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 -

Randy Chamberlin and Sandy Chamberlin
operating as Super Save Gas
("the Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/521 & 97/522

DATE OF DECISION: August 18th, 1997

DECISION

OVERVIEW

This is an appeal by Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas ("the Employer"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against two determinations which were issued by delegates of the Director of Employment Standards on June 27, 1997. One Determination ("Determination #1") deals with a Section 63 of the *Act* (Compensation for length of service) arising out of a complaint by a former employee, Crystal Jensen, in which she alleged that her employment was terminated without notice or compensation in lieu of notice. The other Determination ("Determination #2") deals with the imposition of a penalty under Section 29 of the *Employment Standards Regulation*.

This decision follows from my review and analysis of the Determinations and the parties' written submissions.

ISSUES TO BE DECIDED

There are two issues to be decided:

1. Is Crystal Jensen entitled to compensation for length of Service under Section 63 of the *Act*?; and

2. Is the imposition of a penalty reasonable in the circumstances of this appeal?

Determination #1

FACTS

Crystal Jensen was employed as a cashier/gas jockey from August 28, 1996 to January 15, 1997 at which time her employment was terminated without notice.

The Determination contains a summary of both Ms. Jensen's complaint and her recollection of the relevant facts as well as the Employer's responses. Following her investigation, the Director's delegate determined that Ms. Jensen was entitled to compensation based on length of service, under Section 63 of the *Act*, for the following reasons:

> The investigation revealed that Crystal Jensen was terminated because her performance did not meet the expectations of her employer. Randy and Sandy Chamberlin argue that they warned Crystal Jensen on many occasions

that her performance was inadequate and that on January 10, 1997 she was told to "clean up her act". Sandy Chamberlin sent copies of written notes made after two conversations on November 8, 1996 and January 10, 1997. The January 10, 1997 note states at the bottom "Chrystal (sic) saw this note and was told she was to clean up her act or she would loose (sic) her job."

Sandy Chamberlin says Crystal Jensen was spoken to on January 16, 1997 and terminated on the 18th, but the payroll records show her last day of work as January 15, 1997. Crystal Jensen denies ever seeing the note of November 8, 1996.

Crystal Jensen acknowledged receiving a written warning on January 10, 1997, but said she was not told on that day or in the next five days before her employment ended that she was in danger of losing her job. On the contrary, she says that she asked Sandy Chamberlin if her performance was meeting expectations and was told she was "doing fine".

I accept that Sandy Chamberlin conveyed to Crystal Jensen that her performance was inadequate on at least one occasion. There is a disagreement between Crystal Jensen and Sandy Chamberlin as to how many warnings were given and exactly what was said. There is no written warning which clearly states to Crystal Jensen that there were problems with her work performance which she had previously been warned about and which would result in her dismissal the next time they occurred.

In the absence of any documentation to support Sandy Chamberlin's contention that she clearly warned Crystal Jensen that further performance problems would result in her termination, I find that she did not carry out progressive discipline in a manner that would relieve her of the obligation to give notice or pay termination pay in lieu of such notice when she terminated Crystal Jensen's employment.

The amount of compensation to which Ms. Jensen was found to be entitled is $222.89 based on an average week's wages plus vacation pay and interest.

The reasons given by the Employer for its appeal include the following:

- Ms. Jensen was advised verbally of her poor work performance on several occasions;
- the employer "tried a variety of motivational techniques" to improve Ms. Jensen's work performance;
- Ms. Jensen's performance on her last day of employment demonstrated that those techniques had not been successful;
- the threat of dismissal was stated clearly during the two months prior to Ms. Jensen's dismissal;

and

- the verbal warning given on January 10, 1997 was sufficient by itself to constitute notice of termination for purposes of Section 63 of the *Act*

These reasons do not differ in any substantial way to those summorized by the Director's delegate in the Determination under the heading of "Employer's Position".

ANALYSIS

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*. The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

Just cause is not defined in the *Act*. However, the Tribunal has decided many appeals where the central issue was whether or not there was just cause to dismiss an employee. The following principles have been applied consistently by the Tribunal (see, for example, *Kenneth Kruger* BC EST No. 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.

In deciding this appeal I wish to be understood clearly. My decision is not based on my finding that I believe Ms. Jensen and do not believe the Employer. This is an appeal. It is not a re-investigation of Ms. Jensen's compliant. As the appellant, the Employer bears the onus proving that it had just cause to terminate Ms. Jensen's employment.

When I read the Determination it is clear to me that the Director's delegate conducted a thorough investigation of Ms. Jensen's complaint and the Employer's response to the allegations made by Ms. Jensen. The Determination also contains a clear,concise and yet complete set of reasons which support the delegate's Determination that Ms. Jensen is entitled to compensation.

Section 63(3)(a) of the *Act* requires an employer to give written notice of termination [see, for example *SunWah Supermarket Ltd.* (BC EST #D324/97)]. The Tribunal has commented on that requirement many times by noting that in the absence of a fundamental breach of the employment contract, the concept of just cause requires an 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 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 his or her work performance is acceptable to the employer.

For all of these reasons I find that I concur with the conclusion that the Employer is liable to pay compensation for length of service. Having made that finding, I wish to make an observation that has more to do with style rather than substance. The Director's delegate uses the words "termination pay" rather than the phrase "compensation for length of service" which is used in Section 63(1) of the *Act.* "Termination pay" or "severance pay" (the term used in Section 42 of the former *Employment Standards Act*) are often used interchangeably to describe the compensation which must be paid by an employer unless it has discharged its liability under Section 63(1) of the *Act*.

As noted above, I agree with the Director's delegate that the Employer is required to pay compensation to Ms. Jensen for length of service. The observation which I have made is intended to add some clarity to a provision of the *Act* which is not understood well by many employers and employees.

Determination # 2

FACTS

The text of the second Determination (also dated June 27, 1997) is set out below:

> On June 27, 1997, a Determination was issued by Jennifer Hagen, Industrial Relations Officer (copy attached). As Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas has contravened a specified provision of a Part of the *Employment Standards Act* or of Part of the *Employment Standards Regulation*, this is a penalty in the amount of $0.00 for these contraventions.
>
> A further contravention by Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas of these specific provisions will result in a penalty of $150.00 per employee by the contravention as set out in Section 29 of the *Employment Standards Regulation.* Contraventions beyond that may result in penalties to a maximum of $500.00 per affected employee.

ANALYSIS

The *Act* gives the Director many powers to administer and enforce the provisions of the *Act.* One of those powers is the power to impose a penalty.

Section 98(1) of the *Act* states:

> **98. Monetary penalties**
> (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

The prescribed "schedule of penalties" is set out in the *Employment Standards Regulation* (B. C. Reg 396/95) at Section 28, Section 29 and Appendix 2 of the *Regulation*. In particular, Section 29 of the *Regulation* sets out the penalty for contravening one of the " specific provisions" which are listed in Appendix 2. Section 63(1) of the *Act* is one of the "specific provisions" in Appendix 2.

The Director, or her delegate, does not impose a penalty for every contravention of one of the "specific provisions". This is consistent with what I believe to be the discretionary power which was given to the Director under Section 98(1) of the *Act* (" ... the director *may* impose a penalty ...").

Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person who is named in it. When I read this Determination I am unable to find any reasons which explain why the Director's delegate exercised the discretionary powers given by Section 98(1) of the *Act.* The *Act* does not require the Director to impose a penalty for every contravention of a "specified provision". Thus, in my opinion, when the

Director's delegate exercises the discretionary power given by Section 98(1) of the *Act*, that power ought to be exercised in a way which is not arbitrary and the reasons for imposing the penalty must be stated clearly in the Determination. Furthermore, the principles of natural justice also speak in favour of there being a clear set out reason's within the Determination.

In my opinion, it is not adequate and does not comply with the requirements of Section 81(1)(a) to state:

> "As (the Employer) has contravened a specified provision ..., this is a penalty in the amount of $0.00 for these contraventions."

Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director (or her delegate) has elected to exercise that power under the specific circumstances of a particular contravention.

For all these reasons I find that Determination #2 should be cancelled.

ORDER

I order, under Section 115 of the Act, that Determination #1 be confirmed and that Determination #2 be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal