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 -

Sven Skold operating as Grand Forks Recycling and Metals
("Skold")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/774

DATE OF DECISION: December 16, 1997

DECISION

OVERVIEW

The appeal is by Sven Skold operating as Grand Forks Recycling and Metals ("Skold") under section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") which is dated September 19, 1997. The Determination is that Denis McLellan was dismissed without just cause and, as a result, is owed one week's compensation for length of service as well as vacation pay and interest.

ISSUE TO BE DECIDED

At issue is the Director's conclusion that the employee was dismissed without just cause.

FACTS

Dennis McLellan was employed as a labourer by Skold. He began work in October, 1995. His employment was terminated on September 13, 1996. He was to be paid on that Friday and, on not being paid, got into a heated exchange with his supervisor, Ian Taylor. Taylor delivered his paycheque that evening and told him that he was fired.

On being contacted by the Director's delegate, Skold gave three reasons for McLellan's termination: repeatedly driving the company truck home despite instructions to the contrary; smuggling (which put the company truck at risk); and swearing.

The Determination notes that it is the responsibility of the employer to prove just cause. The delegate said that he was unable to establish that McLellan had disobeyed instructions on driving the company truck home. The delegate found no proof of smuggling. In regard to the alleged swearing, the delegate found no wilful misconduct and no evidence that McLellan had been warned not to swear. And in regard to the employee's behaviour on his last day of work, the delegate found that it did not meet the criteria for "just cause".

On appeal, Skold takes issue with the delegate's findings. On the smuggling, he says that McLellan bragged to him about the smuggling and that "smuggling was proven to me …". But Skold presents nothing which shows that. On the other hand, McLellan flatly denies any smuggling and says that he would not risk his bonding by smuggling. Absent proof of smuggling, I am unable to conclude that McLellan is engaged in the alleged smuggling.

McLellan admits to swearing and to calling his immediate superior, Ian Taylor, a "fat fart". But he says that others called Taylor that and that there was a general habit of swearing at Grand Forks Recycling, Skold and Taylor included. Skold does say that McLellan's

swearing was directed towards customers and inappropriate in other ways. And he goes on to say that McLellan was told not to swear in public. But, again, he produces no proof of that. He merely complains that he tried to get people to provide him with written confirmation of the swearing and they refused to do so; and, that he cannot give out written warnings because both he and Taylor are dyslexic. I find that Skold's written submission to the Tribunal disproves the latter but what is most important is whether there is evidence of truly offensive swearing or an order not to swear. If there is Skold has failed to present it to me.

Skold says, but does not prove, that his gas bill declined quite substantially on McLellan's departure. That goes to McLellan's habit of driving of the company truck home. But it matters not whether Skold's gas bill fell or not. That is quite irrelevant. What is important is whether or not the driving home was contrary to instructions. As matters are presented to me, I conclude that the facts are just as the Director's delegate found them.

ANALYSIS

It is clear from the Skold's submission that he found McLellan to be a less than satisfactory employee. And it is clear that he believes that the Director's delegate erred in his assessment of matters. But Skold produces neither evidence nor argument which challenges the material points of the Determination. As such his appeal is one with no prospect of succeeding.

For that reason, I am inclined to dismiss the appeal pursuant to section 114 (1) (c) of the *Act*, simply as an appeal which is frivolous in the legal sense of the word. That is an appeal which does not controvert the material points of the Determination and is devoid of merit in that it has no prospect of succeeding [*Sammy S. Ali (Roti Kabab House*), BC EST #D436/97]. However that would do little to convey what is required by the *Act*. I think that there is a point to doing that in this case.

Section 63 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 Director's delegate found no proof of smuggling. On appeal, Skold again accuses McLellan of smuggling. He says "smuggling was proven to (him) …". That may be but Skold had to prove that to the Director's delegate and, on appeal, must prove it to me on what is called the "balance of probabilities". He has not done that. There is simply no evidence which points to smuggling. There is only Skold's assertion. As such, I conclude that if he had just cause for the termination, it was not for reason of smuggling.

Skold would have reason to terminate with just cause if he could show that McLellan was insubordinate. The Director's delegate did not find that McLellan's driving of the company truck home was contrary to instructions, nor did he find that his swearing was contrary to a policy of which he was made aware or some sort of clear warning not to swear. On appeal, Skold presents nothing which indicates to me that an order or instructions were given and then deliberately disobeyed. If Skold had just cause to terminate McLellan it was not because of insubordination.

I must say that as McLellan describes his use the company truck it appears rather sensible. And, in regard to the swearing, it is my experience that swearing is not only condoned in workplaces of the rougher, tougher sort, it can be a part of the culture of the workplace. But that is not to say that the driving or the swearing is necessarily acceptable. Where it is not and is repeated, that sort of less serious misconduct may still be grounds for dismissal but in such cases 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.

As matters are presented to me, there is no evidence which shows that McLellan received a plain, clear warning that he was failing to meet a standard and that he was in danger of losing his job unless he improved.

In summary, I am unable to see that Skold had just cause in terminating McLellan. It follows that one week's compensation for length of service is owed the employee, and vacation pay on that amount plus interest.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination DDET dated September 19, 1997 be confirmed in the amount of $312 together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc