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 -

Ecco Il Pane Bakery Inc.
(the " Appellant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/414

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES

Andrew Bose	for the employer
Hamza Abbas	for himself
Jim McPherson	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Ecco Il Pane Bakery Inc. (the "employer") from a Determination dated May 11, 2000. That Determination found the employer liable for $789.17 for compensation in lieu of notice to Hamza Abbas (the "complainant"). The Director's Delegate determined that the employer had breached Sections 18(1), 63(2), and 63(3) of the *Act*.

ISSUE TO BE DECIDED

1. Did the employer have just cause to terminate Hamza Abbas?

FACTS

The employer operates two restaurants in Vancouver. The complainant was hired in April 1998, and at the time of the termination was working as a cook. The complainant was terminated July 8, 1999 for, allegedly, carelessness and poor work performance. The complainant has two written warnings on file. The first related to lateness on December 12, 1998; the other was for an unauthorized absence on February 12, 1999. The letter given on December 12 included a warning that "to continue to be late could result in dismissal." The letter on July 8, 1999 does not give detail to any incidents of carelessness nor give any examples of poor work performance.

ANALYSIS

The employer takes the position that the complainant was fired for just cause due to the fact that he was fairly warned, both verbally and in writing, that his performance was substandard and that a continuation of this substandard work would result in termination. The employer puts forward no new evidence nor does it take exception to the evidence that the delegate relied on in making the Determination.

The delegate states that the employer took the position that the complainant was fired for just cause and that it would make no further submissions. There is no indication from the evidence before me that the complainant was further warned about his work performance outside of the two warning letters. Specifically, the employer has not given any particulars i.e. dates or reasons

to verbal warnings or that they were recorded. Consequently, in order to determine whether the employer has just cause to terminate the complainant, I must rely on the three letters on file.

It is well established that, absent a fundamental breach of the employment relationship, the employer must show the use of progressive discipline in order to prove just cause (Re: *Hall Pontiac Buick Ltd.*, BC EST #D073/96). The employer does not allege, nor is there any evidence before me, that Mr. Abbas committed a single act that could be considered to fundamentally breach the employment relationship. As such, the delegate was correct to consider whether progressive discipline (or corrective discipline) was applied to Mr. Abbas.

I can find no error in the delegate's report in the statement of the criteria for determining just cause. Consequently, in order to overturn this Determination I must be convinced that the delegate's conclusion, based on the evidence, was clearly wrong. At the heart of the concept of progressive discipline is the notion that the employee, if warned, will correct his/her actions. As such the mere fact that the employee has been warned about being late does not lead to a conclusion that just cause is establish when the employee is later found to be careless. This is not to say that the employer necessarily has to establish that progressive discipline was followed for each separate and discreet example of employee misconduct. In order for alleged misconduct not related to the previous misconduct to be viewed as giving the employer just cause it must be shown that the employee is incapable of learning from mistakes. Since there are no further notations for tardiness on the complainant's file I must conclude the December 12, 1998 warning had the desired effect of correcting behavior. Similarly there are no further examples of unauthorized absences. I assume the February 12, 1999 warning also served its purpose.

In conclusion, progressive discipline is not a formula that can be applied without regard to the individual facts. The popular conception of a verbal warning followed by a written warning and progressing to termination does not establish just cause in all cases. The delegate has made no mistake in applying the law of progressive discipline. There is nothing in the file to indicate that he erred in concluding that just cause was not shown. The complainant is therefore entitled to compensation in lieu of notice of termination of employment.

ORDER

The Determination dated May 11, 2000 is confirmed.

E. Casey McCabe

E. Casey McCabe
Adjudicator
Employment Standards Tribunal