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 -

Covert Farms Ltd.
("Covert Farms")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	1998/709
DATE OF HEARING:	February 10, 1999
DATE OF DECISION:	February 22, 1999

DECISION

APPEARANCES

for the Appellant	Shelley Larsen Gene Covert Diana Covert
for the individual	On her own behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Covert Farms Ltd. ("Covert Farms") of a Determination which was issued on October 28, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found that Covert Farms had contravened Section 63 of the *Act* in respect of the employment of Sonia Grenier ("Grenier") and ordered Covert Farms to cease contravening the *Act* and to pay an amount $318.92.

Covert Farms says the Determination is wrong for two reasons: first, Grenier was dismissed for just cause; and, in any event, Section 63 did not apply to Grenier as she was employed under an arrangement described in paragraph 65(1)(a) of the *Act*.

ISSUE TO BE DECIDED

The issue in this appeal is whether Covert Farms has met the burden of persuading the Tribunal that the Director erred in fact or in law in reaching the conclusions upon which the Determination is based.

FACTS

Covert Farms, as its name implies, is a farming operation. It comprises approximately 600 acres near Oliver on which ten or more crops are grown. As with any farming operation, most of the available employment at Covert Farms is seasonal. Grenier first worked for Covert Farms from August 11, 1997 to September 24, 1997. She was employed as a farm labourer during harvesting and was let go when harvesting was completed. She was re-employed as a farm labourer on January 24, 1998 to do winter pruning and continued to work at Covert Farms at a variety of jobs until her termination on June 23, 1998.

The Director assessed the reasons given by Covert Farms to support the termination in the context of the tests that have been applied under the *Act* to determine if just cause exists. The following comments are found in *Kenneth Kruger*, BC EST #D003/97:

> The Tribunal has addressed the question of dismissal for cause on many occasions. The following principles may be gleaned from those decisions:
>
> 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 minor instances of 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 had 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 available 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.

The conclusions of the Director that formed the basis for the Determination are found in the following paragraphs:

> I do not find that Grenier's behavior, as matters were presented to me, was a serious breach of the employment relationship. In other words, taking a break when one is not supposed to, would warrant discipline, not the immediate termination of one's employment.
>
> Relying solely on the employer's information I find that if Grenier breached the company rule pertaining to breaks, then Larsen was correct and right in speaking to her. However, although a policy outlining the steps of corrective discipline was in place, the employer failed to follow the policy to meet the test that would be required in common law as outlined above.
>
> As to the clear and unequivocal warning that this type of behavior would put Grenier's job in jeopardy. I find no evidence that Grenier was made aware that the continuation of such behavior would put her job in jeopardy. In that Grenier was spoken to on the 22nd of June and terminated on the 23rd of June, I find no evidence that Grenier was provided with a reasonable time to meet the standards.

I find that the Director's analysis of the circumstances to be incomplete. It was clear from the evidence before me and from the material provided to the Director during the investigation that "taking a break when one is not supposed to" on June 22 and 23 was not treated by Covert Farms as the sole basis for terminating Grenier. In correspondence delivered to the Director on July 29, 1998, Covert Farms included a memorandum dated June 23, 1998, which stated in part:

> Sonia Grenier was terminated on this day for the following reasons:

- tardiness, showing up late for work
- insufficient work being done during the allocated working hours
- taking un-authorized or scheduled breaks
- poor quality of work

Sonia and the rest of the crew were given a warning, they were told that tardiness or poor quality of work were no longer going to be tolerated, if a person was late or absent without good reason or their work was not up to standards they would be given a warning, their pay would be put back to minimum wage if warned once again they would be terminated.

The Director was wrong to restrict the analysis of whether Covert Farms had just cause to dismiss Grenier to the events of June 22 and June 23. In light of the reasons given by the employer to support the termination, a broader analysis was needed. I have the authority to do that in this appeal.

ANALYSIS

The burden is on Covert Farms to establish conduct that would justify dismissal.

I heard evidence from Gene Covert ("Covert"), a manager at Covert Farms, Diana Covert ("Mrs. Covert"), bookkeeper and office manager at Covert Farms, and Shelley Larsen ("Larsen"), an assistant manager at Covert Farms and the direct supervising manager of Grenier at the time of her termination. In the evidence, Grenier was described as an "average to good" worker until June 10, 1998 when she began thinning apples. There was an indication in a notarized statement from Peter Busink, who describes himself as a foreman at Covert Farms and Grenier's "immediate supervisor" in the days just prior to her termination, that Grenier's work was "average to poor, and declined during the last 2 months of her employment", but I am unable to give weight to that comment for two reasons: first, it is not consistent with the direct evidence I received; and second, it appears to be based on information and belief, the source of which is not identified in the statement.

I digress to make a general comment about the notarized statement of Peter Busink. Although the statement was introduced by Covert Farms in support of their appeal, inconsistencies between that statement and the evidence of Larsen and Mr. Covert caused Covert Farms to distance itself from key aspects of it. As a result, I give no weight to what the statement says. I have taken notice, however, of what the statement does *not* say and I will return to that below.

Covert Farms asserts there were five separate occasions during the period June 10 and June 22, 1998 where Grenier was put on notice of the standard of performance expected of her, told that her performance was not up to that standard, warned that her job was in jeopardy if that standard was not met, given a reasonable time, in the circumstances, to meet that standard and failed to meet it.

Grenier says she was terminated without any warning that her performance was not up to the established standard or that her job was in jeopardy. She challenges the version of events provided by the employer in respect of four of the five occasions relied upon to support the termination.

I do not accept the position of either party in its entirety. I accept that Grenier, along with the other employees engaged in thinning apples, were made aware of the performance standard expected of them and that a failure to meet that standard would result in a reduction of her wage rate to minimum wage and a continuing failure to meet that standard would result in termination. There was no issue that the performance standard set by Covert Farms was not a reasonable standard and I accept that it was. I also accept that Grenier and her partner were put on notice, on three occasions, that their work did not meet the

expected standard and were told on the third occasion, June 19, that one more warning would result in a reduction in pay to minimum wage rate.

I accept that Larsen observed Grenier on June 23 "sitting down in the middle of her row smoking" when she should have been working. What is less problematic, and not established on the evidence before me, is that Grenier was observed sitting down in her row smoking a cigarette when she should have been working on June 22. Grenier has consistently denied the validity of that observation.

As well, I do not accept that Larsen told Grenier on June 22 that she was being moved to minimum wage as a result of the information she had received from Peter Busink. The only indication from all the documents on file of that occurring is found in a statement from Larsen, dated November 11, 1998, attached to the appeal. She adopted that statement in her evidence. Against that single assertion are several other pieces of evidence that lead me to reject Covert Farms' version of the events of June 22.

In a June 23, 1998 memorandum from Larsen, which I was urged to accept as the most accurate description of the events because it was made immediately following the termination, she states:

> Yesterday [June 22], Sonia was reprimanded for sitting down in her row taking a break in the afternoon, however we do not have an afternoon break. I approached Sonia and asked her if she knew that we did not have an afternoon break she said she was aware of this. I then asked why she was sitting down, she denied doing so.

There is no reference in the letter to telling Grenier that she was being moved to minimum wage even though it makes specific reference to an earlier warning to Grenier of that possible consequence. Later, in a letter to the Director dated July 24, 1998, Larsen responded to allegations from Grenier that she had been paid less than minimum wage during her employment. The letter provided some information concerning Grenier's rate of pay and hours of work. In the letter Larsen states:

> I don't believe she was ever paid less than minimum wage, as minimum wage was $7.00 / hr from January to April 1, when it was increased to $7.15 and *her rate of pay was $7.50/hour*.
> (emphasis added)

Again, there is no reference in that letter that Grenier's rate of pay had been adjusted downward at any time during her employment. Also, Mrs. Covert, who was the bookkeeper and office manager for Covert Farms at the time of Grenier's termination, testified she was in the office on June 22, 1998 and observed Larsen and Grenier having what she described as "an angry exchange". She recalls nothing of what was said nor does she specifically recall discussing the exchange with Larsen afterward, but said she "probably did discuss it with Shelley". That evidence is inconsistent with a statement written by Mrs. Covert, dated November 13, 1998 and filed with the appeal, that:

> Ms. Larsen and Mr. Busink, having warned Ms. Grenier prior to this occasion that this behavior was unacceptable, told her they would now reduce her pay to minimum wage.

The above statement suggests Mrs. Covert knew that Grenier's pay had been reduced to minimum wage, but that is not borne out by the direct evidence. The statement also indicates Mr. Busink was present with Larsen when they lowered Grenier's wage to minimum wage However, the notarized statement by Peter Busink is silent about telling Grenier, or being present when Grenier was told, that her wages were going to be reduced. His only comment about reducing wages is found in the following statement:

> During the two weeks leading up to Sonia's dismissal, everyone on Shelley's crew had been warned about slacking off and taking longer and more frequent breaks than were expected by Covert Farms. However, Sonia and several others ignored the warning. So

> another warning was issued that anyone needing further reprimanding would be demoted and wages adjusted accordingly.

The inability of Covert Farms to demonstrate consistency in their assertion that Grenier was moved to minimum wage on June 22 causes me to conclude that Grenier was not moved to minimum wage before she was terminated. I also do not accept that Covert Farms can rely on the allegation of tardiness to support the termination. In the memorandum of June 23, Larsen says:

> Sonia and the rest of the crew were given a warning, they were told that tardiness and poor quality of work were no longer going to be tolerated . . .

This comment is an obvious reference to a meeting that took place on June 11. In the next paragraph, Larsen says:

> After this talk Sonia . . . was then late for work by 3 hours with the excuse of: it was raining.

Larsen says in the appeal submission that this occurred on June 12, but changed her position in the hearing and said it occurred on June 4. Three problems arise for Covert Farms resulting from that change in position. The first problem is that it places the "offence" seven days before the "warning". The second problem is that there is no suggestion that this incident was ever brought to her attention as a matter that placed her employment in jeopardy. The third problem is that the evidence from Larsen was that the workers who were given the option to do thinning were perceived to be "solid" workers. If the June 4 incident did not detract from Covert Farms' perception that Grenier was a "solid" worker when they asked her to do thinning, they should not be allowed to dredge it up later as a reason supporting her termination. As a result, that incident cannot be relied on to support Grenier's termination.

In the final analysis, Covert Farms has established, first, that there was a general warning to all employees, including Grenier, that a failure by any employee to meet performance standards could result in reduction in pay to the minimum wage and, if the employee's performance did not improve, could result in termination, second, that there were three occasions where Grenier and her partner were told their performance was not up to standard, including one occasion where they were told any further concerns would result in their pay being put back to minimum wage, and, third, that there was an incident on June 23 where Grenier was observed smoking a cigarette when she should have been working. Those are the facts upon which they must rely to support Grenier's termination. Covert Farms has failed to establish that Grenier was ever placed at minimum wage. This is no small matter because that would have been Grenier's warning that her job was in jeopardy.

The above facts do not satisfy the burden on Covert Farms to show Grenier's dismissal was justified.

Covert Farms also says that Section 63 of the *Act* does not apply to them by application of paragraph 65(1)(a), which states:

65. (1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(I) the employer may request the employee to come to work at any time for a temporary period, and

> *(ii) the employee has the option of accepting or rejecting one or more of the temporary periods.*

This argument is raised for the first time on the appeal. In its initial reply to the complaint, Covert Farms argued that Grenier was not entitled to length of service compensation because she was hired for "specific work to be completed within 12 months" (paragraph 65(1)(c) of the *Act*). They now argue paragraph 65(1)(a) applies. There is a preliminary question about whether I should consider this argument at all. The Tribunal does not normally hear new arguments on an appeal that were not raised during the investigation. For the purpose of achieving some finality to this matter, however, I will address the argument.

Paragraph 65(1)(a) does not apply to Grenier's employment. Section 65 establishes several exceptions to length of service compensation and, like other provisions of the *Act* that limit or remove minimum statutory rights and benefits, its application will be narrowly construed. In paragraph 65(1)(a), there are four conditions that must be established in order to come within the exception: first, that there is an *"arrangement"* between the employer and the employee; second, that the *"arrangement"* allows the employer to call the employee to work *"at any time"* for temporary periods; third, that the employee may accept or reject any temporary period of work; and fourth, that the employee may reject the temporary period without risk to his or her continued employment.

The evidence does not support a conclusion that the arrangement under which Grenier was employed meets all of these conditions. There are at least two circumstances that separate the "arrangement" under which Grenier was employed with the kind of *"arrangement"* contemplated by paragraph 65(1)(a) of the *Act*. First, Larsen stated that Grenier was given the "option" of doing thinning or of leaving and returning later to harvest onions. Even if that occurred on that occasion, Covert Farms has not shown that such an option was a general part of the employment arrangement applicable to Grenier. In her statement accompanying the appeal, Larsen says:

> All individuals were given the option to work during this period or choose to leave *and resume working at the end of the three weeks for onion harvesting*.

The implication of that statement is that Grenier, if she decided not to participate in the thinning work, or any other employee who decided not to participate in the thinning work were required to return for the onion harvest.

Second, the evidence shows that Grenier, like most individuals hired to work as farm labourers, had no expectation of continued employment past the particular work for which she was hired. She had been employed for a brief period in 1997. At the end of that period she was let go from her employment with no promise of further employment. In January, 1998, Grenier sought to work again at Covert Farms and was re-hired to do winter pruning. She stayed on, without break, to work at a variety of jobs until she was terminated. Covert Farms says that the time between letting her go and rehiring her should not be construed as a period of layoff. I agree. In my opinion, Mrs. Covert accurately described Grenier's employment "arrangement" in her statement dated November 13, 1998:

> The fact that Sonia, along with other seasonal employees, inquire about returning in January to winter prune, does not imply a "layoff". While we may say we would be interested in hiring some of these people in the future, we make no firm decisions on whom we hire until we hear from them in January, as we may not see nor hear from them ever again.

In other words, her employment in 1997 was not continued under some understanding or agreement that she would be recalled for other temporary periods of work.

Given that Grenier was also occupying a place in the pickers' cabin at no cost to her increases the likelihood that there was no arrangement under which she could reject temporary periods of work without affecting her employment. The nature of the work required to be done at Covert Farms does not conform to the concept of large numbers of transient workers occupying the pickers' cabin while contemplating whether to accept temporary periods of work offered to them.

On the basis of the above, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 28, 1998 be confirmed in the amount of $318.92, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal