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 -

Ragnar Jewellers Ltd. operating as Ragnar Jewellers (1974) Ltd.
("Ragnar" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	97/832
DATE OF HEARING:	January 27, 1998
DATE OF DECISION:	February 19, 1998

DECISION

APPEARANCES

Mr. Michael Ly Mr. Ragnar Bertelsen	on behalf of Ragnar
Mr. Hao Dihn Le	on behalf of the Complainant
Ms. Sylvia Pham	interpreter

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on October 24, 1997. In the Determination, the Director's delegate found that the Employer had terminated Mr. Le's employment without "just cause" and ordered that the Employer pay $5,484.58 as compensation for length of service and vacation pay. The Employer says that Mr. Le was terminated with "just cause".

ISSUE TO BE DECIDED

The issue to be decided in appeal is whether the Employer had just cause to terminate Mr. Le's employment. The parties do not dispute the amount of the compensation, if I find that the Employer did not have just cause.

FACTS

Mr. Bertelsen testified on behalf of the Employer. The Employer is in the jewellery business and operates a design studio and three retail outlets.

Mr. Le had been employed for approximately 10 years as a jeweller, when the Employer terminated his employment on February 17, 1997. The reason for the termination was stated to be that Mr. Le had done work on a ring without permission on February 14, 1997 contrary to company policy. Mr. Le's evidence was that he only worked on the ring, which belonged to his wife, for a few minutes during a coffee break. He stated that he merely polished the ring. He used a hammer. There was no evidence that Mr. Le did the work surreptitiously. The foreman, Mr. Kerr, who did not testify at the hearing, saw Mr. Le do the work and told him that it was not

allowed. In the "Critical Incident Form", dated February 14, 1997, tendered by the Employer, Mr. Kerr noted that he had found Mr. Le "working on a personal job". Mr. Kerr stated:

> "I immediately knew that I would have to let him go. I had suspicions of the same thing happening last year, but I could not prove it."

On February 17, the following Monday, Mr. Kerr terminated Mr. Le's employment. There was no evidence of any basis for the suspicions against Mr. Le.

Mr. Bertelsen testified to the importance of security concerns in the jewellery business. The employees work with small but valuable items. Trust is very important. The Employer require that a work order be completed and processed for every job done by the jewellers. In this fashion, the Employer can control its inventory of gems and precious metals. The Employer allows employees to work on personal jobs, provided they ask permission in advance and agree to pay for any materials used. Mr. Le testified that employees work on "small jobs" without asking for permission. If that was the case, Mr. Bertelsen stated that the Employer did not know.

The Employer had a "Conflict of Interest Agreement" (the "Agreement") with its employees, including Mr. Le. It provided as follows:

> "While employed by Jewellers Ragnar:
>
> I warrant not to engage in outside Business arrangements which could be considered a Conflict of Interest.
>
> Failure to disclose any outside Business arrangements of a "Conflict of Interest" nature will result in termination without notice and without Severance pay."

Mr. Le's evidence was that he considered the job of a "personal nature". Mr. Bertelsen's view was that a "personal job" would be covered by the Agreement.

ARGUMENT

The Employer argues that it had just cause to terminate the employment of Mr. Le because he breached company policy and because he was in breach of the "Conflict of Interest Agreement". He points to the importance of security concerns in the industry. Trust is important.

Mr. Le acknowledges that he worked on a "personal job". However, it was a small job, taking only a few minutes, done during a coffee break, and using no materials belonging to the Employer. He did not believe that he required permission for work of this nature.

ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BC EST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
>
> 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:
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> 1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 4. The employee continued to be unwilling to meet the standard.
>
> 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
>
> 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal

> without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

Turning first to the "Conflict of Interest Agreement", which was drafted by the Employer, it is my view that is it not clear that it applies to "personal jobs" as in the case at hand. The Agreement speaks to "outside Business arrangements". In my view, the Agreement is ambiguous and the

Employer's argument must fail.

The burden of proving just cause is on the Employer. The Employer did not present any evidence of any prior incidents involving Mr. Le. In the result, the Employer's ground for termination boils down to one single incident, namely the events of February 17, 1997. In my view, there is no disagreement between the parties that Mr. Le worked on a "personal job". The Employer is not in a position to dispute Mr. Le's evidence on this point. In fact, Mr. Kerr's statement, quoted above, agrees with that characterization. Mr. Le says that it was a small job, taking only a few minutes, done during a coffee break, and using no materials belonging to the Employer (except a hammer). The Employer is not in a position to seriously challenge Mr. Le's evidence because Mr. Kerr did not testify. Mr. Le's evidence was that other employees also worked on small personal jobs without asking permission. Mr. Bertelsen stated that working on such jobs without prior permission was against company policy and, if it did occur, the Employer did not know. Mr. Le agreed that permission was required in some circumstances, for example where the employee could benefit financially from the work.

I accept that the Employer did have some rules and procedures governing the circumstances when employees could do their own work, or "outside" work. As well, I accept the Employer's argument that security concerns and trust are important in the jewellery business. Nevertheless, for the breach of the employer's rule to constitute cause, the employee must be aware of the rule, the rule must be reasonable and the consequences of its breach so severe as to fundamentally breach the employment contract (see, for example, Ball, *Canadian Employment Law* (Aurora, Ontario: Canada Law Books) at 11-34). In the circumstances of this case, I am not satisfied that the Employer has discharged the burden to show that the rule or policy was clear and the consequences of its breach known to Mr. Le. The rule or policy may not have been consistently applied to small jobs of a personal nature. Mr. Le did not perform the work surreptitiously. On the contrary, he explained to the foreman what he was doing and stopped when told to. He believed that he was permitted to do the work. Given Mr. Le's lengthy employment, the nature of the work, and the uncertainty of the rule or policy, the Employer's decision to terminate Mr. Le was out of proportion with the seriousness of the conduct.

In the result, the Employer has not discharged the burden of proof and the appeal, therefore, must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated October 24, 1997 be confirmed in the amount of $5,484.58 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal