

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-

Fraser Ridge Bakery Ltd.
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	98/237
DATE OF HEARING:	June 24, 1998
DATE OF DECISION:	July 29, 1998

DECISION

APPEARANCES

Theo Van Reeuwyk for Fraser Ridge Bakery Ltd.

Greg Hughes for himself

OVERVIEW

This is an appeal by the employer, Fraser Ridge Bakery Ltd., pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated March 31, 1998 which found that Fraser Ridge Bakery Ltd. had contravened Section 63 of the Act by failing to pay Mr. Greg Hughes termination pay. The employer appeals on the grounds that it had just cause for terminating Mr. Hughes and should, under Section 63(3)(c), be relieved from any liability under Section 63(2)(b).

ISSUE TO BE DECIDED

Is Mr. Hughes entitled to compensation for length of service pay ?

FACTS

Mr. Hughes commenced work for the employer on March 30, 1994. He was employed as a baker. He worked a 40 hour week at a base rate of \$8.00 per hour. The employer operates a combination bakery, tea room and deli located in Abbotsford, British Columbia.

Mr. Theo Van Reeuwyk is the owner of Fraser Ridge Bakery Ltd. Mr. Van Reeuwyk testified that he had been concerned during the summer of 1997 about dishonesty and abuse of the honour system by the employees in his work place. He testified that he felt that his employees were not being honest with respect to their purchases and consumption of the day old product. Furthermore, on or about September 1, 1997 the amount of \$1,600.00, which had been counted and wrapped in a neat bundle, went missing. The money reappeared approximately two weeks later but, according to Mr. Van Reeuwyk, it appeared in a place in his bakery that was different from the spot in which it was originally hidden and from which it had originally disappeared.

Mr. Van Reeuwyk, when the money had first disappeared, filed a police report. However, it appears that there was no investigation and that the police officer made a remark that influenced Mr. Van Reeuwyk's decision with respect to Mr. Hughes' employment.

Mr. Hughes, although employed as a baker, also performed other duties for the employer. For example he would use his home computer to run off labels for the employer and he would use his car to do deliveries occasionally. As compensation for performing these extra duties the employer would, on occasion, allow Mr. Hughes to use a company credit card to purchase a tank of gasoline for his car. In particular, between August 20 and 24, 1997 Mr. Hughes used the credit card on two occasions. The employer took the position that the second use was unauthorized and decided to give Mr. Hughes two weeks' working notice rather than terminate him immediately.

Mr. Van Reeuyk testified that he had a policy of allowing Mr. Hughes to use the company credit card to purchase gas as compensation for the use of his personal vehicle and Mr. Hughes home computer for company business. The employer presented receipts for the purchases of gasoline which showed that Mr. Hughes had used the card on at least two occasions in the prior year and again on two occasions in August, 1997. The employer testified that the use of the credit card was at his discretion and that there was no written policy regarding its use. The employer acknowledged that its use was not a taxable benefit. The employer did acknowledge that, while he was on holidays during July 1997, the bakery was quite busy and that Mr. Hughes was using his car for company business. However, Mr. Van Reeuyk did not believe that Mr. Hughes had used his car during the period of August 20 to 24, 1997 and felt that the charge for the second tank of gas was unwarranted. He acknowledged that the charge for the first tank was authorized. It should be noted that Mr. Van Reeuyk was on holidays during July and that the credit card was not given to Mr. Hughes until mid August. It was the intention that Mr. Hughes would fill his car with gas as compensation for the deliveries that were made during July and August. However, as previously stated, the employer took exception to Mr. Hughes using the card on a second occasion.

On August 26, 1997 Mr. Van Reeuyk informed Mr. Hughes that his last shift would be on September 6, 1997. Mr. Van Reeuyk indicated that he was unhappy with the second use of the credit card and that it was necessary to make an example of one employee because of Mr. Van Reeuyk's perception that the employees were not being as honest or candid as they could be in the work place.

Mr. Hughes worked through three days of his notice period. On September 1, 1997 Mr. Van Reeuyk phoned him at home and informed him that there had been a theft over the weekend. The theft that Mr. Van Reeuyk was referring to was the misplacing of the \$1,600.00. Mr. Van Reeuyk also told Mr. Hughes at this time that he had been advised by the police officer who had attended at the Fraser Ridge Bakery to terminate Mr. Hughes immediately.

It is significant that Mr. Van Reeuyk acknowledges that there was no evidence to link Mr. Hughes to the missing money. Indeed it appears that the money had been misplaced in as much as it was found approximately two weeks later in another spot in the work place. That of course was long after Mr. Hughes had been terminated and had no access to the premises.

ANALYSIS

Turning firstly to the issue of the use of the credit cards I note that there had been a discretionary practice in this work place regarding use of the company credit card. The employer had allowed Mr. Hughes to charge tanks of gasoline in his personal car as compensation for deliveries and the production of the labels on his home computer. I note that this policy was not clearly defined either verbally or in writing. The use of the credit card was not regular but rather at the discretion of Mr. Van Reeuyk. I accept Mr. Hughes' evidence that the workplace was very busy during July when Mr. Van Reeuyk was on holidays and that it was also busy during August due to the passing of the head baker early that month. I also find that Mr. Van Reeuyk had given Mr. Hughes the credit card expecting that Mr. Hughes would charge a tank of gas. Mr. Hughes did that plus he charged a second tank some four days later. Mr. Hughes testified that he had done deliveries during that period. Mr. Van Reeuyk was not able to support or deny that claim.

Mr. Van Reeuyk testified that he believed that he had just cause to terminate Mr. Hughes for the unauthorized use of the credit card but also believed that Mr. Hughes was entitled to two weeks' notice. He testified that a further intention in terminating Mr. Hughes was to make an example of him to reinforce the employer's concerns to the other employees about dishonesty and abuse of the honour system in the work place. An employer is entitled to terminate an employee for just cause without notice or pay in lieu of notice. On August 26, 1997 Mr. Van Reeuyk terminated Mr. Hughes employment with notice despite Mr. Van Reeuyk's belief that he had just cause for the termination. From a legal perspective and on the facts of this case I believe that Mr. Hughes was entitled to notice. The sufficiency of the notice period will be discussed later. Suffice to say that in my opinion the policy on the use of the credit card was too ambiguous to provide proper cause to terminate Mr. Hughes. That is not to say that an employer needs to establish a policy against theft but rather where the employer is providing a gratuitous benefit through the use of a credit card the terms and conditions of that credit card use should be fully explained by the employer and understood by the employee.

As stated previously Mr. Hughes worked three days of his notice period. He was then terminated by Mr. Van Reeuyk after the \$1,600.00 had gone missing and after Mr. Van Reeuyk's conversation with the police officer. I note that there was no investigation by the police other than the initial contact with Mr. Van Reeuyk. Mr. Hughes testified that he was not contacted by police. Mr. Van Reeuyk testified that there was no basis for assuming that Mr. Hughes had stolen the money. Indeed Mr. Van Reeuyk testified that the money appeared but in a different place from where he had hidden it some two weeks

earlier. Mr. Van Reeuyk also candidly testified that he acted on the misguided advice of the police officer. There is no evidence to link Mr. Hughes to the missing money and for these reasons I find that the employer did not have just cause to terminate Mr. Hughes.

When the employer gave Mr. Hughes notice on August 26, 1997 the employer mistakenly believed that Mr. Hughes was entitled to only two weeks' notice. Mr. Hughes commenced employment on March 30, 1994 which meant that he had been employed in excess of three consecutive years on August 26, 1997. Mr. Hughes is entitled to notice or pay in lieu of notice pursuant to section 63(2)(b) of the Act. However, Mr. Hughes did work for three days of his notice period. I find that Mr. Hughes is entitled to termination pay under Section 63 of the Act as compensation in lieu of notice for a period of 12 days. I remit the matter back to the Director's delegate for calculation.

ORDER

The Determination dated March 31, 1998 is varied to reflect the fact that Mr. Hughes had worked three days of the notice period. The matter is remitted back to the Director's delegate for the calculation of wages owing including vacation pay and interest to date.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal