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 -

Westcoast Custom Shower & Door Ltd.
("Westcoast" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/427
DATE OF HEARING:	August 7, 1998
DATE OF DECISION:	December 8, 1998

DECISION

APPEARANCES

Ms. Jennifer A. Agnew	on behalf of Westcoast
Mr. Wilson Wong	on behalf of himself

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 June 8, 1998. The Determination found that the Employer had terminated Mr. Wong's ("Wong") employment was terminated without "just cause" and the delegate determined that Guest was entitled to $4,410.77 on account of compensation for length of service. The Employer appeals the Determination and maintains that Wong 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 Wong's employment.

FACTS AND ANALYSIS

Westcoast supplies customized glass products, such as shower doors, to residential construction sites. Wong was employed by Westcoast as an installer between October 8, 1991 and November 6, 1997, when his employment was terminated.

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 Employer argues that Wong was rude to customers on a number of occasions, contravening company policies and common sense standards, causing loss of business, and that this conduct constitutes just cause.

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:
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> 1. A reasonable standard of performance was established and communicated to the employee;
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> 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;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 4. The employee continued to be unwilling to meet the standard.
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> 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.
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> 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."

In my view, this case turns on the evidence of Meppelink and Wong.

From the outset that I am satisfied that the Employer made its expectations and required standards known to its employees, including Wong. I agree with the Employer that, in any event, many of these standards are common sense. Not getting into arguments with customers, being courteous etc. are not unreasonable standards. The Employer's witnesses testified that employees were aware of performance standards, among others, from memoranda from the Employer. Reid explained that Wong likely would have been aware of these and other company policies which were posted on bulletin boards and attached with pay cheques. Meppelink also held staff meetings in response to customer complaints. In cross examination, Wong admitted that he was aware of the Employer's standards and expectations. In my view, he was also aware of the consequences to the Employer's business should he fail to adhere to those standards and expectations: loss of future business and the customer refusing to pay for a customized product which cannot be resold or reused elsewhere.

One memorandum, dated January 1995, addressed to all staff complained of damage to fixtures and mess in the shop. Another memorandum, dated August 14, 1997, addressed to installers, and not to Wong specifically, stated:

> "I do not know how many times I have told you guys to take off your shoes, to clean up after yourself, to sweep up your filings, to cut in the garage or outside the house, and still I am receiving complaints from builders. Each one of you is at fault. Just because a house is messy when you install, does not give you the right to make a bigger mess. If a builder ask you to clean up your mess, clean it up. You do not have the right to argue with him, even if the house is a pig sty. It is hard enough to get business in today's market, and to maintain it requires that we be as good as possible. If we lose a builder because of the installer's performance or attitude, the individual will not be employed here. I cannot afford to lose any accounts at this time."

The January 1995 memorandum stated:

> "1) Damage on job sites From now on, whenever I am billed for damage to bathroom fixtures or floors, whomever is initialled on the work orders as installers, will be responsible for the cost. If the damage is evident and obvious, and I do not care of how good an excuse is given. The money will be deducted."

These memoranda are addressed to staff in general, and I do not accept that they constitute warnings to Wong.

The Employer terminated Wong's employment on November 6 due to "various customer complaints". The termination letter indicated that Wilson had been given two earlier warnings. Mr. Barry Meppelink ("Meppelink"), the owner of Westcoast, testified that he had met with Wong on several occasions with respect to complaints from customers. According to the Employer, the last two incidents triggered Wong's termination. These incidents relied upon to constitute cause concerned:

1. Stirling Development:

   The customer complained to Meppelink that Wong had scratched a floor. (Meppelink did not recall if he had a meeting with Wong with respect to this incident). The customer never returned to Westcoast.

   Wong testified that he never heard anything about this complaint.

2. Spools Lumber (February 1996):

   Meppelink explained that the customer complained to him that Wong had used the customer's cell phone and used profanities when he was asked to return the phone. The customer ordered Wong off the work site. Meppelink said that he told Wong that he would have to change and "grow up" and that failure to do so would "jeopardize his employment". The Employer received no further business from this customer.

   Wong testified that the installer on this job was someone else and that the customer was unhappy with the installations. Wong asked to borrow the customers cell phone to call the Employer. Wong talked to Meppelink but was put on hold several times. The customer was angry because Wong could not get the required information for him and asked him to leave and get the information.

3. Tawana Construction (March 1997):

   The customer was irate and complained to Meppelink that he had found Wong standing on a black lacquer toilet with his sand and metal covered shoes. When asked to step down, Wong had directed profanities at the customer. Meppelink said he received two call from the builder and a contractor on the site complaining about Wong to the effect that "who is the ass-hole you sent to my work site". Meppeling said that he told Wong that "if it happened again, he would be out of a job". Meppelink said he sent somebody else to finish the job. According to Meppelink, Tawana was a good customer but "to this day never ordered any product again".

Wong denied using profanities at the customer or getting into an argument with him. He agreed that he had been standing on the toilet but said that he had covered his shoes. He agreed that the builder was irate and had requested that he leave. He did not agree, however, that the builder was irate at him: he was "irate in general". Wong also agreed that he had a conversation with Meppelink about the incident upon his return to Westcoast. However, Meppelink had merely told him to "be more careful" in the future.

4. RJR Construction (November 6, 1997):

Meppelink explained that the customer was irate and complained that Wong would not install a product in the manner requested. The customer had ordered a specific pre-measured product with instructions to build it in a certain manner. According to Meppelink, the customer said that Wong swore at him and said that the Employer "did not know what it was doing", "was stupid" and that the "product could not be installed that way".

