

**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 -

Greater Vancouver Restaurant Development Corporation  
Operating as Burger King

(“Burger King”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 97/727

**DATE OF DECISION:** November 25, 1997

**DECISION**

**OVERVIEW**

This is an appeal by Burger King under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued on September 15, 1997 by the Director of Employment Standards (“the Director”).

Donna Burton (“Burton”) was registered with POLARIS Employment Services Society which provides persons with a developmental disability the means to participate in quality employment opportunities. POLARIS assisted Burton in employment matters. That organization helped her in making the complaint and in responding to the appeal filed by Burger King.

**ISSUE TO BE DECIDED**

The issue is whether Burger King had just cause under section 63 of the *Act* to terminate the employment of Burton.

**FACTS**

In the Determination under appeal here, the Director’s delegate determined that Burton had been terminated without just cause and was owed \$1161.31 as compensation for being dismissed without just cause, vacation pay and interest. The facts were set out fully in the determination and the parties have not introduced new evidence to challenge those findings.

Burton was employed at Burger King at its 1695 Main Street, Vancouver location as a lobby person since May 9, 1989. At some time late in November early December, 1996 the employer unilaterally reduced Burton’s hours. Finally, on January 15, 1997, Burton was dismissed without notice or compensation for service.

An individual from POLARIS, Earl Anderson, contacted the Burger King Manager Janif Mohammed (“Mohammed”) to ascertain why Burton’s hours had been reduced. Anderson maintained that he was not able to determine why this happened, from the information offered by Mohammed. Another POLARIS employee, Alice Cheung, then contacted Mohammed; she, too, was unable to ascertain why Burton’s hours had been reduced. The Employment Standards Officer discussed the termination with Mohammed and was advised that Burton was dismissed because she was not friendly to customers. Mohammed said he discussed this with an individual from POLARIS and assumed someone from that organization would talk to her. When she did not take corrective action, he dismissed her. He

acknowledged that he had no documentation or other notes to show how he had attempted to correct the performance problems.

The Employment Standards Officer concluded that Burton had been wrongly dismissed since she had not been advised by her employer that her performance was unacceptable or that if she did not improve, her employment would be in jeopardy. Nor was she given any instruction in how to improve, or any time to learn what changes were needed. In calculating the sum payable for compensation for length of service, the Employment Standards Officer based her calculations on the last eight weeks of Burton's normal shift, in October and November of 1996.

On behalf of Burger, King Mohammed argues that he told Burton to improve and she was unable to. He indicated that an individual from POLARIS, Debbie, came to see him on behalf of Burton and they discussed Burton's attitude. He indicated that Debbie agreed to help him take steps to improve Burton's attitude on the job. He said Debbie came to Burger King regularly to help Burton but after a "few months" of Debbie showing Burton what to do, there was still no improvement. He said Debbie was present when he told Burton that her performance had to improve or she would be dismissed. During this period Mohammed was asked by Debbie if Burton could also work at a Bingo Hall and he agreed. He said he "fully informed" Earl Anderson: "we tried to improve her (Donna [Burton]) for one year and we couldn't get the result." He said that neither Anderson nor Cheung had been fully informed of Burton's situation as Debbie was the worker on Burton's file.

On behalf of Burton, Cheung said that Anderson had worked with Donna and he could not ascertain from Mohammed why Burton's hours had been reduced. Cheung said that when he contacted Mohammed, his responses were "ambiguous".

## **ANALYSIS**

An employer can terminate for poor work performance where the employee has been clearly advised of the specific problems; given instructions on how to improve and time to do so; and is aware that termination will follow if there is no improvement. Moreover, the onus is on the employer to establish just cause and in the circumstances here, just cause has not been shown. Like the Employment Standards Officer, I find there was an inadequate attempt by management to advise Burton that her employment was in jeopardy if her work performance did not improve. I also find inadequate attempts to inform Burton of the specifics of the performance difficulties and an inadequate opportunity to improve.

Cheung states that neither she nor Anderson were told enough to be able to advise Burton of the problems and that Mohammed was ambiguous in the statements he was making to them. In the appeal submissions, Mohammed identifies an individual by the name of Debbie from POLARIS as being the individual with the most accurate information. However, she was not

mentioned by the Employment Standards Officer in the determination. Moreover, Burger King, which has the onus in these proceedings to show a problem in the Determination, did not introduce any direct evidence from “Debbie” to verify her participation. As the facts surrounding her participation are unsubstantiated hearsay, I do not accept that she had been advised of the specifics of the performance problems claimed by Burger King.

I was also noted one important inconsistency in the information provided by Mohammed to this Tribunal”: in one place he said that he had been working with Debbie for a few months but subsequently stated that it was one year. I am also troubled by his apparent failure to mention “Debbie” to the Employment Standards Officer who investigated the complaint. If he had mentioned “Debbie” to the Employment Standards officer during the investigation state, I would have expected him to appeal on the ground that Debbie had not been interviewed by the Employment Standards Officer. Since that is not one of the specifics alleged, I infer that he had not mentioned her earlier.

I also confirm use in the Determination of Burton’s wage rate during the last week of her regular shift to determine compensation owed.

Finally, the outcome of this appeal does not hinge on Burton’s status as a mentally challenged individual. The procedure and lack of documentation followed by Burger King was the determining factor.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination dated September 15, 1997.

**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**