

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 -

445864 B.C. Inc.
operating
The Cellular Store

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 1999/313

DATE OF DECISION: January 14, 2000

DECISION

OVERVIEW

This is a second, or follow-up adjudication as a result of an appeal by 445864 B.C. Inc. operating The Cellular Store ("445864" or "the employer") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination dated April 28, 1999 (ER# 089008) by the Director of Employment Standards (the "Director").

The Director determined that an employee, Michelle Morton ("Morton") was dismissed from employment with 445864 without cause and without compensation. The Director also found that certain commission wages and vacation pay were also unpaid.

445864 did not appeal the findings of the Director in relation to wages and vacation pay. However, 445864 did appeal two issues relating to the conclusion of Morton's employment. Firstly, 445864 claimed that Morton quit her employment or if there was a constructive dismissal there was just cause. Secondly, 445864 claimed a set-off from wages for Morton's extensive personal use of a company telephone.

ISSUE TO BE DECIDED

In an adjudication dated August 04/99 I confirmed the Determination on all aspects except the issue of compensation for length of service. This latter issue was referred back to the Director to investigate whether there was just cause for dismissal or whether the employee "quit" her job before any dismissal occurred. This has now been investigated and a report submitted back to me for decision.

FACTS AND ANALYSIS

Compensation for Length of Employment:

Morton is entitled to two weeks compensation for length of employment unless the employer shows that there was just cause for dismissal or that she terminated her own employment. On an appeal to the Tribunal the onus is also on the appellant to demonstrate that the Determination is wrong.

The original Determination stated that "*there is no evidence to establish just cause for termination*" but clearly the employer did submit reasons for termination. They stated that their primary point was that Morton quit before she could be terminated. On the evidence submitted by the employer there were substantial grounds to find that the employee quit her position because she had other employment which conflicted with her employment with 445864. The employer admitted that if she had not quit she would have been fired and it appeared that there were grounds upon which just cause could be founded.

I have now been provided with a report from the Director's delegate which is very thorough and comprehensive and which has been shared with the parties and, although given the opportunity, there have been no further submissions from either party.

As a result of further investigation it is clear that Ms Morton deliberately deceived her employer in order to take time off work for personal matters despite the direct instructions of the employer to the contrary. She was advised that she would be dismissed if she did not attend work as directed. She could have been dismissed for just cause as a result of her behaviour which went to the essence of the employer employee relationship. It is not necessary to decide the issue of whether she actually quit her position or was fired because under the circumstances she would not be entitled to compensation either way.

ORDER

I order under Section 115 of the Employment Standards Act that the Determination be varied to reflect that the employee is not owed compensation for length of service.

John M. Orr
Adjudicator
Employment Standards Tribunal