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 -

Eva P. Reycraft operating as Creative Embroidery West
("Creative Embroidery")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Geoffrey Crampton
FILE NO.:	97/073
DATE OF HEARING:	May 29. 1997
DATE OF DECISION:	June 9, 1997

DECISION

APPEARANCES

Pam M. Searle	on behalf of Creative Embroidery West
Nicholas Jordon	on behalf of Creative Embroidery West
Sandra I. Mahil	on her own behalf
Joanne Kembel	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Eva P. Reycraft operating as Creative Embroidery West ("Creative Embroidery"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued on January 15, 1997 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Sandra I. Mahil ("Mahil") had been employed continuously from March 24, 1992 to July 26, 1996 and that Creative Embroidery did not have just cause to terminate Mahil's employment. As a result, Creative Embroidery was required to pay to Mahil compensation resulting from length of service. Creative Embroidery's appeal challenges both findings and seeks to have the Determination cancelled. A hearing was held on May 29, 1997 at which time evidence was given under oath.

ISSUES TO BE DECIDED

There are two issues to be decided in this appeal:

- Was Mahil's employment continuous from March 1992 to July 1996; and
- Was Mahil's employment terminated for just cause?

FACTS

The Determination made the following finding concerning the duration of Mahil's employment:

> Sandra Mahil was employed continuously from March 24, 1992, through July 26, 1996. I find that the period of April 18 to July 4, 1995, was an unpaid sick leave which did not break the continuity of her employment.

On the question of whether there was just cause to terminate Mahil's employment, the Director's delegate found that there was not just cause to dismiss Sandra Mahil. Her reasons for making that finding were given in the following terms:

> ...the Employer suggests that the warning contained in the letter of warning in March of 1995, implied that the consequences of continued non-performance would be dismissal. However, since the Employer failed to act upon this warning by dismissing Sandra Mahil upon further problems with her performance (on one occasion she allegedly threw a pair of scissors at a co-worker), this warning apparently was not a "final warning". The Employer cannot rely upon the implicit warning in the letter to demonstrate that it had just cause to dismiss Sandra Mahil on or about July 26, 1996. I find that Sandra Mahil's actions during the week of July 26, 1996, were not of a nature serious enough to dismiss, without termination pay or notice in lieu, a four year employee. ... As an aside, it was the assertion of the Employer that Sandra Mahil quit in April of 1995 and was re-hired in July of 1995. Had this assertion been confirmed by the investigation, the letter of warning issued in March of 1995 would have had no force or effect after re-hire.

Ms. Mahil was employed in March, 1992 by Creative Embroidery as a machine operator through a program offered by the Surrey Rehabilitation Society. That program's objective was to place "unskilled and chronically employment-challenged individuals into the workforce." Creative Embroidery's workforce totals 16 employees, including 3 who were recruited from the Surrey Rehabilitation Society. Pam Searle and Nicholas Jordan, partners in Creative Embroidery, gave evidence that it was understood by all concerned that Creative Embroidery's management and staff would have to assist Ms. Mahil to become a successful employee. This was an undertaking which Creative Embroidery gave willingly and reflects the management style with which the business was operated and managed. I accept Ms. Searle's statement (which was not disputed or challenged in any way) that:

> For the entire four years that she was involved with our Company, we worked with her in many ways to help her understand what we expected of her in the work-place, and we had many upset employees, and loss of product and production along the way. In addition, we dealt with Sandra's on-going depression, absences, and heavily-medicated state.

Creative Embroidery offers its employees a performance-based profit-sharing plan. Again, I accept Ms. Searle's undisputed evidence that Ms. Mahil's behaviours and moods had a negative impact on payments to her co-workers under the profit-sharing plan. Ms. Mahil's unsatisfactory work performance and unacceptable behaviour were discussed with her on many occasions. Deborah Peck, a former employee and co-worker of Ms. Mahil's, gave evidence about the difficulties and frustrations which she experienced when she worked with Ms. Mahil. Her evidence corroborated that given by Ms. Searle and was consistent with the concerns set out in the letter of March 14, 1995. On March 14, 1995

Ms. Searle met with Ms. Mahil to document her concerns and to formally warn her that her employment was in jeopardy.

Prior to requesting that Ms. Mahil sign the March 14th letter, Ms. Searle encouraged her to take it home and consider it carefully. She also contacted Cathryn McDonald (Ms. Mahil's program counsellor) and asked her to review the contents of the letter with Ms. Mahil. Ms. Mahil testified that she met and discussed the letter with Ms. McDonald and with her sister prior to signing it. The letter set out eight key behaviours and performance standards which were required of Ms. Mahil and concluded with the following warning:

> By signing this, I realize that I have been given one final chance to do the job I was employed to do; and that if I fail to carry out my job with the expected behaviours as out-lined above, I will immediately be given notice, and will no longer be employed by Creative Embroidery.
>
> All of this I have thought about and discussed with Cathryn McDonald and Pam Searle.

As noted above, Ms. Mahil signed the letter, thereby indicating that she understood its contents.

Ms. Mahil did not work between April 18, 1995 and July 3, 1995. Creative Embroidery issued a Record of Employment (ROE), signed by Pam Searle, which showed code "D" (Illness or injury) as the reason for issuing the ROE. The expected date of recall was shown as "unknown" rather than "not returning".

Ms. Searle testified that when she agreed to "...rehire Sandra, or whatever you want to call it" she had hoped that Ms. Mahil would be "...ready to come back and work cooperatively." According to Ms. Searle's evidence, that did not happen. Ms. Searle's evidence on this point was corroborated by Nicholas Jordan's evidence which was that immediately after her return her performance and behaviour was acceptable but that it quickly deteriorated to the point that there was an incident "almost every week" in which Ms. Mahil's behaviour and or work performance was at issue.

Under cross-examination, Ms. Searle testified that the medication which Ms. Mahil was taking under prescription in July, 1995 had the effect of improving her moods but made it difficult for her to understand instructions. Her work-related behaviours were such that "...she was not allowed to perform any tasks without supervision" according to Ms. Searle's evidence. Ms. Searle also testified that she and all of Ms. Mahil's co-workers had a great deal of sympathy for Sandra and "wanted to give her an opportunity to work through the effects of the medication."

Two of Ms. Mahil's co-workers (Nirmal Singh and Susana Bognar) submitted written statements, but did not give oral evidence, concerning their experiences working with Ms. Mahil. Their statements corroborate the oral evidence given at the hearing.

Ms. Searle gave the following evidence concerning her decision to terminate Ms. Mahil's employment effective July 26, 1996. She testified that there was an "...escalation of familiar behaviour such as a lack of cooperation, poor work habits and throwing work tools around" to the point where Nirmal Singh and Susana Bognar "...could not take it any longer." After speaking with Ms. Mahil to solicit her reply and an explanation, Ms. Searle testified that she decided to dismiss Ms. Mahil.

Creative Embroidery paid Ms. Mahil $532.48 (the equivalent of 64 hours' wages) in addition to any wages which she had earned up to July 26, 1996.

ANALYSIS

Was employment continuous?

There is no dispute in the evidence that the reason why Ms. Mahil was not at work between April 18, 1995 and July 3, 1995 was that she was ill and under medical care. The ROE which was issued by Creative Embroidery at the time confirms that "illness or injury" was the reason for her absence from work. I received no evidence to suggest that Creative Embroidery treated her absence as anything other than a leave of absence due to illness.

Section 1 of the *Act* defines an "employee" and includes "*...a person on leave from an employer.*"

For these reasons I find that Ms. Mahil's employment was continuous, for purposes of the *Act*, from March 24, 1992 to July 26, 1996 and confirm the findings made by the Directors delegate in that respect.

Was there just cause to dismiss Ms. Mahil?

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation 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 by the conduct of the employee where 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. The following principles may be gleaned from those decisions, such as *Kenneth Kruger* [BC EST # D003/97]:

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.

The Director's delegate found that Creative Embroidery did not have just cause to dismiss Ms. Mahil. One reason for that finding was that Creative Embroidery could not rely on the written warning given on March 14, 1995 because it had not dismissed Ms. Mahil "...upon further problems with her performance." The second reason given by the Director's delegate was that "...(Ms.) Mahil's actions during the week of July 26, 1996 were not of a nature serious enough to dismiss, without termination pay or notice in lieu, a four year employee."

When I apply the principles which are set out above to the facts of this appeal I am led to the following conclusions. First, Creative Embroidery does not dispute that it bears the burden of proving that it had just cause to dismiss Ms. Mahil and, thereby, that it had discharged its liability under Section 63 of the *Act*. Second, Creative Embroidery does not seek to rely on a "single act of misconduct" by Ms. Mahil to justify its decision to dismiss Ms. Mahil. For that reason, Creative Embroidery relies on the written warning letter dated March 14, 1995 in which Ms. Mahil was given "...one final chance to do the job (she) was employed to do" and was told that the consequences of not meeting her employer's performance standards was that she would "...no longer be employed by Creative Embroidery."

Thus, the crucial question which I must answer is: did the written warning of March 14, 1995 become invalid due to inaction or untimely action by Creative Embroidery? In his well-known legal text *The Law of Dismissal in Canada*, 2nd edition (Canada Law Book, 1992), Howard Levitt describes the legal concept of "condonation" in the following terms:

> If an employer learns of an act of misconduct on the part of an employee, the employee must be terminated immediately or after the employer takes a reasonable time to consider its position. If the employer does not do so, the employee's misconduct will be held to have been condoned and the employer will then be precluded from dismissing the employee for that act at some later date.

Creative Embroidery argues vigorously that it did not condone Ms. Mahil's unsatisfactory behaviour and poor work performance. It also argues that it would be unfair if I were to confirm the Determination because it would see such a decision as blaming it for being a caring employer which wished to give a difficult employee every possible assistance. While I am extremely sympathetic to that point of view, I must be guided by the legal principles which the courts have established to guide decision-makers when exercising their statutory authority.

It is clear from the evidence that Ms. Mahil's performance became unsatisfactory to her employer shortly after she returned to work in July, 1995. There was an incident "almost every week," yet she was not dismissed until July, 1996. The evidence also shows that there was not a single or culminating incident which led to the decision to dismiss Ms. Mahil. Rather, there was an "...escalation of familiar behaviour..." to the point where Ms. Mahil's co-workers and her employer could not tolerate it any longer. Under those circumstances and given the facts as I have described them above, I find that I concur with the finding made by the Director's delegate - there was not just cause to dismiss Ms. Mahil.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show the amount of $798.72 as payable in compensation for length of service.

Geoffrey Crampton
Chair
Employment Standards Tribunal

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