

**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 -

Lillo Darnel

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 1999/125

**DATE OF HEARING:** June 16, 1999

**DATE OF DECISION:** September 9, 1999

**DECISION**

**APPEARANCES**

Ms. Lillo Darnel on behalf of herself

Ms. Wilkie Bernstein on behalf of Snowflake Trading Corporation Ltd.  
("Snowflake" or the "Employer")

**OVERVIEW**

This is an appeal by Ms. Lillo Darnel ("Darnel" or the "Employee") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director's delegate issued on February 10, 1999. In the Determination, the Director's delegate found that the Employer had terminated Darnel's employment with "just cause" and, in the result, she was not entitled to compensation for length of service. The Employee appeals the Determination and maintains that there was not "just cause".

**ISSUE TO BE DECIDED**

The issue to be decided in appeal is whether the Employer had just cause to terminate the employment of Darnel.

**FACTS**

Darnel was employed as a commissioned salesperson with the Employer until her termination on September 26, 1998. It was common ground that she had been employed for some five years. The Employer operates a number of stores, selling, among other things, fur, in hotels in Vancouver, British Columbia, and Banff, Alberta. Darnel worked in the store in the Hotel Vancouver in downtown Vancouver.

The Employer based its decision to terminate Darnel's employment on two factors: first, her refusal to carry out instructions and, second, her failure to come to work on a given day when she was scheduled to work.

The events that gave rise to the termination of Darnel's employment occurred on Friday, September 25, 1998. Around 10:00 a.m. Darnel asked her supervisor, Ms. Lorna Gillespie, for permission to go to the bank. Darnel's supervisor, Lorna Gillespie, asked her to go to a particular stationary store, London Drugs, to buy fax paper for the Employer. She did not go to London Drugs. Instead, she went to another store and purchased fax paper. As it happened, she bought the wrong fax paper. The supervisor asked her to return the fax paper and bring back the correct paper. Darnel testified that she felt sick (and, in fact, had felt sick since the morning) and did not want to return the paper at that time. Gillespie explained that Darnel first told her that she was sick when she was asked to return the paper. In cross examination, Darnel admitted that she was not too sick to sell and, in fact, carried on with her duties for the better part of the afternoon. In cross examination, Gillespie agreed that Darnel was "good at selling". At the same time, she was "difficult to work with because she was not a team player"--"she just like to sell". The supervisor, according to Darnel, became upset and returned the paper herself. Gillespie admitted that she was "mad" at Darnel. Around 11:00 a.m., Gillespie left the store to meet with Bernstein, the president of the Employer. She told Bernstein what had transpired. She agrees that she was "irked" by Darnel's behaviour--that she would not correct her mistake.

Darnel says that she telephoned the Employer because she was feeling ill. She called the Employer's store at the Bayshore Hotel to speak with Gillespie, who was at that store. An employee there, Janice, said that she would locate Bernstein and Gillespie and told her to wait until she had spoken with her supervisor. Darnel agreed that she was told to "stay in the store until she had heard" from her supervisor.

Darnel testified that around 2:00 p.m., the assistant manager came in. Darnel says that the assistant manager later sent her home. The Employer denied that she was sent home by the assistant manager.

During her lunch break, Darnel went to a chiropractor. She explained that she had “severe pain”. Darnel supplied a note from the chiropractor, whose office she had attended on September 25, 1998. The letter, dated March 3, 1999, addressed to Darnel’s solicitors at the time, states:

“Please be advised that your client Lillo Darnel booked a new appointment with me on September 28, 1998. She subsequently cancelled the appointment and was never seen by me as a patient.”

Darnel admitted that she did not actually consult with the chiropractor on September 25.

Gillespie says that she and Bernstein received a telephone call from the Darnel around 3:30 p.m. to the effect that she “had gone to the clinic and really needed to go home”. Gillespie says that she asked Darnel to “hang on for another one half hour” because she wanted to meet with her. She felt a need to discuss Darnel’s behaviour with her. Darnel said that she could not wait and left. By the time Gillespie arrived at the store, Darnel had left. Darnel explained that when she spoke with Gillespie she was told that she could go home but would have to bring a doctor’s note the following Tuesday. The Employer denied this. Darnel “thought it completely clear that she was not coming in on Saturday” --the next day and her next regularly scheduled shift. Gillespie, on the other hand, said that she did not know Darnel did not intend to come to work the next day, Saturday.

The next day, Gillespie went to the store to speak with Darnel but she was not there. It was Gillespie’s regular day off work. Darnel had not contacted her to let her know that she was not coming to work. Apparently, security and insurance requires that there be two employees in the store at all time. The Employer’s evidence was that it could not open the store without two employees present. In other words, if Gillespie had not gone to work, the Employer would have been unable to open the store. Gillespie telephoned Darnel to inquire about her absence from work. She then called Bernstein who immediately called Darnel and left a message on her answering machine to the effect that the Employer assumed that she had abandoned her position. This call was not returned.

Darnel received a call from her supervisor asking her why she had not come to work. Darnel said she told her that she had a kidney infection. Darnel testified that later that day, the Employer couriered a

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letter to Darnel, dated September 28, 1998, confirming the termination of her employment. The Employer's evidence was that the letter was delivered on September 28. The letter stated that because she

“chose to leave in the middle of a shift and failed to show up for <her> next scheduled shift without notifying or speaking with Lorna <her supervisor>, we have assumed that you have abandoned your position...”.

