

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 -

Winstar Holdings Inc. o/a Garden City Shell
("Winstar")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/414

DATE OF HEARING: September 30, 1999

DATE OF DECISION: November 2, 1999

DECISION

APPEARANCES

Margaret Yu	For the employer
Dave Vandenberg	On his own behalf

OVERVIEW

Winstar Holdings Inc. o/a Garden City Shell (“Winstar” or “the employer”) appeals a Determination by a delegate of the Director of Employment Standards dated June 11, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination orders Winstar to pay Dave Vandenberg (“the employee” also, “the Complainant”) \$49.35 for reason of a violation of section 21 of the *Act*. The Determination also orders the payment of compensation for length of service. The delegate has determined that Winstar did not have just cause when it dismissed Vandenberg, that the employee is guilty of minor misconduct but nothing so serious as to justify his immediate termination.

Winstar appeals both parts of the Determination. According to the employer, Vandenberg’s claim for \$49.35 is false. And it claims that it was fully justified in terminating Vandenberg for several reasons, dishonesty and insubordination included.

ISSUES TO BE DECIDED

The question is whether the delegate is or is not correct in his decision that Vandenberg is guilty of only minor misconduct.

The order to pay \$49.35 remains an issue.

FACTS

Winstar operates Garden City Shell, a full service gas station.

Vandenberg worked for Winstar from September 23, 1997 to February 7, 1998 as a gas station attendant.

It was part of Vandenberg’s job to check the oil for customers. According to Winstar, he failed to replace an oil cap on more than one occasion. Vandenberg paid towards the cost

of having a customer's engine steam cleaned. Margaret Yu, Winstar's Manager, agrees that he did. In a letter to the delegate dated July 9, 1998, and in reference to the steam cleaning, she states, "I was going to discipline him but he volunteered paying the garage this time himself so that he would not be disciplined".

The matter of how much Vandenberg paid towards the steam cleaning remains a source of dispute. According to Vandenberg, he paid Yu \$40 in cash. Yu tells me she is certain that it was less than \$40 but she cannot recall the exact amount paid.

The delegate has accepted that it was \$40 that Vandenberg paid Yu for the steam cleaning. He also accepts that Vandenberg paid Winstar another \$9.35 for the purpose of making up for a fuelling error.

Vandenberg again forgot to replace an oil cap on the 29th of January, 1998. Believing that Yu was again going to ask him to pay for further steam cleaning, he consulted the Employment Standards Branch. As soon as Yu raised the matter of the forgotten oil cap, Vandenberg told her that she could not make him pay for his mistake and that, if he was disciplined, he would lodge a complaint against his employer.

At some point, Vandenberg began to believe that he might soon lose his job. And it appeared to him that his hours were being cut back. He was, in the last days of the employment, at times sullen, uncooperative and incommunicative. The delegate identifies acts of minor misconduct by Vandenberg. Winstar alleges various instances of gross misconduct.

The first of the alleged instances of gross misconduct is what I will call the "Bettschen allegation". It is said that Vandenberg encouraged Trevor Bettschen to tell lies about uncontrolled stealing from the employer. Vandenberg denies doing that. The delegate interviewed Bettschen and he reports that Bettschen said that Vandenberg did not ask him to spread lies. That is contrary to what Bettschen has had already said in a letter. For that and other reasons which are outlined in the Determination, the delegate chose to give no weight to Bettschen's evidence. That is to cast doubt on whether Bettschen is credible and whether there is anything to the Bettschen allegation.

Winstar persists in the Bettschen allegation on appeal but does not produce Bettschen for the purposes of my hearing and the appeal. It fails to show that Bettschen is believed in any way. I find that the employer on appeal fails to establish that Vandenberg in fact encouraged Bettschen to be dishonest in some way.

The second of the alleged instances of gross misconduct is what I am going to call "the Plumb incident". Vandenberg telephoned another employee, Larry Plumb, on February 5, 1998. In a wide-ranging conversation, Vandenberg told Plumb that people thought that he was the employer's spy, that they did not like him and were going to beat him up, that Yu was trying to fire the both of them, and that there was a rumour going around that Plumb was using other people's credit cards to steal cigarettes. Plumb has written the Tribunal and he, in his letter, states that Vandenberg tried to "make trouble for me" and "create a

difficult work environment for me”. I am given no reason to think that it was anything more than that.

According to Winstar, the final straw was the manner in which Vandenberg conducted himself on the 7th of February, 1998. According to Yu, Vandenberg refused to do cleaning, was exceedingly rude to his supervisor, Adele Burroughs, in that he made a comment about whether her maternity outfit was a ‘Shell approved’ uniform, and disobeyed clear instructions in respect to cash sales. In regard to the latter, the employer claims that first Burroughs, then Yu, told Vandenberg that when a customer paid cash for gas, he was to tell Burroughs what the money was for, on handing it over to her, so that she would then know if anyone left without paying. Vandenberg denies that he disobeyed instructions. According the employee, he could not always tell Burroughs what sale or sales cash was for because he was really busy, and Burroughs was often busy with customers, and so, rather shouting over their heads, he would just hand her his cash and leave for the next customer. He notes that the Garden City Shell station has 8 gas pumps and that he was on the 7th looking after all 8 of them. Vandenberg goes on to add that he had no idea that Burroughs was a supervisor, denies saying anything untoward about her uniform and says that, it is not that he refused to perform cleaning on the 7th, it is that he really had no time for the cleaning in that he was so very busy pumping gas.

Burroughs did not attend the hearing set in the appeal but she has written the Tribunal. She writes in regard to the matter of the cleaning, “I had asked Dave to help with some of the cleaning, he began to shout at me as he did not feel he should have to help”. As that is all that Burroughs has to say on the point, and there is no other evidence on point, I find that Vandenberg was merely asked to help with cleaning, he was not ordered to perform cleaning. Clearly, to ask for help is not to order that work be done.

Burroughs, in writing to the Tribunal, does not say anything which confirms that Vandenberg made an improper comment regarding her uniform. All that she has to say on the matter is that she is “not sure why Dave was so concerned over my uniform”. There is no expression of shock or disappointment. The evidence before me simply does not show that Vandenberg said something untoward, or of an improper nature, to Burroughs.

Burroughs told the delegate that she felt that Vandenberg resented the fact that she worked inside and he had to always work outside, and pump gas, and that he would often just walk off or was otherwise incommunicative. In writing to the Tribunal, she tells me that he ignored her on the 7th when she asked if he had outstanding money from pumping gas. As she puts it, “I asked a couple of times, he refused to answer any of (my) questions”. As that is all she has to say, I am again led to the conclusion that Vandenberg did not wilfully disobey instructions. What he did do was not answer questions.

Burroughs goes on to tell me that Vandenberg left her feeling “stressed out and upset” on the 7th. She complains, “Dave had no right to treat me so unfairly as I did nothing to (invoke) his behaviour”. I accept that but it only goes to show that, on the 7th, Vandenberg must have been particularly sullen, incommunicative and uncooperative.

The delegate has recognised that Vandenberg was a less than satisfactory employee.

In this case, in my opinion, the acts of misconduct to which Mrs. Yu has referred fall into the category described above as “minor misconduct”. This is not meant to minimize the uncooperative attitude exhibited by Vandenberg towards Adele Burroughs and, to some extent, Mrs. Yu. Nor does it excuse the poor judgement shown by V, in my opinion, in phoning Larry Plumb at night to accuse him, in effect, of spying for Mrs. Yu. It is rather to distinguish such misconduct from acts of wilful insubordination or dishonesty, which exemplify the category of acts which may provide just cause for dismissal after a single incident.

ANALYSIS

What I must decide is whether the appellant has or has not met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of what is either an error in fact or in law.

Vandenberg did not volunteer to pay for steam cleaning. Winstar required the payment in that it threatened him with discipline.

Section 21 of the *Act* is as follows:

- 21 (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
- (2) *An employer must not **require an employee to pay any of the employer's business costs** except as permitted by the regulations.*
- (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

(my emphasis)

I am satisfied that Winstar has contravened section 21 of the *Act*. Vandenberg in paying what he did, paid part of Winstar's business costs. It is Winstar that decided to make amends for mistakes by paying for steam cleaning engines and just giving away gasoline that is mistakenly given to customers. And Winstar must accept that employees will make the occasional mistake and that that is simply a part of being in the full service station business. It is plainly unrealistic to expect that an employee will never fail to replace an oil or gas cap and that he or she will always give customers exactly what they want in the way of gasoline. That sort of mistake is to an extent unavoidable and inevitable, after all, Winstar is employing human beings, not machines.

The delegate has decided that \$49.35 was paid to Winstar, contrary to the *Act*. It is reasonable to believe that Vandenberg paid something like that amount. Winstar claims that less was paid but it has not given me a clear idea of what that might be. There not being evidence which clearly shows that the amount was less than \$49.35, I will not change the Determination's order to pay that amount.

I now turn to the matter of length of service compensation. The delegate relies on *Kenneth Kruger*, BCEST No. D003/97, a decision of the Tribunal, in deciding matters. I agree with that sort of approach. It is what, in my view, a delegate should do.

Winstar did not at any point tell Vandenberg that his job was in jeopardy for reason of his conduct or his failure to meet some standard of the workplace. It follows that the employer would only be justified in terminating Vandenberg if there was an act of gross misconduct. The delegate has accepted that there was misconduct but decided that it was minor misconduct, which is to say, not so serious as to justify immediate dismissal. The appeal requires that I decide whether the delegate is wrong in deciding that. The question is, Is there plain, clear evidence of gross misconduct in this case?

In setting out the facts of this case, I have identified several ways in which Vandenberg's conduct was less than satisfactory. He was overly sullen, uncooperative and incommunicative, he was upsetting to employees, he tried to make trouble and make work difficult for another employee, he refused to help with cleaning, and he did not answer when spoken to. From what I can see, Vandenberg let a dispute over steam cleaning get the better of him. I can certainly see why Yu began to think that she should fire Vandenberg. But the misconduct which is identified in this case is not gross misconduct but rather minor misconduct. I agree with the delegate on that. It is the sort of conduct which leaves open the possibility of real improvement. For that reason, before the Tribunal will find just cause in cases of minor misconduct, it must be shown that the employee has been given plain, clear warning that they stood to lose their employment for reason of some failure to meet a reasonable standard(s) of conduct or performance; that the employee was given sufficient time to improve; and that, despite that, the employee demonstrated an unwillingness or inability to meet the standard or standards.

Winstar did not have just cause when it terminated the employee, Vandenberg. The liability to pay compensation for length of service has yet to be discharged.

For the above reasons, I find that the Determination should be confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated June 11, 1999 be confirmed in the amount of \$230.40, and to that amount I order the addition of whatever further interest has accrued pursuant to Section 88 of the *Act*, since the Determination's date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal