

**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 -

Community Legal Assistance Society  
(the “appellant” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

**AJUDICATOR:** Sherry Mackoff

**FILE NO.:** 98/498

**DATES OF HEARING:** September 21, 1998,  
October 16, 1998,  
December 8, 1998  
January 22, 1999

**DATE OF DECISION:** March 2, 1999

## DECISION

### APPEARANCES

Mr. Steve M. Winder	On behalf of the Community Legal Assistance Society
Mr. Kwenu Turkson	On his own behalf

### OVERVIEW

This is an appeal by the Community Legal Assistance Society (the “appellant” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination, dated July 14, 1998, issued by a delegate of the Director of Employment Standards. The Determination found that the employer did not have just cause to dismiss Mr. Turkson (the “respondent”) and that Mr. Turkson was entitled to three weeks’ compensation based on length of service.

It is Mr. Turkson's position that there was no cause for dismissal.

It is the employer’s position that the Determination should be cancelled because it did have just cause to dismiss Mr. Turkson. The employer relies on two grounds to establish just cause. One of those grounds is alleged insubordination that took place on January 19 and January 20, 1998. Because I have come to the conclusion that the employer had just cause to dismiss on the basis of the respondent's conduct on those days, that is the only ground I will address in these reasons.

A hearing was held at the Vancouver office of the Employment Standards Tribunal on September 21, 1998, October 16, 1998, December 8, 1998 and January 22, 1999.

The hearing commenced on September 21, 1998 but no evidence was heard on that day. On September 21st I dealt with the issue of production of documents which had been raised by Mr. Turkson in his letter to the Employment Standards Tribunal, dated August 18, 1998. I made an order that the employer produce certain documents to Mr. Turkson. That order was confirmed in a letter to the parties dated September 22, 1998. The hearing reconvened on October 16, 1998 and on that day the appellant began to call evidence.

Mr. James Pozer, Ms. Laurie Thompson and Mr. Brett Haughian gave evidence on behalf of the appellant. Mr. Turkson gave evidence on his own behalf.

### ISSUE TO BE DECIDED

Did the delegate err in deciding that the employer did not have just cause to dismiss?

## FACTS

### *Introduction*

The employer is a non-profit society which operates as a law firm working in the areas of poverty law, disability law, human rights law and equality law. The Mental Health Law Program is one of the programs run by the employer.

The Mental Health Law Program has two offices (or cottages) on the grounds of Riverview Hospital where lawyers and paralegals do advocacy work for patients who are involuntarily detained in Riverview and other institutions. The paralegals and their support staff work in one cottage and the lawyers and their support staff work in another cottage.

Mr. Turkson began work as a paralegal, or advocate, at the Mental Health Law Program on September 6, 1994. Prior to his work as a paralegal Mr. Turkson had, for approximately twelve to thirteen years, sat as a patient appointee on review panels. (A review panel is an administrative tribunal set up under the *Mental Health Act* to decide whether a patient should continue to be detained involuntarily.)

Mr. Turkson was hired by Mr. Pozer who is both the Executive Director of the employer and a staff lawyer. Mr. Pozer has been with the employer for fourteen years.

Mr. Turkson was fired by Mr. Pozer on January 26, 1998. Mr. Pozer's decision was confirmed by the Personnel Committee of the appellant's Board of Directors.

During the last two and a half years of Mr. Turkson's employment with the appellant, his immediate supervisor was Mr. Brett Haughian. In the fall of 1996 (approximately five months prior to the respondent's dismissal) Mr. Haughian began working at the cottage at Riverview on a day to day basis. Prior to that time Mr. Haughian spent the majority of his time at the appellant's downtown office.

Mr. Haughian has worked at the Mental Health Law Program for seven years and he is the supervising paralegal. At the time of Mr. Turkson's dismissal, Mr. Haughian supervised the paralegals and two support staff.

Mr. Turkson was unhappy with Mr. Haughian's supervision. He stated that Mr. Haughian spoke to him only when he thought he had done something wrong and never offered him a compliment. As well, the respondent did not believe that Mr. Haughian was qualified to be the supervising paralegal. He believed that there were other people, himself included, who were more qualified to hold the position.

As set out above, Mr. Turkson worked for the appellant from September 6, 1994 until January 26, 1998. Some of the respondent's work history with the appellant is briefly set out below.

In May, 1995 Mr. Pozer received a formal complaint against Mr. Turkson from the manager of nursing at a Vancouver Island hospital. The gist of the complaint was that the respondent had been aggressive and intimidating to staff and patients. At a face to face meeting, Mr. Pozer spoke to Mr. Turkson about this complaint. Mr. Turkson denied the allegations, said that he acted properly and Mr. Pozer accepted what Mr. Turkson said. In short, Mr. Pozer sided with Mr. Turkson.

A complaint was made to Mr. Haughian concerning Mr. Turkson's conduct at a hearing in March, 1997. Mr. Turkson refused to meet with Mr. Haughian about the tape of that hearing and subsequently Mr. Pozer and Mr. Haughian met with Mr. Turkson. Although both Mr. Pozer and Mr. Haughian had concerns about the respondent's conduct at the hearing Mr. Pozer did not tell him that his job was at risk.

The only written warning that Mr. Turkson ever received from the appellant was a memorandum from Mr. Pozer dated January 13, 1998 to advise that "... it is absolutely unacceptable for you to advise CLAS at 1:00 p.m. that you will not be in today when there was no reason for you not to phone at 9:00 a.m. ... Please ensure that this does not happen again."

A February, 1997 employee evaluation indicated that the respondent needed to improve in two job areas. However, that evaluation was followed by a positive evaluation in October, 1997. The following line appears in that follow-up evaluation memorandum by Mr. Pozer: "Brett further advised that you are a real team player who has an excellent work ethic and is willing to help out your colleagues as requested."

The basis for the employer's assertion of insubordination involves Mr. Turkson's conduct at a meeting on January 19th and his behaviour towards Mr. Haughian on the morning of January 20th, 1998. Before setting out the evidence with respect to those events it is necessary to set out some further background information.

Mr. Turkson believed that he was treated unfairly with respect to the scheduling of hearings. As well, Mr. Turkson believed that another paralegal, Ms. Thompson, received preferential treatment.

In September, 1997 the respondent brought his workplace concerns to Mr. Pozer who needed until January, 1998 to deal with them. Prior to the January 19th meeting (which will be described shortly) Mr. Turkson had raised his scheduling concerns with Mr. Haughian a number of times and had also raised his concern about Ms. Thompson's alleged preferential treatment. Mr. Haughian testified that there was no substance to Mr. Turkson's scheduling concerns and that Ms. Thompson did not receive preferential treatment. The fact that Mr. Turkson raised these issues with the employer played no part in his termination.

I now turn to the events of January 19th and 20th.

On Sunday, January 18th Mr. Haughian called Mr. Turkson at home to tell him that he wanted an advocates' meeting on Monday, January 19th and he wanted Mr. Turkson to set it

up for later in the day. Mr. Haughian stated that he called at approximately 6:00 p.m. and Mr. Turkson stated that he was called at 10 p.m. Mr. Turkson was enraged by the telephone call.

*January 19th*

A meeting of the paralegals took place on Monday, January 19, 1998 in the late afternoon that lasted approximately fifteen or twenty minutes. Present at the meeting were Mr. Haughian, Mr. Turkson, Ms. Thompson, another paralegal (Carolyn) and a practicum student from Simon Fraser University. I note for completeness that the paralegal who worked as the legal information counsellor was not at the January 19th meeting.

The meeting of January 19th was a follow-up to a previous meeting with Mr. Pozer that had dealt with workplace concerns including scheduling. Mr. Haughian handed out a memorandum from Mr. Pozer that set out the issues from the previous meeting. As well, Mr. Haughian handed out time sheets on which the paralegals were to record their time. As a result of the previous meeting which involved workload issues, Mr. Pozer wanted the advocates to keep track of their time over a two week period.

Three people gave evidence about what happened at the January 19th meeting: Ms. Thompson, Mr. Haughian and Mr. Turkson.

The evidence of Ms. Thompson is briefly summarized as follows. Ms. Thompson was employed by the appellant from May, 1996 to May, 1998, first as a student in a three month practicum and then as a paralegal. She worked with Mr. Turkson. She stated that she had a bit of a strained relationship with him and found him difficult. She found his behaviour unpredictable and everyone "treaded on eggshells" around him.

Mr. Turkson was not happy about the time sheets or the scheduling. He had been scheduled for two recent late hearings and although the situation had been rectified, according to Ms. Thompson, he felt that it should not have happened. She stated that he said that he felt he was being "shit on". She stated that Mr. Haughian said that Mr. Pozer was "quizzical" about Mr. Turkson's scheduling problems because it had been done the same way for so long. She testified that Mr. Turkson got quite angry, that his behaviour changed dramatically - "like he erupted". He was aggressive verbally, pounded his fists on the table and pointed at Mr. Haughian and called him a coward. She said that he told Mr. Haughian that he should have the courage to deal with the scheduling difficulties himself rather than go to Mr. Pozer. Mr. Haughian remained calm. He did nothing to provoke Mr. Turkson. The respondent wanted to leave. Mr. Haughian asked him to wait a minute and the respondent left at the end of the meeting. Ms. Thompson stated that Mr. Turkson was standing up and frightening. Ms. Thompson felt intimidated.

Mr. Haughian's evidence about the meeting is briefly as follows. Mr. Haughian testified that at some point in the meeting Mr. Turkson asked him if he thought the scheduling was fair and when Mr. Haughian said "yes", at that point Mr. Turkson verbally attacked him. Mr. Haughian stated that Mr. Turkson raised his voice at him, pointed his finger at him and

banged the table. According to Mr. Haughian, Mr. Turkson said that he thought the schedule worked well because he had blinders on. Two to three times Mr. Turkson said that he was being "shit upon". He called Mr. Haughian a coward for not wanting to fix the problem and said that Mr. Haughian was the problem. Mr. Haughian said that he was not there to resolve the issue; the scheduling system would remain in place while Mr. Pozer looked at the issue. Mr. Haughian told Mr. Turkson that if he had problems with the way Mr. Haughian does his job then he should take it up with Mr. Pozer. According to Mr. Haughian, Mr. Turkson said "don't tell me what to do, everything you say is irrelevant." Mr. Haughian felt embarrassed, his authority challenged and betrayed. The effect of the respondent's outburst was intimidation.

After January 19, Mr. Haughian felt he could no longer manage Mr. Turkson. Mr. Turkson's reluctance to take his supervision was "thrown open before the staff". Mr. Haughian stated that prior to January 19th, Mr. Turkson was reluctant to accept Mr. Haughian's supervision and other employees had told Mr. Haughian of problems dealing with the respondent.

After the meeting Mr. Haughian told Mr. Pozer what had happened. Mr. Haughian recommended that Mr. Turkson be terminated.

Mr. Turkson's evidence with respect to the January 19th meeting is, briefly, as follows. On January 19th everything came to a head. He said that he had waited to hear from Mr. Pozer about his concerns since September, 1997. When Mr. Haughian said that the advocates would now have to account for their time by filling out time sheets, Mr. Turkson wanted to know if that was Mr. Pozer's response. Mr. Turkson said that he would then take lunch and coffee breaks and not take work home. Mr. Haughian's response was wasn't the scheduling resolved and Mr. Turkson replied no - that Carolyn had helped him out that week to make the schedule fair. Mr. Turkson told Mr. Haughian that he was the supervisor and asked why he didn't "go to bat for us". Mr. Turkson said that he raised his voice due to pent up frustration over unaddressed concerns. After Mr. Haughian finished, the respondent walked to his office and sat down to calm down before driving home.

On cross-examination Mr. Turkson said he did not swear at Mr. Haughian at the meeting but said that he was being "dumped on". He said that he did not recall saying he was "shit upon". He said that he knocked a pencil on the table and raised his voice. He admitted calling Mr. Haughian a coward and telling him that he was the problem. He stated he was not trying to intimidate Mr. Haughian at the meeting. During cross-examination, Mr. Turkson asserted that Mr. Haughian "dressed him down" at the staff meeting; told him that he was a chronic complainer.

Mr. Turkson stated that when the time sheets were handed out he raised his voice when he said "I can't believe it". According to Mr. Turkson he raised his voice only when he said those words.

*The morning of January 20th*

I now turn to the morning of January 20th. I will briefly recap the evidence of Mr. Haughian and Mr. Turkson.

The crux of Mr. Haughian's evidence is that Mr. Turkson refused to meet with him on the morning of January 20th.

In summary, Mr. Haughian gave the following evidence. He testified that on the 20th he asked Mr. Turkson to come into his office for a meeting. Mr. Turkson's response was what do we have to have a meeting for. Mr. Haughian said that they needed to discuss what had happened the night before. Mr. Turkson said there was nothing to discuss. Mr. Haughian said that as the supervisor he needed to convey some information to him. Specifically there were four things that Mr. Haughian wanted to tell Mr. Turkson. He got as far as his first point, which was that the respondent's behavior at the meeting was unacceptable, when Mr. Turkson told him that his behavior was unacceptable. Mr. Turkson said this is not a meeting, let me know when you are ready to have a real meeting and he left. Mr. Haughian called him back two or three times. Mr. Turkson left the cottage a couple of minutes later.

On cross-examination, Mr. Haughian added the following. Fifteen minutes after Mr. Turkson had left Mr. Haughian's office he came back to the cottage. Mr. Haughian went to Mr. Turkson's office and told him that he needed to cover some important issues. Mr. Turkson said that he had more important things to do. Mr. Haughian said that he was his supervisor and Mr. Turkson told Mr. Haughian to make an appointment. Mr. Haughian testified that he twice asked if Mr. Turkson was refusing to meet with him. Mr. Haughian walked into Mr. Turkson's office, sat down and tried to raise the first point he raised earlier. Mr. Turkson told him that he could talk to himself and he left the building.

It was Mr. Haughian's evidence that on the morning of January 20th Mr. Turkson never told him that he had a meeting with a doctor. According to Mr. Haughian, Mr. Turkson never said prior to the second attempt at a meeting, that he had missed his appointment, needed to take a walk to calm down and would speak to Mr. Haughian later.

Later that day Mr. Haughian called Mr. Pozer and told him that Mr. Turkson was insubordinate and that he wanted him to get Mr. Turkson out of the cottage that day.

Mr. Turkson's testimony about the morning of January 20th is as follows. When Mr. Haughian called Mr. Turkson to his office he made it clear that he needed to talk to him immediately and that he had four things to say. Mr. Turkson felt that Mr. Haughian was "invading his space". Mr. Turkson told him that he had an appointment with a doctor that shouldn't take more than twenty minutes and that when he came back they could chat. Mr. Haughian replied that they needed to speak immediately. Mr. Turkson told him that he needed to speak to the doctor and he left for the meeting.

Mr. Turkson testified that he missed his meeting with the doctor. As soon as he got back to the cottage Mr. Haughian came to Mr. Turkson's office to tell him that the way he had spoken to Mr. Haughian the previous day was unacceptable, and that he had refused to talk to him earlier.

Mr. Turkson testified that he told Mr. Haughian that it was obvious they were not communicating (Mr. Haughian was angry and they both needed to calm down) and he said he was going to take a coffee break, a quick walk and then they could talk. When Mr. Haughian asked if he was refusing to talk to him, Mr. Turkson said he would talk to him in ten or fifteen minutes, but not now. Mr. Haughian stated that if he didn't talk to him now he would have to talk to Mr. Pozer. Mr. Turkson replied that he would speak to Mr. Haughian in ten to fifteen minutes but that if he wanted him to speak to Mr. Pozer he would.

In examination in chief Mr. Turkson gave evidence that when he came back from his walk, Mr. Haughian never said anything and Mr. Turkson never went to see Mr. Haughian. However, on cross-examination Mr. Turkson said that when he came back from his ten minute walk Mr. Haughian's door was shut. When the door opened Mr. Haughian went to get coffee and Mr. Turkson told him that he was available now. Mr. Haughian said that Mr. Turkson would be talking to Mr. Pozer.

*Events subsequent to the morning of January 20th*

Later that day Mr. Pozer asked Mr. Turkson to come downtown to meet with him, which he did. That meeting lasted nearly four hours. The then office manager was present and she took notes. The meeting of January 20th was the beginning of Mr. Pozer's investigation of the dispute between Mr. Haughian and Mr. Turkson.

Mr. Pozer told Mr. Turkson not to go to the office the following day (Wednesday) but to work from his home for the next two days. On Wednesday night Mr. Pozer called Mr. Turkson at home and Mr. Turkson went back to the cottage on Thursday. Mr. Pozer stated that when the respondent asked for his advice on the telephone, he suggested that he apologize to Mr. Haughian and the others at the meeting.

On Thursday morning, January 22nd, the respondent went back to the cottage. That morning he apologized to Mr. Haughian. Mr. Haughian testified that he asked the respondent to apologize to the staff.

Mr. Turkson testified that the first thing that he did on Thursday was to go to Mr. Haughian's office and tell him that he was not proud of what happened on Monday and Tuesday morning and that he hoped Mr. Haughian could forgive him. He testified that he told Mr. Haughian that he wanted to apologize to the whole staff and Mr. Haughian agreed that would be a good idea. Mr. Turkson apologized to everyone who was at the January 19th meeting and he went to Debbie's office (she is one of the support staff) and apologized to her too.

On January 26, 1998 Mr. Pozer terminated Mr. Turkson for insubordination. Mr. Turkson stated that he wanted to appeal to the Board of Directors.

Prior to terminating the respondent, Mr. Pozer interviewed everyone who had attended the meeting on January 19, 1998 and everyone who worked in the cottage with Mr. Turkson.

The appellant's Personnel Policy provides that staff who are terminated have a right of appeal to the appellant's Board of Directors. The respondent exercised that right. On February 2, 1998 an appeal hearing was held. Mr. Turkson was represented by counsel. Mr. Turkson's appeal was heard by five members of the seventeen member Board of Directors. Those five members comprised the Personnel Committee of the Board of Directors.

Mr. Pozer's decision to terminate Mr. Turkson was confirmed.

## **ANALYSIS**

Section 63 of the *Act* provides that after three consecutive months of employment, an employer who wishes to terminate an employee becomes liable to pay compensation for length of service. This statutory liability is discharged if the employer gives the employee adequate notice of termination, pays wages equal to the notice period to which the employee is entitled, or provides a combination of appropriate notice and wages. The employer is also discharged from its statutory liability to pay compensation for length of service if the employee quits, retires or is dismissed for just cause. (See: section 63(3)(c) of the *Act*.)

The onus is on the employer to establish, on a balance of probabilities, that there was just cause for dismissal.

I will now deal with the issue of insubordination. Where there is discrepancy in the evidence I prefer the evidence given by the witnesses for the appellant. I have considered the manner in which the witnesses gave their evidence, whether their evidence was reasonable, when viewed in its entirety and in relation to all the other evidence, and which version of events is more probable. I note that during the hearing of this appeal the respondent, in frequent, angry outbursts, verbally attacked counsel for the appellant, Mr. Pozer and Mr. Haughian.

At the staff meeting on January 19th, the respondent verbally attacked his supervisor in front of other employees and his conduct was intimidating. Mr. Turkson admitted that he raised his voice, called his supervisor a coward and told him that he was the problem.

However, the matter did not end with the staff meeting on January 19th. On the morning of January 20th Mr. Turkson twice impolitely refused to meet with Mr. Haughian even though his supervisor made it clear that he needed to speak to him. Mr. Turkson did not apologize until Thursday.

The employer has characterized Mr. Turkson's conduct on January 19th and 20th as insubordination. Perhaps insolence would be the more accurate legal term to describe the misconduct on the 19th.

In *Just Cause: The Law of Summary Dismissal in Canada* by Echlin and Certosimo, (Aurora, Canada Law Book, 1998) the following appears at page 17-1:

.. insubordination refers to an employee's intentional refusal to obey an employer's lawful and reasonable orders; whereas, insolence involves an employee's derisive, contemptuous and abusive language (and sometimes conduct), generally directed at a superior.

However, whether the respondent's conduct on January 19th is characterized as insubordination or insolence the question in my view is: Did the respondent's angry, intimidating behaviour directed at his supervisor, in the presence of other staff members, together with his actions on the morning of January 20th, give the employer just cause to dismiss?

Misconduct sufficient to justify summary dismissal has been described as conduct which amounts to a fundamental breach of the employment contract. The issue is whether the respondent conducted himself "in a manner inconsistent with the continuation of the contract of employment" [see: *Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181 at page 183 (B.C.C.A)].

In the absence of a fundamental breach of the employment contract, the employee must be given a warning that their conduct is unacceptable and that repetition of that conduct will result in dismissal.

The respondent's misconduct on January 19th and 20th was serious and unacceptable but was it "sufficiently serious to justify summary dismissal without the requirement of a warning."? (See: *Kenneth Kruger* BC EST #D003/97)

Prior to the unfortunate events of January 19th and 20th there was no evidence that the respondent had ever received a warning for either insolence or insubordination. His evaluation of October 23, 1997 was positive. As well, at the time of the January 19th meeting Mr. Turkson believed that he was being unfairly scheduled. I note also that Mr. Turkson worked on Thursday and Friday before he was dismissed on Monday. Mr. Pozer stated that the January 19th incident was out of character with the way the respondent had acted towards Mr. Pozer.

If this case only concerned Mr. Turkson's misconduct at the January 19th meeting, I do not think that dismissal without a warning would have been justified. But the January 19th meeting was not the end of the matter. The following morning he refused to meet with his supervisor, despite Mr. Haughian's very clear wish to speak to him. In my view, the combination of his actions on January 19th and 20th amounted to "conduct inconsistent with the employment relationship" and there was, therefore, no requirement for the employer to first issue a warning.

Having come to that conclusion, I wish to deal with two points raised by the respondent during the hearing. First, Mr. Turkson stated that he did not receive a written warning as

required by the employer's Personnel Policy. The third paragraph under the heading "DISCIPLINE AND DISCHARGE FOR CAUSE" provides in part:

If the Executive Director decides that there are serious concerns about a staff member's performance, the Executive Director will ... provide the staff member with a written warning outlining the nature of the problem and the steps to be taken to remedy it, and stating that failure to remedy the situation within a specified time period will lead to dismissal.

The answer to this point is that no warning is required where there has been a fundamental breach of the employment contract.

Second, the respondent alleged, for reasons which need not be set out, that the appeal hearing before the Personnel Committee was unfair. The answer to the respondent's allegation that he did not receive a fair hearing before the Personnel Committee, is that that is not an issue for determination on this appeal. The sole issue on this appeal, which is an appeal from the delegate's Determination, is whether the employer had just cause to dismiss and is therefore relieved from its obligation to pay compensation for length of service under the *Employment Standards Act*.

In conclusion, this appeal is allowed.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination, dated July 14 1998, be cancelled.

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**Sherry Mackoff**  
**Adjudicator**  
**Employment Standards Tribunal**