Darnel did not contact her Employer on Sunday, September 27.

The following Monday, Darnel called Gillespie and told that she would be at work on Tuesday. Asked if she did not “get Bernstein’s message”, Darnel answered that she would be in Tuesday. Nevertheless, Darnel says that she brought her store keys to the Employer on the Monday. She told her supervisor that she had not quit or terminated her employment. Gillespie testified that Darnel brought the keys on Tuesday.

Darnel apparently also attended a doctor’s office on September 26. The note states briefly that “Ms. Darnel was seen today for illness. She was unable to work.” In a further note, dated February 18, 1999, the same physician elaborates on the earlier note. The latter note states “Ms. Darnel was treated for kidney infection with antibiotics on Sept. 26, 1998”.

### ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for “just cause” (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BCEST #D003/97):

- “1. The burden of proving the conduct of the employee justifies dismissal

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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 instances of minor 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 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 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 the question of whether the established facts justify such a dismissal.”

In my view, this case deals falls within the fourth category.

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It is clear from the Determination, which sets out the facts in great detail, that the delegate preferred the Employer's version of the events to that of the Employee. The delegate concluded that the Employer did have cause for termination:

“It is inconsistent with the employer's actions of Saturday September 26, 1998 that they were aware that you would not report to work that day. No other person had been scheduled to cover your shift. No one had been scheduled to open the store. Ms. Gillespie's presence was by chance. It is not reasonable to assume that the employer would have jeopardized its position with the landlord and customers by failing to have someone available to cover your shift had it been known that you were not planning to come to work”.

...

On Monday, September 28, 1998, you telephoned Ms. Gillespie to tell her that you intended to report to work the following day. By that time, the employer had decided that the employment relationship had broken down irretrievably and that if you had not resigned, which it appeared that you had by your actions, the employer had just cause to terminate you. You were aware that the employer perceived your failure to report for work as a serious abandonment of your duties. You made no effort all Saturday or Sunday to contact the employer and put forward anyh reasonable explanation for your behaviour. Had you done so the circumstances may have been different.

....

You failed to follow a direct and reasonable order (returning the fax paper) while presenting no reasonable for failure to comply, you failed to report to work and failed to present any reason for your failure to report to work. You refused to discuss the failure to follow orders with the store owner and refused to discuss your failure to report to workwith the store owner. Subsequent to all of these events you

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obtained a doctor's note that merely states that you had been seen for illness and were unable to work.”

Having considered the evidence and the law carefully, I am of the view that the Employer did have just cause for the termination of Darnel and, therefore, I am not persuaded that the appeal can succeed.

I agree with the delegate that this complaint turns on the credibility of the complainant Employee. Where there is conflict in the evidence, I prefer that of the Employer. I was struck, in particular, by Darnel's assertion that she was in too much pain to return the fax paper--when reasonably asked to do so by her supervisor--and, yet, continued to work until late in the afternoon. She did not bring her illness, if she was ill, to the attention of the Employer until after she had been requested to return the fax paper. As well, Darnel claimed to be in severe pain--and went to a chiropractor's clinic during her lunch break--and, yet, she returned to work, and continued to work, after her break. She refused to wait for her supervisor at the store to discuss her behaviour for a relatively short period of time, based on her alleged illness, despite having worked the better part of the afternoon. In my view, it is more likely than not, that Darnel became upset when she was asked to return the fax paper--as she just wanted to sell--and used her alleged illness as an excuse, first, to avoid having to take the fax paper back and, second, to avoid having to meet with Gillespie to discuss her conduct. She did not, in fact, seek any medical attention on September 25. She admitted that she did not, in fact, see the chiropractor. Her claim to the Employer, during the telephone conversation with Gillespie, that she “had gone to the clinic and really needed to go home” was at best misleading. In the circumstances, I find it incredible that she did not return the telephone call from the Employer's president on the Saturday, or attempt to remedy the situation on the Sunday.

Darnel submitted two notes from her physician. The note supplied to the delegate is referred to in the Determination. The first note is dated September 26. I place little weight on this note. The physician did not testify at the hearing. The note was not supplied to the Employer at the time. In short, the circumstances of this note are not clear to me. (That is the case for the second note, as well). Darnel may have obtained the note to justify her absence. If she, in fact, obtained the note on September 26, why did she not contact the Employer and why did she not supply the note. It is clear that Gillespie contacted Darnel early in the morning of Saturday, September 26. She contacted her when she realized that Darnel was not at work. It is common ground that Darnel did not contact the Employer to let it know that she was not coming to work on the Saturday. Gillespie's conduct, as found by the delegate, is entirely consistent with her claim that she was unaware that Darnel was not going to come



to work. She only came to the store--on her day off--because she wanted to discuss Darnel's behaviour.

In short, I accept the delegate findings that Darnel refused a reasonable request to return the fax paper, that she refused to discuss her conduct with the Employer, and that she failed to report for work at her regularly scheduled shift without notifying the Employer.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 10, 1999 be confirmed.

**Ib Skov Petersen**

**Adjudicator**

**Employment Standards Tribunal**