

**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 -

Jack Paulo  
doing business as  
Pro Sound & Lighting

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No:** 98/192

**DATE OF HEARING:** June 02, 1998

**DATE OF DECISION:** June 11, 1998

## DECISION

### APPEARANCES

Jack Paulo	On his own behalf
Philip Shaver	On his own behalf

### OVERVIEW

This is an appeal by Jack Paulo ("Paulo" or "the employer") doing business as Pro Sound & Lighting pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 85541) dated March 06, 1998 by the Director of Employment Standards (the "Director").

Philip Shaver ("Shaver") was employed by Paulo as a sales clerk to work in his music shop from February 1994 to July 15, 1997 at which time the employment was terminated. The employer did not pay compensation for length of service as required by section 63 of the *Act* and claims that Shaver terminated his own employment or was dismissed for just cause therefore the liability for compensation is discharged.

### ISSUE TO BE DECIDED

The issue to be decided in this case is whether Shaver severed the employment relationship and/or was dismissed for just cause. Implicit in this latter issue is the question of whether the employer gave sufficient warning and engaged in progressive discipline prior to dismissal.

### FACTS

Philip Shaver was employed by Paulo from February 02 1994 until July 15, 1996. Paulo has alleged that at Christmas time 1996 Shaver was given two weeks holidays but took 7 or 8 weeks. When he returned Paulo decided to continue Shaver's employment because it was difficult to find and train a replacement. In the summer of 1997 Shaver took another two weeks holidays. Paulo says that it was very inconvenient at that time for Shaver to take more holidays and that he told Shaver that it was not convenient to take holidays at that time. Paulo did not specifically tell Shaver not to take his holidays. When Shaver returned from this two weeks holiday Paulo had hired a replacement and Shaver's employment was terminated.

Paulo says that he terminated Shaver's employment for two reasons, firstly because Shaver had taken holidays without permission and secondly because of a number of complaints about Shaver including a bad performance history at work, using the company phone for personal business, and unsubstantiated allegations of theft. Paulo says that he told Shaver often not to use the phone for

personal business. He agrees that he took no action against Shaver for using the phones. The allegation of theft was confronted and denied but no further action was taken.

Shaver testified that he had no intention of leaving his employment. He denies the conversation about the holidays being inconvenient and denies the allegations of poor performance and theft. He admits that he used the telephone for some personal calls but says that this was allowed provide employees reimbursed the business for the calls.

The Director's Delegate found the employer liable to pay Shaver two weeks pay for length of service.

## ANALYSIS

The onus is on the employer to show that there was just cause for the termination of employment. In this case the employer took no steps to discipline Shaver. The employer says that he warned Shaver verbally not to use the phone for personal calls but took no action when they were made. The employer says that Shaver's work was unsatisfactory but took no steps to identify and correct the perceived problems. The employer alleges theft but did no further investigation and allowed Shaver to continue to work for him. The employer says that Shaver took unauthorised holidays but agrees that he knew Shaver was going on holidays and did not tell him not to go.

There have been no steps taken in this case to identify problems, give specific warnings, or commence any form of progressive discipline. Although dismissal can be justified without such steps when there is a serious breach of the employment relationship there is no such allegation in this case. I conclude that there was not just cause for dismissal.

The issue remains whether Shaver terminated his own employment. For such to occur there must be an intent on the part of the employee to terminate and an act in furtherance of such intent. In this case Shaver testified that he did not intend to quit and in fact returned to work after his two weeks holiday. There is no evidence to support an allegation that Shaver intended to quit.

It is clear that Shaver took holidays at a time that was inconvenient to his employer but the employer did not tell him that he was not allowed to take holidays at that time. It is clear that it was the understanding of both parties that Shaver was taking holidays and not quitting his position. I conclude that Shaver did not terminate his own employment.

I conclude that as Shaver did not terminate his employment and that there was not just cause for dismissal that the employer's liability is not discharged and that Shaver is entitled to compensation for length of service.

The Director's Delegate calculated the claim at 2 weeks wages @248.32 per week + 4% vacation pay = \$516.51. However section 63(2)(b) of the *Act* provides that after 3 years consecutive years of employment the employee is entitled to 3 weeks wages as compensation for length of service. Although this period of employment bridges between the old and new acts the employee is entitled to the benefit of the new provisions - see section 128 (5) of the *Act*. The employee in this case is entitled to 3 weeks wages @248.32 per week + 4% vacation pay = \$774.76 plus interest.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is varied to order that the employer pay \$774.76 plus interest calculated in accordance with the *Regulations*.

**John Orr**  
**Adjudicator**  
**Employment Standards Tribunal**