EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Paladin Security Group Ltd.
("Paladin")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/237 & 1999/238

DATE OF HEARING: July 13, 1999

DATE OF DECISION: August 5, 1999

DECISION

APPEARANCES

Ashley Cooper	For Paladin Security
Jason Steele	Witness
Jason Begin	Witness
Greg Swecera	Witness
Michael Irwin	On his own behalf
Barry Yates	On his own behalf

OVERVIEW

The Paladin Security Group Ltd. ("Paladin", also, "the employer") appeals two Determinations by a delegate of the Director of Employment Standards, both of which are dated March 29, 1999. The appeals are pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

The Determinations separately respond to two Complaints, one by Michael Irwin, the other by Barry Yates. Compensation for length of service is awarded in each case. Paladin, on appeal, claims that both of the men were dismissed for just cause and that it does not, for that reason, owe length of service compensation.

In the Irwin Determination, the delegate has decided that Irwin was guilty of minor misconduct, and that he deserved discipline, not termination. In explaining her decision, the delegate recognises that minor misconduct is grounds for dismissal where it is shown that a reasonable standard of performance was established and communicated to the employee; the employee is told, clearly and unequivocally, that their employment is in jeopardy because they are failing to meet the standard; and the employee proved unwilling to meet the standard despite being given adequate time to improve. The delegate then goes on to say that she was not satisfied that Irwin received adequate notice that his job was in jeopardy. Paladin, on appeal, claims that the employment relationship was fundamentally breached by Irwin. The employer beyond that claims that it did tell Irwin that his job was in jeopardy even though different words were used. And Paladin claims that, even if nothing was said to the employee, and it is the case that Irwin was guilty only of minor misconduct, any reasonable person would know that termination would likely be the consequence of not calling in sick for two days in a row.

In the case of Yates, the delegate found that there were several instances of minor misconduct but that Paladin had neither administered corrective discipline, nor plainly and clearly warned the employee that his job was in jeopardy. Paladin, on appeal, claims that

Yates was properly warned that he was going to be terminated unless his performance improved and that, despite that warning, he did not improve.

ISSUES TO BE DECIDED

At issue is the matter of whether the employer did or did not have just cause to terminate Irwin for reason of a fundamental breach of the employment relationship. Paladin claims that it is enough that Irwin was intoxicated at work. And Paladin also claims that Irwin failed to call in sick and that gave it grounds for immediate dismissal.

Should I find that there was not gross misconduct which justified termination, I must then consider whether Paladin did or did not have just cause for reason of minor misconduct which was repeated.

At issue is the matter of whether or not the employer had just cause to terminate Yates for reason of various instances of minor misconduct.

FACTS

Paladin Security provides it clients with security officers, on what is both an ongoing basis and a special event basis. The company employs almost 500 people in that regard.

Irwin's employment

Michael Irwin was employed by Paladin as a security officer from August of 1996 to the 13th of February, 1998. While employed, he was moved from one location to another, three times.

Irwin in September of 1996 was intoxicated at work. He was told in no uncertain terms that if he was ever again found in an inebriated state while at work that he would be fired. Irwin was never again found in a state of intoxication while at work.

Irwin was once late for work.

Irwin was absent from work on the 10th of April, 1997. He failed to notify his employer of that, at least that was the conclusion of the delegate.

Irwin was again absent on the 4th of September, 1997. He did tell his employer that he would not be able to work his shift of September 4-5 but gave his employer only 4 hours warning of that. Paladin generates "Incident Reports" as problems arise with employees. I am shown 4 Incident Reports which pertain to Irwin. The last is to do with the lack of notice given in respect to his absence on the 4th of September. On that report, someone has written the words "possibly intoxicated, unable to confirm".

Irwin denies seeing any of the above reports. It is not shown that he was made aware of the reports.

Paladin fired Irwin because of an alleged failure to notify his employer that he would be absent from work on the 18th, and again on the 19th, of February, 1998. The delegate concluded that, probably, Irwin did not tell his employer of his absence.

That Paladin viewed Irwin as a less than satisfactory employee is clear. What is not clear and disputed is whether Paladin did or did not warn Irwin, plainly and clearly, that his job was in jeopardy for reason of his misconduct. Paladin claims that each and every time that an Incident Report is generated, one of its supervisors would have spoken to Irwin about its concern. Yet on hearing from Jason Steele, Jason Begin and Greg Swecera, all managers in some capacity, I find that while they believe that Irwin would have been told, just as a matter of course, that his performance was unsatisfactory and that his job was in jeopardy, they are not able to confirm it. Irwin tells me that, the one instance of intoxication aside, he received neither complaints, nor warnings, about his work or conduct. And no written warnings were issued. I am led to the conclusion that Irwin did not receive plain, clear warning that his job was in jeopardy for reason of misconduct or unsatisfactory performance.

Paladin claims that, just in moving Irwin from job to job as it did, Irwin was informed that his job was in jeopardy. It is argued that a reasonable person would just know that. But Irwin tells me that he thought that he was being promoted in that each location was in some way an improvement over the last. He was clearly labouring under a false sense of security.

The facts in respect to Yates

Barry Yates was also employed as a security officer. He worked from March 11, 1995 to March 17, 1998. He was assigned to three different locations in that time. At the end of his employment he was working the graveyard shift at Douglas College.

I am shown two Incident Reports which pertain to Yates. It is not clear that Yates was aware of the reports. He denies seeing either of them. There is an area for recording the employee's remarks and another for the employee's signature. Those areas are blank on each of the reports.

Yates was found to be improperly dressed in December of 1997. That and earlier examples of misconduct led Paladin to invoke a 'three strike' policy. The uniform infraction was counted as strike one. Yates was then caught watching videos while on the job at Douglas College. Strike two. The last straw for Paladin came when its customer complained of Yates' appearance. Jason Begin was sent to investigate and he observed that Yates had on an old shirt, dirty pants and white runners, not the black shoes that Paladin requires. Begin tells me that, so far as he could see, Yates had also not shaved that day.

The delegate accepts that Yates falsely completed reports and that he was late, missed shifts, and was improperly dressed on more than one occasion.

Yates says no one said anything to him about any three strike policy and he says that while Paladin clearly told him that his false documents were unacceptable and while he was told to wear his tie and not watch videos or TV while at work, no one every said anything about his being fired, or said anything like that in discussing his need to improve. Yates was not given written warning that his job was in jeopardy. Jason Begin remembers speaking to Yates about the dress code infraction in December of 1997 and Begin remembers telling Yates that he faced being moved to another job for failing to be in uniform, and that termination was a possibility. But there are not witnesses to confirm it.

ANALYSIS

What I must decide is whether the appellant has or has not met the burden for persuading the Tribunal that one or both of the Determinations ought to be varied or cancelled for reason of what is either an error in fact or in law.

It is section 63 of the *Act* that provides for the payment of compensation for length of service in certain circumstances. Sub-section 3 is of particular importance. It is as follows:

> **63** (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;*
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> *(ii) 2 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****.* (my emphasis)

A single act may be so serious as to justify the termination of employment, as may misconduct of a relatively minor sort, when it is repeated, or the chronic inability of an employee to meet the requirements of a job, even though it is not the fault of the employee. In all cases the onus for showing just cause lies with the employer.

In cases where just cause is alleged for reason of minor misconduct which was repeated, or generally unsatisfactory work, it is the well established view of the Tribunal [*Randy*

Chamberlin and Sandy Chamberlin operating as Super Save Gas, BCEST No. D374/97] that the employer has just cause only where the employer shows the following:

a) That reasonable standards of performance were established and communicated to the employee;

b) the employee was plainly and clearly warned that his or her employment was in jeopardy unless such standards were met;

c) the employee was given sufficient time to improve; and

d) the employee did not meet those standards.

It is not enough to show only that there was misconduct and it was repeated. It must be shown that the employee failed to meet reasonable standards of performance even though he or she had been clearly warned that they faced dismissal unless they met such standards. The importance of the warning was explained in *Veeken's Poultry Farm Ltd.*, (1997), BCEST No. D165/97. It is to avoid any misunderstanding and the false sense of security which can exist where the employee believes that his or her performance is acceptable.

The termination of Irwin

What led to Irwin's termination is his alleged failure to tell his employer that he would be absent from work. The delegate has decided that is minor misconduct. I agree. Even if Irwin did fail to report his absence, that in itself is not grounds for immediate dismissal. It is not to fundamentally breach the employment relationship.

There is no disputing that Irwin was once found in a state of intoxication while at work. It was in the second month of his employment. Paladin could easily have dismissed him at that time. The payment of compensation for length of service is not required where termination is in the first three months of the employment. But Paladin clearly chose not dismiss Irwin at that point. Now, on appeal, it claims just cause on the basis of that single episode of intoxication. Even if I were of the view that a single instance of intoxication is grounds for immediate dismissal, and I am not of that view, it being a sign of illness, not gross misconduct, it is inconceivable to me that it justifies dismissal more than a year later. Gross misconduct is reason for immediate dismissal, once the employer learns of the misconduct, but it does not justify dismissal well after the misconduct is discovered.

Termination may be justified where minor misconduct is repeated. But as set out above, the employer must issue plain, clear warning to the employee that his or her continued employment is in jeopardy because of the misconduct. If there is further misconduct in the face of that warning, the employer may then chose to terminate the employee. In this case I have found, as noted above as fact, that Irwin did not receive the required warning. It follows that Paladin fails to show that it had just cause for reason of minor misconduct.

I find the order that Paladin pay Irwin compensation for length of service to be fully consistent with both the facts and the law.

The termination of Yates

There is no question that Yates was guilty of minor misconduct which was repeated. I further accept that he may not have been the best of employees. But, as in the case of Irwin's termination, there is not evidence which shows that Yates received plain, clear warning that he faced termination if he ever again failed to meet some particular standard or standards.

Begin believes that he clearly warned Yates that his job was in jeopardy. But there are not witnesses to corroborate that. And I find that, even if Begin did warn Yates as he claims, that is to mix the minor threat of being moved to another location with the threat of termination. Yates may have all too easily misunderstood what Begin meant. It is not to issue plain, clear warning that another dress code infraction would put his employment in jeopardy.

I find that the order that Paladin pay Yates compensation for length of service is fully consistent with both the facts and the law.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is dated March 29, 1999, and which orders Paladin to pay Michael Irwin $674.35 in compensation for length of service and other moneys, be confirmed. To that amount of moneys I add whatever further interest may have accrued pursuant to section 88 of the *Act* since the date of issuance.

I order, pursuant to section 115 of the *Act*, that the Determination which is dated March 29, 1999 and which awards compensation for length of service and other moneys to Barry Yates be confirmed in the amount of $1,037.01, and to that I add whatever further interest has accrued pursuant to section 88 of the *Act* since the date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal