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 -

Cream of the Crop Unisex Haircare and Design Ltd
("Cream" or "employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 1999/686

DATE OF HEARING: February 1, 2000

DATE OF DECISION: February 16, 2000

Appearances:

Debbie Ketch, for Cream of the Crop Unisex Haircare and Design Ltd
Cheryl Cook

DECISION

OVERVIEW

This is an appeal by from a Determination dated October 22, 1999, where the Delegate determined that Cream of the Crop Unisex Haircare and Design Ltd. did not have cause to dismiss Cheryl Cook. The Delegate determined that Ms. Cook was entitled to the sum of $2,232.68 or 5 weeks wages pursuant to s. 63 of the *Act* as compensation for length of service. The Delegate further determined that Ms. Cook was entitled to vacation pay calculated at the rate of 6 % pursuant to s. 58 of the *Act*. The Delegate determined that the total wages payable plus interest amounted to $3,429.31. The vacation pay entitlement was not in issue in these proceedings. As the employer did not establish an error in the Determination, I confirmed the Determination.

ISSUES TO BE DECIDED

Did the Delegate err in determining that the employer did not have cause to dismiss Ms. Cook?

FACTS

Ms. Cook commenced her employment as a hairstylist with Cream of the Crop Unisex Haircare and Design Ltd. ("Cream" or "employer") on March 22, 1993. She was terminated on March 10, 1999. At the time of the termination she worked as a manager and as a hairstylist. She was involved in the scheduling of other employees, termination of employees as well as providing hair stylist services. On or about March 6, 1999 several of the employees met with the principal of the employer, Debbie Ketch, in the absence of Ms. Cook. This meeting occurred in advance of a staff meeting scheduled for March 7, 1999. The employees relayed to the employer their concerns about Ms. Cook particularly that Ms. Cook had an abrasive manner and was critical of employees in front of other employees, and in front of customers. The employees had a concern that Ms. Cook was creating an atmosphere which was unsuitable for a beauty salon where female patrons attended for hair cuts and "pampering".

Ms. Ketch does not work in the business on a regular basis. Her sister, Tracy Freeman, who also gave evidence in this proceeding, apprenticed as a hair stylist, and now workers as a hairstylist with Cream. Warren Apsouris, the brother of the principal, also works in the business as a tanning technician. There are 5 employees of the saloon.

Ms. Ketch cancelled the staff meeting on March 7th, and spoke to Ms. Cook on the telephone that date. Ms. Ketch warned Ms. Cook and relieved her from her duties to supervise other staff. Before making the decision to terminate, Ms. Ketch had formed the intention to follow a

progressive discipline system with warnings. She had attended at the public library and had reviewed a Self Counsel Press publication related to employment law. She determined that Ms. Cook's conduct merited three warnings, and then termination.

On Wednesday March 10, 1999, Ms. Cook confronted Ms. Brooks and Ms. Freeman in the shop, before the shop opened, indicating that "she did not appreciate being stabbed in the back". She referred to one of her co-workers, Ms. Brooks, as a "shit disturber", and indicated that she did not think that she could ever forget how she was treated. The two co-workers, who were upset by the conduct of Ms. Cook, finished the appointments that morning and left the shop. The owner was notified of the problem by her brother, Mr. Apsouris. The owner met with the co-workers at a coffee shop and was advised by the co-workers that they could no longer work with Ms. Cook and they were quitting. Ms. Ketch indicated that she would speak to Ms. Cook. Ms. Ketch was upset when she investigated the information that was related to her by Mr. Apsouris, Ms. Brooks and Ms. Freeman. Later that day, Ms. Cook was provided with a termination letter which was marked as an exhibit in these proceedings.

Employer's Version:

Ms. Ketch the owner testified that her concern was that the conduct of Ms. Cook was affecting the business, that she was losing customers and this matter had escalated to the point where she was going to lose two valuable employees. She felt that she could not wait to apply progressive discipline. The culminating incident was when she had related to her that Ms. Cook had confronted two of the employees who had complained of her conduct, and that those employees were now threatening to quit. Ms. Cook testified that she wanted to get things into the open with the two employees, and that she honestly felt that she did not have the opportunity to get her side of the story across to the employer. While the conduct of Ms. Cook may have been her open and honest attempt at conflict resolution, it did appear to inflame the situation and it cost her her job.

At this hearing there was discussion of three incidents which were of concern to the employer. In the fall of 1998 Ms. Ketch spoke to Ms. Cook about an incident where she had become upset in front of a customer, and had allegedly made the customer feel uncomfortable. The customer was not called as a witness. Ms. Brooks and Ms. Freeman testified that the customer appeared upset. Ms. Cook testified that the customer was upset at her hair not being cut short enough, and that the particular customer is still a customer of Ms. Cook. In any event, the discussion with Ms. Cook is not recalled by her. Ms. Ketch did not warn her that her job was in jeopardy.

There was another incident where Ms. Cook announced to another employee, Diane Arsenault that the employee's husband had arrived by referring to him as her "worst half". Ms. Cook admits the incident and indicates that there was no love lost between her or her co-worker's husband.

In the fall of 1998 there was an incident where Ms. Cook was asked to cut the bangs of a customer, and apparently it is the practice of the employer not to charge for this service. Ms. Brooks gave evidence that she was reluctant to schedule this with Ms. Cook, who had no paying appointments that day, and who might be upset about taking a non-paying customer.

Ms. Brooks indicates that Ms. Cook illustrated poor customer handling skills that day by being gruff with the customer and rolling her eyes back into her head. The customer left.

At the hearing I heard from Kathy Brooks and Tracy Freeman, co-workers who confirmed that Ms. Cook was a difficult employee. Ms. Freeman in particular testified that although Ms. Ketch was her sister she was reluctant to communicate the problems that she was having with Ms. Cook. There was reference in the employer's case " to many other incidents in the two year period leading up to termination". The company, however, did not keep an employee file system. There does not appear to have been any other incidents brought to the attention of Ms. Cook. In my view, the employer did not prove that the conduct of Ms. Cook adversely affected the business in terms of loss of income or loss of customers. In my view it is probable that Ms. Cook was an abrasive employee. She demonstrated some of those abrasive qualities at the hearing.

Employee's Version:

Ms. Cook gave evidence in these proceedings confirming that she was unaware of any significant issues until March 7th, 1999. I accept the evidence of Ms. Cook, however, when she testified that she was not aware that her conduct was a problem in the past, and that had she been aware she could have attempted to correct the problem, and that it was unfair of the employer to terminate her after 5 years service without an opportunity to correct her behaviour. She indicated that her conversation with Ms. Ketch came as quite a shock to her, and after a sleepless night on March 9th, she decided to let Ms. Brooks and Ms. Freeman, know how she felt. Ms. Cook also called Kirsten MacNeill, a former co-worker, who testified that during the two years that she worked with Ms. Cook, she had no difficulties with Ms. Cook, and appreciated her direct and open method of resolving conflicts. Kirsten MacNeill found it difficult to get along with the Ms. Brooks and Ms. Freeman. Ms. MacNeill was terminated by the employer in August of 1999. I also heard from Kim Sutton, manager of Ms. Cook's new employer, who testified that Ms. Cook was an open, direct, honest and hardworking stylist who got along with everyone in her establishment. In my view, it is unnecessary for me to making findings of fact concerning whose version of Ms. Cook's customer and staff relations skills is correct.

The Delegate found that the employer's initial analysis and decision concerning Ms. Cook's purported misconduct was reasonable and appropriate, but that Ms. Ketch had not given Ms. Cook an adequate opportunity to meet the required standard. The Delegate concluded that the circumstances of a "mass quit" by other employees did not obviate the need of the employer to engage in progressive discipline. The Delegate found no need to review the disagreements made against her by the staff.

The Delegate determined that Ms. Cook was entitled to the sum of $2,232.68 or 5 weeks wages pursuant to s.63 of the *Act* as compensation for length of service. The Delegate further determined that Ms. Cook was entitled to vacation pay calculated at the rate of 6% pursuant to s.58 of the *Act*. The Delegate determined that the total wages payable plus interest amounted to $3,429.31. The vacation pay entitlement was not in issue in these proceedings.

ANALYSIS

In this appeal the burden is on the employer to demonstrate that there was an error in the Determination such that I should vary or cancel the Determination.

The employer says that the Delegate erred in finding that the incidents giving rise to termination occurred over a relatively short period of time (January to March 1999). The employer says that the Delegate erred in finding that Ms. Cook had an unblemished work record. The employer says that given the prospect that it would lose customers, and lose staff, it had no option but to terminate Ms. Cook.

In my view, the Delegate correctly identified the proper test to be applied in this type of a case, particularly that the employer must demonstrate:

1. A reasonable standard of performance has been established and communicated to the employee;

2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated that they are unwilling (or unable) to do so;

3. The employee was adequately notified that her employment was in jeopardy by a continuing failure to meet the standard; and

4. The employee continued to be unwilling to meet the standard.

The evidence before me from the co-workers was that the "problems with Ms. Cook" arose two years before the termination date. The principal's evidence was, with the exception of the events noted, that she was unaware of any continuing problems until March of 1999. It is clear that Ms. Cook did not receive any warning that her job was in jeopardy until March 7, 1999. It is unfortunate in this case, that the co-workers did not bring their concerns in a more timely and forceful way to the attention of the employer. Ms. Freeman testified that she was sensitive to the fact that Ms. Cook was the manager, and that her sister was the owner, and that she was reluctant to discuss her concerns about Ms. Cook with Ms. Ketch. There might have been an opportunity to salvage the employment relationship, had there been some earlier attempt to resolve the conflicts in the workplace between Ms. Cook and other employees.

In my view, there is a supporting foundation for the Delegate's finding that the conduct of concern to the employer arose over a relatively short duration of time. At the longest the conduct appears to have emerged 9 months prior to termination, but it did not attract any sanctions of a disciplinary nature until 3 days before the termination. I do not think that the conduct of Ms. Cook was such that the last incident or even the combination of the incidents justified her summary dismissal. The last incident was clearly evidence of a personality conflict between these employees, which was not witnessed by other employees or customers. Ms. Cook was instructed that she was removed from her staff supervisory duties, but she was "relating" to her fellow co-workers, albeit perhaps in an inappropriate manner. There does not appear to be an element of insubordination in Ms. Cook's contact with the co-workers.

The law related to wrongful dismissal does not require that an employer retain an abrasive employee, to the detriment of its business. An employer is free to restructure the work force at any time, provided the employer gives notice of termination, or compensation for length of service, or dismisses an employee for cause. An employer may as Ms. Ketch did, come to the conclusion that she had a problem employee, who had no insight into the problems that she created in the workplace, and was unlikely to change. It might make good business sense to remove such an employee from your work place. Employees are removed on a regular basis from a workplace by the giving of notice or compensation in lieu of notice, where the conduct of the employee falls short of "cause" for dismissal. Unless an employer has cause for dismissal, an employer must give notice or pay compensation in lieu of notice. If a complaint is made by an employee the Delegate will investigate the complaint and the employer will be required to justify that its decision to dismiss was "with cause".

It is quite possible that an employer may in good faith conclude that it is in the best interests of its business to terminate a "problem employee", this however, will not relieve the employer of the consequences of failing to adhere to the minimum standards set out in the *Act*. An objective review of the facts leads one to the conclusion that the employer did not give Ms. Cook an adequate opportunity to meet the communicated performance standard. The employer did not establish any error in the Determination, and this appeal therefore fails.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated October 22, 1999 be confirmed.

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Paul E. Love
Adjudicator
Employment Standards Tribunal