

**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 -

Frederick Goertz Ltd

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 1999/41

**DATE OF HEARING:** March 22, 1999

**DATE OF DECISION:** March 24, 1999

**DECISION**

**APPEARANCES:**

Ernest Redding	Secretary, Frederick Goertz Ltd
Bob Loten	On his own behalf
Ron Corrigan	Delegate of the Director

**OVERVIEW**

This is an appeal by Frederick Goertz Ltd ("Goertz") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination (File No. 088-226) dated January 11, 1999 by the Director of Employment Standards (the "Director").

Ernest Redding ("Redding") was the Secretary and manager of the operations of Frederick Goertz Ltd in Victoria during and including the years 1993 - 1998. The company was in the computer business and Redding handled, as well as his managerial duties, the sales relating to the marine side of the business. He employed the complainant in this case, Bob Loten ("Loten") to handle all the sales on the engineering side of the business. Loten was hired with a base salary plus commissions. On December 11, 1997 Loten's employment was terminated.

Issues regarding commissions and holiday pay have been concluded but the Director found that Loten was due compensation for length of service despite Goertz's assertion that Loten was dismissed for just cause. The Delegate found that there was no evidence of prior warnings to Loten that his job could be in jeopardy.

Goertz appeals on the grounds that the Determination was wrong in not finding just cause. Goertz submits that warnings are not necessary where the actions of the employee are inconsistent with continuation of the employment relationship as they allege in this case.

**ISSUE TO BE DECIDED**

The issues to be decided in this case are:

1. Was there just cause to warrant dismissal ?
2. If so, were the actions of Loten so inconsistent with the continuation of the employment relationship as to warrant immediate dismissal without warning ?

## FACTS

Mr Redding testified at the hearing and called one witness, Donna Ferguson, the office secretary/receptionist. Loten did not testify.

Redding testified that at all times Loten performed his duties with the company in an excellent manner. His ability as a salesman was never in question. Loten was hired in October 1993 but in the Spring of 1997 Redding was beginning to have some concerns about Loten's behaviour. Redding felt that Loten was receiving a large number of personal calls at the office. Many of these calls were incoming or to Loten's pager which Loten would then return. Redding could not say, for sure, which calls were personal but his suspicions were aroused.

Redding testified that he never confronted Loten about these calls nor did he direct Loten not to receive or return personal calls on office time. The concern that Redding had about these calls was never really addressed and it continued up to the date of termination on December 11, 1997.

Redding testified that he also had concerns about the manner in which Loten submitted his expense accounts. Redding testified that the dollar amounts were never excessive but that he felt that mileage claims were not always accurate and he felt they were, in some instances, inflated. He says that he did mention this to Loten in July or August 1997. He did not question Loten about any specifics or suggest any specific wrongdoing. He did not impose any discipline or warnings.

The concerns that Redding had were aggravated by a suspicion that Loten was spending a great deal of company time on his own personal business. Redding became aware that Loten, and members of his family, were involved in a private land subdivision project and Redding was suspicious that this project was being done on company time.

Redding hired two separate private investigators to follow and observe Loten. Neither of these investigations came up with anything to substantiate the concerns. Only one incident was reported, in the second report, which acted to continue Redding's suspicions and this was a visit by Loten to a construction company called Kasapi Construction. Kasapi was not a Goertz client.

Again, Redding did not ask Loten about these concerns and the situation continued through the Summer and Fall of 1997. The second investigation report was delivered to Redding in early October but Redding did not take any action upon receiving it.

Redding had an ongoing agitation with Loten about Loten's failure to always advise the office of his whereabouts, keep up the daily log books, and maintain proper records. However, Redding did not confront Loten on these issues, did not warn him, and did not discipline him in any way.

A further issue that concerned Redding was that in 1996 he saw Loten access sales records and information in the office computers. Redding did not mind Loten accessing the engineering side of the business but objected to him accessing the marine side. Redding put in a security code.

Some time shortly thereafter Loten needed access to the engineering sales records so the code had to be removed but Loten said that he would not access the marine side records. A year later Loten again accessed the marine side sales records to compare them to the engineering side. Redding

was upset about this and once again inserted a security code. There was no discussion about consequences, no discipline, and no warnings.

Redding testified that some time in November 1997 Loten arranged for a Loomis courier delivery on the business account in the amount of \$9.00. Loten did not seek prior approval but says it was an urgent matter and that he intended just to re-imburse the company for the \$9.00.

There was submitted to the delegate a performance review dated October 14, 1996 which opens, "*This letter is to reinforce your position with Frederick Goertz Ltd and remind you of certain requirements that must be met*". The letter goes on to suggest improvement in certain area including record keeping and keeping the office informed of comings and goings. However the letter does not indicate any specific consequences for failure to comply with these suggestions.

Other than this letter of October 14, 1996 there were no written warnings or letters of discipline.

Ms Ferguson testified that Loten did receive personal calls at the office but confirmed that other employees also received personal calls. She could not say that Loten's calls were any more frequent than other employees.

## **ANALYSIS**

One act of disobedience or misconduct can justify dismissal if it is of the nature which shows that the employee is wilful repudiating the contract of employment or that the conduct was inconsistent with the continuation of the employment contract, *Gary Allen Candy v. C.H.E. Pharmacy Inc.* [1997] Victoria Registry V102557, B.C.C.A. However this Tribunal has established certain principles for establishing just cause for dismissal.

In *Grammy's Place Restaurant & Bakery Ltd*, BCEST #D105/98 the Chairman of the Tribunal summarised those principles as follows:

1. The burden of proving that the conduct of the employee justified dismissal is on the employer;
2. Most employment offenses are minor instances of misconduct, not sufficient to justify dismissal.
3. Where the employer seeks to rely on such minor misconduct, it must show:
  - (a) A reasonable standard of performance was established and communicated to the employee;
  - (b) The employee was given a sufficient period of time to meet the required standard and had demonstrated that he or she was unwilling to do so;
  - (c) The employee was adequately notified that their employment was in jeopardy by failure to meet the standard, and
  - (d) The employee continued to be unwilling to meet the standard.
4. The Tribunal will look at the efforts made by the employer to train and instruct the employee and whether the employer considered other options such as transfer;

5. In extreme circumstances, a single act of misconduct may be sufficiently serious to justify summary dismissal without the requirement of a warning.

Certain acts have been seen as serious enough to justify summary dismissal such as acting in competition to the employer, theft, deliberate and intentional fraud, and assault (including threats of assault) of the employer or other employees. However, each case must be assessed individually and the onus is clearly on the employer to lead sufficient evidence to establish that the alleged incident occurred and that the misconduct was so serious as to warrant summary dismissal.

In this case the employer is not able to establish any such serious act that would warrant summary dismissal. The employer hired two private investigators who were unable to establish any wrongdoing by Loten. There was no evidence of deliberate and intentional fraud in the submission of poorly documented expense accounts. Redding said that he was satisfied that the dollar amounts were not excessive only certain mileage inaccuracies caused him concern. The use of company time for personal business was not established on a balance of probabilities even though there may have been some clear suspicion that this was occurring. The use of the Loomis courier is a minor matter as is the access to the computer. The failure to keep adequate records and proper reporting procedures are certainly not grounds for summary dismissal.

I am satisfied that there were no grounds which would warrant summary dismissal in this case.

As the complaints were minor in nature then I must look at whether the employer has shown that a reasonable standard was set and that the employee had failed to comply as set out above. In this case I am not satisfied that the employer has been able to establish on a balance of probabilities that any standards were set and communicated to the employee. Although Redding says that he raised concerns. Redding testified that he had never questioned Loten directly, never confronted him, never warned him, and never advised him of the potential consequences.

I accept that Redding perceived that the Company was somehow being shortchanged but there was never any substantive evidence to establish any wrongdoing by Mr Loten. In all of these circumstances it can not be said that there was just cause for dismissal.

## **ORDER**

I order, under Section 115 of the *Act*, that the Determination is confirmed.

**JOHN M. ORR**  
**ADJUDICATOR,**  
**EMPLOYMENT STANDARDS TRIBUNAL**