Wong testified that changes were required to do the job. He could not install the shower door because it was the wrong size and the customer had to wait 4-5 days. The customer was unhappy about the wait. Wong returned on November 6 and completed the installation. He explained that the shower was too tight against the wall. There was a scratch on the glass which he explained to the customer he could change if the customer did not mind waiting. Wong denied having an argument with the customer, "bad-mouthing the company" or using profanities. He said he telephoned Mr. Glyn Reid ("Reid"), the Employer's warehouse manager, and told him that he could not do the installation.

5. BTL Construction (November 6, 1997):

The customer complained to Meppelink that he had asked Wong to get a shim, but that Wong had ignored him and refused to acknowledge his presence. Meppelink said Wong should have cooperated. Meppelink said he was told not to send Wong again.

Wong agreed that he attended the work site. His explanation is that a person, who did not identify himself, asked him, while he was working on a shower tub door, if he had any shims and that he told the person to wait while he completed the installation. He said that he went to his truck but did not find any shims. He went back into the house and, not finding the person he had spoken to, told some of the workers present at the site that he would bring some shims from the shop. Upon his return to the Employer, he spoke with Reid who said Meppelink wanted to speak with him. Meppelink said that there had been customer complaints and terminated his employment.

One of the questions is whether Wong received a written warning concerning the Tawana Construction complaint. Meppelink explained that he never gave warning letters to employees personally. One copy was attached with the pay cheque at the end of the pay period, another copy was put in the payroll book. Meppelink also explained that he wrote a hand written warning letter to Wong, which was attached to his pay cheque given to him at the end of the pay period:

> "Thursday, March 6/97
> Attn Wilson Wong,
> This is a confirmation of our meeting today, in regards to Oliver of Tawana Const ... You are forewarned that if you treat or respond to our customers in a rude manner, that you will no longer be employed here. You have been warned many times to remember your shoes, and clean up your mess. Failure to do so in future will result in your termination.
> Barry M"

Wong explained he never saw the March 6 letter until the delegate showed it to him in the course of her investigation. Ms. Joanne Brassington is a former employee of Westcoast. She was the Employer's office administrator between January 1994 and June 1997. She explained that Meppelink's practice was to have discipline meetings in private--behind closed doors--with the employee in question. She was aware of what transpired during these meetings because Meppelink would often discuss the incidents with her before or after the meetings. Warning letters were either typed by her or hand written by Meppelink. Meppelink attached the letters with the pay cheques, which she prepared for his signature, after which she put them in envelopes. She also put a copy of any discipline letter into the payroll book which she kept manually for backup. She testified that, while she did not recall specifically putting the letter into the envelope with Wong's pay cheque, she recalled seeing a copy of the March 6 warning letter, handwritten by Meppelink to Wong, on or about that date when she put it into the payroll book. While I am prepared to accept her evidence on that point, there is, nevertheless, no direct evidence which places this warning into Wong's hands. That, however, does not mean that I must disregard the circumstances of this complaint. As noted by the Employer, there is no requirement under the *Act* that warnings be in writing. It is simply easier for an employer to prove a written warning (*Ruby Enterprises Ltd.*, BCEST #D208/98).

Wong stated in cross examination that he "apologized" to Meppelink who was "understanding". This lends credibility to the allegation that he had been rude to the customer. Even if I accept that Wong received a warning for with respect to the Tawana Construction complaint, and I am prepared to accept that, based on the evidence before me, I do not find that the Employer has established just cause.

Turning briefly to the two fist incidents or complaints, Meppelink did not recall if he, in fact, met with Wong regarding the Stirling Construction complaint. Wong recalled a "discussion in general" concerning Spools Lumber. In these circumstances, I do not find that the Employer satisfied the burden to prove that Wong had been warned in clear and unequivocal terms. The Employer's case suffers from a more fundamental problem.

Swearing or directing profanities at customers may certainly constitute just cause for termination. While I have some sympathy for the Employer in this case, I am troubled by the lack of direct or circumstantial evidence with respect to the incidents relied upon by the Employer for Wong's termination. In my view, this is fatal to the appeal. The Employer did not call any of the customers, or perhaps other employees, who witnessed the incidents with Wong, to testify at the hearing. As well, there was no documentary evidence to support the allegations that Wong had been removed from the work site and other employees had been sent. Work orders and other records may have been able to shed light on these questions.

The Employer's evidence boils down to the following proposition: it received customer complaints that Wong was rude. I accept the fact that the Employer received complaints from customers. While it is often said in business that "the customer is always right", that maxim does not apply to the law of dismissal. Wong's evidence is that the facts underlying the complaints are not true. In other words, he was not rude. The Employer argues that Wong is not credible and ought not to be believed. I am not satisfied that Wong's testimony should be disregarded. In effect, the Employer is arguing that the fact that complaints were made is evidence of the facts underlying the complaints or that I may infer those facts from the fact that complaints were made against Wong. The evidence tendered by the Employer on the material facts is hearsay, *i.e.*, "... statements ... made by persons otherwise than in testimony ... if such statements are tendered either as proof of their truth or as proof of assertations implicit therein": Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Toronto, Vancouver: Butterworth, 1992) at 156. While Wong did not object to the introduction of the evidence, I am of the view that I cannot give much weight to the Employer's evidence of customer complaints, particularly where this evidence is not corroborated by other credible evidence, other than to establish that complaints were made. Whether the action is framed in common law or under the statute, the Employer must prove cause for termination. In my view, this means that the Employer--if called upon to do so, as in this case--must ultimately prove the facts relied upon.

Having considered all the circumstances, I am not persuaded that Employer has proved cause and, in the result, that the appeal can succeed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated June 8, 1998 be confirmed and the amount held in trust be paid out to Wong together with such interest as may have accrued.

Ib Skov Petersen
Adjudicator