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 -

Island Power Wash Ltd.
("Island or Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/363

DATE OF DECISION: August 18, 1998

DECISION

APPEARANCES/SUBMISSIONS

Mr. Russ Jackson	on behalf of Island
Mr. Allan MacKenzie	on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on May 13, 1998. In the Determination, the Director's delegate found that the Employer had terminated Mr. MacKenzie's employment without "just cause" and ordered that the Employer pay $684.57 as compensation for length of service and vacation pay. The Employer says that Mr. MacKenzie was terminated for "just cause".

ISSUE TO BE DECIDED

The issue to be decided in appeal is whether the Employer had just cause to terminate Mr. MacKenzie's employment.

FACTS

Mr. MacKenzie was employed as a painter by the Employer from May 21 to August 27, 1996 when his employment was terminated. The Employer states that Mr. MacKenzie was terminated for "cause".

According to the Determination, the Employer terminated him due to "unacceptable" work on one occasion when he was working on a site in Nanaimo. The Employee explained that the Employer had failed to give appropriate instructions with respect to the job and the he had attempted to contact the Employer to obtain further instructions but had been unable to do so. The Employer also stated to the delegate that Mr. MacKenzie kept sending in "crazy" time sheets that bore no relationship to hours worked. Mr. Jackson's father observed that the employees, including Mr. MacKenzie, were often in a coffee shop or in a bar when they should be working. The Employer, therefore, paid for 8 hours per day, 80 hours every two weeks. The Employer agreed that Mr. Jackson was a good employee until the Nanaimo project. The Determination found that Mr. MacKenzie had not been given any warnings before his employment was terminated.

The delegate relied in the Tribunals decision in *Kruger*, BC EST #D003/97, and found that the misconduct on the part of the Employee was minor and not sufficient to justify dismissal.

ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (Kruger, BC EST #D003/97):

"1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

The burden of proving just cause is on the Employer. In the appropriate circumstances, "unacceptable" work and improper time keeping may constitute cause for termination. However, in the case at hand, Mr. MacKenzie's conduct with respect to the "unacceptable" work and the sloppy time keeping may, at most, be characterized as "minor misconduct". The Employer found the quality of Mr. MacKenzie's work, on one project, unacceptable. Generally, the Employer agreed that Mr. MacKenzie was a good employee. Mr. MacKenzie provides an explanation, *i.e.*, that was unable to obtain instructions with respect to the work from the Employer. This is not denied by the Employer. There are no

particulars of the "unacceptable" work. There is nothing in the Employer's submission to show that a reasonable standards had been established and communication to the Employee. The Employee was not given a warning that his employment was in jeopardy, or at all. As such, it is clear that Mr. MacKenzie was not given any time to meet the required standard and demonstrate his unwillingness to do so.

It appears from the Employer's submission that the Employer did not accept the time sheets and substituted his own view of the hours worked and paid accordingly. There are no particulars as to the nature of the problem with the "sloppy" time keeping. The Employer did not speak to the Employee about the problem.

The Employer also argues that Mr. MacKenzie and other employees went off to coffee shop or bars during working hours, or, in other words, took unauthorized breaks for which they were paid. In my view, this could -- in the appropriate circumstances -- constitute cause for termination. However, there is nothing in the Employer's submission to support that argument apart from general statement. There are no particulars of the claim, i.e., where, when , what who, ect. In short, there is little merit to the argument.

In the result, the Employer has not discharged the burden of proof and the appeal, therefore, must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this mater, dated December 8, 1997 be confirmed in the amount of $684.57 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the dated of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal