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 -

Shawn D. Venables
("Venables")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	97/529
DATE OF HEARING:	October 20, 1997
DATE OF DECISION:	November 7, 1997

DECISION

OVERVIEW

The appeal is by Shawn D. Venables under section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") dated June 25, 1997. In the Determination, Accent Stainless Steel Mfg. Ltd. ("Accent") is found to have had just cause to terminate Venables and that as such the employer's liability for compensation for length of service was discharged.

APPEARANCES

Shawn D. Venables	On His Own Behalf
Brad McQuhae	Accent Stainless Steel

ISSUES TO BE DECIDED

Did Accent have just cause to terminate Venables?

FACTS

Shawn Venables began work as a grinder/polisher for Accent Stainless Steel on April 16, 1996. He was terminated on May 9, 1997.

Accent gives as reasons for the termination, the unsatisfactory quality and quantity of his work, excessive absenteeism, an excessive number of injuries, a bad attitude, poor work habits and a refusal to take direction.

Venables was often unavailable for work. He missed a few days for reasons of illness. He stopped work on 8 occasions so that he could receive minor first aid. But he missed 26 days of work as a result of what he says were injuries at work. Those injuries are welder's flash in June of 1996, a pulled groin in August, a strained back in November, and a broken thumb in January of 1997. It is clear that Accent now doubts that Venables actually broke his thumb at work because he kept on working and did not report his accident until the following Monday. But my own experience is that fractures are not always immediately apparent. In the absence of clear evidence that the thumb was broken somewhere other than at work, I must view all of Venables' injuries as being work related.

Orie Staten, Accent's production supervisor, and Gerald "Chico" Gyuricska, its shop supervisor, met with Venables on March 26, 1997. The record of that meeting shows that Accent was at that time concerned with his work performance. Other records indicate that

Jason Buller, the last of Venables' four team leaders, reported that his work was unsatisfactory.

Buller also found Venables' attitude quite unsatisfactory. On April 18, 1997, Buller recommended to Staten that Venables be replaced. He did so again on the 8th of May. On that day he complained that Venables was uncooperative, refused to take direction and, as a result of that, upset others around him. The next day was Venables' last day of work.

According to Accent, it was made quite clear to Venables that his performance as an employee was unsatisfactory. Venables flatly denies it. There is no evidence which confirms that he was told to improve or face the prospect of his termination. The record of the meeting between Staten, Gyuricska and Venables merely indicates that Venables was asked to see his doctor for an assessment of his health and whether he was able to "safely accomplish his assigned work". I find it unlikely that Staten and Gyuricska would have told Venables that his job was in jeopardy without recording that they did so.

Venables' doctor, in a letter dated March 27, 1997, advised Accent that he was unaware of any physical or mental health problems which would prevent Venables from meeting his job responsibilities.

The employer's record of Venables' injuries and illnesses shows no injuries of any sort after Staten and Gyuricska spoke with Venables on the 26th of March.

ANALYSIS

Section 63 of the *Act* sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. That the liability for compensation for length of service can be discharged is set out in section 63 (3). That section of the *Act* is as follows:

(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.*

A single act of misconduct may be of such a serious nature as to justify an employee's termination. Examples of less serious misconduct, when considered together, may also constitute just cause for dismissal as may the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

The Determination is that Accent had just cause for reasons which included absenteeism.

Venables' many absences were with justification. His absenteeism is innocent absenteeism, in part the result of illness but, in the main, the result of a series of *bona fide* work related injuries. Such absenteeism does not normally present an employer with just cause to terminate an employee although termination may be warranted where it is extremely excessive [*Massey-Ferguson Ltd.* (1969), 20 LAC 370 (Weiler), at p. 371]. Where it is excessive, even though it may be through no fault of the employee, there may be, nonetheless, a fundamental, irreparable breach of the employment relationship and the employer may have just cause to terminate as a result. Is that the case here? I have considered the extent to which illness and injury has prevented Venables from fulfilling his employment obligations, and whether it is likely to prevent him from doing so in the future, and find that Venables' absenteeism falls well short of presenting Accent with just cause. Venables' injuries did not have the ongoing effect of preventing him from performing the work required of a grinder/polisher. There is, moreover, no record of injury or absenteeism after his March 26, 1997 meeting with Staten and Gyuricska.

Accent says that it had just cause for reasons of misconduct and his inability to perform the work required of a grinder/polisher. The matter of whether or not an employer has just cause because of misconduct is a matter which has often been before the Tribunal. Where there is repeated misconduct but it is of a less serious nature, there may be just cause but the Tribunal has consistently found [See, for example, *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas* BCEST No. D374/97.] that the employer must show the following:

a) A reasonable standard of performance was established and communicated to the employee;
b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;
c) the employee is given the time to meet the required standard; and
d) the employee continued to demonstrate an unwillingness to meet the standard.

Where the dismissal is because of the inability of the employee to meet the requirements of the job, the Tribunal will also consider efforts to train and instruct the employee, and whether other options were available to the employer beyond dismissal, such as the ability to offer the employee a job to which he or she is more suited.

It has not been made at all clear to me that Venables is either guilty of misconduct, or was incapable of his job. But even if I were to accept Accent on that, the employer fails to show that it warned Venables, plainly and clearly, that his job was in jeopardy unless he his performance improved. As such, I am unable to see just cause.

Accent did not have just cause to terminate Venables. It owes compensation for length of service as a result.

Venables was employed for just over 12 consecutive months. As such he is owed two weeks' wages. His rate of pay was $15.35 per hour. He worked a 40 hour work week. As such he is owed 80 x $15.35 or $1,228 in compensation for length of service. He is also owed vacation pay on that amount, a further $49.12 [4 percent of $1,228]. The total amount owed is $1,277.12.

ORDER

I order in the matter of Shawn D. Venables and Accent Stainless Steel Mfg. Ltd., pursuant to section 115 of the *Act*, that the Determination dated June 25, 1997 be varied. The employee is owed a total of $1,277.12 in compensation for length of service and vacation pay.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc