

**EMPLOYMENT STANDARDS TRIBUNAL**

Bulldog Bag Ltd.  
("Bulldog")

-and-

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 95/014

**DATE OF DECISION:** January 18, 1996

## DECISION

### OVERVIEW

This is an appeal by Bulldog, pursuant to Section 112 of the Employment Standards Act (“the *Act*”), against Determination #CDET 000060 issued by the Director on November 9, 1995. In this appeal, Bulldog claims no compensation for length of service is owed to Shaun Auger (“Auger”) under Section 63 of the *Act*.

I have completed my review of the written submissions made by Bulldog and Auger, and the information provided by the Director. I have concluded that Auger is owed compensation in the amount calculated by the Director.

### FACTS

Auger was employed by Bulldog as a bag-catcher from January 18, 1995 to September 12, 1995. Auger’s employment was terminated by Bulldog without notice or compensation. At the time of his termination, Auger earned \$360.00 per week.

### ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer’s liability to pay compensation for length of service has been discharged under Section 63(3)(c) of the *Act*. That is, has Bulldog demonstrated, on the balance of probabilities, that Auger was terminated for just cause.

### ARGUMENTS

Bulldog argues that Auger is not entitled to compensation as he was warned at least four times by his supervisor about his poor performance, attitude and punctuality. Bulldog also argues that Auger failed to show up for work on September 12, 1995 with no explanation for his unauthorized absence.

The Director contends that although Bulldog has provided records which show Auger was late or left work early on certain occasions, Bulldog has not shown Auger was given a clear and unequivocal warning about the consequences of his conduct. Indeed, Auger claims Bulldog did not bring up the issue of tardiness during his two performance appraisals. Regarding the September 12, 1995 incident, Auger argues he could not go to work on that day because he had to go to court to assist the partner of the person whose funeral he had attended on September 11, 1995. He claims he phoned in to work around 7 a.m. on September 12, 1995, and because his supervisor was not available, he left a message stating he would not be in to work.

### ANALYSIS

The burden of proof for establishing just cause for dismissal rests with the employer.

Contemporary jurisprudence concerning just cause has evolved through the common law, labour arbitrations and employment standards decisions. Generally, it is accepted that the following test must be met by the employer to support its position that there was just cause for dismissal:

1. That reasonable standards of performance have been set and communicated to the employee;
2. That progressive discipline has been given to the employee for failure to meet such standards (which includes clearly warning the employee that his/her continued employment is in jeopardy if such standards are breached);
3. That a reasonable period of time has been given to the employee to meet such standards; and
4. That the employee did not meet those standards, i.e. that there was a provable culminating incident.

I conclude, on the evidence before me, that Bulldog has not established that Auger was progressively disciplined for his performance, attitude, and punctuality. In particular, it has not been demonstrated that Auger was made clearly aware that if his conduct persisted his employment with Bulldog would be terminated. Auger did not receive any written warnings, and Bulldog concedes that Auger's supervisor did not document his discussions with Auger and "could not swear as to the exact words he used while speaking to Auger". Furthermore, while the September 12, 1995 incident may have been deserving of some form of discipline, I find the discipline imposed by Bulldog, which was termination, to be excessive in light of the absence of any prior progressive or corrective discipline.

For these reasons, I conclude Bulldog did not have just cause to dismiss Auger and owes compensation to Auger in the amount calculated by the Director.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 000060 be confirmed in the amount of \$720.00.

\_\_\_\_\_  
**Norma Edelman, Registrar**  
**Employment Standards Tribunal**

\_\_\_\_\_  
January 18, 1996

**Date**

NE:sd