Employment Standards TRIBUNAL

An appeal

- by -

Martin White
("White")

- 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: M. Gwendolynne Taylor

FILE No.: 2002/498

DATE OF DECISION: December 17, 2002

British Columbia

DECISION

This is an appeal, pursuant to section 112 of the *Employment Standards Act*, by Martin White ("White") from a Determination by the Director of Employment Standards (the "Director") dated September 10, 2002. White had filed a complaint against his former employer, Ideal Parking Inc./Stationnement Ideal Inc. operating as Central Parking System ("CPS") claiming that he had been terminated without just cause. The Director found that CPS had just cause and ceased investigating the complaint.

ISSUE

Did the Director err in determining that CPS had just cause for terminating White's employment?

BACKGROUND

White worked for CPS from January 2, until October 26, 2001 as a parking lot patroller, at the rate of $12.00 per hour. In a memo to White dated October 15, 2001, CPS documented that company policy required White to take status reports from the parking lots he patrolled. In the memo, CPS noted that White had taken some status reports but they were taken close in time to each other, not spread over his shift. The memo observed that White's work was unsupervised, the company relied on him to perform his duties, and the timing of his status reports and the level of ticketing indicated that he was not devoting his full attention to the required duties. In the memo, CPS indicated the issue would be reviewed again in two weeks.

By an Employee Warning Report dated October 17, CPS documented that White had not taken status reports on October 15 and 16, and cautioned him that if he did not take the reports he would be suspended for one week. That report also contains a standard paragraph: "You are given this notice in order that you may have an opportunity to correct the situation. If this is repeated, or if you engage in any other misconduct, you will be subject to appropriate disciplinary action, including layoff or discharge."

By Employee Warning Report dated October 26, 2001, CPS terminated White's employment on the grounds that he was not taking status reports and had told the manager he would not do so. That memo outlined another ground for termination but that was not pursued as cause by CPS or by the Director.

In the Determination, the Director stated:

> The employer may change the conditions of employment at any time during the employment. The company policy requires all patrollers to take status reports from the pay stations during every lot visit. While White states that he was not required to complete the status reports at the start of his employment, he acknowledges that the policy was changed. Based on the evidence provided, White refused to complete the status reports required by Ideal.

The Director acknowledged the second reason given by CPS in the October 26 memo and stated that if termination had been based solely on that ground, there might have been a different result to the Director's investigation. Because of the first reason cited by the employer, the Director found it was not necessary to examine the second reason. The Director concluded:

> Based on the evidence provided, White failed to meet the employer's standard of performance, despite the employer's written warnings and notification that if White continued not to provide

> status reports that it would result in dismissal. Ideal has demonstrated that White was warned of the performance problem of failure to provide status reports and that dismissal was the outcome for failure to meet reasonable performance standards.

THE APPEAL

White submitted that he was denied the opportunity to respond to the investigation and that the Director overlooked facts. White submitted that the company had been threatening to eliminate him from his position and had been harassing him and that the issue of status reports came up after some other troubles with the company. He claims that only the first reason given for termination was analyzed. He also submitted that the company did not properly follow through as indicated in the October 17 memorandum, that "the dates do not match" and that he did not know his employment was in jeopardy.

White did not challenge the Director's finding that he refused to take the status report. In the documents he presented with the appeal, his position was that taking the reports presented a safety issue because it involved getting out the vehicle to take the reports from the machine.

ANALYSIS

Section 63 of the *Act* provides:

> **Liability resulting from length of service**
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> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
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> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
>
> (i) one week's notice after 3 consecutive months of employment;
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> (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.
>
> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
>
> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
>
> (b) dividing the total by 8, and
>
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
>
> (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of

mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the Act. Consistent with that approach, the burden is on White to demonstrate such an error.

One of the leading cases in British Columbia on ‘just cause’ is *Silverline Security Locksmith Ltd (re)* [1996] B.C.E.S.T.D. No 200; BCEST # D207/96, July 31, 1996. At paragraph 11, the tribunal stated:

> The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
>
> It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:
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> 1. Reasonable standards of performance have been set and communicated to the employee;
> 2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
> 3. A reasonable period of time was given to the employee to meet such standards; and
> 4. The employee did not meet those standards.

And at paragraph 15, the tribunal stated:

> The concept of "just cause" requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

In my view, refusal to take the status reports as required is grounds for dismissal. However, one of White’s main ground of appeal is that he did not know his employment was in jeopardy and that raises the issue of whether CPS gave him sufficient notice that his employment could be terminated.

The first documented warning was October 15, and the issue was to be reviewed again in 2 weeks. However, CPS then issued another warning on October 17, indicating that suspension could result. This is the report with the standard form paragraph indicating layoff or discharge could result. The termination notice on October 26 states that White continued to refuse to take the reports. The Director found that White refused to take the reports.

Based on the evidence and submissions, I find that the Director was justified in finding the White refused to take the reports. From the time of issuing the first warning until the termination notice, 11 days, it is apparent that there were some discussions between White and CPS in which White expressed his concerns and indicated that he would not comply with the company directive to take the status reports. Although the October 17 report suggested that a 1 week suspension could result, the standard form paragraph referred to the possibility of termination. That, coupled with White’s stated intention not to

follow CPS' requirement, should have been sufficient notice to alert White that he was placing his employment in jeopardy.

I find that CPS gave notice that there was a problem and that termination could result and gave sufficient time to correct the problem.

White also raised as a ground of appeal that the Director did not investigate the other reason given for the termination. I agree with the Director that it was not necessary to examine the second reason because the first reason was substantiated as grounds for termination.

ORDER

Pursuant to section 115 of the *Act*, I dismiss the appeal and confirm the Determination issued September 10, 2002.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal