

**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 -

Para Space Landscaping Inc.

(“Para Space”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 97/454

**DATE OF HEARING:** June 13, 1997

**DATE OF DECISION:** June 18, 1997

**DECISION**

**APPEARANCES**

Steve Tifenbach      For Para Space  
Pat Cook              For the Director

**OVERVIEW**

This is an appeal by Para Space Landscaping Inc. (“Para Space”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination # CDET 004876 issued on December 11, 1996. In this appeal, Para Space claims that it had just cause to dismiss Kevin Clark (“Clark”).

**ISSUE TO BE DECIDED**

The issue is whether Para Space had just cause under Section 63 of the *Act* to terminate the employment of Clark.

**FACTS**

Clark was employed as a labourer for Para Space. On August 22, 1996, when he failed to appear for work, he was fired. Because of a record of absenteeism and tardiness, Clark was placed on probation on June 28, 1996. He had started work with Para Space on March 22, 1996 and between April 17 and June 14 was late or absent on 10 occasions. By a letter dated June 28, 1996, the company warned him that the pattern of absenteeism, together with four serious concerns about his work performance, placed his employment in jeopardy. It advised that between June 28 and August 28, 1996, he would be on probation.

No lates or absenteeism will be tolerated. Improvement in your focus is a must. Immediate dismissal will be incurred if this is not adhered to.

Clark’s work performance was monitored monthly by his supervisor and Steve Tifenbach, Vice President; the July and August reports of his performance were “mixed”. While he was not an ideal employee, he consistently rated 3-4-5 on a rating of 0-5 (5 being the highest). He also maintained a perfect attendance record until August 22, 1996.

On that date he failed to report for work because he was detained by the Coquitlam RCMP. His lawyer phoned to advise Para Space that Clark would not be at work. (The hearsay contents of a conversation with “Chris” are of little evidentiary value and of questionable relevance.) On August 26, 1996, when he appeared at work, he was dismissed. He filed a

complaint with the Employment Standards Branch claiming that he was wrongfully dismissed:

I WAS WARNED VERBALLY ABOUT ME BEING LATE WHEN I FIRST STARTED FOR THIS COMPANY. THEN THEY SAID I AM ON PROBATION TILL AUG. 28. SO I WAS ON GOOD TERMS UNTIL I PLANNED MY HOLIDAYS. MY HOLIDAYS STARTED AS AUG 24 - SEP 03., BUT ON AUG 22 I WAS FIRED BECAUSE I WAS IN CUSTODY WITH COQUITLAM R.C.M.P. THEN APPEARED IN COURT AT 1:30 AUG - 23.

The Employment Standards Officer (ESO) who investigated the complaint concluded that there was a definite improvement “which appears to demonstrate a desire to maintain employment”. Moreover Clark had been detained and thus was unable to report for work. He had also made arrangements to inform the employer. The latter action was taken by the ESO as an action Clark thought was necessary to protect his job. She thus concluded he was terminated without cause.

The employer’s position as outlined in a November 5, 1996 letter and at the oral hearing is that Clark had been clearly warned that further tardiness or absenteeism would not be tolerated and he failed to live up to the terms of his probation.

## **ANALYSIS**

Section 63 of the *Act* prohibits an employer from terminating the employment of an employee except for just cause, notice or pay in lieu of notice. In this case, the employer is alleging just cause for absenteeism. The onus is on the employer to prove just cause. The British Columbia Court of Appeal in *Stein v. British Columbia Housing Management Commission* (1992) 65 B.C.L.R. (2d) 181 set out this test for just cause:

Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment.

In this case, I find that the worker’s failure to report for work was conduct inconsistent with the continuation of the employment contract. Attendance problems, both absenteeism and lateness, appeared early in Clark's employment and Para Space took quick and reasonable steps to deal with the problem. They had justifiable and serious cause for concern and clearly warned Clark of the consequences of further lateness and absenteeism. It was also clear that he understood the consequences of further attendance problems.

The ESO concluded that the improvement in Clark's attendance was consistent with a desire to continue the employment relationship. However, this is not the only factor to be considered. His failure to report for work on August 22, even though he (through his lawyer) advised Para Space after the fact of the reasons why he had not reported for work

earlier in the day. In light of the previous bad record, letter of warning and Clark's probationary status, his conduct on August 22 constituted just cause for dismissal.

**ORDER**

Pursuant to section 115 of the *Act*, Determination No. CDET 004876 is cancelled.

**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**