

**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 -

Hana Fischer  
("Fischer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang

**FILE No.:** 2000/072

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

**DATE OF DECISION:** May 4, 2000

**DECISION**

**APPEARANCES**

Hana Fischer	Representing herself
Eileen Wells	Representing The Governing Council of The Salvation Army
Dave Maandag	Representing The Governing Council of The Salvation Army
Captain Martin Ketteringham	Representing The Governing Council of The Salvation Army

**OVERVIEW**

This is an appeal by Hana Fischer (“Fischer”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination issued by the Director of Employment Standards on January 24, 2000. The Determination found the Governing Council of The Salvation Army (“The Salvation Army” or “the employer”) had terminated Fischer for just cause and payment for length of service was not required.

Fischer is appealing the Determination claiming the penalty was too severe.

A hearing was held April 17, 2000 and evidence was taken from all parties. Mediation was offered however the employer declined to participate.

The delegate for the Director did not attend the hearing.

**ISSUES TO BE DECIDED**

Did The Salvation Army terminate Fischer for just cause and, if not, do they owe her any compensation for length of service?

**FACTS**

Fischer came from Eastern Europe and spoke no English when she arrived. She became a volunteer for The Salvation Army in 1989 or 1990 and later became a part-time employee in one of their Thrift stores. Due to the closure of one of the stores Fischer was laid off. She was rehired in June 1993 as a part-time employee and then offered full time employment until her termination, according to the Determination, on April 30, 1999. (The letter of termination from the employer is dated May 12, 1999)

Each year Fischer arranged to take additional leave with her vacation entitlement to provide a 6 to 8 week period to take care of her ailing parents who still lived in Eastern Europe. This leave was normally taken in March and April and was mutually arranged with the employer in accordance with the Salvation Army Employee Manual.

Fischer claims on or about March 31, 1999, on returning home from work Friday, she received a letter from her mother indicating she had elected to have a serious eye operation in an attempt to restore some vision. Her mother is legally blind and suffers from a number of medical problems. The operation was scheduled for early in May and, according to Fischer, she panicked and telephoned a travel agent the next day to purchase a ticket with a departure date of May 2<sup>nd</sup>. She did not contact the employer before purchasing the ticket. She claims she was very sure no one was taking vacation in May except for one employee who had asked for a couple of days in May and another who had asked for two weeks in June.

Fischer also claimed she had no difficulty in the past getting leave. There were a number of part time employees who were happy for the opportunity of getting some extra hours work.

Fischer claims she approached the Store Manager, Ken Landers (“Landers”) on returning to work on Monday to arrange for the time off work, however he was too busy to discuss the matter with her. She waited a couple of days and wrote a note to Landers dated April 6, 1999 indicating she was going to Europe on May 2<sup>nd</sup> and returning June 11<sup>th</sup>. Fischer claims he refused her request saying, “no you don’t go anywhere, you did not apply soon enough”.

Fischer then went to meet with the Business Administrator, James Latour (“Latour”) claiming she was desperate. He said he could not let her go for six weeks but offered her three weeks leave. In an undated memo signed by James Latour there are two separated notations, the first, undated, indicates:

May 2 – May 24	Hana *
24 – 5 <sup>th</sup> June	Cathi
21 <sup>st</sup> – 24 <sup>th</sup>	Brandi 2 days

Below that, dated 14 April 99, is the notation:

Spoke with Ken & Eileen and then with Hana \*. Permission denied.

\* Hana Fischer

Fischer’s letter of April 12, 1999 to Latour indicates, in part:

I am sorry, but I have to go to Europe May 2, my mom goes for an operation.

James when I got mom’s letter, I panicked and bought my ticket last week. I go to help my parents every year, but this time I planned my trip for September, because we are moving this month.

Later in the same letter Fischer states:

James I did not get any chance to explain what happened. (sic) To my situation is

- go and lose my job and be sorry.
- stay and feel guilty if .... and lose ticket.

I honestly pray for your advise (sic) and understanding. I can promise to return sooner than June 11, I can exchange the return day in Prague, if mom will be O.K. and I will give you her medical record. My mom needs me now and I owe her a lot. Plus the atmosphere in Europe does not help to anyone. (sic)

Fischer states Latour went to meet with the Store Manager and Assistant Store Manager the next day to discuss her time off. After that meeting he changed his position and said, “no you don’t go anywhere, not even three weeks, you did not apply soon enough”. Fischer finally went to Captain Ketteringham (“Ketteringham”) as a last resort. He indicated he was unable to assist Fischer in getting time off but told her to “follow her heart”. Fischer claims she did that and went to see her mother without approval from her employer. In her letter of April 12<sup>th</sup> she was aware she might lose her job however she never really thought they would terminate her.

Ketteringham denies telling Fischer to “follow her heart” and claims he advised Fischer not to leave after being told by her supervisor her request had been denied.

Fischer was issued a letter by Latour dated May 12, 1999 notifying her she had been terminated in accordance with the Employee Manual section 3, paragraph 2, which states:

The employer/supervisor shall decide (in consultation with the employee) when the vacation is given. (emphasis added)

Further in the same letter Latour indicates:

You still chose to take your vacation without authorization. This is a very serious offense (sic) and cannot be tolerated. (emphasis added)

Fischer claims the employer took action to terminate her employment in advance of the letter of May 12, 1999. The employees park their cars on a business lot next to The Thrift Store for a \$5.00 per month rental charge. She claims she called back by telephone on her arrival in Europe. She was informed that when one of the people went to pay for the May parking they were told not to pay for Fischer, as she was no longer employed. This, she claims, was the reason she did not change her ticket and return earlier.

Latour was the Business Administrator during Fischer’s request for leave and was unable to attend the hearing. He is currently on extended medical leave. Dave Maandag (“Maandag”) is the Acting Business Administrator. He was not involved with Fischer’s request therefore was only able to give evidence from the employer’s files.

The Store Manager, Landers, also did not attend the hearing. Eileen Wells, (“Wells”) the Assistant Store Manager, gave evidence of her involvement in Fischer’s application for leave.

Wells refuted Fischer's statement that Landers denied the leave on the basis she did not apply early enough. It was denied because it would create a staffing problem.

The employer took the position two other employees had requested vacation leave for the month of May and it had been granted. To allow Fischer leave would cause a serious scheduling problem or force them to hire additional staff. The employer submitted copies of three undated requests for leave, one from "Brandy" for May 21 and 22 to attend a wedding and two from "Catherine", one for the last week in May 24<sup>th</sup>, (a holiday), to May 28<sup>th</sup> and a second request for the first week in June. The three notes are marked at the bottom with the notation "OK". Also submitted is a copy of the request from Fischer dated April 6<sup>th</sup> for leave from May 2<sup>nd</sup> to June 11<sup>th</sup>. At the bottom of the note from Fischer is the notation "denied".

A letter from Landers dated February 29, 2000 indicates the applications from Brandy and Catherine were made in early January. Landers indicates, as no other employees had requested that time, it was granted. Further in the letter, Landers stated:

It was later in April Hana Fischer said she had to go to Europe to visit her parents. She went and bought tickets ahead of time without telling us. She wanted to go to Europe May 2/99 and return June 11/99.

We told her other staff Brandy, Catherine already requested holidays during part of that time. We would be short handed if she went then. We told her she could go for 3 weeks early in May. She said her tickets were already booked and paid for. She said she was going. We told her she could not go during that time. (emphasis added)

In a letter also dated February 29, 2000, Wells stated:

My recollection of the events that took place, two employees, Brandy Sacerty and Catherine Barnes had booked holidays previous to April 6<sup>th</sup>, 1999 and had been told they could have them.

Hana Fischer had requested May 2<sup>nd</sup> through June 11<sup>th</sup> and we had to refuse her as it would have left us too short of staff, as this was overlapping the holidays we had already granted the other two girls.

Hana did not offer to shorten or change her dates, and not being happy with our answer she took this matter up at the Victoria Rd. office. (emphasis added)

Wells claimed Fischer did not identify the reason for her request for leave at the time it was made to the Store Manager. The employer considered it a request for vacation leave and dealt with it accordingly. Wells claims Fischer only identified the application as a medical emergency after the Store Manager had denied the request.

In response to the statement by Fischer to Latour that she would provide a copy of her mother's medical record, Wells stated Fischer was a doctor. She had medical friends in Europe and it would not be difficult to produce a medical record to support her claim of a medical emergency. She further claimed Latour would never agree to a request for leave without discussing it with the

employee's supervisor. Wells also raised the point that Fischer's brother lived with their parents and could have provided assistance to the mother.

Fischer stated her brother's wife had recently had a baby that had medical problems and required the full attention of her brother. Secondly, Fischer was concerned that the eye operation was only given a slim chance of success by the doctors and her mother would probably be left with total blindness. Fischer wanted her mother to see her before the operation with what little sight she had left. At the hearing Fischer indicated her mother did not have the scheduled eye operation however she was not aware of that until after her arrival in Europe. She indicated her mother was admitted to hospital on another matter.

## **ANALYSIS**

The employer is at some disadvantage by not having Landers or Latour, who dealt directly with Fischer, in attendance at the hearing. We are left to rely on the evidence of Fischer as to what happened during their meetings and have only hearsay evidence from the employer in respect to Landers and Latour's discussions with Fischer.

There appears to be some confusion on the dates given by Fischer. She claimed she received the letter from her mother on the Friday after work. The Friday in the week of March 31, 1999 is April 2<sup>nd</sup> and was also Good Friday, a day I doubt that Fischer worked. That would make her last day of work Thursday, April 1<sup>st</sup>. If she returned to work on Monday, April 5<sup>th</sup> it would be the first opportunity to speak to her manager, other than contacting him at home. She submitted her written request to the manager in a note dated April 6<sup>th</sup>. Her request for leave was refused. Fischer then went to the Business Administrator, Latour, and following that meeting, wrote him the letter dated April 12, 1999. Upon being denied by Latour she went to Ketteringham who supported the decision of his staff. There is no doubt she was refused leave at the three levels of management.

The employer claimed Fischer was refused leave because there would be two people in addition to Fischer on leave at the same time in May. This was later withdrawn at the hearing. With the exception of the two days, May 21<sup>st</sup> and 22<sup>nd</sup> requested by Brandi, Fischer would have been the only employee away if she were to return by May 24<sup>th</sup>. This should not have presented a staffing problem and, if needed, part time employees could have been available.

Fischer was entitled to 3 weeks vacation and was applying nearly a month in advance of her departure date, which should have given a reasonable time for scheduling. All of this if there was no medical emergency. The employer then argued Fischer refused the offer of 3 weeks vacation and therefore no leave was granted.

Both Landers and Wells wrote letters dated February 29, 2000 indicating Fischer had refused to change or amend her travel plans. That is contrary to the letter from Fischer to Latour dated April 12<sup>th</sup> in which Fischer states: "I can promise to return sooner than June 11, I can exchange the return day in Prague, if mom will be O.K. and I will give you her medical record". If she had refused to amend her travel plans in her meeting with Landers she had re-considered at the time of her meeting with Latour.

If the undated note from Latour listing the date “May 2 – 24 Hana” was written at the time or shortly after the time he met with Fischer, it appears Latour was prepared to accommodate her leave request providing she returned by May 24<sup>th</sup>. This is supported by the written submission to the Tribunal from Fischer and evidence given by her at the hearing. In Fischer’s submission to the Tribunal dated February 3, 2000, Item 7 states:

I was despart (sic) to go, worried about my mum and the European situation. I went to see the Business Manager of the Salvation Army. He tried to help me and his offer was “I can not let you go for six weeks, way(sic) don’t you take just three and return.” I took this compromise, I could exchange my return day.

I believe there was an understanding between Latour and Fischer on the compromise of three weeks. It was when that was presented to the Store Manager that the second refusal was made. Latour accepted the decision of Landers and Wells, went back to Fischer and denied the leave on or about April 14<sup>th</sup>.

The employer has relied on the position Fischer’s request was for vacation leave. They claim the Employee Manual is clear on who has the authority in granting such leave. Fischer left in spite of being advised that doing so would put her job in jeopardy. This was considered to be a serious offence, which undermined the authority of management and, for that reason, they terminated Fischer.

Clearly, the employer has the right, within reason, to control the number of employees who may be absent for vacation in a given period. (although I question whether zero is a reasonable number when you consider May is one of the more desirable periods for leave). Where a requirement for consultation exists as in the Employee Manual, refusing a leave request when no other employees are on leave seems unreasonable.

Equally clear is the leave contemplated by Section 52 of the *Act*. This is a reversal of the vacation request, which is at the call of the employer, here the employee’s request is paramount and the employer must accommodate that request, even at the inconvenience of scheduling other employees.

Section 52 states:

An employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to

(b) the care or health of any other member of the employee’s immediate family.

In BC EST #D035/99 the adjudicator takes the following position in respect to Section 52(b) of the *Act*.

The section creates a duty on the employer to arrange the scheduling such that the employee can take the family leave required. It is without dispute that this is a leave request which fell under Section 52(b) of the *Act*. The employer has no discretion to refuse leave. In my view of the circumstances of the case, one would have thought more consideration would have been given to (employee), who had worked for the employer on a part time basis for 7 years and apparently had faithfully and diligently discharged her

duties. In my view, while there might have been some scheduling difficulties engendered by the family leave request, as the staff at the Woodgrove workplace consisted only of the (supervisor) and (employee). The employer operates a number of locations in the Nanaimo area. The employer, however, has a duty to comply with the *Act*, and the employer was given plenty of notice with regard to the request.

In that decision the adjudicator found the employer was in violation of Section 52(b) of the *Act*. The employee in that case claimed a violation of Section 66 in that her conditions of employment had been “substantially altered” forcing her to quit. That test need not be applied in this case as the employer terminated Fischer. The question is was it for just cause?

The letter from Fischer to Latour was an attempt to explain her situation and the reason for her request for a leave of absence. Fischer also offered to provide a copy of her mother’s medical records on return to verify the purpose of the trip as a medical emergency. Fischer was aware her employment was at considerable risk if she took the leave without permission, however, believing it to be an emergency, she decided to make the trip.

There was a suggestion the reference to a medical emergency was only raised after the leave had been refused and may not have been as serious a situation as Fischer portrayed. To my knowledge, the employer at no time, until the hearing, challenged Fischer on whether a medical emergency existed.

If Fischer was correct in characterizing the situation as a medical emergency she had a stronger case for compassion from the employer. She had been involved with the organization for 10 years, first as a volunteer and later as an employee. The difficulty is we cannot order an employer to be compassionate and must deal with the law.

Section 54 of the *Act* states:

1. *An employer must give an employee who requests leave under this Part the leave to which the employee is entitled. (emphasis added)*
2. *An employer must not, because of an employee’s pregnancy or a leave allowed by this Part,*
  - a) *terminate employment, or*
  - b) *change a condition of employment without the employee’s written consent.*

Section 52 sets out the entitlement to family responsibility leave. Section 54 deals with the duty of an employer to comply with a number of leaves, including Section 52, outlined in Part 6 of the *Act*. Fischer was entitled to up to 5 days, as she had applied for family responsibility leave by way of her letter of April 12<sup>th</sup>. That put the request under Section 52(b). There is no argument Fischer did not request “family responsibility leave”. She was unaware of the provision in the *Act* until the hearing. The fact she did not specifically use that terminology did not diminish her entitlement.

That raises the question of the responsibility of the employer to make employees aware of the provisions of the *Act*. For example, if an employee fails to apply for annual vacation the employer is obligated to inform them they must take such leave. I do not believe an employee



should suffer as the result of the failure by an employer to be familiar with the provision of the *Act*.

The employer representatives in attendance admitted they were unaware of the provisions of Section 52 of the *Act* and it had not been considered in their deliberations on whether to grant Fischer leave or not. We have no way of knowing if Landers or Latour were aware of Section 52. The problem is none of the parties, including the delegate, looked upon this as a request for family responsibility leave but solely as a request for vacation, which, if Fischer is to be believed, it was not. The employer might initially deny the leave, believing it to be a normal application for vacation with a request for additional time off, however Fischer's letter of April 12<sup>th</sup> should have certainly placed the request in a different light. In that letter she identified she wanted her vacation in September because she was moving in April.

The Determination did not consider the requirements of Section 52. Fischer was considered to have been deliberately disobedient and had committed a deliberate breach of the employment contract. The delegate found the employer had cause to terminate Fischer and therefore no payment for length of service was required. Liability for length of service is deemed to be discharged under Section 63(3)(c) of the *Act* if the employee:

- c) terminates the employment, retires from employment, or is discharged for cause. (emphasis added)

I find that was not the case. Section 52 and 54 require the employer to recognize the request for leave when it involves the health of a family member. Fischer pleaded with three levels of management to allow her to attend to her mother. When that failed she undertook to go without permission and clearly recognized the seriousness of her actions. As an immigrant with a steady job she had much to lose if her employment was terminated yet she still went to assist her mother. That is the purpose of Section 52 and 54 and the employer failed to recognize their responsibility in that respect.

The onus rests with the employer to prove just cause and, in my opinion, the employer has failed in that regard. They acted arbitrarily in refusing to grant time off when no other employees were on vacation and tried to hide behind the terms of the Employee Handbook. While I agree an employer has the right to terminate an employee for taking vacation without permission, in Fischer's case she was terminated for taking family responsibility leave; therefore the employer is in violation of Section 54.

I believe Fischer has been terminated without just cause and order she be paid in lieu of notice. The matter is referred back to the Branch.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination dated January 24, 2000 be referred back to the Director of Employment Standards for the calculation of the proper amount compensation for length of service, plus interest owing to Fischer .

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**