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 –

Tungs Pharmacy Ltd.
(“Tungs” or the ”Employer”)

- of a Determination issued by -
The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO: 1999/597

DATE OF HEARING: January 27, 2000

DATE OF DECISION: February 15, 2000

DECISION

SUBMISSIONS

Mr. Bruce Russell — on behalf of the Employer

Mr. Brendan Neil — on behalf of Ms. Erminiloa Elman ("Elman" or the "Employee")

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 of Employment Standards (the "Director") issued on September 10, 1999 which determined that Elman had been terminated from her employment with Tungs and awarded her $711.96, or two weeks' pay, on account of compensation for length of service. The Employer appeals the Determination and says that it had cause for the termination. The only issue before me is whether the delegate erred when he determined that the Employer did not have cause for termination.

FACTS AND ANALYSIS

Tungs operates a Pharmasave store on Hastings Street in Vancouver. Elman was employed there between December 4, 1996 and January 26, 1999 as a postal clerk, earning $8.50 per hour.

The circumstances which gave rise to her termination on January 26, 1998 were as follows.

Elman's vacation was scheduled for December 25, 1998 to January 25, 1999, *i.e.*, four weeks. According to the Employer she was entitled to two weeks' vacation but, as Elman was going to the Phillippines to be with her aged father, the Employer had agreed that she could take two more weeks. The dates are important. Mr. Francis Chong ("Chong"), who testified for the Employer, explained that Elman told him that she would be back at work on January 25, which was a Monday. Elman agreed that she had told the Employer that she "would be back on January 25". However, she explained that she did not mean that she would be back at work on that date, rather that was the date she arrived back in the country. She explained that she believed that she did not have to be back at work until January 26, 1999. From Elman's travel itinerary, dated December 16, 1998, it was clear that she would not arrive in Vancouver until the morning of January 25 and that she, therefore, would not be able to report to work that day.

While her vacation was scheduled to commence on December 25, it appears that Elman spoke to one of the pharmacists, Ms. Rose Lee ("Lee"), on December 21 about taking off December 23 and 24. Lee told her to speak to Chong, as he was the only person who could authorize time off. Elman did not want to speak to Chong and said, according to a statement by Lee, that was part of the record, that "she did not want to ask Francis <Chong> and that she would work only one more day", leaving Lee with the impression that she "had no intention of working anymore".

Later on December 21, Lee spoke with Chong about an unrelated matter and mentioned that Elman had requested two more days off. Chong approved the additional time off. At closing time on December 22, Elman said to Lee that she would see her "in February" as she would not be back until then. I note that Elman's airline ticket had an "open" return date. In other words, she could well have returned in February.

On January 26, 1999, Elman called in sick. At that time the Employer terminated her employment for absenteeism. On January 27, Elman went to see her doctor. He wrote a note stating that she had been "ill since January 24 and has been unable to work".

The delegate concluded that the Employer had not met the onus to prove that it had cause for summary termination. The delegate found that the one-day absence was not "significant", neither was the fact that Elman contacted the Employer one day after the Employer expected her to return, *i.e*., January 26, and did not prejudice the Employer's interest. As well, the delegate accepted that the absence was not "intentional misconduct" and rejected the suggestion that she took time off under "false pretenses". He then went on to find that the absence was due to a misunderstanding between the Employer and Elman and that there, in any event, was a reasonable excuse for the absence, illness. The delegate concluded that the "Employer may have had just cause for discipline but not for termination". In my view, the delegate erred. If the absence was simply due to a misunderstanding about the return dates, the Employer would not have had cause for termination. Similarly, if the absence was caused by illness, I would not have accepted that the Employer, in the circumstances, had just cause. In either case, as well, there is not cause for discipline. The delegate, however, accepted, on the one hand, Elman's allegation that the absence was "not intentional" and that she did not take time off "under false pretenses" and, on the other, that her conduct merited discipline.

The Employer's concern was that Elman was not truthful about either the return date or the illness. In my view, the delegate failed to seriously address this aspect. The delegate stated, under the heading "findings of facts":

> "Both the Employer and the Claimant have provided credible evidence for consideration regarding the issue at stake. This is not an issue of whose evidence is more credible. This is an issue of whether or not the Employer had just cause for termination, and in his case, just cause for absenteeism."

I agree with the delegate that the Employer has the onus to prove cause. However, the case at hand turns largely on issues of credibility which have to be resolved. In my view, the delegate ought to have considered the relative credibility of the parties in order to arrive at a proper conclusion with respect to the issues between the parties. The issue of whether the Employer, in the circumstances, had just cause turns precisely on credibility. In my view, the delegate erred and the Determination must be set aside.

Having considered the evidence and submissions of the parties, I am of the view that the Employer did have cause for the termination of Elman. First, I do not find it credible that she would not be aware that she was to report for work on January 25. She had four weeks' vacation, from December 25, 1998, a Saturday, and was to report for work on January 25, 1999, a Monday.

That is exactly four weeks' vacation. I find it difficult to accept that Elman would not have been fully aware of that. There was not any dispute that she had only four weeks' vacation. The fact that Elman was reluctant to approach Chong with respect to adding two more vacation days, December 23 and 24, supports the conclusion that she knew that he was reluctant to grant her more vacation time. In my view, she simply decided to take the chance that she could return on January 26. I do not place much weight on the doctor's note. As argued by the Employer's counsel, how could the doctor know that she had been ill since January 24, if he only saw her on January 27? I accept the Employer's submission that Elman was not truthful either with respect to her return date or her illness. Her conduct constitutes a serious breach of trust and is cause for termination.

As mentioned above, the Determination must be set aside.

ORDER

The Determination dated September 10, 1999 is cancelled.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal