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 -

Brookwood Developments (1979) Ltd. operating as Aspen Motor Inn
("the Aspen")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/607

DATE OF DECISION: December 7, 2000

DECISION

OVERVIEW

This appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by Brookwood Developments (1979) Ltd. operating as Aspen Motor Inn. ("the Aspen", "the employer" and, also, "the appellant" in this decision). The Aspen appeals a Determination which is dated July 2, 2000, and by a delegate of the Director of Employment Standards (the "Director"). The Determination calls for the Aspen to pay Ronald Nelson compensation for length of service and interest.

The appeal is that the employer had just cause when the employee failed to show up for work after being warned that if he was ever absent or late again that he would be dismissed.

ISSUES TO BE DECIDED

What I must decide is whether the employer has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

Ron Nelson worked as a cook for the Aspen from September 15, 1999, to February 13, 2000.

The delegate in the Determination indicates that he was satisfied that there was misconduct but orders length of service compensation because the employer contradicted itself and it is unclear whether Nelson received the appropriate notice.

The Aspen claims that the delegate is wrong in many respects but I find that there is no dispute over the following important facts:

- The Aspen uses a form called an "Employee Warning Report" for the purpose of disciplining employees. It indicates that discipline may involve verbal warnings, written warnings, suspension, dismissal and other unspecified action.
- On January 7, 2000, Nelson was three hours late for work. A warning report was issued as a result of that. Nelson received the report. The report indicates that it is issued for a lack of attendance and being late and it states, on its surface, that a "failure to improve will result in … dismissal".
- On January 30, 2000, Nelson was late again. He was not dismissed by the Aspen but given some sort of verbal warning.
- And, Nelson failed to show up for work on February 14, 2000. He was terminated at that point.

According to Nelson, he called in sick. According to Brad Vennard of the Aspen, Nelson was telephoned, admitted that he was intoxicated, said that he would report for work and did not. It is not shown that Nelson was sick and/or intoxicated, or that he was not sick and/or intoxicated.

CLAIMS AND ANALYSIS

I am satisfied that this appeal can be decided on the basis of written submissions as section 107 of the *Act* allows.

> ***107*** *Subject to any rules made under section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.*

Section 63 of the *Act* imposes a liability on employers to pay length of service compensation once a person's employment reaches 3 consecutive months. Subsection 63(3) of the *Act* provides, however, that the liability to pay compensation for length of service can be discharged.

> *(3) The liability is deemed to be discharged if the employee*
>
> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment;*
>
> *(ii) 2 weeks' notice after 12 consecutive months of employment;*
>
> *(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
>
> *(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
>
> *(c) terminates the employment, retires from employment, or is* ***dismissed for just cause****.* (my emphasis)

A single act of misconduct may justify an employee's immediate dismissal but it must be shown that there was a fundamental breaching of the employment. Depending on the circumstances, misconduct of a much less serious nature, or the chronic inability of an employee to meet the requirements of a job, can also provide an employer with grounds for terminating an employee. In all cases the onus is on the employer to show just cause.

Where minor misconduct is alleged, as is the case here, it is the well established view of the Tribunal [see for example *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that just cause requires that:

> a) A reasonable standard of performance was established and communicated to the employee;

b) the employee was warned, clearly and unequivocally, that his or her employment was in jeopardy unless the standard was met;

c) the employee is given the sufficient time to improve for the purpose of meeting the standard; and

d) the employee did not meet the standard.

In this case, the employer claims that Nelson was chronically late and often absent and unduly absent once again on the 14th of February. The employer, however, has not produced evidence which confirms that the employee was in fact unduly absent on the 14th. That is fatal to the appeal in that the employee claims that he phoned in sick. An employer may not discipline an employee for an absence that is due to a legitimate illness of which the employer is informed or aware.

Even when I assume that Nelson was unjustifiably absent on the 14th, I am still led to the conclusion that the Aspen was not in position to dismiss Nelson for just cause.

There is no question in my mind that the Aspen did establish a reasonable standard of performance and communicate that to the employee. Clearly, employers have the right to expect that employees be on time and that they not be unduly absent. And I am satisfied that the Aspen did convey its policy on being late and absent to Nelson, if not through the verbal warnings which it claims to have made, then on issuing the warning report that it did when Nelson was late on the 7th of January.

What is not established, however, is that it was made plainly clear to the employee that if he was again late or absent that he stood to be terminated. The warning report issued for being late on the 7th is certainly clear enough. But when late again on the 30th of January, Nelson was not terminated but given only an oral warning of some sort. That verbal warning supersedes the warning report. And the warning being verbal, it is of course completely unclear that the employer at that point told Nelson, in no uncertain terms, that he still faced termination if late or absent again, that he was merely being given another chance, or additional time to improve. Adding greatly to that lack of clarity is of course the fact that the employer had just demonstrated to the employee that the consequence of further tardiness or absenteeism was not termination but a verbal warning, the least severe of the employer's disciplinary measures.

In summary, the employer has failed to show that there was misconduct on the February 14, 2000, or that it was made plainly clear to the employee on the 30th of January that he faced termination if unduly late or absent again.

The Determination is confirmed. The employer must pay compensation for length of service.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 2, 2000, be confirmed in the amount of $289.14 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC/bls