

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 -

Margaret Moss Operating as T.M.M. Enterprises
and Kings Market and Kings Food Market
("Kings Food")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/168

DATE OF HEARING: June 9, 1997

DATE OF DECISION: June 18, 1997

DECISION

OVERVIEW

This appeal is by Margaret Moss Operating as T.M.M. Enterprises and Kings Market and Kings Food Market (“Kings Food”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) which is dated February 28, 1997. In the Determination, Moss is found to have contravened section 63 of the *Act* and Robert Lesperance (“Lesperance”) is found to be owed compensation for length of service.

APPEARANCES

| | |
|-------------------|-------------------|
| Margaret Moss | On Her Own Behalf |
| Shannon Bosche | Witness |
| Robert Lesperance | On His Own Behalf |

ISSUE TO BE DECIDED

The sole issue is whether Margaret Moss (“Moss”) had just cause to terminate the employee, Lesperance.

Lesperance was appointed manager of Kings Food Market by Moss when she purchased the store. She says that she soon realised that Lesperance was not managing as she expected. According to Moss, Lesperance’s performance was inadequate in a number of respects and, as a result, she told him to improve and that his job was “on the line”. Moss says that Lesperance showed no improvement and that as such she had just cause in terminating him at the same time as she terminated the employment of his daughter.

FACTS

Robert Lesperance was working at the store now known as Kings Food Market when it was sold to Margaret Moss. Moss appointed him manager of the store. He was employed by Moss as manager from January 31, 1996 until May 20, 1996 when he was fired.

The store was immediately in financial difficulty because Lesperance placed orders for food that were beyond what Moss could afford, given sales. First there was a \$6,000 order. That was soon followed by a \$7,000 order. Neither were approved by Moss. Both were on credit. On learning of the orders, Moss spoke to him the inability to pay for orders of that magnitude and she made a number of changes. She reduced what could be bought on credit, instructed Lesperance that she would pay cash from that point on, and she ordered budgets drawn up, to name a few of the changes. Moss says that was the end of the excessive ordering by Lesperance.

As the weeks wore on, Moss found other faults with Lesperance's work. She complains of a generally bad attitude, inadequate record keeping; a failure to give direction to her two sons, both employees of the store; a lack of tact in handling customers; poor work habits; sloppy appearance; a failure to ensure that store shelves were kept clean; a failure to order what was required, including a popular line of bread; his absence during inventory; and the fact that he planned to take a vacation at the same time as the store's two other experienced employees (his wife and his daughter). Lesperance admits that his record keeping could have been better, says that Moss approved of the vacation arrangement and disagrees with the rest of Moss's complaints. On the basis of what is presented to me, I am satisfied that Lesperance's job performance left much to be desired.

Beyond the above complaints, Moss believes that Lesperance took cigarettes and other items from the store without paying for them. She says that her suspicions in that regard led her to lose trust in Lesperance. She may well have lost trust in her manager but she is unable to prove her allegation of theft.

In April the lease ran out on Lesperance's 1994 Aerostar van. He needed a van for the shopping that he did for the store and he leased a new van.

Moss was about to fire Lesperance when she fired his daughter, Michelle LeBlanc, for gross insubordination. On firing LeBlanc, Moss decided to fire Lesperance at the same time. She was planning to fire him anyway. And she feared that he might retaliate for the firing of his daughter.

ANALYSIS

The onus is on the employer to show just cause.

There is in this case a question of whether the employment of Lesperance was terminated for a lack of performance as manager or because of what Moss imagined he might do, as a result of his daughter being fired. The Director's delegate concluded that while job performance was certainly an issue, the firing was triggered not by something that Lesperance did, or did not do, but because of his relationship with LeBlanc. That is how the employer presents matters to me. Lesperance

was, if not entirely, at least in part, fired not for what he did but for what Moss imagined he might do given his relationship with LeBlanc.

Even if I were to accept that the termination was simply because of a failure to perform work as required, I am unable to see just cause.

A single deliberate act of a most serious nature can cause such damage to the employment relationship that there is just cause for an employee's termination. But Lesperance was not fired for a single act of his doing, that is clear.

Less serious infractions, when repeated, or a consistent failure to perform work may also constitute just cause but in such cases the Tribunal requires that the employer show that:

- 1) Reasonable standards of performance have been set and communicated to the employee;
- 2) the employee was clearly and unequivocally warned that his or her employment was in jeopardy if such standards were not met;
- 3) the employee is given reasonable time to meet the standards; and
- 4) the standards are not met by the employee.

As matters are presented to me, I conclude that, at the time of appointing Lesperance as manager, Moss did not have a very clear idea of what she wanted from him, that is beyond the showing of a profit, but that she soon did. As she began to take control of the store and realise that Lesperance's idea of managing the store was not the same as her own, or in her interests, she began to give him instructions and point out what she wanted done, and did not want done. I am satisfied that as a result of that process that standards befitting a small grocery store, reasonable standards, were set and communicated to the employee.

I am however unable to find that Lesperance was clearly and unequivocally warned that his job was in jeopardy unless he improved, was given time to improve, and that he did not then meet those standards. As matters are presented to me, there is no hard evidence that Lesperance received the required warning. There is no written warning on which to rely. And there is no other evidence which allows me to establish that Lesperance received plain, clear verbal warning that his job was in jeopardy.

The Director's delegate found "no apparent oral or written warnings pertaining to his performance, nor any indication by the employer that he was informed that his job was in jeopardy". Moss says that she gave Lesperance the required warning, and I accept that warnings of a sort were given, but I am unable to determine the precise nature of what was said. A lack of

clarity in that regard means that I am unable to know whether clear and unequivocal warning was in fact given. Indeed, the only hard evidence is to the contrary. I refer to Lesperance's leasing of a van in April, just weeks before being terminated. I find it unlikely that he would lease a vehicle at a time when his job was in jeopardy.

Lesperance might not have been a model employee or a very capable manager but for there to be just cause, Moss had to advise him of his failings, tell him that his job was in jeopardy, give him time to improve and only then, if his performance was still not up to standard, would she have had just cause for the termination. Moss is unable to show that she took all of the required steps and as a result Lesperance is now owed compensation for length of service.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination against Margaret Moss Operating as T.M.M. Enterprises and Kings Market and Kings Food Market, dated February 28, 1997, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc