Employment Standards TRIBUNAL

An appeal

- by -

BRP Enterprises Ltd., operating as Robins Donuts
("BRP")

- 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: Norma Edelman

FILE No.: 2002/368

DATE OF DECISION: September 9, 2002

DECISION

OVERVIEW

This is an appeal by BRP Enterprises Ltd. operating as Robins Donuts ("BRP") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards on June 12, 2002.

The delegate determined that BRP owed its former employee, Bjorn Moen ("Moen"), the sum of $349.50 representing compensation for length of service plus interest.

Brian Percival ("Percival"), on behalf of BRP, filed an appeal on July 5, 2002. He wants the Tribunal to cancel the Determination.

This appeal was decided based on the written submissions of the parties.

ISSUES TO BE DECIDED

Is Moen entitled to compensation for length of service?

FACTS

Moen commenced employment with BRP on November 23, 2001. He was dismissed on February 27, 2002 for allegedly discarding a "Baker's Cleanup Schedule" in the garbage. He was rehired on March 8, 2002. He was again dismissed on April 1, 2002.

Moen filed a complaint at the Employment Standards Branch alleging he was dismissed without just cause and did not receive written notice of termination of employment or compensation for length of service.

The delegate determined that Moen's employment was continuous from November 23, 2001 to March 29, 2002. He stated, "I advised the employer that he in essence nullified the dismissal of Mr. Moen on February 27, 2002, by reinstating him in such a short period of time."

The delegate described BRP's position regarding the dismissal of Moen on April 1 as follows:

> Mr Percival submits that the complainant left work sick on March 19, 2002. Subsequently on March 24, 2002, Mr. Moen was scheduled to work…but called from Victoria and advised another employee that he would be unable to report to work as he had… no means of transportation to return to Parksville that day.
>
> Mr. Percival advises that the employee that Mr. Moen contacted told him that after the telephone conversation the complainant neglected to hang up the phone and was heard to tell someone that they could now go bike riding.
>
> On April 1, 2002, Mr. Moen called in sick and according to Mr. Percival, at this point he decided that the complainant was unreliable and terminated his employment.

> Mr. Percival conveyed the above information to me in his letter dated May 3, 2002. Subsequently after advising the employer that the circumstances as described by him did not constitute just cause for dismissal, Mr. Percival stated that he wrote the aforementioned letter in haste but had more information to add.
>
> On June 6, 2002, the employer faxed an additional letter advising that Mr. Moen's employment had been terminated because he did not obtain his Food Safe Certificate when requested to do so.

The delegate described Moen's position as follows:

> Mr. Moen reports that he was legitimately ill on the two days identified above. He explained that he doesn't drive and was unable to get back to Parksville from Victoria on time for his shift on March 24, 2002.
>
> According to the complainant, he had approached Mr. Percival for payment of Statutory Holidays and shortly thereafter he was fired.
>
> Mr. Moen confirms that he agreed to obtain his Food Safe Certificate but had no opportunity before being dismissed for the second time. Moen asserts that at no time did Mr. Percival advise him that he was at risk of losing his job if he didn't obtain the Certificate within a specific period of time. Mr. Moen also adds that the employer never mentioned the issue of a Certificate as a reason for termination.
>
> The complainant confirms that he was summarily dismissed after phoning in sick on April 1, 2002.

The delegate concluded that BRP did not have just cause to dismiss Moen. He said the employer took no disciplinary action when Moen allegedly said on March 24, 2002 that he could now go bike riding. It was not until Moen called in sick on April 1 that BRP terminated Moen's employment. The delegate stated that if the issue concerning the Food Safe Certificate had actually been the reason for termination, he believes Percival would have stated it as the primary reason when first making his submission to him in response to Moen's complaint. The delegate said he therefore relied on Moen's position regarding the Certificate and he concluded that the Certificate was not the reason for dismissal. The delegate found that Moen was entitled to one weeks' wages amounting to $349.50 inclusive of interest

Percival appealed the Determination on July 5, 2002. He requests that the Determination be cancelled. He claims he was denied the opportunity to respond to the investigation. He also says the following:

a) Mr. Moen should have been able to return from Victoria on time for his shift on March 24/02. Since Mr. Moen does not drive, how did he get there? The busses were not on strike. He made no attempt to come to work, and no "valid" reason. A warning letter was issued to Mr. Moen. He, again missed work shortly thereafter.

b) Mr. Moen was advised via a letter to all staff, that a Foodsafe Certificate was required. Mr. Moen replied, that he would take the next available course. When he did not do so, he was advised verbally that he must acquire the Certificate to maintain his job. He advised again, he would take the next available course. Again, he did not do so.

c) Mr. Moen did not have 3 consecutive months of employment as he was terminated with just cause Feb. 27/01 (I accept that this date should be 2002 and not 2001) for having discarded a baker's clean-up schedule into the garbage. The clean-up schedule had just been placed in

> front of him that day because he was not competing this task properly. It was missing the next morning, I went through the garbage and found it in a garbage bag that only he used. He was re-hired Mar. 8/02 with a new 3 month probation period.

Percival attached a document titled "Letter of Warning to: Bjorn Moen" with his appeal. It reads as follows:

> On March 24/2001, you called from Victoria stating that you were unable to make your shift at Robin's Donut's that evening. The reason, you stated was that you were stuck in Victoria.
>
> Unfortunately, for you, you left the phone off the hook, and the conversation with that ensued after that was one that leads me to believe that you could have made it too work.
>
> I believe your lack of effort to get to your scheduled shift was irresponsible on your part and caused a great deal of stress on the part of your teammates and your employer.
>
> Please be advised, this is not acceptable, and if it happens again you will be dismissed.

At the bottom of the letter in handwriting its states "Bjorn: Please sign and return for my records, Thank you."

The delegate and Moen filed submissions in reply to BRP's appeal.

The delegate said that Percival did not produce the letter of warning during his investigation or advise him of its existence and, Moen told him that he never received the letter or a verbal reprimand regarding his missed shift on March 24. The delegate also said Percival was given the opportunity to respond to the investigation. He said he faxed a copy of Moen's complaint to Percival on May 3, 2002; Percival replied in writing on May 3, 2002; he advised Percival on May 23, 2002 that his reason for dismissing Moen as set out in his May 3 letter did not constitute just cause; he received a letter from Percival dated May 27, 2001 containing various questions and he responded to it on May 31, 2002; and on June 6, 2002 he received another letter from Percival wherein for the first time he advised that Moen's employment was terminated for not obtaining a Food Safe Certificate.

Moen replied that after he was fired for throwing out the "Bakers Cleanup Schedule" (and he denies doing this), Percival called him a week later and apologized and asked him to return to work, which he did on May 8, 2002. Moen said he was truly sick on the days in question and when he called in to work on March 24, 2002 the employee who he talked to assured him that his shift would be covered and this would not be a problem. He said at no time did he receive any reprimand from Percival regarding missing this or any shift. He further said Percival knew his Food Safe Certificate had expired when he hired him and at no time did Percival say it would need to be renewed. Moen said he never received any written or verbal warnings and Percival's accusations regarding his Food Safe Certificate only arose after he went to the labour board regarding his wrongful dismissal. He said he confronted Percival on April 29, 2002 (I accept that this date should be March 29) as he wanted to be paid for two statutory holidays. Percival told him to be careful with his requests as he may price himself out of a job. On April 31, 2002 (I accept that this date should be April 1) he received a message from Percival on his answering machine stating that due to his request for pay he was unable to continue employing him as he had made himself an unaffordable asset to his business. Moen says he was fired for requesting pay that he was legally entitled to receive.

ANALYSIS

The burden is on the Appellant, BRP, to show that a Determination is wrong. In this case, I am not satisfied that BRP has met that burden.

Percival, on behalf of BRP, claims he was denied the opportunity to respond during the investigation. I am not convinced that is the case. First, Percival has provided no particulars to support this claim. Second, the documents provided by the delegate in his reply to the appeal make it clear Percival was given the opportunity to respond during the investigation.

Under Section 63 of the *Act* an employer is liable to pay an employee compensation for length of service (or notice in lieu) after the employee is employed for at least 3 consecutive months unless the employee quits or retires, neither of which is applicable in this case, or is dismissed for just cause.

Moen commenced employment at BRP on November 23, 2001. He was dismissed on February 27, 2002, which is just over 3 months of employment. He was rehired on March 8, 2002 and dismissed again on April 1, 2002.

Percival claims that since Moen did not have 3 consecutive months of employment after he was rehired on March 8, he is not entitled to compensation for length of service. He says that Moen was rehired with a new 3 month probation period. Percival also appears to argue that he had just cause to dismiss Moen on April 1 because he gave him a prior letter of warning stating he would be dismissed if he missed another shift and because Moen refused to obtain his Food Safe Certificate after being warned he must acquire it to maintain his job. Percival further claims that Moen was dismissed for just cause on February 27, 2002 for having discarded the "Baker's Cleanup Schedule".

Turning first to the issue of whether Moen was employed for at least 3 consecutive months, I am of the view that Moen was continuously employed from November 23, 2001 to April 1, 2002. Moen stated that after he was fired on February 27 Percival called him and apologized and asked him to return to work. This statement was not contradicted or challenged by Percival and I accept that what Moen says is accurate. Accordingly, I find Percival's conduct to be inconsistent with a true or continuing intent to terminate Moen's employment and for this reason, as well as the fact that Moen agreed to return to work, I find that the dismissal was revoked. Moen's length of service for the purposes of determining eligibility for compensation under Section 63 of the Act runs from November 23, 2001 to April 1, 2002, a period in excess of three months.

The next issue is whether BRP had just cause to dismiss Moen.

The Tribunal has addressed the question of dismissal for just cause on many occasions (see for example *Kenneth Kruger* BC EST # D003/97). The Tribunal has said that where there are instances of minor misconduct, the employer must show, in order to establish just cause, that a reasonable standard of performance was communicated to the employee; the employee was given a sufficient period of time to meet the required standard of performance and had demonstrated an unwillingness to do so; the employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and the employee continued to be unwilling to meet the standard. In exceptional circumstances a single act of misconduct (such as theft or gross insubordination) by an employee may justify summary dismissal without the requirement of a warning because the employment relationship has been fundamentally breached.

I am not satisfied that BRP had just cause to dismiss Moen on February 27, 2001. Even if Moen did discard the "Baker's Cleanup Schedule" this act does not amount to serious misconduct. Percival has not shown it was a deliberate and willful act and his subsequent apology and reinstatement of Moen supports the view that the matter was not so serious that it undermined the employment relationship.

I am also not satisfied that BRP had just cause to dismiss Moen on April 1.

Percival claims he verbally warned Moen about the Food Safe Certificate. Moen, however, denies being verbally warned about the Certificate and in the absence of any evidence to prove he received the verbal warning I am unable to accept that Moen was warned about the Certificate. As a result this reason for Moen's dismissal does not amount to just cause. I would add that I agree with the delegate that if Certificate issue were the real reason for Moen's dismissal, Percival would have said so when he made his first submission to the delegate.

Percival further claims he gave Moen a written warning that he would be dismissed if he missed another shift. The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see Specialty Motor Cars BCESTD#570/98). Percival has provided no explanation why the letter of warning was not provided to the delegate during his investigation. If the letter existed prior to April 1, it could have and should have been presented to the delegate. Insofar as it was not presented to the delegate I will not consider it on the appeal. Therefore, Percival has not established that BRP had just cause to dismiss Moen for calling in sick on April 1. Based on the information before me, I cannot say that Moen's conduct was of such a nature that it repudiated the employment relationship and BRP was justified in dismissing him without a letter of warning. For example, there is no proven fraud in this case or evidence of prejudice to the employer's interest. Having said that however, even I did consider the letter, I am still of the view that BRP has not established it had just cause to dismiss Moen. I am not convinced that the letter of warning was given to Moen or for that matter was even prepared prior to April 1. Moen denies receiving the letter and the letter does not contain Moen's signature. If the letter existed prior to April 1, I would have expected that Percival would have provided it to the delegate during the investigation process insofar as it is critical to his case. Insofar as he did not do so, I find it extremely doubtful that this letter existed prior to April 1.

For the above reasons I dismiss the appeal. I concur with the delegate that BRP owes Moen one week's wages as compensation for length of service

ORDER

I order under Section 115 of the *Act* that the Determination be confirmed.

Norma Edelman, Vice-Chair
Adjudicator
Employment Standards Tribunal