Employment Standards TRIBUNAL

An appeal

- by -

Underground Enterprises Ltd., operating as The Underground
(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.: 2001/327

DATE OF DECISION: July 10, 2001

DECISION

OVERVIEW

This is an appeal by Underground Enterprises Ltd., operating as The Underground (the "Appellant") based upon written submissions, pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), of a Determination issued by the Director of Employment Standards (the "Director") on April 2, 2001 wherein the Delegate ruled that the Appellant had terminated an Employee without just cause and ordered the Appellant to pay the Employee $1,555.69 as compensation for length of service with section 88 interest.

ISSUE

The issue on this appeal is whether or not the Appellant had "just cause" to terminate the Employee such that it did not have to pay compensation for length of service.

ARGUMENT

The Appellant's Position

In an appeal form and letter dated April 24, 2001 filed with the Tribunal on April 25, 2001, the Appellant seeks an order overturning the Determination made April 2, 2001 on a variety of grounds. The Appellant submits that the Determination should be overturned because not all of the information available was taken into consideration. The Appellant also submits that, prior to dismissing the Respondent, enquiries were made at the Employment Standards Branch and information received that "just cause" for termination of the Respondent existed. Further, the Appellant submits that retail staff turn over regularly, that it was repeatedly mentioned in appraisals of the Respondent that he needed to get along better with other Employees and noted problems with tardiness and alcohol on the Respondent's breath when arriving for work. The Appellant also disputes the amount of severance ordered on the basis that, when the Respondent first began working for the Appellant, he was only working one day a week in the first few years.

The Appellant filed a supplemental submission in the form of a letter dated May 24, 2001 noting that witness statements submitted by the Respondent were all from friends of his and that, in the end, it is "his word against mine". The Appellant further notes that "all my future dealings with Employees will be very heavily documented".

The Respondent's Position

In a written submission dated May 2, 2001 filed with the Tribunal May 18, 2001 the Respondent seeks confirmation of the Determination issued April 2, 2001 saying that it was fair and accurate. In further support of this general submission, the Respondent says, in part, as follows:

1. That he was never advised prior to his dismissal of any "untoward behavior" or deficiencies.

2. That although he did initially begin his employment on a part time basis, it was not during the first 3 full years.

3. That retail staff to not regularly turn over as the Appellant suggests, but may stay on for years often making retail a career choice.

4. In the earlier appraisals of him, tardiness and odour of alcohol on his breath were mentioned but resolved 3 years prior to his dismissal. Following those appraisals he had an exemplary record.

5. He notes that a number of witness statements were omitted from the documentation apparently considered by the Director's Delegate.

6. He disputes that he was falsely claiming to have been promoted to accounting. Rather, he says there were discussions about him being promoted to either the office or beauty bar.

7. That the Director's Delegate was well aware of what he was disputing and asking for in his complaint and that he was seeking four weeks further severance pay rather than one.

In summary, the Respondent maintains that he upheld "a strong work ethic and true passion for (his) job".

The Director's Position

In written submissions dated May 17, 2001 the Director's Delegate submits, in part, as follows:

1. Although the Appellant did attend the Employment Standards office and receive information that they had just cause to dismiss the Respondent, that opinion was not based upon any information from the Respondent and such an opinion could only be based upon the information provided at the time.

2. The appraisals of the Respondent reveal that the overall performance of the Respondent was rated average to above average and the Appellant did not provide any written documentation to show that the Respondent had been disciplined for any of his actions or warned that his continued misbehaviour would result in termination.

3. All of the witness statements or interviews reviewed or considered were not outlined in the Determination in view of the Appellant not following the criteria required to show "just cause".

4. Regarding the amount of severance, compensation is based on the length of service and the hours of work performed at the time of termination. The length of service is determined by the years of continuous service regardless of the number of hours worked.

THE FACTS

In a Determination dated April 2, 2001 the Director's Delegate found that the Respondent was terminated without just cause and entitled to six weeks compensation for length of service and section 88 interest totalling $1,555.69.

The Appellant is in the retail clothing and cosmetics business, originally in retail clothing and then expanding to sell cosmetics in what is referred to as the "Beauty Bar". The Respondent worked for the Appellant from June 1, 1994 to July 21, 2000 as a Floor Supervisor at the rate of $9.25 per hour. A complaint was filed in the time period allowed under the *Act*.

A culminating incident occurred approximately one week prior to the Respondent's termination date (July 26, 2000) when the Respondent stated to a co-worker something to the effect that "things weren't getting done in the Beauty Bar and they needed another Manager in there. She wasn't doing her job". This apparently was in reference to another Employee of the Appellant, a Supervisor or Assistant Supervisor of the Beauty Bar. That Supervisor or Assistant Supervisor then learned of this comment and complained to the Appellant about it. The Appellant decided to terminate the Respondent based on the information provided. The Appellant then gave the Respondent a letter of termination, a copy of which was submitted to the Delegate in evidence. The Appellant paid the Respondent two weeks severance pay notwithstanding its position that he was terminated for "just cause". That letter, dated July 26, 2000 said in part, "Supervisors and co-workers alike have petitioned for your departure" and "it is not acceptable to harass other employees, make false representations to them about their performance, or make new staff feel unwanted."

Three appraisals dated July 27, 1997, February 10, 1998 and July 27, 1999 were submitted in evidence to the Director's Delegate. In these appraisals the Respondent was rated average to excellent on all categories with comments related to areas where he needed improvement. There was no suggestion in any of these appraisals that, if he did not improve in the areas delineated, there would be any ramifications such as termination. It was noted that, after the second appraisal which called for improvement in dealing with co-workers, he was promoted to Floor Supervisor where he was required to supervise Employees. It is also noted that after the third appraisal a concern was expressed about the Respondent reporting for inventory while drunk and high on drugs and that a raise would be withheld until a follow up meeting. However, no such meeting was ever held and he was subsequently granted a raise in November 1999.

The Director's Delegate found that this documentation was not sufficient to establish the criteria for progressive discipline and noted that no written warnings were ever given to the Respondent or any suspension from employment imposed for his conduct. The Delegate noted that the Appellant did not interview the Respondent prior to his termination to obtain his side of the story regarding the complaint from a fellow Employee. The Delegate observed that the Appellant did not provide any evidence to show that it had discussed any of the concerns allegedly expressed by fellow Employees with the Respondent prior to terminating him. The Delegate also noted that a complaint of attempting to access fellow Employees' computer codes and looking at their

pay stubs was not relied upon in the termination letter and so did not form part of the basis for just cause.

The Director's Delegate found that six weeks compensation was payable for length of service but deducted the two weeks which had already been paid by the Appellant to the Respondent such that four weeks compensation and section 88 interest were payable in the total amount of $1,555.69.

ANALYSIS

The onus is on an 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.*, BCEST #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:

> Paragraph 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.
>
> Paragraph 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.
>
> Paragraph 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.

With respect, I find that the Director's Delegate erred in the Determination in applying the concept of "progressive discipline". In an earlier decision of this Tribunal, *Jace Holdings Ltd. (c.o.b. Thrifty Foods) (Re)* [2001] BC EST #146 it was found as follows:

> Paragraph 10. A significant error in the determination is the delegate's application of the principles of progressive discipline. In his submission before me the delegate referred me to a number of decisions that were based on labour relations principles in which the principles of progressive discipline have long been established. However these principles derive from the powers granted to

arbitrators under the Labour Relations Code and similar legislation in other jurisdictions.

Paragraph 11. Section 89 of our Labour Relations Code grants significant powers to arbitrators including the power to reinstate an employee or to determine that a dismissal or discipline is excessive and to substitute other measures that appear just and equitable. Such similar powers in the Employment Standards Act have very limited application. Section 79(4) grants fairly broad remedial powers but such authority is limited to cases where there is a contravention of section 8 (false representations), Part 6 (leaves), or section 83 (retaliation). None of these provisions have application in this case.

Paragraph 12. Under the Act there is a simple threshold test. If there is "just cause" for dismissal there is no power for the Director or the Tribunal to reinstate an employee or to substitute some other discipline. One "just cause" exists, it is completely in the discretion of the employer whether to dismiss or not. There is no requirement for progressive discipline once "just cause" exists.

Paragraph 14. The Act does not regulate the employer's right to discipline. There is no requirement for "progressive discipline". If an employee's behaviour falls short of the threshold of "just cause" then an employer may impose whatever discipline the employer considers fair, short of dismissal. The only restriction would be if the discipline amounted to a substantial alteration in a condition of employment (section 66) in which case the Director may determine that the employment has been terminated or those matters referred to previously as giving rise to a remedy under section 79(4).

Paragraph 15. Likewise, even if an employee's behaviour exceeded the threshold of "just cause" it is still within the employer's discretion to dismiss or impose some other form of discipline. This decision is not reviewable by the Director (unless it also involved a matter triggering section 79(4)). It is completely within the discretion of the employer whether to dismiss or not. Even in the case where several employees have behaved in a manner that gives the employer just cause for dismissal, it is within the discretion of the employer whether to dismiss one, some, or all of such employees. There is no requirement in the Act that each employee be treated equally.

Although I find that the Director's Delegate erred in applying the principle of progressive discipline, that does not end the matter as it must still be determined whether or not the Director's Delegate erred in finding that just cause did not exist on the facts. Nothing in the submissions or material filed demonstrates, on a balance of probabilities, that the Delegate's decision was in error. To the contrary, it is clear that the three appraisals relied upon by the Appellant to demonstrate just cause do not meet the test as set out in *Silverline Security Locksmith Ltd.* to show that the Employee was warned that his continued employment was in jeopardy if certain standards were not met and that a reasonable period of time was given to him

to meet those standards. This was not a case of conduct that amounted to fundamental breach of the employment relationship.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated April 2, 2001 be confirmed in the amount of $1, 555.69, together with any interest that has accrued pursuant to section 88 of the *Act*.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal