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 -

Deluxe Cleaning Services Ltd.
("Deluxe")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/314

DATE OF HEARING: August 11, 1999

DATE OF DECISION: August 24, 1999

DECISION

APPEARANCES

Krishna Saxena	For the employer
Parminder Cheema	On her own behalf
Manjit Arneja	Interpreter

OVERVIEW

Deluxe Cleaning Services Ltd. ("Deluxe", also, "the employer") appeals a Determination by a delegate of the Director of Employment Standards dated May 3, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

The Determination orders Deluxe to pay Parminder Cheema compensation for length of service, with interest over and above that. Cheema worked as a janitor for Deluxe, cleaning the common areas of buildings owned by GVRD. GVRD had other work that needed doing, an occasional need for someone to clean inside apartments. Cheema was hired for that work. When Deluxe discovered that Cheema had been working for its client, it fired her. Even though there was little of the apartment cleaning and the work was done outside of her regular hours, Deluxe saw only that the employee had acted to take away business. Length of service compensation has been awarded because Deluxe both failed to prove that Cheema knew of its interest in the apartment cleaning, and failed to show that Cheema knowingly acted to take business away from her employer.

Deluxe, on appeal, asks for the chance to show both that, Cheema knew that the apartment cleaning was something that Deluxe had reason to expect under its contract with GVRD, and the employee was told that she was not allowed to take on the extra work that she did for its client.

ISSUES TO BE DECIDED

It is the matter of whether or not the termination was for just cause which is at issue. As matters are presented to me, Deluxe alleges insubordination as well as conflict of interest. The employer claims that Cheema entered into direct competition with it, the conflict of interest, and that the employee disobeyed clear instructions.

FACTS

Deluxe provides janitorial services. Its staff is primarily engaged in the cleaning of office and commercial buildings but it has been cleaning three residential properties in White

Rock (the "White Rock properties") since 1995 under a contract between it and GVRD. Under that contract, Deluxe is to clean the lobby, halls and laundry areas of the buildings. But the contract recognises that, on occasion, there is a need to clean apartments that are left dirty by tenants. The contract states:

> It is to be understood that full service must be available on an immediate basis for any vacancies as and when they occur, if the unit has not been satisfactorily cleaned by a departing tenant. Immediate service on a "call out' basis will also be required for snow and ice removal. Contractor shall provide 24-hour contact service, 7 days per week.

Parminder Cheema was hired by Deluxe as a janitor of the White Rock properties. She began that work on August 6, 1997. It was Krishna Saxena, Vice-President of Operations for Deluxe, that told Cheema what it was that she was to do. He claims that, in doing so, he told Cheema that Deluxe, under its contract with GVRD, expected to clean apartments now and again, and that it would offer her the additional work. Cheema denies that he said anything of the sort. Saxena also alleges that Cheema was told that she was not allowed to work for GVRD directly. Cheema denies that as well.

On hearing from the employer, I find that Deluxe is quite unable to offer any firm support what is alleged as fact. There were no witnesses. And there are not written documents on which to rely. Deluxe operates without written rules. Terms of the employment were never written down. There is no correspondence which is of value. The employer produces only affidavits by two employees, both currently employed. The employees say that they were told to expect that, if there was apartment cleaning to be done, that it would come from Deluxe. But they know only what they were told, not what Cheema was told. And neither employee goes so far as to say that Deluxe specifically forbid them to work for GVRD directly.

The evidence does not indicate that Cheema was shown the contract between Deluxe and GVRD. But even if she was, I doubt that she could understand it. She demonstrates a rather limited command of English.

Deluxe's employees are free to take on janitorial work outside of their employment. Many have second jobs. Deluxe was paying Cheema only $7.15 an hour. It was the caretaker of the White Rock properties that approached Cheema and offered her the apartment cleaning. It was agreed that Cheema would be paid $10 an hour for that work. She earned a total of $120 cleaning apartments, $15 to $20 an apartment.

ANALYSIS

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

I find that the delegate has made no error with respect to the facts. The employer alleges that the delegate has erred in that respect but it has again failed to show either that Cheema was somehow advised of its interest in the apartment cleaning, or told not to work for GVRD. In the latter regard, I believe it most unlikely that the employee would risk her employment, by disobeying instructions, just for the sake of earning $15 to $20 now and again.

The payment of compensation for length of service is governed by section 63 of the *Act*. 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;*
>
> *(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 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.

Insubordination is claimed. Insubordination is grounds for immediate dismissal. But Deluxe has failed to show that the employee was at any point told that she was not allowed to work for GVRD. It fails to show insubordination.

The employer claims conflict of interest. It alleges that Cheema entered into direct competition with it. And in that regard, the employer is able to show that Cheema performed work for GVRD, that she did so without first notifying her employer or gaining its permission, and that Deluxe wanted the apartment cleaning work for itself. I accept that where an employee takes on outside work in direct competition with his or her employer, without divulging that fact or without securing permission for such activity, he or she may be found to have breached their duty of fidelity to the employer, regardless of whether the employer has published rules which specifically prohibit such outside work. But it is not shown that Deluxe actually conveyed that it had any interest in the apartment cleaning and, as such, that the employee clearly knew that she was entering into direct competition with her employer. The employee that inadvertently enters into competition with his or her employer has not breached the duty of faithful service.

The employer claims just cause for reason of insubordination and conflict of interest but is unable to establish that either occurred. The appeal is accordingly dismissed.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination dated May 3, 1999 and awarding $304.70 in compensation for length of service and interest to Parminder Cheema, and I order the payment of whatever further interest has accrued pursuant to section 88 of the *Act*.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal