

**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 -

Below the Belt Store (Victoria) Ltd.  
(" Below the Belt ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 2000/25

**DATE OF HEARING:** March 17, 2000

**DATE OF DECISION:** March 24, 2000



was a bad work environment but that he intended to return for his next shift on August 17th and to continue to work out his notice. He says that he did not intend to quit. Chatlain also points out that his Record of Employment indicates that he "quit" his employment and not that he was fired.

Ms Wright, the President of Below the Belt and owner of the store, testified that she was out of town on August 15th but that when she returned the next day she was told about the incident. She spoke to Jon and the two other employees who were present in the store at the time and that they all confirmed that Chatlain had told Jon to fuck-off in a loud angry voice spoken in the presence of a number of customers. Ms Wright testified that Jon was in charge of the store that day and had authority to address employees about their work duties and productivity. He was, in effect, the acting manager of the store at the time.

Ms Wright telephoned Chatlain at home and told him not to bother coming to work for the balance of his shifts during his notice period. Ms Wright said there were only two shifts remaining but Chatlain indicated there were five. Regardless, It was clear that Ms Wright did not intend for Chatlain to return to work at the store and therefore he was effectively dismissed, whether or not the actual words "you are fired/dismissed" were spoken. There were five days of potential employment remaining in the notice period at the time of the dismissal.

Ms Wright testified that she had held a 2 1/2 hour training seminar in March with the new employees including Chatlain to make sure that all employees were aware of company policies and procedures and the employee handbook. She pointed out that the employee handbook states that:

#### Resignation/Termination

If you wish to resign from your employment at Below The Belt, please advise your Store Manager. A reasonable notice period, say two weeks, is requested. After the preliminary three-month period of employment, *terminations by Store Managers may occur as a result of a serious uncorrected performance decline, gross negligence or misconduct (Misconduct includes theft or dishonesty, falsifying records, giving unauthorized discounts, vandalism, using abusive behaviour, rudeness, intoxication while on duty, sexual harassment, persistent lateness, unexplained absence or irresponsibility in matters of security or customer service.*

(the underlining is in original text; the emphasis is added)

#### ANALYSIS

Section 63 of the *Act* provides that the employer's liability to pay an employee compensation for length of service is discharged if the employee is dismissed for just cause. The Director's delegate accurately adopted the Tribunal's summary of the relevant criteria as follows:

*The tribunal has addressed the question of dismissal for just 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 offenses 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 instances of minor 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 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.*

*Re: Kruger BCEST #D003/97*

The employer in this case concedes that none of the criteria set out in paragraphs 2 and 3 above apply to Mr Chatlain. The employer submits that Chatlain's behaviour on August 15th in failing to perform his work adequately, entering into an argument with his supervisor, swearing at the supervisor in a loud and angry voice in the presence of customers, and then abandoning his shift on a very busy day, amounts to serious misconduct which justified dismissal.

In reviewing the evidence and having heard and weighed carefully the evidence from Ms Wright, Mr Chatlain and the other employee who testified I find as a fact that Chatlain was not pulling his weight on his shift that day. I find that indeed an argument occurred when Jon confronted Chatlain about his lack of activity and that Chatlain swore at Jon in a loud and angry voice. I

accept that Jon was the acting supervisor that day. I find that there were customers present who reacted to the swearing and I find that Chatlain abandoned his shift on a very busy day at the store.

The Director's delegate found that "There is no dispute that the behavior of Mr Chatlain should not be tolerated at the workplace and may have warranted disciplinary action. However I find that dismissal was severe in this matter. As noted earlier, the other employee was treated somewhat differently and this raises some question of the severity of the incident." In my opinion, the treatment of the other individual was not a relevant factor to be considered. The delegate does not take into account that the other individual was the acting manager of the business at the time of the incident. It is not the role of the delegate or this Tribunal to decide the fairness of the treatment of the two individuals but to decide whether there was, on the established facts, just cause for dismissal of this employee.

Where an employee uses profanities and directly challenges the authority of his manager in the presence of other employees and customers such conduct is inconsistent with his continued employment - see *Re: Sentinel Peak Holdings Ltd.* BCEST #D359/98. In this case Chatlain not only challenged his manager but abandoned his position saying "I'm out of here!" While a single incident of abandoning a position has been found not to warrant dismissal, *Re: Million Fancy Investments Co.* BCEST #D342/97, in this case the abandonment on top of the abusive behaviour toward the manager amounts to just cause for dismissal.

I am satisfied that the appellant has met the onus of establishing that the Determination was in error and that there was just cause for dismissal.

## **ORDER**

I order, under section 115 of the *Act*, that the Determination is cancelled.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**