

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-

D.J.M. Holdings Ltd. operating as Romeo's Place
("Romeo's")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE No.:	97/605
DATE OF DECISION:	October 15, 1997

DECISION

This is a decision based on written submissions by Ron Medland and Angela Soderman, supervisors of DJM Holdings Ltd.

OVERVIEW

This is an appeal by D.J.M. HOLDINGS LTD. operating as Romeo's Place ("Romeo's"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 18, 1997. The Director found that Romeo's contravened Section 63 of the Act in dismissing Greg Johnson ("Johnson") without just cause, and Ordered that Romeo's pay \$644.38 to the Director on behalf of Johnson.

Romeo's claims that the Director's findings of fact are in error, and that Johnson was properly dismissed. Romeo's seeks to have the Determination set aside.

ISSUE TO BE DECIDED

Whether the Director correctly determined that Johnson was properly terminated.

FACTS

Johnson worked for Romeo's from March 28, 1995 to February 21, 1997, primarily in a janitorial capacity. On February 21, 1997, Johnson had a confrontation with another employee. That employee filed a complaint with management, and his employment was terminated. Johnson filed a complaint in the matter of his termination on February 27, 1997.

On June 23, Romeo's provided the Director with daily time and payroll records for the later period of Johnson's employment, and a letter of explanation. In that letter, Romeo's indicated that verbal warnings had been issued regarding Johnson's work level and standards prior to his termination.

Romeo's also issued a written letter of warning to Johnson on January 30, 1997 regarding dissatisfaction with his work. The notice stated "Due to your refusal to acknowledge the seriousness of the verbal warnings you have received...YOU ARE HEREBY GIVEN NOTICE that the management believes it has case to reprimand you. Any further incidents of which notice shall be given, constitutes cause for immediate dismissal". The notice was signed by Johnson.

Romeo's letter of explanation further stated that that, by February 21, as Johnson's supervisors were of the opinion that he had not attempted to improve his performance, they decided to terminate his employment.

No other issues were raised by Romeo's.

Johnson disputed Romeo's allegations that he had been verbally warned on one or more occasions. He indicated that he understood those "warnings" as discussions regarding his work responsibilities.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Romeo's contends that Johnson was in fact given notice that his future employment was in jeopardy if his attitude and performance did not improve. Romeo's claims that it follows a policy of 'progressive discipline' and that Johnson received a number of warnings from several supervisors of tasks he was required to perform and asked why he had not performed them. Romeo's claims that Johnson received verbal warnings from Soderman and Medland on January 2, and another on January 10 from Soderman and the Chef. Romeo's claims that Johnson acknowledged and agreed that his work habits were not 'up to par'.

Romeo's also alleges that Johnson finally received a written warning, along with verbal explanation. They argue that Johnson signed the warning acknowledging that he had received previous verbal warnings. Romeo's contends that the Director failed to take this acknowledgment into account in arriving at his determination. Romeo's also questioned whether the Director properly verified an incident alleged to have occurred on February 21, which led to the dismissal.

Romeo's also referred to a B.C. Court of Appeal decision (*Gary Allen Candy v. C.H.E. Pharmacy*) in support of their contention that insubordination is grounds for immediate dismissal.

The Director placed the onus on establishing cause on the Employer, as required by the *Act*. He also set out the criteria by which the employer's actions would be measured. In this instance, Romeo's provided the Director with one written notice, and references to verbal notices which were disputed by Johnson. After a review of that evidence, the Director found that the criteria were not met, and determined that Johnson was owed two weeks compensation in lieu of notice. I am not persuaded that this finding is perverse, or wrong. No evidence was presented to demonstrate that Romeo's policy of "progressive discipline" was followed, nor was any evidence provided regarding the establishment of objective standards of performance, and clear warnings issued to Johnson regarding his failure to adhere to them. Although Romeo's also submitted statements regarding the warnings, I have not considered them. That evidence ought to have been placed before the Director in the first instance. There are numerous Tribunal decisions supporting the refusal of an adjudicator to accept new information where that information should have been presented at the time of the initial investigation. (see *TriWest Tractor Ltd.* (1996) BCEST 268/96)

I note that Romeo's claims that the incident on February 21, 1997 constituted an act of insubordination, giving ground for immediate termination. While there is case law supporting the right of an employer to dismiss an employee for this reason, there was no evidence before me on this issue. The Director was advised of an incident on the 21st of February by Johnson, not Romeo's. That incident led to another employee complaining to management which resulted in Johnson's termination. Romeo's assertion that the incident constituted an act of insubordination was not supported by any evidence, either to the Director or on appeal. Consequently, it may not be considered as a ground for the termination at this point. (see *TriWest Tractor Ltd.* supra, and *BWI Business World Inc.* BCEST D050/96).

The appeal is denied.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination be confirmed.

A handwritten signature in black ink, appearing to read 'C Roberts', written in a cursive style.

Carol Roberts
Adjudicator
Employment Standards Tribunal