

**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 -

Ronald G. Wood, C.G.A.

- of a Determination issued by -

The Director Of Employment Standards

**ADJUDICATOR:** John M. Orr

**FILE No:** 1999/233

**DATE OF DECISION:** June 14, 1999

## DECISION

### OVERVIEW

This is an appeal by Ronald G. Wood, C.G.A., ("Wood") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination, File No.093-648, dated March 24, 1998 by the Director of Employment Standards (the "Director").

The Director found that Nelia Moreira ("Moreira") was employed by Wood and was dismissed without notice or compensation and that she was owed some overtime pay. Wood has appealed the Determination on the grounds that while he agrees that he terminated Moreira's employment she was dismissed for just cause.

### ARGUMENT AND ANALYSIS

Section 63 of the *Act* provides that an employer is liable to pay to an employee compensation for length of service when the employment ends. However, section 63(3) provides that the employer's liability is discharged if the employee "*is dismissed for just cause*".

This Tribunal has considered the interpretation of what amounts to "just cause" on many occasions and has consistently followed the comments found in *Kenneth Kruger*, BC EST #D003/97 as follows:

The Tribunal has addressed the question of dismissal for 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 minor instances of 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 available 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 whether the established facts justify such a dismissal.

Wood's position, as stated in his appeal, is that Moreira was given plenty of notice that her work was not up to standard and that reasonable standards of work were set and were made clear. He says that Moreira was given an extensive written critique. The ultimate reason for dismissal was that Moreira took time off from work without prior permission.

All of the arguments made by Wood in his appeal were previously made by Wood to the Director's Delegate at the time of the investigation and they were considered by the Delegate. The Delegate also applied the appropriate legal test as set out above and this appeal could be dismissed on the basis that the Tribunal has stated that the purpose of the appeal is not to just substitute our opinion for that of the Delegate unless there is an error in law or fact. However, I intend to address the issues raised as Mr Wood seems to feel that his presentations have not been accorded the attention he believes they warrant.

Wood insists that he set reasonable standards and that the standards were communicated. He is adamant that the employee was given ample opportunity to meet those standards. He says that extra training was provided and that Moriera still did not seem to be able to meet the standards of performance expected.

There are two points that Wood did not address clearly in his presentations to the Delegate nor on this appeal. Firstly, if he dismissed Moriera on the basis of her work performance, there is no evidence presented that Moriera (or other employees for that matter) was adequately notified that her employment would be in jeopardy, i.e. that she would be dismissed, if she continued to fail to meet the standard. Wood says that staff were told that if there was not a greater effort made "there would be no practice left to come to work in". In my opinion this remark to the staff as a whole relates to the success or failure of the business and does not give notice to any individual that they would be dismissed if their work did not improve.

The second point is that it seems very clear on Wood's presentation to the Delegate and on his appeal that he fired Moriera because she took time off work without prior permission. As noted above, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. In some circumstances abandonment of your position at work or failure to attend where there are serious consequences to the business, its clients, or the public could amount to serious misconduct. There is no evidence in this case of serious consequences resulting from the failure of Moriera to report to work. There is no evidence that employees were given notice that such behaviour could result in dismissal.

What the appellant fails to understand is that, except in cases of serious misconduct, dismissal for poor performance or tardiness must be preceded by a clear warning that such future behaviour will result in dismissal. This issue was properly considered by the Delegate and correctly decided in the Determination. I am also satisfied that the Delegate has correctly calculated the quantum owing including the training days.

**ORDER**

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

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