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 -

Victor Dirnfeld, MD
("Dirnfeld")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Mark Thompson
FILE NO.:	98/245
DATE OF HEARING:	August 10, 1998
DATE OF DECISION:	September 1, 1998

DECISION

APPEARANCES

Victor Dirnfeld	For himself
Barbara Dirnfeld	For Dirnfeld
Debbie Roberts	For the Director

OVERVIEW

This is an application filed by Victor Dirnfeld, MD ("Dirnfeld"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination issued on March 31, 1998 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Dirnfeld had terminated Sandy M. Evans ("Evans") in violation of Section 54 of the *Act.* The Determination further found that Evans was entitled to compensation for wage loss of 68 days (plus vacation pay and interest) pursuant to Section 79(4)(c) of the *Act.* Dirnfeld appealed on the grounds that he had dismissed Evans for cause.

ISSUES TO BE DECIDED

The issues to be decided in this case are whether Dirnfeld dismissed Evans for cause and the extent of her entitlement under Section 79(4)(c) of the *Act.*

FACTS

Certain facts in this case were not in dispute. Evans began work for Dirnfeld as a medical office assistant on November 18, 1996. Dirnfeld terminated her on February 2, 1997. Dirnfeld was away from his office from November 28, 1996 through December 7, 1996. He took vacation from December 9 through December 31, 1996. Evans commenced her family responsibility leave as provided in Section 52 of the Act on January 27, 1997 to care for her husband, who was ill. Evans telephoned Dirnfeld at home at 10:00 a.m. on January 27 and informed him that she would not be coming to work because of her husband's condition. Dirnfeld told her that he would find a temporary replacement. In fact, the replacement was his wife, Mrs. Barbara Dirnfeld. Evans called again on January 28 to say that she would not be coming to work. Ultimately, Evans considered herself ready to return to work on February 3. However, Dirnfeld called her on February 2 and terminated her employment.

Evans filed a complaint with the Employment Standards Branch, alleging that she had been terminated because she had taken family responsibility leave. Apart from the circumstances of her employment with Dirnfeld, Evans informed the Director's delegate

that she had searched diligently for another job after her termination. She presented evidence that her next job began on May 8, 1997.

In support of his appeal, Dirnfeld produced a memorandum from Richport Medical Centre dated March 30, 1998. The memorandum stated that Evans had been employed at Richport Medical Centre from February 21 through February 28, 1997 and that she was terminated as unsuitable for the position.

The hearing for this case was originally scheduled for June 19, 1998. On June 13, 1998, Evans wrote the Tribunal to state that she would not attend the hearing for medical reasons. She commented on the difficulties in working for Dirnfeld and denied that she had used headphones in her office as Dirnfeld had alleged. She further stated:

> I had neglected to acknowledge the (7) seven days worked at the Richport Medical Clinic and the repercussions of this, I could not rightly consider receiving any monies I was not legally or morally justified in receiving. When this was brought to my attention on the package dated April 22, 1998 I believed by not replying to the date mentioned, of May 13, 1998 that I automatically relinquished my previous stand and any gain that might have accompanied the previously wrongly substantiated claim/determination.
>
> Due to the level of stress I was under at that time and the months that followed, my records and recollections were less than adequate. The strain of working in this environment, coupled shortly thereafter with the hospitalization of my husband was terribly draining. Then the sudden and unexpected loss of my job intensified an already stressful situation. Having unintentionally omitted this vital information I have position myself in an unenviable spot, nullifying my claim.

Tribunal staff informed Evans by telephone on June 16 that she had the right to have her husband attend the hearing to support her or to participate as her representative. Evans reiterated that she did not wish to attend. Subsequently, the hearing was rescheduled for August 10, 1998 and the Tribunal informed Evans of the new hearing date.

Evans wrote to the Tribunal on July 21, repeating that she would not attend the August 10 hearing and that she was "still unable any longer to actively participate in this claim."

I brought this information to Dirnfeld's attention at the hearing and stated that, should my decision find that he had violated Section 54 of the *Act*, Evans' entitlement to lost wages would extend to the date of her employment at Richport Medical Centre.

Dirnfeld presented evidence at the hearing concerning the circumstances under which he terminated Evans' employment.

Stated briefly, Dirnfeld argued that he had dismissed Evans for cause. He and Mrs. Dirnfeld testified concerning the events prior to Evans' termination.

Evans began work on November 7, 1996. Dirnfeld was absent from his office November 28 through December 8. When he returned to his office, he found that Evans had made a number of changes to the layout and arranged for services without authorization from him. Mrs. Dirnfeld told Evans not to make the changes in the office before going away with her family. From December 9 through 31, Dirnfeld was out of town on a family vacation.

Upon his return to the office in January 1997, he noticed a number of deficiencies in Evans' work, including unauthorized absences, booking appointments contrary to normal office procedure and a number of errors in managing patients' records and files. According to Dirnfeld, Evans failed to interview a patient properly prior to an appointment with him. These actions were contrary to office policies that Dirnfeld and his previous office assistant had explained to Evans when she began work for Dirnfeld also observed her wearing headphones and listening to her own music during office hours. Evans also failed to prepare documents for filing properly. On Friday January 24, 1997, Dirnfeld told Evans that her continued employment with him was "in serious doubt," and that he would discuss the matter the following week.

Before the discussion could take place, Evans began her family responsibility leave. She spoke to Dirnfeld on January 27 to say that she could not work. The following day she called Mrs. Dirnfeld, who was replacing her in the office, to say that she would work the following day. Mrs. Dirnfeld told Evans that she was needed in the office, although a temporary assistant was present. In the evening of January 28, Evans left a message at the Dirnfeld's home that she would not be working "any more." Dirnfeld chose to interpret this statement, which his younger daughter took as a written message, as meaning that Evans had resigned. He attempted to contact Mrs. Evans at home by telephone without success. However, Mrs. Dirnfeld believed that Evans meant that she would not be able to come in to work on January 29, and that Evans did not now when she would be able to work again.

When Mrs. Dirnfeld came to the office, she found many files stacked up. Account cards had been misfiled. Other files were incomplete, and it was difficult to determine how much more had to be done in order to close the file. Mrs. Dirnfeld worked with the temporary assistant on January 29 and 30. Evans called in the evening of January 30 to inquire about picking up her pay cheque. Mrs. Dirnfeld asked her for her pass and keys to be used by the temporary employee. Evans called on January 31 to say that she would not be coming in for her cheque or to leave the keys. She did not mention her husband. Evans called Mrs. Dirnfeld at home on January 31 and said that she would be back to work on Monday. Mrs. Dirnfeld told her to call her husband at medical meetings he was attending.

In the event, Dirnfeld called Evans on the evening of Sunday February 2 and told her that her had terminated her employment. Evans filed a complaint with the Employment Standards Branch on February 4, alleging that her termination was due to her taking family responsibility leave.

ANALYSIS

Section 126(4) of the *Act* places the burden of proof on the employer that a termination was not related to personal responsibility leave. In this case, Evans did not appear at the hearing to challenge Dirnfeld's evidence, which was persuasive as it was presented.

Dirnfeld presented evidence that Evans' performance was unsatisfactory, including Mrs. Dirnfeld's observations of the state of his office when she substituted for Evans. However, he chose to leave Evans without direct supervision for virtually a month only two weeks after she began work. In her written statement, Evans acknowledged that she was aware of "minor problems" with her work. Evidence on specific verbal warnings was ambiguous. Dirnfeld did state that he told Evans on January 24 that he wished to discuss her continued employment. Dirnfeld did agree that he never warned Evans that her employment was in jeopardy because of her performance prior to January 24, either verbally or in writing.

Based on evidence before me, I conclude that Dirnfeld did not violate Section 54(2)(a) of the *Act*. He terminated Evans for what he believed was just cause, not her family responsibility leave. Despite Dirnfeld's state of mind, the circumstances under which he terminated Evans' employment did not meet the test of dismissal for cause as contemplated in section 63(3)(c) of the *Act*. The Tribual has held in many decisions that an employer must put an employee on notice that her performance may cause dismissal before terminating her employment (see, for example, *Grammy's Place Restaurant & Bakery*, BC EST #D105/98). However, since Evans was not employed for three consecutive months prior to her termination, as required by the Section 63(1) of the *Act*, she is not entitled to compensation for length of service.

Dirnfeld presented evidence of Evan's employment history before she began working for him and after her termination. These facts were not relevant to this case. He also argued that the Employment Standards Branch had erred in its investigation of the case. The Tribunal hearing provided Dirnfeld with the opportunity to present his version of the case, which he did.

ORDER

For these reasons, the Determination of March 31, 1998 is cancelled pursuant to Section 115(1) of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal