

**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 -

G. T. Lynch Developments Inc., and Lynch Bus Lines Ltd.  
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 97/444

**DATE OF HEARING:** August 8, 1997

**DATE OF DECISION:** August 22, 1997

## DECISION

### APPEARANCES

Tom Lynch	on behalf of G. T. Lynch Developments and Lynch Bus Lines
Ross Anten	on behalf of himself

### OVERVIEW

This is an appeal by G. T. Lynch Developments Inc. and Lynch Bus Lines (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued on May 16, 1997 by a delegate of the Director of Employment Standards. The Determination found that the Employer had violated Section 63(2) of the *Act* by failing to pay Mr. Ross Anten (“Anten”) compensation for length of service. The Employer’s position was that it had discharged Anten, a former bus driver, for just cause and thus was not required to pay compensation for length of service pursuant to Section 63(3)(c) of the *Act*.

### ISSUE TO BE DECIDED

The issue to be decided is: did the Employer have just cause to terminate Anten?

### FACTS

It was agreed by all parties concerned that Anten had completed five years of service with the Employer when he was terminated on February 27, 1997. Mr. Tom Lynch (“Lynch”), testifying for the Employer, stated that Anten was effective in dealing with customers. However, Anten’s driving record contained a number of violations (or alleged violations) of safe driving practices. Two years previously, Anten had been involved in several accidents. Lynch spoke to him, there were changes in Anten’s personal life, and his performance improved. The sequence of violations that caused Lynch to discharge Anten began six months before his termination. The Employer also submitted extracts from Anten’s records, showing a number of alleged violations of the law or safe driving practices during a period commencing in 1993.

The incidents to which Lynch spoke began with an allegation that Anten was exceeding the speed limit and following a vehicle too closely. Anten stated that he was traveling at the same speed as other vehicles, which might have been higher than the legal limit. A passer by called the Employer to report the incident. Lynch recalled speaking to Anten about the matter, suggesting that he take a defensive driving course and saying, “We can’t have this

kind of thing continue.” Anten denied speaking to Lynch about the incident or being told that he should take a defensive driving course. Instead he spoke to Sherri Nichol, another staff person in the Employer’s office. The next incident occurred on January 23, when a member of the public called to report that Anten’s bus (which was identifiable by a number displayed on it) had cut her off, nearly forcing her into a wall. Anten stated that the driver was trying to pass him on the right. According to him, Sherri told him about the telephone call, but there was no mention of discipline. Lynch recalled telling Anten that if “we can’t get rid of the phone calls or incidents that cause them, you’ll have to find another line of work.” On February 4, Anten received a photo radar speeding ticket. He stated that he did not recall the incident,. Sherri gave him the ticket and he paid the fine himself, on Lynch’s instructions. According to Lynch, he told Anten, “We’re running out of room.”

On February 5, Lynch found that Anten had collided with a truck in a merge lane, based on a complaint filed by a teacher who was in the bus. The collision was not serious, but did cause the hub of the bus to come off. Anten said that the damage occurred when a truck tried to pass him on the right. He reported the incident to Lynch. Neither he nor Sherri said anything to him. No insurance claim was filed, as the damage was minor.

On February 25, 1997, Lynch received a notice of an accident from the Insurance Corporation of British Columbia, concerning an accident involving Anten’s bus on February 14, 1997. Anten had not reported the accident, and Lynch determined that the incident, taken with Anten’s previous record, was sufficient to warrant Anten’s discharge. Anten stated that there was no contact with another vehicle. In a statement to the Tribunal, he asserted that a car passing him on the right was forced up onto the curb. The driver then followed Anten and accused him of causing damage to the side mirror of his car. Anten denied the allegation. Later he examined his bus and found no damage. He showed the bus to “Wanda,” another employee of the Employer, and she found no damage. Consequently, he did not report the incident.

## **ANALYSIS**

In cases of dismissal, the Employer bears the burden of demonstrating that just cause existed. An important principle in cases of dismissal for poor performance is that an employee must be told that his or her job is in jeopardy. Thus, this case turns on the of the Employer prior to Anten’s dismissal. Anten’s performance gave cause for concern by the Employer and perhaps even for discipline. However, the Employer did not allege that any single incident warranted termination. Indeed, Lynch did not investigate the circumstances of the February 22 incident before dismissing Anten. The Employer did not dispute that Section 63(1) of the *Act* required it to pay compensation for length of service if it did not have just cause for terminating Anten.

The statute does not define “just cause.” The Director’s delegate argued that a “process of progressive discipline” would be necessary to sustain a dismissal under these circumstances. The Tribunal has examined this question in previous cases. In *Hall Pontiac Buick Ltd.*, BC EST #D073/96, the Tribunal Chair, acting as an adjudicator, set out the applicable standards for an employer to establish that there is just cause to dismiss an employee for poor performance:

1. That reasonable standards of performance have been set and communicated to the employee;
2. That the employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. That a reasonable period of time was given to the employee to meet such standards; and
4. That the employee did not meet those standards.

In *Hall Pontiac Buick*, the employer imposed disciplinary suspensions, and the employee was informed in writing of deficiencies in his performance. However, the adjudicator found that the employee had not been warned that continued failure to meet the employer’s standards would result in termination of employment.

In this case, it was clear that aspects of Anten’s performance were not satisfactory. However, he was never given a specific standard of performance and in particular was not warned clearly that his employment was in jeopardy if his performance did not improve. The record did not show clearly that discipline, even in the form of a written warning, had been imposed prior to termination. At least two of the incidents on which the Employer relied arose from complaints filed by members of the public. It was not possible to verify the accuracy of the complaints. While Lynch assumed that Anten knew his job was at risk, by his own testimony, he did not communicate his position to Anten clearly.

For these reasons, I find on the balance of probabilities that Anten was not dismissed for just cause as contemplated in Section 63(3)(c) of the *Act*.

**ORDER**

For these reasons, the Determination of May 16, 1997 is confirmed.

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**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**