Employment Standards TRIBUNAL

An appeal

- by -

Malcolm Dean

- 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: Carol L. Roberts

FILE No.: 2002/208

DATE OF HEARING: July 30, 2002

DATE OF DECISION: August 20, 2002

DECISION

APPEARANCES:

Jessica Groeneboer, Law Student, Law Students' Legal Advice Program:	For Malcolm Dean
Debbie De Bonis, General Manager: J. Goldschmidt, Plant Manager	For Dayliter Skylights & Installations Ltd.

OVERVIEW

This is an appeal by Malcolm Dean, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 28, 2002. The Director's delegate concluded that Dayliter Skylights & Installations Ltd. ("Dayliter") had not contravened the Act in failing to pay Mr. Dean compensation for length of service, and closed the file.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in concluding that Mr. Dean was not entitled to length of service compensation either because he had abandoned his position, or because it had just cause to dismiss him.

FACTS

Mr. Dean was employed was an assembler with Kardam Mfc. Inc., a predecessor company to Dayliter, from June 1, 1998 to October 1, 2000, and for Dayliter from October 16, 2000 to May 4, 2001. Mr. Dean's service was continuous for the purposes of the Act.

Upon assuming control of the company, Ms. De Bonis met with Mr. Dean. Although the contents of Mr. Dean's personnel file was destroyed by previous management, Ms. De Bonis had been advised of Mr. Dean's history of repeated absences on Mondays following paydays. Ms. De Bonis raised this issue with Mr. Dean, and set out the company's expectations for his future employment.

There is no evidence of any written warnings the company might have issued to Mr. Dean prior to October 2000, but for an August 15, 2000 letter warning him about smoking inside the plant, and a "Strenght (sic) Weakness Evaluation" prepared in 1996, which Ms. De Bonis discovered in unrelated files. The latter document identified Mr. Dean's weaknesses as what might be characterized as an abrasive personality, that he had taken an unusual number of sick days, although that had improved in 1996, and that he was quick to "fly off the handle". There were no letters or reports generated by Dayliter. There is no evidence, or allegation, that Mr. Dean failed to comply with any written warnings.

On or about April 13, 2001, Mr. Goldschmidt had a discussion with Mr. Dean. Both parties agree that the substance of the conversation concerned Mr. Dean's emotional state. Mr. Goldschmidt told Mr. Dean to go home. Mr. Goldschmidt said he had some safety concerns about Mr. Dean's behaviour, but he could not say whether he communicated those concerns to Mr. Dean. Mr. Goldschmidt's concerns, safety or

otherwise, were not put into writing. Mr. Dean testified that nothing was said to him about his performance on the job.

On April 27, 2001, Ms. De Bonis and Mr. Goldschmidt met with Mr. Dean. Ms. De Bonis told Mr. Dean that he was being laid off. Mr. Dean testified that Ms. De Bonis told him that work was slowing down and that he was going to be laid off. Ms. De Bonis stated that she told Mr. Dean that he needed counselling, and appeared to have an alcohol problem that was getting worse. She also told him that he could return to work so long as he had an AA sponsor, and Dayliter was assured he was making progress in a recovery program. No one at Dayliter attempted to contact Mr. Dean after April 27, 2002.

Ms. De Bonis agreed that she did not lay Mr. Dean off because business was slow; rather, she had concern for his welfare and the health and safety concerns of his co-workers. She advised the delegate that she would not have let him go but for her concerns about his behaviour.

Mr. Dean's Record of Employment ("ROE") noted that he was laid off due to shortage of work.

The delegate concluded that, even though Mr. Deans' ROE stated that he was laid off due to shortage of work, and that lay-off exceeded 13 weeks in a 20 week period, Mr. Deans was not entitled to length of service compensation. The delegate concluded that Mr. Dean's ROE was "probably improperly completed" and determined that Mr. Dean:

> was given time off to straighten himself out and of a related concern for the health and safety of those who worked with him. It was done with the recognition that he was a long term employee whose expertise was appreciated and whose job was waiting for him once he got some help, was making some progress, and that it could be verified by an outside person skilled in helping him with his particular problem. The employer properly placed the onus on him to make that call and he did not; rather it appears that he took himself out of the equation both in terms of his personal and employment responsibilities. ..

The delegate also concluded that, even if it could be concluded that Mr. Deans did not abandon or resign his position, Dayliter had sufficient grounds to dismiss him for cause. The delegate stated that Mr. Dean's personal problems were apparently preventing him from efficiently and effectively carrying out his job and his conduct was a safety concern both to himself and to others. Finally, it can be contended that Mr. Dean's behaviour frustrated the working contract with Dayliter and thereby constituted cause for his dismissal.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

The delegate failed to apply the Act in arriving at his determination. The delegate concluded that Mr. Dean was not laid off, but given time off "to straighten himself out". There is no evidence Mr. Dean requested time off for any purpose. He was, according to Ms. De Bonis' own admission, laid off. It was not made clear to Mr. Dean that the layoff was temporary, if indeed it was. In any event, Dayliter made no attempt to contact Mr. Dean to recall him at any time. Given that he was not recalled, Mr. Dean was, by operation of the Act, terminated on April 27.

Section 63(5) provides that, for the purpose of determining the termination date, the employment of an employee who is laid for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff. Section 1 defines temporary layoff, for the purpose of Mr. Dean's employment, as a layoff of up to 13 weeks in any period of 20 consecutive weeks.

While the legislation does not require that an employer attempt to contact an employee in writing of an intention to recall, an employer must make reasonable efforts to do so.(see Ocelot Enterprises Ltd. v. British Columbia (Director of Employment Standards) BC EST #D068/97). This is particularly so where an employee has been employed with the company for 13 years, as Mr. Dean had been.

Employees are entitled to compensation on termination of employment. Section 63 of the Act sets out the employer's liability for length of service.The liability is discharged if the employee is given written notice of termination, or a combination of notice and money. The employer is not liable for compensation if the employee terminates the employment, retires or is dismissed for cause. If an employee is dismissed for cause, an employer must establish just cause.

As I understand it, Dayliter does not contend that Mr. Dean's behaviour constituted gross incompetance, willful misconduct or other serious misconduct that led to a fundamental breakdown of the employee-employer relationship. Rather, it contends that there was a problem with Mr. Dean's drinking problem, which manifested itself in excessive missed Mondays, and emotional issues which led to safety concerns.

Just cause includes an employee's failure to respond appropriately to progressive discipline.The employer must prove that progressive discipline has been applied, and that the employee has failed to respond to the disciplinary measures.

If Dayliter had been of the view that Mr. Dean's job performance was unsatisfactory, it had an obligation to a) establish and communicate a reasonable standard of performance, b) give Mr. Dean an opportunity to meet the required standards and show that he was unwilling to do so, c) notify Mr. Dean that he had failed to meet the standards and that his employment was in jeopardy because of that, and d) dismiss only when Mr. Dean failed or was unwilling to meet those standards. (Kruger BC EST# D003/97).

The delegate did not investigate whether any progressive disclipline had been applied. Ms. De Bonis did not dispute that Mr. Dean was never given any written warnings about his job performance after November 2000. There is no evidence Mr. Dean failed to respond to any other written warnings about his performance on the job.

Further, there is no evideniary foundation for the delegate's conclusion that Mr. Dean's behaviour frustrated the employment relationship, constituting cause for dismissal. Consequently, Dayliter is liable to pay Mr. Dean compensation for length of service.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination be varied. The matter is referred back to the delegate to calculate Mr. Dean's compensation for length of service on an expedited basis.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal