

**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-

Fort Optical Ltd. operating as Eyeworks of London

(“Eyeworks”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/422

**DATE OF DECISION:** July 24th, 1997

## DECISION

### OVERVIEW

This is an appeal brought by Fort Optical Ltd. operating as Eyeworks of London (“Eyeworks”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on May 14th, 1997 under file number 079-307. The Director determined that Eyeworks owed its former employee, Wanda C. Nowosad (“Nowosad”), the sum of \$1,955.45 representing three week’s wages as compensation for length of service payable under section 63(2)(b) of the *Act*.

### ISSUE TO BE DECIDED

The employer alleges that it had just cause to terminate Ms. Nowosad and, therefore, was not obliged to pay her any compensation for length of service [see section 63(3)(c) of the *Act*]. The employer does not assert that the Director’s calculation as to the amount of termination pay payable is in error (assuming no just cause); rather, the employer’s appeal is limited to the narrow question of whether or not it had just cause to terminate Nowosad.

### FACTS

According to her complaint filed with the Employment Standards Branch, Ms. Nowosad was employed by Eyeworks, on a full-time basis, as an optician from July 1993 to March 12th, 1997 when she was terminated.

On February 18th, 1997 the employer gave Nowosad a written warning regarding her “conduct and performance”. This letter was signed by Mr. Dale Ward, whom I understand to be the manager of the Guildford store where Nowosad worked. Specifically, although Ward apparently had “no problem with [Nowosad’s] sales ability”, he expressed concern regarding her “very poor attitude and lack of respect toward [Ward] and others”. In particular, Ward stated that Nowosad had made “disrespectful remarks” during a staff meeting and complained about the level of her compensation to co-workers. Ward also suggested that Nowosad had taken a number of paid “sick days” when she was, in fact, not sick. The letter also states that, on occasion, Nowosad had been insubordinate but this allegation is not particularized.

Subsequent to the February 18th letter, Nowosad’s performance was again discussed in a March 12th, 1997 meeting attended by Nowosad, Mr. Ron Phillip (the company president) and Ward.

According to the employer, Nowosad refused to accept that she had “performance deficiencies” and “abruptly ended the meeting...and walked away”. Nowosad, citing medical reasons, did not attend work the next day and was then terminated by way of a letter dated March 13th, 1997 signed by Mr. Phillip. In this latter termination letter the employer sets out a number of reasons to support its position that it had just cause to terminate Nowosad’s employment such as:

- “rude and disrespectful” conduct toward a supplier;
- “insubordination”;
- abuse of sick leave days; and
- “complaining about your pay”.

For her part, Nowosad says that in the fall of 1996 the employer unilaterally implemented a new compensation system that resulted in a decrease in her earnings and was an irritant in her relations with Ward. Nowosad felt that she was not “out of line” in airing her dissatisfaction at staff meetings as that was an appropriate place to do so. She admits that she did not attend work on March 13th but did not attend on her physician’s advice--this is confirmed by a letter from her medical doctor.

## **ANALYSIS**

In my view, none of the events that are particularized in Ward’s February 18th letter constitute acts of insubordination that would justify a dismissal for cause. Ward’s letter also sets out a number of directions that Nowosad was to follow, some of which I do not believe Ward had the lawful authority to issue--for example, Ward purported to forbid Nowosad from discussing her pay with fellow workers or “making negative comments to other associates” [*i.e.*, her fellow employees].

Indeed, with respect to “pay secrecy”, the employer appears to have an almost paranoid fixation with pay secrecy despite the clear evidence in the management literature that such a policy is counterproductive and, ultimately, foolhardy--see, *e.g.*, Dr. Ed Lawler III, *Strategic Pay*, 1990 (Jossey-Bass), esp. pp. 238-242. The employer submitted a document, dated June 10th, 1995 and signed by Nowosad and other employees, that states that the signatories will not discuss their wages with fellow employees (“I may discuss my wages with the manager and/or regional supervisor only”) and that a breach of this pay secrecy rule will result in “automatic dismissal”. In my view, it is entirely improper, and a complete abrogation of an employee’s constitutionally guaranteed rights of free speech, for an employer to purport to enjoin such discussion. In my view, if an employee wishes to discuss his or her pay with a fellow employee, their spouse, or a complete stranger, it is that employee’s right to do so.

The employer's assertion that Nowosad was abusing the company sick leave policy is merely that--an assertion. The burden of proving this allegation rests with the employer. There is absolutely no evidence before me to support the employer's espoused view that Nowosad was claiming to be ill, and thus away from work, when she was not, in fact, ill.

Nowosad's explanation regarding the "rude and disrespectful" conduct toward a particular supplier (see above) is not challenged by the employer. Nowosad's explanation is entirely consistent with her position that she was not, in fact, rude or disrespectful. Nor is it insubordination for an employee to raise concerns regarding company policies or procedures at a staff meeting.

Nowosad's refusal to report for work on March 13th cannot be characterized as insubordination in light of the fact that she did not attend on the advice and at the direction of her physician. I might also add, and again this is not challenged by the employer, that Nowosad did not simply fail to show up for work; she took appropriate steps to inform the employer as to the reason for her absence on March 13th.

It is clear that Ward was dissatisfied with Nowosad's attitude; she appears to have been an excellent salesperson who was also quite assertive in terms of what she perceived to be problems with respect to company policies and procedures. However, there is no evidence before me upon which I can conclude that the Director erred in determining that the employer did not have just cause to terminate on the basis of insubordination, or on any other ground advanced by the employer.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated May 14th, 1997 and filed under number 079-307, be confirmed as issued in the amount of \$1,955.45 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**