# EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Morrey Nissan
A Division of White Spot Service Ltd.
("Morrey Nissan")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 96/687

**DATE OF DECISION:** **January 24, 1997**

## DECISION

## OVERVIEW

This is an appeal by Morrey Nissan a division of White Spot Service Ltd. ("Morrey Nissan") pursuant to section 112 of the Employment Standards Act (the "Act") against Determination #CDET 004527 of the Director of Employment Standards (the "Director") issued on October 31, 1996. In this appeal the employer claims that it had just cause to terminate the employment of Alana Fraser.

## ISSUE TO BE DECIDED

The issue is whether the employer had just cause to dismiss Alana Fraser.

## FACTS

This appeal arises from the July 31, 1996 termination of employment of an accounting clerk, Alana M. Fraser ('Fraser') who had been employed with Morrey Nissan since February 6, 1995. A letter dated October 25, 1995 from Christine Hughes ('Hughes) an accountant with Morrey Nissan, told Fraser that this was a "final warning that your work habits are not acceptable". The letter claimed that Fraser's failure to "reconcile ICBC on a monthly basis and to advise" the accountant of any problems showed "complete disregard to our established system". It warned: "Any further problems will result in immediate termination". According to the employer, Fraser's work performance fluctuated between satisfactory and unsatisfactory over the next few months.

On July 2, 1996, the employee was given another warning letter by Hughes. It was brief:

> Please accept this letter as final warning that legnthly (sic) and continuous personal phone conversations will not be tolerated. We have discussed this problem on several occasions and yet it still continues.
>
> I expect that you will adjust your work habits accordingly or I will be forced to take final action which will result in permanent dismissal.

Fraser denies that she spent lengthy periods on the telephone, although she concedes that she was going through a divorce and used the phone at work for "legal consultation". She said that her work duties required her to spend time on the telephone, collecting outstanding accounts.

Hughes acknowledged that it was agreed that the employee "had from July 15th to the end of the month to complete her move" and that on July 30, 1996, Fraser asked if she could work through her lunch break so that she could leave early at the end of the day in order to

use a truck on loan to complete her move. Hughes, after consulting with the General Manager, granted permission to leave 1/2 hour early.

A problem arose on the morning of July 31, 1996. Fraser was wearing shorts when she reported to work, saying that she had not been able to complete her move the previous evening because of problems with the truck and that she would like time off for all or part of the morning to complete the task. There is disagreement about how long a period was required: the employer says Fraser asked for a couple of hours; Fraser said she might need half a day. Regardless, Hughes reluctantly gave permission. Fraser telephoned at either 11 a.m. or 1 p.m. (depending on whether the evidence of the employee or employer, respectively, is accepted) to say she would be in shortly. When she returned to work, she was told that her employment was terminated and was given pay to date along with other separation papers. There is a dispute as to whether or not she actually received a July 31, 1996 letter of termination that is in evidence before this tribunal.

On September 4, 1996, Fraser launched a complaint with the Director against Morrey Nissan, alleging unjust dismissal. She said she had not received severance pay or notice of termination. She said she had been terminated for "poor work habits", for spending too much time on personal telephone calls and for being late. She denied all of these grounds.

In a letter dated September 16, 1996, B.T. (Bernie) Gifford, an Industrial Relations Officer with the Employment Standards Branch, wrote to the employer saying that after investigating the allegations, he concluded that the employee had not been dismissed for just cause. His analysis focused on the events of July 31, 1996; he concluded that because the employee had been given permission to take the morning off, just cause did not exist. He also noted the previous warning letters of October 25, 1995 and July 2, 1996, noting only that Fraser "strenuously objects" to the accuracy of the latter. On October 31, 1996, Mr. Gifford, as the Director's delegate, issued Determination #CDET 004527, requiring Morrey Nissan to pay $828.78 in severance pay and interest.

In "Reasons for this Appeal", Morrey Nissan argues that there was just cause to dismiss Fraser and that Mr. Gifford overlooked and misinterpreted important facts. Hughes said that between the first and second letters of reprimand, Fraser's work "fluctuated between acceptable and unacceptable" and that Hughes spoke to Fraser on "numerous occasions" about "these situations". With reference to the July 2, 1996 reprimand letter and the amount of time the worker was spending on personal telephone calls, Hughes says that the calls were not to deal with the divorce but rather "related more to weekend plans and catch up gossip". She estimated that these calls would last from 20 to 45 minutes. Hughes said that other employees began to complain and that the calls interrupted Fraser's work, causing her to fall behind "on a regular basis". Hughes agreed that "Fraser had from July 15th to the end of the month to complete her move" but said it was Fraser's "attitude" on the morning of the 31st that triggered the decision to terminate:

> The problem with Ms Fraser's time off on the 31st and the reason I showed annoyance is due to the attitude Alana showed when she arrived that morning. She arrived in shorts unprepared to work, she did not request time

> off she said she was going to be off. This is a person who was on probation and had already had half a month to move. The reason I did not terminate her at that time was because I did not have her papers ready. My response to her was, "what can I say?". When I spoke on the phone with Mr. Gifford for the first time he agreed that the situation was a difficult one and he had no suggestions as to what we should have done instead. Before terminating Alana I phoned labour relations and discussed the situation, they said that we had "just cause". If employers cannot go by what they say what should be done when you want to terminate an employee? I did not discuss the termination with Alana on the phone because I was trying to follow the three written notices policy put forth by labour relations. (reproduced as written)

Attached to the appeal form were copies of two warning letters and the July 31, 1996 letter of termination, along with a copy of Fraser's application to "Roommies, Roommate Service, B.C." and to MSP, deleting "Derek Graham Fraser" from coverage.

In her December 17, 1996 response to the employer's appeal, Fraser says that she did not receive the final letter of termination. She denies excessive use of the telephone for personal purposes and takes exception to the documents submitted by the employer in support of its appeal. In particular, she objects to the application for accommodation and queries how such a sensitive document came into the employer's possession. She said that on the morning of July 31st, she reported for work early, "allowing for time to prepare for work had I not been granted permission to take time off". She said that her daughter was staying with her grandmother. She points out that Hughes could have refused the request but instead said "what can I say?" She insists that she "extended more effort in this position than what was required" because she enjoyed the job; she also claims to have done the work of three people. She also denies being advised of shortcomings in her work and that when she asked for specifics in response to the letters, "conclusive problems" could not be identified. She believes the reason she was fired was a "personality conflict" with Hughes.

**ANALYSIS**

Section 63 of the Act permits an employer to terminate the employment of an employee for just cause, or on notice or payment of salary in lieu of notice.

> 63(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of services increases as follows:
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> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> > (i) one weeks' 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
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> (c) terminates the employment, retires from employment, or is dismissed for just cause.

The concept of "just cause" is taken from the common law and is judged according to the circumstances of each case. Here, Morrey Nissan says Fraser was dismissed for poor work performance and her attitude and actions on July 31, 1996.

Just cause for termination exists when an employer can show that the employee's conduct amounts to a fundamental breach of the employment. An employer can dismiss a worker for incompetence, inability to perform duties or substandard work which continued despite a warning. The onus on the employer to show that the standards of performance are reasonable and communicated to the employee; that progressive discipline, in cases of minor problems, has been given to the employee and this includes a warning that the employment was in jeopardy; that the worker was given a reasonable period of time to meet the standards; and that the employee did not meet the standards. After examining all of the circumstances, I find that while Fraser was not an ideal employee, I agree with the Director's delegate that just cause for dismissal did not exist in this case. In particular I find that the employer did not establish just cause with the July 31, 1996 incident or the employee's attitude.

The October 25, 1995 warning cannot be relied upon since it states that the worker would be terminated for any further misdeed but despite Hughes claims that there were numerous instances of poor performance over the next few months, dismissal did not result. Thus, to some extent, there would have been reason for Fraser to think that Morrey Nissan condoned her performance difficulties (assuming they existed in the first place). My conclusion might have been different, if other written warnings had been given during that period; but a lapse of eight months without a further warning, together with the admission

that the employee's work fluctuated and the employee's denial that she had been verbally warned, leads me to find that the employer has not discharged its onus on this point.

The second letter was issued on July 2nd, less than one month before the final decision to terminate, and warned Fraser about excessive use of the telephone for personal calls. It was clear and unambiguous: further problems would be considered cause for dismissal. However, Fraser contests that letter, claiming that the problems identified in it were untrue. She says that she was required to use the telephone in her duties, to collect delinquent accounts, and implies that because many of the telephone calls related to her divorce that the employer could not use them as grounds for complaint. Hughes maintains that many of the calls dealt with personal matters only, and were lengthy. To the extent that Fraser spent time on the telephone tending to personal matters, whether they were relevant to her divorce or not, this is conduct which the employer was entitled to complain about, and conduct which the worker knew she had to change in order to retain her position. There is no direct evidence before me on the impact of this warning letter on the employee's performance but since these problems were not referred to in the final letter, I must assume that Fraser took the warning seriously and stopped using the telephone for personal calls.

The next period was crucial in my analysis of this case. It was understood by both parties that Fraser needed the period of July 15th, to the end of the month to complete her move. When Fraser reported for work on the morning of the 31st, dressed in casual clothes, and asked for time off to complete her move, Hughes reluctantly agreed. Hughes was not happy about this development since she had let Fraser leave work one-half hour early the day before (after Fraser worked through her lunch break) to take advantage a truck on loan for the move. After giving Fraser permission (albeit reluctantly) to leave work, Hughes took up the matter of Fraser's work performance with the General Manager and the decision was made to terminate Fraser's employment. Hughes said that it was more because of Fraser's attitude than her actions. Certainly, Fraser's departure from work could not be used as grounds for termination since she left with permission.

A poor "attitude" is grounds for termination if the employer can show that it is inconsistent with the proper discharge of the employee's responsibilities and is prejudicial to the employer's interests. In this case, it is unclear what aspect of the employee's "attitude" was inappropriate. It was understood by both parties that she would be moving from her home from the 15th to the 31st and she had been given permission to leave work early on the 30th and for a short period on the morning of the 31st. While the employer was under no obligation to accommodate the employee's personal needs in this way, once they agreed, in particular by permitting her to leave work on the 31st, Fraser was entitled to leave work for a short time without fear of termination. Hughes particularly objected to Fraser's appearance at work in casual clothes, but precisely why this was a problem is unclear, since Fraser was willing to change into more appropriate attire if she was required to remain at work.

I would like to make one final comment. It is not clear what point the employer wanted to make by introducing the "Roomies" application or MSP change of dependent application and I did not consider them in my deliberations. I must caution Hughes that an employer

must not invade the privacy of its employees. In my view, Fraser has a valid complaint with the introduction of those documents into proceedings where their relevance is marginal.

**ORDER**

Pursuant to section 115 of the Act, I hereby confirm Determination #CDET 004527.

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**Lorna Pawluk**
**Adjudicator**
**Employment Standards Tribunal**

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