

An appeal

- by -

Hallstead Plumbing Inc.  
("Hallstead" or the "Appellant")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Norma Edelman, Vice-Chair

**FILE No.:** 2001/757

**DATE OF HEARING:** February 7, 2002

**DATE OF DECISION:** February 12, 2002

## DECISION

### APPEARANCES:

Kevin O'Reilly	on behalf of Hallstead Plumbing Inc.
Subodh Chandra	on behalf of Debebe Asrate

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Hallstead Plumbing Inc. ("Hallstead" or the "Appellant") of a Determination issued by a delegate of the Director of Employment Standards on October 5th, 2001.

The delegate found that Hallstead owed Debebe Asrate ("Asrate" or the "Respondent") compensation for length of service in the amount of \$4,202.16. Hallstead appealed the Determination on the basis that Asrate was dismissed for just cause and therefore it is not liable for compensation for length of service.

The Tribunal received written submissions from the parties regarding this appeal. As well, an oral hearing was held on February 7, 2002. Kevin O'Reilly ("O'Reilly"), one of the owners of Hallstead, attended the hearing with a witness, Joel Carter ("Carter"). Asrate attended the hearing with his representative, Subodh Chandra ("Chandra").

### ISSUE

Is Asrate entitled to compensation for length of service?

### FACTS AND ARGUMENTS

Asrate commenced employment with the Rotor-Rooter Corporation - Vancouver Division (the "Corporation") as a service technician (drain cleaner) on October 27, 1994. On October 18, 2000 Hallstead took over the operation. On March 7, 2001 O'Reilly and the other owner of Hallstead, Dave Mendenhall ("Mendenhall"), dismissed Asrate.

According to O'Reilly, Asrate had a number of problems when he worked for the Corporation. On the one hand, he was able to perform his job, but on the other hand, he often did not do so. He cited an example where the Corporation's training manager did an evaluation of Asrate, which showed he performed well while under scrutiny, but when he was on his own, he was less motivated and did not apply the same diligence, which resulted in customer complaints. In the end, however, O'Reilly and Mendenhall decided to give Asrate "a shot" and he was retained when Hallstead took over the operation.

Between October 18, 2002 and February 10, 2001, Mendenhall and/or O'Reilly talked to Asrate on at least 4 occasions about customer complaints regarding his performance and attitude. The complaints included using worn out equipment; not using his cutters; sloppy work; standing around and watching his coworker do a job and then billing for work he did not perform; and having an aggressive attitude towards customers. During these occasions, Asrate was advised on ways to improve his attitude and performance.

On February 10, 2001 Mendenhall and O'Reilly had a meeting with Asrate regarding a customer complaint about a job he did on Ranger Street in North Vancouver. The complaint involved an accusation of an aggressive attitude and incompetent work. Asrate left cable stock in the customer's drain and on the following day the customer had to get it removed by the North Vancouver City Public Works.

O'Reilly testified that during the meeting on the 10th he and Mendenhall reviewed the Ranger Street job with Asrate and all the other past complaints they had with him and advised him twice that this was his last chance and any further displays of incompetence, laziness and/or customer complaints would be grounds for dismissal. Asrate then asked O'Reilly if he could be registered in the provincial plumbing apprenticeship program. O'Reilly said he was shocked and replied: "Have you been in the same room with us during the past half-hour? We've just finished explaining to you that your job is at risk of being terminated because you're borderline in drain cleaning, so we can hardly consider the privilege of getting you an apprenticeship registration in plumbing until you can prove yourself worthy in the areas we discussed. Do you understand?" O'Reilly said Asrate replied in the affirmative and then said if they were not happy with him, he would go. They replied if he performed to their standards they would keep him, as they hoped he would improve, but if not, he would be fired. The meeting then ended. O'Reilly said Hallstead is a small company and therefore one should not expect it to put warnings in writing. Moreover, an employee could throw away a written warning or refuse to sign it. Accordingly, O'Reilly and Mendenhall rely on the use of verbal warnings when dealing with their employees

O'Reilly stated that Asrate was subsequently fired as a result of a customer complaint about his work at the Mayberry Apartments on March 7, 2001. This was a big account. Asrate was sent to clear a bathtub drain. After the job was completed, the Apartment Manager complained that his time had been wasted and Asrate cost him money by failing to take directions from him at the outset about how to do the job. Carter was sent to the job site to assess the issue and he reported back that the customer was right. Consequently, Mendenhall and O'Reilly dismissed Asrate for just cause following the verbal warning on February 10. They were frustrated, Asrate would not improve and so they had to fire him as the last resort. O'Reilly says there is no doubt in his mind that Asrate was properly warned and it is improbable that he would have been called in on the 10th and not given a warning on that day.

Carter has been a plumber at Hallstead for 5 years. He confirmed he was sent to assess the Mayberry Apartments job and reported back to O'Reilly that Asrate should have known the customer was right regarding where he should make a cut to clear the drain and should have

accepted his directions at the outset. He also said O'Reilly told him that he warned Asrate on February 10 that his job was in jeopardy.

Asrate testified that during the meeting with Mendenhall and O'Reilly on February 10 they talked about technical issues and the proper ways to do things. He told them he usually did not use his cutter first, just a cable, but if they wanted him to use the cutter first then he would do so. He also told them that he left the cable in the drain at Ranger Street because it was stuck and he told the customer he would come back after the weekend to get it out. He further told them he worked hard and he did not want to do sloppy work, as it would effect his commissions, but if they didn't want him, then so be it. At that point he said, "If things are not going smoothly and you don't like it, you can ask me to leave and I will." Asrate states that Mendenhall responded to this by saying "We don't want you to leave, we like you, we want you to improve technically", to which he replied "Ok, and I will use my cutter all time". They then said, "Just do as we say and you can work". During the meeting he asked to be a plumber and was told that once he improved he could go to school. Asrate said he was not told that his job was in jeopardy during this meeting or that he would be fired if there were another incident regarding his performance/attitude.

Asrate stated that a few weeks later, O'Reilly asked him to come in to the office and he was told he was fired because he did not do a good job at the Mayberry Apartments. He replied, "Ok I will leave". O'Reilly then suggested some places for him to go to look for work.

## ANALYSIS

Section 63 of the *Act* establishes a statutory liability on an employer to pay compensation for length of service to an employee upon termination of employment. The employer may discharge that statutory liability by giving appropriate notice to the employee, by providing a combination notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability if the employee terminates the employment (in other words, quits), retires or is dismissed for "just cause".

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 (*Kenneth Kruger*, BCEST #D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences 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 in fact instances of minor misconduct, it must show:

1. A reasonable standard of performance was 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 they were unwilling to do so;
  3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
  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 the 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 dismissal.

The burden is on the Appellant, Hallstead, to persuade me that the Determination should be set aside. Hallstead, as well, has the burden of proving it had just cause to dismiss Asrate.

As noted above, in the absence of a fundamental breach of the employment contract, in order to establish just cause, an employer must inform an employee, clearly and unequivocally that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer. While there is no requirement under the *Act* that a warning be in writing, it is preferable because it is easier to prove (*Sambuca Restaurants Ltd.*, BCEST #D322/97). As will be seen, had Astrate received a written warning, Hallstead's appeal might have turned out differently.

The delegate concluded that Asrate was not dismissed for just cause because Hallstead failed to give him a prior warning that his job was in jeopardy. I am not satisfied that Hallstead has shown that conclusion to be wrong.

In this case, I have two conflicting (and equally plausible) versions of what transpired on February 10.

O'Reilly says that Asrate was given a verbal warning. He presented a witness, Carter, to support his position. However, Carter was not present at the pivotal meeting on February 10 and his evidence regarding what he was told by O'Reilly amounts to hearsay and is of little, if any, value. Furthermore, although Mendenhall was at the meeting on the February 10, and in his written submission supports O'Reilly's position, he did not attend the oral hearing to give evidence and be cross-examined on this matter. Consequently, having heard directly from Asrate, I prefer his evidence about what transpired on February 10 to Mendenhall's version of events on that day.

Asrate denied receiving a verbal warning. In his closing statements, O'Reilly contended that Asrate did not deny being given the verbal warning, but rather said he couldn't remember getting the warning. On the basis of what I heard at the hearing, I find that Asrate was clear in his testimony that he did not receive a warning and he was not told on the 10th he would be dismissed if there were another incident regarding his performance.

The burden of proof is on Hallstead to satisfy me on balance that it gave a verbal warning to Asrate. In the face of Asrate's denial, Hallstead has not been able to establish it gave him a warning. I can find no basis to prefer O'Reilly's version of events to Asrate's version. Hallstead had not managed to tip the scales in its favour and so its appeal must fail.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 5, 2001 be confirmed.

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**Norma Edelman, Vice-Chair  
Adjudicator  
Employment Standards Tribunal**