**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 -

Westburne Industrial Enterprises Ltd.
("Westburne" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 98/326

**DATE OF DECISION:** September 10, 1998

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## DECISION

### SUBMISSIONS

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|---|---|
| Ms. Sharon Campbell | on behalf of Westburne |
| Mr. Andrew Guest | on behalf of himself |
| Mr. Marco Valinski | on behalf of the Director |

### OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on May 6, 1998. In the Determination, the Director's delegate found that the Employer had terminated Mr. Guest's ("Guest") employment without "just cause". The delegate determined that Guest was entitled to $4,485.64 on account of compensation for length of service. The Employee appeals the Determination and maintains that Guest was terminated for "just cause".

### ISSUE TO BE DECIDED

The issue to be decided in appeal is whether the Employer had just cause to terminate Guest's employment.

### FACTS

Guest was employed by Westburne, which operates a plumbing supply outlet in Victoria, selling to both professional contractors and the public, between July 30, 1990 and September 19, 1997 and, at the time of termination, was a counter sales person. The Employer's stated reason for the termination was "insubordination".

It is clear from the Determination that the delegate, in the circumstances, required evidence of progressive discipline: "Evidence of progressive discipline was required". In that respect, the only written warning given to Guest by the Employer arose out of an incident which occurred on September 2, 1997, just over two weeks prior to the termination. This incident is not described in any detail in the Determination. However, the "Employment Warning", submitted with the appeal, describes Guest's conduct as follows: "Rudeness to customer resulting in customer leaving in

tears. Alternate counterman had to take over." While Guest signed the warning, he indicated that he did not agree.

The Employment Warning stated:

> "The matters referred to in this warning are viewed by us, as your employer, as being a violation of the terms of your employment and sufficiently serious that failure by you to correct such behaviour, any reoccurrence of such behaviour or the occurrence of other unacceptable behaviour by you may, without further notice, subject you to such severe disciplinary steps as the company may consider appropriate, including without limitation, suspension, demotion, or dismissal for cause, without notice or termination pay."

The delegate interviewed a number of witnesses, including Bob Meilleur, a branch manager of the Employer. His is characterized as follows:

> "Mr. Meilleur states that he spoke to the complainant every two or three months to discuss the complainants temper. The only written discipline action is recorded and dated September 2nd, 1997. This is an isolated incident. The employer was unable to provide documentation that would evidence when other disciplinary action had been taken. The employer did provide a recommendation letter dated August 20th at the employee's request...."

This letter, signed by Meilleur, recommended Guest to other employers and was apparently provided to Guest at his request:

> "To whom it may concern:
>
> Andrew Guest has been an employee of Westburne for almost 10 years. He quickly developed into a key component of our operation. Andy learns quickly and has the ability to teach new staff members as he has had to do over the past few years. He is very hard working, caring and dedicated. He will be greatly missed by our staff and customers. I would not hesitate to recommend Andy for any position he may be applying for. If you wish any further information please do not hesitate to contact me at 475-1111."

The delegate relied upon other witnesses in making his Determination (I note in passing that there is nothing in the Determination to indicate why the delegate preferred the statement of this witness

over that of Meilleur. Moreover, there is no indication of the situation described by the witness and how it differs from "that of the employer"): "Mr. Giles was a first party to the scenario that played out, for which is the substance of the written letter of warning given to the complainant on September 2nd, 1997. The witness described a situation that differs in substance from that of the employer."

The delegate continued:

> "All of the witnesses interviewed had a common thread in their evidence. It was that the complainant was prone to loose his temper. All agree that Andrew Guest was knowledgeable, hard working and reliable. All agree his temper was never directed at any one person. All heard of the complainants antics and it appears that it was an accepted feature of his personality. The complainant states that he was never informed that any of his actions would lead to termination."

The delegate concluded:

> "The employer admits that the complainant was hard working, competent and a very knowledgeable employee. The employer states that his antics, the complaint of September 2nd, 1997, and the fact that he did not want to work for them, was just cause to terminate the employments relationship. As the director's delegate in this matter, I find that the employer failed to evidence the employee was "disobedient to authority". The employer failed to provide evidence to demonstrate they tried to correct any unwanted behaviours. The employer could only evidence an isolated incident. I find that he employer, by failing to apply progressive discipline in a manner consistent with the employer's expectations, they were partly condoning the actions of the complainant. I find that the employer failed to clearly communicate their intentions. I find that the employer contravened the Act."

**ARGUMENT**

The Employer argues that the September 2, 1997 incident was a serious breach of Guest's employment contract. In the result, progressive discipline was not warranted. The Employer notes that Guest frequently though "temper tantrums" which were stressful and intimidating other employees. The September 2 incident was directed at a customer, thus affecting the Employer's

business. Guest was insubordinate because he displayed an unwillingness to submit to the authority who had warned him numerous times about his unacceptable conduct.

Guest points to the fact that the Employer did not terminate his employment until almost three weeks after the September 2 incident. As well, he states that he was subsequently commended by the Employer for his professional conduct in handling an irate customer and, therefore, "not resistant to change" as suggested by the Employer. Guest denies that he was throwing temper tantrums. Moreover, he refers to the letter of recommendation issued by the Employer's operations manager.

In his reply, the delegate provides some factual background with respect the September 2 incident which apparently arose out Guest's difficulty in dealing with an emotionally distraught customer. Moreover, the delegate states that Guest confirms that the Employer spoke to him about his temper. Guest denies that he was told his employment was in jeopardy during those conversations. The delegate argues that Guest's temper was an "accepted feature of his personality" and failed to warn him in clear and unequivocal language.

In its response, the Employer does not deny that the customer in the September 2 incident was emotionally distraught but states that its employees are expected to handle such customers with compassion. Moreover, the Employer states that it did warn Guest on many occasions about his unacceptable behaviour which he was unable to change despite being given a considerable period to do so. The Employer reiterates that the September 2 incident was serious from its perspective.

**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 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."

I have certain misgivings about the Determination. First, the incident which gave rise to the termination is not described with any degree of particularity in the Determination. Second, the delegate did not set out his reasons, which well be appropriate in the circumstances, for preferring the evidence of the employee over that of the Employer. However, the duty to give reasons, in my view, requires that the delegate explains why. Third, the delegate seems to have been of the view that progressive discipline is required in all cases. Progressive discipline is only required where the conduct is minor misconduct. As set out in *Kruger*, above, a single act of misconduct may justify summary dismissal in certain instances. Fourth, the delegate seems to have been of the view that written evidence of warnings are required. That is not the case. There is no requirement that warnings be in writing. It is simply easier for an employer to prove a warning in writing (see for example, *Ruby Enterprises Ltd.*, BCEST #D208/98). I have, nevertheless, decided to uphold the Determination and reject the Employer's appeal.

As mentioned by the delegate, the burden to prove just cause for termination rests with the Employer Even if I accept that conversations with respect to Guest's temper took place, and--on the balance of probabilities--I do, where the employer seeks to rely on what are instances of minor misconduct, it must show that a reasonable standard of performance was established and communicated to the employee; that the employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so; that the employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and the employee continued to be unwilling to meet the standard.

The Employer did not explain in any detail what happened on September 2, apart from the content of the Employment Warning, which briefly stated "Rudeness to customer resulting in customer leaving in tears. Alternate counterman had to take over." Being rude may include any number of things. There are presumably degrees of rudeness. Guest may have made insolent or offensive remarks to the customer. The Employer has not explained what Guest actually did or said to the customer. Guest denied being rude. Some of the witnesses referred to in the Determination and submissions appear to support that and point the customer being emotionally distraught and very difficult to deal with. At the same time, they agree that Guest had a "temper". In my view, if Guest was "rude" to the customer, in the circumstances, his conduct amounted to no more than minor misconduct.

Meilleur states, according to the Determination, that he spoke with Guest about his "temper" every two to three months. Guest, also according to the Determination, explained that "he was never informed that any of his actions would lead to termination". This is relevant for the delegate's determination. It is, in fact, apart from the September 2 warning (set out above), only in the Employer's final response that it takes the position that Guest had been warned that his employment was in jeopardy and--even then--only in equivocal terms, namely that his behaviour "would have to change or the Company would have to look towards alternate solutions."

In this case, the Employer argues that Guest's conduct was serious. In other words, Guest's conduct was one of the exceptional cases where a single act of misconduct is sufficient to justify dismissal without a warning. For a number of reasons I do not accept the Employer's argument on this point.

First, Guest was not a short term employee, having been employed for some seven years. The operations manager of the Employer wrote a letter of recommendation for Guest which stated that he was a "key component" of the Employer's operation and that he would be "greatly missed by staff and customers". The letter went on to state that Meilleur would have no hesitation in recommending Guest for any position he might apply for. The Employer argued that "the complainant's temper tantrums were usually not directed at any one person, yelling and throwing items around is extremely stressful and intimidating to anyone in the vicinity". While the letter was written at the request of Guest and before the September 2 warning, the letter is inconsistent

with the argument that Guest had been a problem employee to the extent argued by the Employer in this appeal.

Second, the Determination found that the "only written discipline action" is that dated September 2, 1997 but "<t>his is an isolated incident". In view of the reference to the discussions between Meilleur and Guest, this may not have been an isolated incident. Certainly, the statements of all witnesses, according to the Determination, is that Guest had a temper--though "never directed at any one person". I accept that this was not an isolated incident in the sense that the Employer mayhave had a concern about Guest's conduct and temper *vis-a-vis* other employees. However, the fact that Guest continued in the employ of the Employer despite this conduct, and received a favourable letter of recommendation, indicates that the Employer did not consider the conduct sufficiently serious to impose severe discipline, at least up to the September 2 incident. I also accept the Employer's assertion that Guest was spoken to on a number of occasions with respect to his temper. However, this does not necessarily assist the Employer's case. If the Employer spoke to the employee about its concern and, yet, took no action, the Employer may ultimately have condoned the conduct, particularly if the conduct complained of has been a recurring problem over a lengthy period of time.

Third, I find it difficult to accept the Employer's argument that is considered Guest's conduct serious, as is now argued. I agree that acting in a manner detrimental to the Employer's legitimate business interests could provide cause for summary dismissal. However, the incident with the customer occurred on September 2, yet Guest was not terminated until September 19, more than two weeks later. Surely, if the conduct is as serious as is now suggested, the Employer would have terminated his employment immediately. Moreover, there is no explanation for the delay. Moreover, the Employer had already issued a warning for the incident which it now seeks to rely upon as cause for termination. The warning clearly stated that further incidents could result in further discipline up to and including termination. There is nothing in the Determination or the submission that there was any further incident which caused the Employer to consider further discipline.

Having considered all the circumstances, I am not persuaded that the appeal can succeed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 6, 1998 be confirmed and the amount held in trust be paid out to Guest together with such interest as may have accrued.

**Ib Skov Petersen**
**Adjudicator**