

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

The Cream Swan Fine Bakery Ltd.  
Operating MacKinnon's Bakery  
(“MacKinnon's”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/443

**DATE OF DECISION:** September 19, 1996

## DECISION

### OVERVIEW

This is an appeal by The Cream Swan Fine Bakery Ltd. operating as MacKinnon's Bakery ("MacKinnon's"), under Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 003165. The Determination, which was issued on July 4, 1996 by a delegate of the Director of Employment Standards, found that MacKinnon's had contravened Section 63(1) of the *Act* by terminating the employment of Carri Drake ("Drake") and Leonie Muldoon ("Muldoon") without just cause. MacKinnon's appeal alleges that there was just cause to dismiss Drake and Muldoon.

This decision is made following a review of the extensive written submissions made by Peter Bartakovich (owner) on behalf of MacKinnon's, Drake's and Muldoon's written submissions, and the documents which were provided to the Tribunal by the Director's delegate.

### ISSUE TO BE DECIDED

The issues to be decided is whether MacKinnon's had just cause to terminate Drake's employment and Muldoon's employment.

### FACTS

Drake was employed by MacKinnon's as a sales clerk from September 5, 1995 to January 13, 1996. Muldoon was employed, also as a sales clerk, from August 26, 1995 to January 13, 1996. The MacKinnon's store is located in Vancouver. Neither Drake nor Muldoon live in Vancouver at this time. Muldoon now lives in Ontario. Drake now lives in the Okanagan region of this province.

In the Reason Schedule attached to the Determination the following reasons are given by the Director's delegate for his finding that MacKinnon's had contravened Section 63(1) of the *Act*:

*"Claim to compensation for length of service, one weeks wages.  
Employer has failed to follow program of progressive discipline.  
Employment of Carri Drake terminated without "just cause".  
Contravention of Section CA 63(1) of the Employment Standards Act."*

This is the complete text of the reasons given by the Director's delegate. The same reasons are intended to apply to both Drake and Muldoon. However, due to a typographical error, Drake's also name appears on the Reason Schedule which pertain to Muldoon.

According to the Determination, MacKinnon's owes Drake \$280.59 and owes Muldoon \$311.51 in compensation, vacation pay and interest.

The Director's delegate and Bartakovich wrote several letters to each other while the delegate investigated the complaints, prior to issuing the Determination. In a letter dated March 6, 1996 Bartakovich states that Drake and Muldoon were dismissed for just cause and offers the following explanation:

*"Drake and Muldoon would not follow store routines or policies both posted and verbal. They worked in a four sales clerk operation; routines, polices and organization are important to make the work flow smoothly. I made several attempts during impromptu sales staff meetings discussing where corrections must be made. Every attempt was made to reach a understanding of my expectations which are more than reasonable."*

In a letter dated march 29, 1996 Bartakovich replied to the delegate's request for additional information by describing, in detail, the reasons why he decided to dismiss Drake and Muldoon. These reasons can be summarized as follows:

- disregarded proper product rotation;
- neglected to keep store trays full with product;
- neglected to take precise orders from customers;
- improper cash register and cash handling techniques; and
- did not follow routine store opening and closing routines;

Bartakovich's letter also states that Drake and Muldoon were told in late November, 1995 that their work habits were unsatisfactory, but "...this made absolutely no difference, the same work habits and attitudes persisted and worsened."

The Director's delegate responded to Bartakovich on May 30, 1996 and included the following statements:

*“I have been advised that at no time did the employer provide a program of progressive discipline to these individuals. By this I mean advising the employees that as a result of their lack of attention to duties and a basic disregard for the manner in which the employer wished procedures to be followed, these employees were not advised that their job was in jeopardy. I am further advised that at no time was a performance evaluation with a private interview carried out during the terms of these individuals employment.*

*While I note in your letter you have stated there were instances of refusal to take direction resulting in alleged problems, i.e. improper cash register and cash handling techniques, cash shortages or overages, tardiness, disregarding product rotation, these are all issues that could have and should have be addressed by the program of progressive discipline, worth the ultimate warning that the employee’s job may be in jeopardy. Given the information submitted to this office by yourself as well as the complainants, the writer must request payment of severance pay with regard to both of these former employees.”*

MacKinnon’s appeal to the Tribunal included the following statement as one of the reasons for making the appeal:

*“After all my attempts to resolve the employment problems with both Drake and Muldoon, or at the very least to reach a compromise, I held an impromptu sales staff meeting on Wed Nov 29, 1995 at 11:00 a.m. All were present. All points of concern were mentioned and discussed. They were all told in no uncertain terms that if matters did not take a dramatic turnaround, that this meeting be considered working notice. They all agreed.*

In a lengthy written submission dated September 10, 1996 Bartakovich, on behalf of MacKinnon’s, states:

*The meeting in late November was not attended by Chau, due to that being her regular day off. Work habits were discussed. Product rotation was discussed. The mountain of product that was accumulating due to improper product rotation and offered to the customers at half price was also discussed. I asked if they though that the landlord would accept half rent, I also asked if they would accept half pay. The response was no.*

*They were told at that time that if matters did not improve they would be replaced with people who would do the job properly. I simply could not afford to keep them around. No effort to replace Drake and Muldoon was made at that time, because the busy holiday season was upon us and available of people seeking employment at that time of the year is almost nil. (page 2)*

At page 3 of his submission Bartakovich describes, for the first time, an additional reason for terminating Muldoon's employment. Due to "...her particular interest in low fat foods..." Bartakovich states that "...she felt qualified to tell people that the product was no good because it had too much fat." He also refers to an incident in which he and Muldoon had a heated exchange of words, and states: "I admit I was angry because less than thirty minutes earlier we made an agreement. At that time she was told that if she persisted to misrepresent the product ... I could not afford to keep her around and that she would be replaced."

At page 4 of his submission, describes his decision to dismiss Drake and Muldoon in the following terms:

*"When Muldoon first met Drake's replacement she went directly to the telephone to call either her husband or Drake to receive further instruction. Her attitude towards this new Employee could not have been cooler. This reaction came as no surprise and it left me with no option to remove Muldoon for just cause. My only interest was to replace these employees and not to cause them any more discomfort than necessary that is why layoff was originally indicated."*

At page 5 of his submission Bartakovich describes an incident in mid-December, 1995 involving Muldoon, Drake and another employee (MacDonald) and offers the following comment:

*The attitude of Muldoon and Drake was worsening by the day. For example, Muldoon came to me and started talking on how much she dislikes the GST tax and how stupid it was and how the rules apply to bakery items. She said she doesn't like to charge the tax and suggested that we stop charging the customers. I told her that if she stops charging tax appropriately that it will be her that goes to jail not me. The combined circumstances left me no choice but to dismiss these two employees.*

Drake wrote to the Director's delegate on April 25, 1996 to respond at length to Bartakovich's correspondence concerning her complaint. She denies the various accusations made by Bartakovich concerning her work performance. With respect to the meeting in late November, Drake states:

*"Mr. Bartakovich did make some comments about work habits, but they were made to all employees."*

*"But, the only comments made were that Mr. Bartakovich felt that we had to work more as a team. He said nothing more."*

Muldoon wrote to the Director's delegate on May 2, 1996 to respond at length to Bartakovich's correspondence. She, too, denies his accusations concerning her work performance. Muldoon describes the meeting in late November, 1995 in the following terms:

*"The meeting itself was an all-staff meeting, where he covered some general guidelines(i.e. cash handling, store cleanliness, the alarm system, ect.). He said he would like to see us all work faster and take better care with the product and customers. Not another word was mentioned regarding my performance. Not in approval or disapproval."*

*"...He did not inform me verbally or in writing of any problem he had with my work, nor was I forewarned of my dismissal."*

## **ANALYSIS**

Section 63(1) of the *Act* states:

*After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*

Thus, the *Act* provides that when an employer terminates the employment of an employee, the employer is liable to pay the employee compensation for length of service. Under Section 63(3)(c) of the *Act*, this liability is discharged if written notice is given to the employee or if the employee is dismissed for "just cause."

The burden of proof for establishing that Drake and Muldoon were dismissed for just cause rests with MacKinnon's.

“Just cause” is not defined in the *Act* nor in the *Regulation*.

It is widely accepted that in order to sustain a dismissal for just cause, the employer must establish that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. Progressive discipline has been given to the employee for failure to meet such standards, which includes ensuring that the employee has been made clearly aware that his/her continued employment is in jeopardy if such standards are breached;
3. A reasonable period of time has been given to the employee to meet such standards;  
and
4. The employee did not meet those standards.

The concept of “just cause” also requires an employer to inform employees, clearly and unequivocally, that their performance or behavior is unacceptable and that the failure to meet the employer’s standards will result in termination of employment. The principal reason for giving clear and unequivocal warning is to avoid any misunderstanding and giving employees a false sense of security that their performance or behavior is acceptable to the employer.

On the face of it, the Reason Schedules attached to the Determination contains only one statement which could be considered a reason- “employer has failed to follow program of progressive discipline”. Section 81(1)(a) of the *Act* requires the Director to give “...the reasons for the Determination”. One reason for describing at some length the exchange of correspondence between Bartakovich and the Director’s delegate was to establish the context in which the Reason Schedule should be read. In the absence of such correspondence I would have significant doubt in my mind whether the Reason Schedule complied with Section 81(1)(a) of the *Act*.

Bartakovich’s written submissions to the Tribunal and his correspondence with the Director’s delegate are lengthy commentaries and observations about Drake and Muldoon which make it clear that, as their employer, Bartakovich was not satisfied with their performance. According to Bartakovich, the meeting in late November, 1995 was an “impromptu sales staff meeting” at which “all were present”. This is consistent with the description of the meeting which both Muldoon and Drake gave in their letters to the Director’s delegate. Thus, Bartakovich cannot rely on his statements at that meeting as evidence that he gave a clear and unequivocal warning to Drake and Muldoon that their employment was in jeopardy.

Having reviewed all of the submissions and correspondence I am not satisfied, on the balance of probabilities, that Drake and Muldoon were given a clear warning that their continued employment was in jeopardy if they failed to meet the performance standards set by Bartakovich.

For these reasons I conclude that MacKinnon's has not met the onus of proving that Muldoon and Drake were dismissed for just cause.

**ORDER**

I order, under Section 115 of the Act, that Determination No. CDET 003165 be confirmed.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

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