least four occasions, not properly bundling credit card and debit card receipts, cashing out during a busy time between 5:25 and 5:30 rather than after 5:40 as requested, and stocking pop from a back room when there was no one else to cover the floor of the store while he was in the back room. On about July 19, 2001 the Appellant prepared written conditions of employment which included such factors as clean appearance, use of body deodorant, no cash shortages of more than $2.00 (with warnings for the first and second occasions and the third being cause for dismissal), no unattended counter time, and no discussion of confidential information. A number of employees signed this condition of employment between July 19, 2001 and October 2, 2001, but the Respondent refused to sign. As stated by the Delegate at page 5 of his Determination, the documentation clearly identifies a poorly performing employee.

The Appellant's "Conditions of Employment" indicate that the Respondent refused to sign these written conditions on July 20, 2001, apparently having first read them over. The Appellant's notes indicate that the Respondent was more than $2.00 short in his cash out on August 13 ($6.91), August 18 ($11.00), September 15 ($3.15), and September 16, 2001 ($3.82).

In a letter written to the Delegate on March 19, 2002 the Appellant said "When I reprimand anyone - I do it discreetly so as not to humiliate them so I have not witnesses - it is just my word against Allan's ….. Allan was warned about his body odour and his behaviour, and given dismissal with just cause as he repeatedly defied the rules and procedures". In his written submission the Respondent says that the Appellant "wasn't discreet, as all the staff would complain that she would talk behind our backs. I was never warned about body odour ….. I didn't defy rules and procedure".

The Respondent was terminated without notice on September 16, 2001 when his cash out once again exceeded the $2.00 limit on shortages at the end of the day contrary to the Appellant's written conditions of employment.

ANALYSIS

The onus is on the Appellant to establish on a balance of probabilities an error in the finding of the delegate.

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

Section 63

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

a) After 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

b) After 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus 1 additional week's wages for each additional year of employment, to a maximum of 8 week's wages.

(3) The liability is deemed to be discharged if the employee

a) is given written notice of termination as follows:

i) one week's notice after 3 consecutive months of employment;

ii) two weeks' notice after 12 consecutive months of employment;

iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

b) is given a combination of notice and money equivalent to the amount the Employer is liable to pay, or

c) terminates the employment, retires from employment, or is dismissed for just cause.

Thus, section 63 (3)(c) provides that an Employer may avoid liability for compensation or notice for length of service if the Employee is dismissed for just cause.

In the case of *Silverline Security Locksmith Ltd.*, BC EST #D207/96, this Tribunal delineated a four part test for determining whether just cause exists or not. In that case it was said as follows:

¶ 11. The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.

¶ 12. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an Employer must be able to demonstrate "just cause" by proving that:

1) reasonable standards of performance have been set and communicated to the Employee;

2) the Employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;

3) a reasonable period of time was given to the Employee to meet such standards; and

4) the Employee did not meet those standards.

> ¶ 15. The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally that his or her performance is unacceptable and that failure to meet the Employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an Employee a false sense of security that their work performance is acceptable to the Employer.

While it is preferable (because it is easier to prove) that a warning be in writing, it is not required: *Re: Beaver Landscapes Ltd*., BC EST #D035/98 (Peterson, Adjudicator). As stated in Employment Standards in British Columbia Annotated Legislation and Commentary, the Continuing Legal Education Society of British Columbia, 2000, at page 8-31 "*The Act does not require that warnings be in writing. Nevertheless, from an evidentiary standpoint, if the warnings are in writing it is obviously easier for an employer to prove the circumstances of the warning and the consequences of repeating the conduct*.": Re: *Paul Creek Slicing Ltd.*, BC EST #D132/99 (Peterson, Adjudicator).

In the present case, the Appellant was found in the Determination to have demonstrated that reasonable standards of performance were set and communicated to the Employee and that, if those standards were not met, the Employee was warned clearly that his continued employment was in jeopardy.

The Appellant's assertion that the Respondent was verbally warned that he would be terminated following documented shortages in his cash out on August 13 and 18 and September 15, 2001 is consistent with the earlier presentation of written conditions of employment to the Respondent on July 20, 2001 which clearly did notify the Respondent that three shortages "shall be cause for dismissal". There is no evidence of a specific denial of such verbal warnings by the Respondent. The Respondent simply denies that the Appellant was discreet or that he was cautioned about body odour.

Accordingly, although it would have been preferable for each warning to have been in writing, it is not required. I find on a balance of probabilities that the Appellant has established that the Respondent was verbally warned on each occasion after these shortfalls that he would be terminated if the problem persisted contrary to the written conditions of employment. I find that the Appellant has demonstrated just cause for terminating the Employee by proving that reasonable standards of performance were set and communicated to the Employee, the Employee was warned clearly that his continued employment was in jeopardy if those standards were not met, a reasonable time was given to the Employee to meet such standards, and the Employee did not meet those standards. I find that the Respondent is not entitled to compensation for length of service.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated March 22, 2002 and filed under number ER69279, be cancelled.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal