

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C.38*

- by -

Eagle Ridge Pontiac Buick GMC Ltd.  
("Eagle")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Jerry W. Brown

**FILE No.:** 96/150

**HEARING DATE:** April 11, 1996

**DATE OF DECISION:** May 26, 1996

**DECISION**

**APPEARANCES**

Brian Knox	General Manager Eagle Ridge Pontiac Buick GMC Ltd.
Randy McConaghy	Fleet Sales & Leasing Eagle Ridge Pontiac Buick GMC Ltd.
Gary W. Van Belois	Sales Manager Eagle Ridge Pontiac Buick GMC Ltd.
Adrian Rees	For The Director of Employment Standards
Alfred Penner	On his own behalf
John Wood	On his own behalf

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 001067 issued by the Director of Employment Standards (the "Director") through its delegate on February 7, 1996.

The Director determined that Eagle Ridge Pontiac Buick GMC Ltd. ("Eagle Ridge") was in breach of section 63 of the Act and the complainants John Wood ("Wood") and Alfred Penner ("Penner") would receive compensation in the amount of \$4,354.86, calculated as follows: \$3,398.00 to Wood for compensation owed for service plus \$203.38 vacation pay for a total amount of \$3,601.38; and, \$724.50 to Penner for compensation for service plus \$28.98 vacation pay for a total amount of \$753.48.

Eagle Ridge claims that there is no liability for compensation owed for length of service as set out in the Act because Wood and Penner were terminated for just cause. Eagle Ridge submits that the

delegate was in error in finding that the warnings and actions of Eagle Ridge were invalidated by allowing Wood and Penner additional time to comply with Eagle Ridge's performance expectations.

Written submissions were received from Eagle Ridge and information was provided by the Director. An oral hearing was subsequently held.

## **FACTS**

Both complainants had been employed as automobile salesmen at Eagle Ridge.

Wood commenced employment with Eagle Ridge on or about January 31, 1987 and his employment was terminated on September 26, 1995. One of Wood's managers for most of the period of his employment was Randy McConaghy ("McConaghy") who is now employed by Eagle Ridge in the capacity of a fleet salesperson.

Penner commenced employment with Eagle Ridge on September 30, 1991 and was terminated on September 26, 1995. Penner was also supervised and managed by McConaghy.

On May 11, 1995 both Wood and Penner received a letter from McConaghy with respect to their employment at Eagle Ridge detailing concerns raised by McConaghy and which was clearly intended to be a warning letter. The May 11 letter stated that the end of May was the period of time within which Wood and Penner would have to improve their sales performance. This letter set sales standards and identified the time frame allowed to meet these standards. The letter also let Wood and Penner know that their jobs were at risk if they did not meet those standards. The evidence indicated that the sales standards for both Wood and Penner were consistent with those set for other auto sales people with similar experience. Wood and Penner do not deny receiving this letter.

On May 29, 1995, McConaghy once again had a discussion with Wood and Penner and asked them to sign letters confirming this discussion. The form of these letters was different in that they were prepared by Eagle Ridge and were meant to be signed by Wood and Penner indicating that they understood that the period given in order for them to improve their performance was to be extended until some time near the end of June 1995. As well, these letters indicated that this expectation was going to be reviewed on a month to month basis and was an attempt to put them on

notice that termination could come at any time if they failed to perform to the standards set by Eagle Ridge. Neither Penner nor Wood deny having the conversation with McConaghy or receiving the letters.

The principals of Eagle Ridge were attempting to implement a management change during the period in question and were also raising expectations for the sales staff. McConaghy, who was responsible for implementing this change, was soon replaced as manager. During this period McConaghy worked with Wood and Penner in an attempt to improve their performance. Wood's and Penner's performance showed little or no improvement during this period and failed to meet the standards set out in the letters.

Wood and Penner were terminated on September 26, 1995.

### **ISSUE TO BE DECIDED**

Did Eagle Ridge have just cause to dismiss Wood and Penner?

### **ARGUMENTS**

Eagle Ridge argues that it had just cause to terminate both Wood and Penner. Eagle Ridge argues that it has satisfied the burden of sustaining a dismissal for just cause and that if anything the organization bent over backwards in its efforts to help Wood and Penner to retain their employment by helping them meet the sales performance standards set by Eagle Ridge.

Wood and Penner argue that Eagle Ridge did not meet the burden of showing just cause in that Eagle Ridge's actions were invalidated by the confusing nature of the two letters sent in May of 1995. Wood and Penner also argue that it was not clear to them that their jobs were at risk. Wood and Penner therefore argue that they are entitled to compensation for length of service as per section 63 of the Act.

### **ANALYSIS**

Section 63 of the Act provides that when an employee is terminated the employer is liable to pay to that employee compensation for length of service. In Wood's case, having completed eight (8) years of service, he would be entitled to compensation in an amount equal to eight weeks wages. In Penner's case, having completed three (3) years of service, he would be entitled to compensation in an amount equal to three weeks wages. The Act provides that the employer's liability to pay compensation for length of service is discharged in some circumstances, one of which is when the employee is dismissed for "just cause".

The employer, in this case Eagle Ridge, has the burden of establishing that either Wood or Penner, or both, were dismissed for just cause.

The test to meet the burden of proof to support termination for "just cause", in cases where job performance is an issue, is as follows:

1. The employer must set objective standards of performance and communicate these expectations to the employee;
2. The employee should, generally, be warned in those cases where the standards have not been met and, when a warning has been given, it should clearly set out that dismissal will result if the standards are not met;
3. The employee should, generally, be given a reasonable time in order to bring his or her performance up to the standards set; and
4. After all of the above, the burden of establishing "just cause" will be met if the employee still did not meet the required performance standards.

The letters of May 11, 1995 clearly meet the first three criteria in the above test. The parties agree that the letters of May 29, while not in the same format as the May 11, 1995 letters, were given in an attempt to provide more time for Wood and Penner to meet the standards set by Eagle Ridge. Despite the different format, the May 29 letters were not inconsistent with the May 11 letters in that they increased the time frame allowed for Wood and Penner to meet the standards. The warning to Wood and Penner that they would have to meet the performance standards was merely extended on a month to month basis. This was acknowledged by both Wood and Penner in their testimony in this appeal. The final criteria was met when Wood and Penner failed to meet the performance standards set by Eagle Ridge.

As I have stated, one of the four parts of the test was that an employee must be clearly aware that his or her continued employment is in jeopardy if the performance standards are not met.

Based on conversations with Wood and Penner, the Director's delegate determined that the warnings were invalidated by Eagle Ridge failing to act as set out in the first letter and then allowing Wood and Penner to continue on a month to month basis to try and improve their performance and meet the standards set by Eagle Ridge. The Director's delegate based his determination on earlier statements by Wood, and then Penner, that they were "confused about what was happening" by the warnings contained in the May 11 letter and in the May 29 letters. If this was correct, and Wood and Penner were misled by the second letters into believing that their continued employment was not in jeopardy, then the earlier determination would have been correct.

However, on the evidence given in this appeal, first Wood and then Penner acknowledged that while they had said they were somewhat confused, they were both clearly aware at all relevant times that their continued employment was in jeopardy if they did not improve and meet the standards of performance set by Eagle Ridge. Neither Wood nor Penner disputed McConaghy's evidence that McConaghy was attempting to work with them and was trying to help them retain their employment with Eagle Ridge. It was understandable that the Director's delegate came to the conclusion he did. He did not have the benefit of the testimony of Wood and Penner which was given in this appeal, to the effect that they were both clearly aware at all relevant times that their employment was in jeopardy.

This is just an unfortunate situation where Wood and Penner were unable to raise their performance, to a level where their continued employment with Eagle Ridge would have been possible. I find that Eagle Ridge had just cause to terminate Wood and Penner.

The clarification of the evidence given by Wood and Penner at this hearing clearly persuades me that the Director's delegate was incorrect in his determination. Eagle Ridge's liability to pay compensation for length of service is discharged pursuant to section 63(3)(c) of the Act.

## **ORDER**

In summary, I order under Section 115 of the Act, that this appeal should be allowed and that Determination No. CDET 001067 be cancelled.

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JERRY W. BROWN  
Adjudicator  
Employment Standards Tribunal

EKB:97686