Employment Standards TRIBUNAL

An appeal

- by -

Carmel Upholstery (1993) Ltd. operating as Carmel Furniture Designs

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2002/406

DATE OF DECISION: October 17, 2002

DECISION

OVERVIEW

This is an appeal by Carmel Upholstery (1993) Ltd. ("Carmel") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated July 05, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Carmel employed Adam Ellison ("Ellison") in a supervisory position in its custom furniture business from 1996 to July 2001 when his employment was terminated without notice and without compensation for length of service. Carmel claimed that there was just cause for the dismissal. The Director disagreed and determined that Ellison was dismissed without just cause and was entitled to compensation.

Carmel appeals the Determination on the basis that the Director was in error in finding that there was not just cause for termination.

ISSUES

The issue raised in this case is whether there was just cause for dismissal.

FACTS AND ANALYSIS

If compensation is found to be owing the amount of compensation has not been disputed.

The substantial issue in this case is whether or not the behaviour of the employee crossed the threshold of giving the employer just cause to dismiss. In my opinion it did.

It is important to distinguish between acts of misconduct and minor infractions of employment rules or unsatisfactory job performance. In the case of unsatisfactory job performance, incompetence, or minor infractions of workplace rules the Tribunal has setout a very clear basis for the establishment of just cause. In cases not involving misconduct the employer will need to show:

1. reasonable standards of performance have been set and communicated with the employee;

2. the employee had actual notice that continued employment was in jeopardy if such standards were not met;

3. the employee was given a reasonable opportunity to meet such standards; and the employee did not meet those standards.

(see*: Re: Hall Pontiac Buick Ltd*, BCEST#D073/96*; Re: Cook*, BCEST#D322/96*; Re*: *Justason*, BCEST#D109/97*; Re: Sambuca*, BCEST#D322/97; *Re: Chamberlain*, BCEST#D374/97; et al)

It is not contested that there were some problems with Ellison's performance and that these were brought to his attention on June 11, 2001. Carmel gave Ellison a document called "Conditions of Employment – Adam Ellison". The document set out nine conditions of employment and then stated the following:

> **ALL THESE CONDITIONS MUST BE MET IMMEDIATELY WITH NO EXCEPTIONS**.
>
> **WEEKLY REVIEW OF THESE CONDITIONS WILL BE DONE.**
>
> **IF ANY OF THESE CONDITIONS ARE UNACCEPTABLE OR BREACHED, IMMEDIATE TERMINATION WILL OCCUR.**

Carmel alleged that Ellison was in breach of a seven of the nine conditions and, in accordance with the notice given, he was dismissed.

The Director's delegate acknowledged the above facts but found that, because the employer had not conducted a weekly review Ellison could have believed that his performance was in compliance with the conditions set out in the notice. In my opinion this analysis is faulty. Firstly, Ellison did not claim that he believed his performance was in compliance with the conditions. But, secondly, the weekly review is not a condition precedent to dismissal; it is simply a means of establishing whether or not the conditions have been met. The failure of the employee to meet the conditions is a clear indication that he did not meet the standards required for his position whether or not inspections occurred.

There is no doubt that standards of performance were set and communicated to the employee. It has not been suggested that those standards were not reasonable. The employee was warned clearly and unequivocally that it is continued employment was in jeopardy if such standards were not met. The standards were set and communicated on June the 11th 2001 and dismissal did not occur until July 18th 2001. There is no submission that this time frame was inadequate for the employee to meet the standards required. The only question remaining was whether or not the employee did meet the standards.

In his findings of fact the delegate does find that Ellison was in breach of some of the conditions. In fact, Ellison admits to breaching some of the conditions. However, the delegate accepts some of the excuses and rationale for the breaches and finds that just cause was not established. But it is not up to the delegate to decide whether these excuses are reasonable it is up to the employer. Once it is established that the employee has failed to meet the standards that were set then the threshold for dismissal has been met. There may be cases were an employer will take into consideration the mitigating factors and choose not to dismiss an employee despite the fact that the threshold has been met but that is within the discretion of the employer.

The four-part test as established by the Tribunal was met in this case. Reasonable standards were set and communicated, clear and unequivocal warning was given, a reasonable period of time was given and the employee did not meet the standards. Under these circumstances just cause is established and there is no requirement for the payment of compensation for length of service.

ORDER

I order, under section 115 of the *Act*, that the Determination dated July 05, 2002 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal