

**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 -

E.P.S. Communications Ltd.  
("EPS")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 98/141

**DATE OF HEARING:** May 25, 1998

**DATE OF DECISION:** June 23, 1998

**DECISION**

**APPEARANCES**

Edward Skulsky  
Susan Burton

For E.P.S. Communications Ltd.  
The Complainant

**OVERVIEW**

This appeal is by E.P.S. Communications Ltd. (“EPS”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) and it is against a Determination of the Director of Employment Standards (the “Director”) dated February 11, 1998. The Determination is that EPS dismissed Susan Burton without notice or just cause and that as such it now owes her compensation for length of service.

**ISSUE TO BE DECIDED**

The issue is the matter of whether or not EPS had just cause. In the Determination, a delegate of the Director finds that EPS failed to establish a reasonable standard of performance, that EPS never told the employee that her job was in jeopardy, and that there did not appear to be wilful disobedience. On appeal, EPS claims an act of insubordination and a consistent failure to perform work satisfactorily.

**FACTS**

Susan Burton was hired by Ed Skulsky, owner and President of EPS, as secretary/bookkeeper. She worked for EPS from October 16, 1996 to March 31, 1997. EPS is a retailer of mobile communication products and marine electronics.

According to Skulsky, he had trouble with Burton’s work right from the start. He spoke to her about the problems that he had with her work and made suggestions on how she might improve. But, he says, after months of doing that, he saw little improvement. He didn’t like the way that she reorganised files. She failed to reconcile bank statements and keep accurate financial records. And Skulsky makes it clear that he had a number of other problems with her work.

Burton admits to having a few difficulties with her new job but says that she was largely on top of things by March of 1997. She says that no one expressed that they had serious complaints with her work and, as matters are presented to me, it is clear that no one ever told Burton that her job was in jeopardy as a result of her failure to perform work satisfactorily.

The alleged insubordination occurred in late March, 1997. According to Skulsky, he told Burton to reconcile bank statements and she responded with the comment, “No. Get your wife to do it”. That is flatly denied by Burton. Nothing allows me to determine the truth of the matter. While Skulsky again alleges a plain refusal to carry out instructions, he again offers no support for his allegation.

Skulsky does make it clear to me that by the end of March he had had quite enough of Burton’s work, or more precisely, her lack of it, in particular, her failure to reconcile bank statements. In his view there was a distinct failure to get the job done. Matters reached a crisis for him on the Easter weekend. Pondering matters over the weekend, Skulsky decided to terminate Burton. Shortly after returning to work on Monday, March 31, 1997, he called Burton into his office and he terminated her.

## ANALYSIS

The appellant does not like the Determination. But EPS does nothing more than indicate its displeasure. It fails to contest the Determination with argument or new evidence. Instead it again presents to me is what it presented to the delegate, as if expecting some sort of second-guessing of the delegate. That is a common error by persons unfamiliar with appeals and the ways of administrative tribunals. Where there is failure to challenge the Determination in any material respect, appeals may be considered to be devoid of merit. Appeals of that sort may be considered trivial by the Tribunal and dismissed without a hearing of any sort [section 114 (1) (c) of the *Act*]. The appeal by EPS is found to be devoid of merit because of the failure to submit either argument or evidence which challenges the Determination in some important way. It can be dismissed for that reason alone.

There are other reasons to dismiss the appeal.

EPS alleges that Burton’s work was unsatisfactory from the start. It could have terminated her at any time within her first three months of employment with neither a need for notice, nor any need to establish just cause [section 63 (1) of the *Act*]. Yet it did not and, as it did not, it became liable to pay compensation for length of service.

Section 63 (3) of the *Act* sets out how the liability for compensation for length of service may be discharged.

- (3) *The liability is deemed to be discharged if the employee*
  - (a) *is given written notice of termination as follows:*
    - (i) *one week’s notice after 3 consecutive months of employment;*
    - (ii) *2 weeks’ notice after 12 consecutive months of employment;*
    - (iii) *3 weeks’ notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks’ notice;*

*(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*

*(c) terminates the employment, retires from employment, or is dismissed for **just cause**.* (my emphasis)

A single act may be of such a serious nature that it justifies termination. As may less serious misconduct when repeated, or the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

Where there are examples of less serious misconduct, it is the well established view of the Tribunal [see for example *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that an employer will have just cause where it shows the following:

- a) A reasonable standard of performance was established and communicated to the employee;
- b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;
- c) the employee is given the time to meet the required standard; and
- d) the employee continued to demonstrate an unwillingness to meet the standard.

Where there is a chronic failing to perform work, the Tribunal may also consider whether or not the employer has exhausted other remedies which are clearly available, including the possibility of placement of the employee in another job and training.

EPS alleges insubordination, a single act of which may justify termination. But as the facts are presented to me, EPS fails to show wilful disobedience.

EPS complains of quite unsatisfactory work. It is clear to me that Burton was terminated largely if not entirely because Skulsky decided that she was simply incapable of the job for which she was hired. It may be that Burton's work was unsatisfactory, or it may be that she was quite capable of the job: I reach no conclusion as to Burton's competence. That is not necessary for the purpose of deciding matters here. That is because the employer must not only show unsatisfactory work but that the employee was plainly and clearly warned that his or her job was in jeopardy unless there is improvement, that the employee was given reasonable time to improve, and, as the allegation is chronically unsatisfactory work, that the problem was not just a lack of training which the employer was capable of providing. EPS has not shown that to me.

The appellant fails to introduce evidence or argument which challenges the Determination in any material respect and as such it is an appeal which is found to be without merit. The appellant fails to prove insubordination. The employer alleges a chronic failure to perform work but fails to show that the necessary steps were taken for just cause to be established. The appeal is dismissed.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated February 11, 1998 be confirmed in the amount of \$433.69, together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**