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 -

Dr. Ronald Woodworth Inc.
(" Woodworth ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/336

DATE OF HEARING: August 4, 2000

DATE OF DECISION: August 18, 2000

DECISION

APPEARANCES:

for the Appellant	Vi Woodworth
for the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Dr. Ronald Woodworth Inc. ("Woodworth") of a Determination which was issued on April 17, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Woodworth had contravened Section 63(2) of the *Act* in respect of the termination of employment of Sandy Cecil ("Cecil") and ordered Woodworth to cease contravening and to comply with the *Act* and to pay an amount of $2442.81.

ISSUES TO BE DECIDED

The issue in this appeal is whether Woodworth has shown the conclusion that Cecil was, in all the circumstances, entitled to length of service compensation was wrong.

FACTS

Woodworth operates a dental office in Chetwynd, British Columbia. Cecil was employed by Woodworth as a Certified Dental Assistant. She commenced her employment on March 7, 1989. Her rate of pay was $15.00 an hour. In November, 1998, Cecil's hours of work were reduced from full-time to part-time. They were reduced again in early February, 1999, to approximately 8 to 16 hours a week and Cecil began looking for other part-time work at that time. The Determination notes that on February 5, 1999, Woodworth issued a record of employment to Cecil, indicating that Woodworth was no longer able to provide her with full time employment and in future they would "provide whatever hours and days we can". On that basis, the Determination concluded that Cecil did not have a regular pattern of employment in the period from early February, 1999 to April 30, 1999 and the nature of the employment relationship was that Cecil would be advised by Woodworth what days and hours to attend work. While that conclusion was challenged in the appeal, no evidence was provided by Woodworth at the appeal hearing to show it was wrong and it continues to stand as an accepted conclusion of fact for the purposes of this decision.

In April, 1999, Cecil was able to obtain employment as a Dental Assistant at another dental office in Chetwynd. It was also part-time work. She commenced employment at that dental office on May 1, 1999. It was her intention to continue to work part-time hours for Woodworth.

On April 30, 1999, Cecil told a fellow employee that she was going to work at the other dental office the following day. That information subsequently came to the attention of Woodworth's Office Manager, Vi Woodworth. After April 30, 1999, Cecil was not called for any work with Woodworth.

ANALYSIS

The issue that arose during the investigation was whether Cecil's employment was terminated by Woodworth or whether she quit. If Cecil had quit her employment then, pursuant to paragraph 63(3)(c) of the *Act*, the obligation of Woodworth to pay length of service compensation would be deemed to be discharged. The Determination notes that Woodworth took the position Cecil had quit her employment by taking a position at the other dental clinic. The Determination reviewed the available facts and concluded that Cecil had not quit but had been terminated by Woodworth when they failed to call her for any work after April 30, 1999. In reaching that conclusion, the Determination states:

> The burden is on the employer to prove that an employee has quit his or her position. The right to quit must be voluntarily exercised by the employee. The employee must form an intent to quit and then carry out an act that is inconsistent with the continuation of his or her employment.

The investigating delegate found no evidence that Cecil had formed any intention to quit her employment. There was no indication from Woodworth during the investigation that Cecil was terminated for just cause.

In the appeal, counsel for Woodworth took the position that Cecil had, in all the circumstances, acted in a manner that was inconsistent with a continuation of her employment with Woodworth and, accordingly, Woodworth had just cause to terminate her employment. This position was raised for the first time on appeal. In *Wendy Benoit and Ed Benoit operating as Academy of Learning*, BC EST #D138/00, the Tribunal considered whether an employer should be able to allege just cause in the context of an appeal when just cause was not the basis upon which the termination either occurred or was addressed in the investigation. The Tribunal provided extensive reasons for concluding that such an allegation would not be considered in the appeal process:

> It would be an incorrect reading of Section 63 and quite inconsistent with the intent of the *Act* to allow [the employer] to allege just cause for dismissal when that was not the basis upon which the termination of employment occurred.

In any event, the burden of showing just cause would be on Woodworth and the failure to establish the necessary factual foundation would be fatal to meeting that burden.. No evidence was presented by Woodworth at the appeal hearing and, not surprisingly, no factual basis for any argument for just cause was established. The allegation of just cause in the appeal relied on two factual assertions: first, that commencing employment at the other dental office (a "competitor") was a serious conflict of interest and inconsistent with the continuation of her employment with Woodworth; and second, that unilaterally cancelling patient appointments for May 1, 1999 prejudiced the business interests of Woodworth.

In respect of the first factual allegation and in the absence of some evidentiary foundation for doing so, I would not be prepared to assume or conclude either that the two dental offices are "competitors" or that accepting part-time work as a Dental Assistant at another dental office in Chetwynd is a conflict of interest inconsistent with continued employment. In respect of the allegation that Cecil had cancelled patient appointments for May 1, 1999, such an allegation was made by Woodworth and denied by Cecil during the investigation. At a minimum, Woodworth would have the burden of establishing their version of events before the question of whether such circumstances constituted just cause under the *Act* was considered. That was not done.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 17, 2000 be confirmed in the amount of $2,442.81, together with any interest that has accrued pursuant to Section 88 of the *Act*

David B. Stevenson
Adjudicator
Employment Standards Tribunal