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 -

Veeken's Poultry Farm Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/143

DATE OF DECISION: April 21, 1997

DECISION

OVERVIEW

This is an appeal by Veeken's Poultry Farm Ltd. ("Veeken's"), under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination which was issued by a delegate of the Director of the Employment Standards (the "Director") on February 20, 1997. The Director's delegate determined that Dianna Maclean ("Maclean"), a former employee of Veeken's, was entitled to receive compensation for length of service and statutory holiday pay totaling $375.61 (including vacation pay and interest).

In its appeal, Veeken's alleges that it had "just cause" to terminate Maclean's employment. The appeal does not dispute the amount of statutory holiday pay determined to be owed to Maclean.

ISSUE TO BE DECIDED

The only issue to be decided in this appeal is whether there was "just cause" to terminate Maclean's employment.

FACTS

Maclean was employed by Veeken's from October 3, 1995 until January 19, 1996 when she was dismissed. Her principal duties were collecting and cleaning eggs. She was not given notice of termination nor compensation for length of service.

The Determination shows that $112.73 is owed to Maclean as a result of improper payment of statutory holiday pay by Veeken's. That aspect of the Determination is not appealed.

With respect to the issue of whether there was "just cause" to dismiss Maclean, the Determination states:

> The employer did not follow a process of progressive discipline. He has not provided evidence that the employee was warned about her job performance or that discipline would be forthcoming if there was no improvement. The onus is on the employer to prove "Just Cause". The employer has not provided evidence to verify that the complainant was properly trained on the equipment, or that she knew any consequences of not using/cleaning it properly.

The Determination contains a complete summary of the findings made by the Director's delegate following his investigation of Maclean's complaint.

In its appeal, Veeken's submits that there was "just cause" to dismiss Maclean and that she was properly trained to perform the work assigned to her. Peter Veeken's letter of November 25, 1996 states that Maclean understood her job duties fully, but "...the ½ hour daily cleaning aspect of her job was done uncompleted and incorrectly. This was brought to her attention, with this knowledge her job performance never changed."

The appeal also contains a letter from two employees (Marie Claire Caron and Sandy Squires) which attest to the fact that Maclean was trained to perform her job duties.

In determining that Maclean was entitled to compensation for length of service, the Director's delegate relied, in part, on the following facts:

- She was hurt at work on December 27, 1995 and was off on sick leave.
- She phone the employer on January 19, 1996 and was informed by the bookkeeper that she was fired. She then spoke to Peter Veeken and says he agreed that she was let go due to a bad back.
- She was not given notice or compensation in lieu of notice.
- She was never told by anyone that her job performance was poor. She did not know her employment was in jeopardy because of poor job performance.

ANALYSIS

Section 63 of the *Act* establishes a statutory liability on an employer to pay compensation for length of service to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability if the employee terminates the employment, retires or is dismissed for "just cause".

The Tribunal has addressed the question of dismissal for "just cause" on many occasions (see, for example, *Kenneth Kruger* BC EST# D003/97). 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:

    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 of performance and had demonstrated they were unwilling to do so;

    c) The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    d) 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.

The facts of this appeal lead me to conclude that Maclean was trained adequately to perform the duties of her job (collecting and cleaning eggs). I also accept Veeken's submission that it believed her work performance to be unsatisfactory. However, I can find no evidence to indicate that Maclean was given a clear and unequivocal warning that her employment was in jeopardy if she failed to meet her employer's performance standards.

As noted above, one important element of the "just cause" concept is that an employer must inform an employee, clearly and unequivocal, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

It would have been helpful if the Determination had explained that the process of progressive discipline includes a requirement to give a clear and unequivocal warning to

an unsatisfactory employee that their employment is in jeopardy unless their work performance improves to an acceptable standard.

I also note that Veeken's appeal does not explain why it did not take action to terminate Maclean's employment prior to December 27, 1995 - when she sustained an injury at work.

For all of the above reasons I conclude that there was not "just cause" to terminate Maclean's employment.

ORDER

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

_____

Geoffrey Crampton
Chair
Employment Standards Tribunal