BCEST #D580/98

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 -

David Nyman operating as
Protech Carpet & Upholstery Specialists
("Protech" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/611

HEARING DATE: December 17, 1998

DECISION DATE: December 23, 1998

DECISION

APPEARANCES

Mr. David Nyman	on behalf of the Employer
Mr. Gill Lepine	on behalf of himself
Ms. Sharon Charboneau	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on August 26, 1998. The Determination found that the Employer had terminated Mr. Lepine's ("Lepine") employment without "just cause and the delegate determined that Guest was entitled to $3,792.07 on account of compensation for length of service, overtime and vacation pay. The Employer appeals the Determination and says that it had just cause for the termination and, as well, that Lepine is not entitled to overtime payments.

FACTS AND ANALYSIS

Lepine was employed by Protech as a technician between May 15, 1991 and August 26, 1997, when his employment was terminated.

With respect to the overtime issue, the Employer agrees with the delegate's calculations but questions Lepine's entitlement in the circumstances. He argues that Lepine agreed to work the hours on the basis of a higher commission. The employees are paid by commission. The Employer explains that a technician such a Lepine would be paid a 20% commission and a helper would be paid 10%. If the technician worked on his own and, in other words, did the helper's work as well, he would be paid the entire 30%.

In my view, there is no merit to the Employer's argument. Whether the Employee had agreed to the arrangement is immaterial. Section 4 of the *Act* provides that the requirements of the *Act* are minimum requirements and that any agreement to waive those is of no effect. Section 35 of the *Act* provides generally for overtime wages in accordance with Section 40 for hours worked in excess of 8 hours in a day or 40 hours in a week. Moreover, an employer who requires an employee to be available for work during meal breaks must count those breaks as time worked (Section 32(2)).

I now turn to the issue of "just cause" for termination. When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)). In this case, the Employer presents a "laundry list" (as the delegate characterized it) of complaints against Lepine. Protech argues that Lepine was arguing with customers on a number of occasions, fighting with other employees, charged personal items on the company credit card, altered company cheques, was involved in traffic accidents in the company vehicle, was late for work on occasion and that this conduct constitutes just cause. The Employer also argues that Lepine was warned on several occasions and, indeed, was placed on probation.

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
>
> 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:
>
> 1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 4. The employee continued to be unwilling to meet the standard.
>
> 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, thetribunal will also look at the efforts made by the employer to train and instruct the employee and whether

> the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
>
> 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

In the circumstances, I dismiss the Employer's appeal. As noted in *Kruger*, the burden of proving that the conduct of the employee justifies dismissal is on the employer. In my view, the Employer fell far short of that. The Employer did not provide any detail or particulars of the allegations referred to above at the hearing with two exceptions which I will deal with below. Allegations that the Employee was involved in a traffic accident in 1993 and 1996 while driving a company vehicle do not assist the Employer. Similarly, while the Employer stated that he warned Lepine on several occasions with respect to his alleged conduct, he did not provide any particulars of these warnings. The Employer admitted to running a "loose ship"--as he put it--and that he could not recall much with respect to the complaints against Lepine and that he did not document the incidents. While there is no requirement that warnings be in writing, the Employer must prove that the Employee was warned in clear and unequivocal terms of the consequences of failing to meet the Employer's reasonable standards.

At the hearing, the Employer presented cancelled cheques to substantiate an allegation that Lepine had altered cheques issued by the Employer to him and another employee on three occasions. One cheque, dated March 19, 1997 in the amount of $24.85 was issued to a fellow employee of Lepine. The name of that employee was crossed out and Lepine's name substituted. Another cheque, dated March 21, 1997 in the amount of $400, issued to Lepine, was changed to $900. A third cheque dated July 19, 1997 in the amount of $60 was changed to $160. These cheques were not presented to the delegate during her investigation. Nevertheless, the delegate did not object to the admission of the cheques at the hearing and, in my view, the cheques are properly before me. The Employer also argued that the Employee had utilized a company credit card to purchase propane for his own use.

These are serious allegations which, in the appropriate circumstances, could constitute cause for termination. The Employer says that he did not authorize the changes to the cheques. Lepine agrees that he altered the cheques but says he did so with the Employer's knowledge and authorization and that, in fact, the Employer deducted the amounts from his subsequent pay cheques. The allegation that the Employer deducted the amounts from Lepine's pay cheques was put in issue in Lepine's submission to the Tribunal. The Employer did not produce pay roll records to contradict Lepine's evidence on this point. Moreover, Lepine explained the

circumstances of each of the cheques. He also explained that he had paid for door handles for the company vehicle used by him and that the Employer agreed that he could charge the propane. At best, it was unclear from the Employer's evidence when the cheques came to the Employer's attention. The Employer admitted to "running a loose ship" and stated at the hearing that the cheques were not "a main concern". In my view, the Employee gave his testimony in a candid manner. On balance, I prefer the Employee's evidence with respect to the cheque alterations and the credit card charge. In the circumstances, the Employer does not have cause for termination.

The Employer also argues that he had cause for termination because Lepine did not attend work when he was required to on August 26, 1997. The Employee explains that he had asked for a half day off on the day in question to attend his daughter's last gym class. He had done so one week prior to the day. The Employer's office manager, who did not testify, requested that he attend to a job during his time off. Lepine explained to the office manager that he had an appointment and could not do the job. There was a telephone conversation between Lepine and the Employer to the effect that if he did not do the job, he was dismissed. The Employer denies that Lepine had been given the day off. In the circumstances, I prefer Lepine's evidence with respect to the events surrounding his termination and the Employer cannot rely on them as cause for termination.

In the result, I am not persuaded that the appeal ought to succeed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated August 26, 1998 be confirmed and the amount held in trust be paid out to Lepine together with such interest as may have accrued.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal