

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-

Paul Almeida, doing business as La Moda Hair Salon

(" Almeida ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 97/825

DATE OF HEARING: January 22, 1998

DATE OF DECISION: February 3, 1998

DECISION

APPEARANCES

Paul Almeida Marion Aberdein	For La Moda Hair Salon
Amy Parker	On her own behalf

OVERVIEW

This is an appeal by Paul Almeida doing business as La Moda Hair Salon ("Almeida"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 20, 1997. The Director found that Almeida contravened Section 63(1) of the Act in failing to pay Amy Parker ("Parker") compensation in lieu of notice, and Ordered that Almeida pay \$312.00 to the Director on behalf of Parker.

Almeida claims that Parker's employment was properly terminated, and that no wages are owing.

ISSUE TO BE DECIDED

Whether the Director correctly determined that Parker is owed wages and vacation pay.

FACTS

Parker worked for Almeida during 1995-1996. She was rehired as a receptionist on a part time basis in November 1996, and progressed to full time employment. Parker's employment was terminated on April 17, 1997.

Parker was scheduled to work April 16 and April 17. On April 15, she attended a concert in Vancouver. She was unable to work on the 16th, so she switched her 9am -5pm shift with another receptionist for that day. On the 17th of April, she caught the 7:00 am ferry to Schwartz Bay. When she became aware she would not be able to report to work by 9:00 am, she called her workplace and spoke with a colleague to advise that she would be up to one hour late. When she arrived at work at 9:20 am, her employment was terminated.

The witness, Marion Aberdein ("Aberdein") indicated to the Director's delegate that Parker was fired while on probation for unreliable behavior. It was her statement to the Director's delegate that Parker had called to indicate she would be late for work on April 16, and did not show up.

The Director's delegate determined that Parker was not on a formal or informal probation period, that there was no record or confirmation of earlier discussions of "unreliable behavior", and that there was no evidence of previous incidents of lateness. The Director's delegate determined that Parker had been wrongfully terminated, as there was no indication shift changes were not permitted, and when that shift change occurred, the employer was so advised. The Director's

delegate found that while Almeida was in a position to discipline Parker, it was not in position to dismiss her summarily.

ARGUMENT

Almeida argued that while Parker did call in to switch her 9 am - 5 pm shift on April 16th, it was in exchange for the closing shift of that day (5pm to 9pm). In addition, Almeida contends that all shift exchanges are to be done with knowledge of management, and that Parker did not speak with anyone in management. Almeida also contends that Parker called at 3pm that day to indicate that she had missed the ferry and would not make it for the 5 pm shift. Once again, Almeida contends that Parker did not speak with anyone in management.

Ameida argued that Parker could have attempted to catch any of the ferries leaving after 3pm, but did not do so. When Parker called on the morning of the 17th, she refused to speak with Marion, who was in the shop. Almeida contends that the shop policy manual requires employees to speak with management when they are unable to report to work.

Almeida also contends that Parker had been given one verbal warning for not showing up for her scheduled shift upon being rehired.

Parker's evidence was that she had been introduced to Aberdein on one occasion only, as she had just started as manager on April 15, and that she was unable to contact her at 7:00 am April 16 because she did not know her last name.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

In determining whether just cause exists to terminate an employee where unsatisfactory performance is concerned, the employer must show that it made attempts to correct unsatisfactory performance by setting reasonable standards of performance and enforcing those standards consistently with all employees, communicating the standards to employees, telling employees when they are not meeting the standards, and telling employees the failure to meet the standards is serious and will result in termination.

I accept that Almeida verbally warned Parker about being late prior to the incident on April 17. Almeida's evidence was that the previous shop manager, Lisa Lowerison, had warned Parker. Lowerison's written evidence indicated that Parker had been verbally warned on one occasion for not showing up for her scheduled shift. However, I am not satisfied that constituted sufficient indication to Parker that her job was in jeopardy. There is no indication that Parker was given a clear and unequivocal warning that her employment was in jeopardy. In fact, Almeida indicated that had Parker shown up on the 16th, he would have disciplined her, not fired her.

Aberdein's evidence was that she was told by Almeida that Parker was "on probation", and that she ought to be dismissed. Aberdein had previous experience as a manager, and her practice was to give three warnings. That was not followed in this instance because of her unfamiliarity with Parker's past performance.

I accept that Almeida had set performance standards, and that they were clearly and effectively communicated. However, there is no evidence that Parker was on a probationary period, nor what that status, if she was subject to another standard, meant. I also accept that Parker was late the day of the 17th, but that she was unable to advise management, as required by the policy manual, of that because of her unfamiliarity with the manager, who had only started work.

Consequently, based on all of the evidence, I am not satisfied that the Determination was incorrect, and deny the appeal.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated October 20, 1997, be confirmed together with any interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal