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 -

Elves Embroidery Inc.
("Elves" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/644

DATE OF HEARING: November 24, 2000

DATE OF DECISION: December 19, 2000

DECISION

APPEARANCES:

Mr. Bob Butterworth	on behalf of the Employer
Ms. Susan Head	on behalf of herself

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 August 24, 2000. In the Determination, the Director's delegate found that the Employer had terminated Head's employment without cause and that, therefore, she was entitled to compensation for length of service. The delegate determined that Christianson was entitled to $4,815.31.

ISSUES

The Employee appeals the Determination and says the Determination is incorrect in that the Employer had cause for the termination.

FACTS AND ANALYSIS

As mentioned in many cases of this Tribunal, the appellant, in this case the Employer has the onus to satisfy me that the Determination is wrong. For the reasons set out below, I am not satisfied that the Employer has met that burden.

The material facts are relatively straightforward. Head was employed as manager and computer embroiderer for Elves between January 1995 and October 25, 1999, when her employment was terminated. She was earning $2,000 every two weeks.

Head was on an unpaid medical leave and on October 18, 1999, informed the Employer that she would be returning to work on November 1, 1999. In response, she received a letter from the Employer's legal counsel, dated October 25, 1999, informing her that she was terminated for cause. The reasons for the termination were set out in the letter. First, Head had taken a company cheque to pay an accountant to draft a shareholder agreement, whereby Head would become a "partner in the business." There had been discussions on and off about this over the years since the business was started up. Second, the Employer alleged that Head had not properly performed the duties of her employment. This was based on allegations of poor workmanship and refusal to follow client instructions. The Employer's appeal attached a letter dated 1995 from a dissatisfied customer. It is clear that the main issue here is the alleged unauthorized use of company funds. In any event, Head denies both grounds.

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 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;
> 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;
> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
> 4. The employee continued to be unwilling to meet the standard.
>
> 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.
>
> 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 this case, the burden is on the Employer, as the appellant, to persuade me that the Determination should be set aside. The Employer, as well, has the burden to prove just cause for the termination. I am not satisfied that the Employer has discharged either burden.

This case turns in large measure on the credibility of the parties. I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Mindful of that test, I prefer the testimony of Head to that of Butterworth where there is a conflict.

Butterworth testified briefly. Head testified. Her evidence was more detailed. She also called Ms. Jo Coffey, an accountant, to testify.

Butterworth explained that the business of Elves had started up following discussions between Head, John Hazel and Butterworth in 1994. The business opened in January 1995. Butterworth explained that Head was hired as an employee to run the business. She was paid a wage. Butterworth operated another business at the time. He retired from that business in 1999 and became more involved in the Elves' business. At that time, he said he discovered "discrepancies" and decided to make changes in the manner in which the business was run, for example, he wanted Head to primarily focus on computer embroidery rather than running the business. There is some dispute over how these changes were implemented. Head explained that she suffered great stress as a result of this and, ultimately, went on unpaid sick leave.

In June 1999, Butterworth went away on vacation. He had left signed company cheques for use during his absence. Head testified that these were generally for use to pay wages, buy supplies etc. There is no dispute that Head went to Coffey, an accountant, to have her prepare a shareholder agreement. She paid Coffey's $1,000 retainer by company cheque. Head does not dispute this.

When Butterworth returned from his vacation, he said that Head made no mention of the shareholder agreement until he discovered the cheque. He contacted Coffey and demanded the return of the retainer and eventually settled for the return of the balance, paying for the work already done on the file. He received some $727 back from the accountant.

Head testified in some detail about her dealings with the Employer. It is clear from her testimony that the relationship soured after Butterworth retired from his other business and he started involving himself in the business that, up to that time, had been built up by Head. Butterworth's involvement had for the most part been that of an investor. There was no disagreement that Head and Butterworth from time to time had discussed Head's "partnership" in the business. At one point, Butterworth prepared a draft agreement. These discussions had not come to fruition. Butterworth acknowledges that he told Head shortly before he and his wife went on vacation in June 1999 that Head should do something about the business because if anything happened to him and his wife, the business would then go to his children, leaving Head unprotected. Butterworth testified that he was talking about insurance. Head, on the other hand, said that Butterworth told her, in a meeting where Hazel was present, to go and get the shareholder agreement done and that the company would pay for it. She made an appointment to see Coffey the following week. She did that and instructed Coffey to prepare a shareholder agreement. As a part of that Coffey recommended that the parties be covered by insurance.

When she told Butterworth about the shareholder agreement upon his return, he wanted her to call the accountant and get the money back. Head was not willing to do that, so Butterworth ended up calling Coffey himself. According to Head, Butterworth told Coffey that he had changed his mind about the "partnership." As mentioned above, Butterworth had the balance of the retainer returned. Head testified that Butterworth requested that she pay the difference. She refused to do this. Apparently, Butterworth told her that he had spoken with his lawyer and been told that if Head refused to pay back to money, it would be stealing.

Subsequently, Head--based on medical advice--went on sick leave around July 27, 1999. Head was on medical leave and on October 18, 1999, informed the Employer that she would be returning to work on November 1, 1999. In response, she received a letter from the Employer's legal counsel, dated October 25, 1999, informing her that she was terminated for cause.

The Employer did not have cause for the termination of Head's employment. If the Employer was of the view that Head had made unauthorized use of company funds, a serious allegation, indeed, and--in the circumstances--equivalent to theft, it is not credible that the Employer would wait, as it did, until October to terminate Head's employment. In any event, I prefer Head's testimony that she was authorized to use the company cheque to pay for the shareholder agreement. In my view, this is supported by the history of the parties' relationship. Butterworth says that he did not authorize Head to get a shareholder agreement drafted up and to be paid for by the Employer. In the circumstances, it makes more sense that Butterworth and Head had agreed to have an agreement prepared and that the company would pay for this agreement, but that Butterworth subsequently changed his mind. The insurance policy to protect Head in the case of his or his wife's death, brought up by Butterworth makes sense only in the context of a partnership or a shareholder agreement.

As for the allegations of poor performance etc., it is telling that the Employer's appeal attaches a customer complaint from 1995. The Employer also submitted a couple of letters from dissatisfied customers. These individuals did not testify and I place little weight on this evidence. In any event, the Employer's testimony did not in any substantial manner address these matters. In my opinion, this does not constitute cause for dismissal. Even if I accepted the veracity of the Employer's allegations, and I do not, these incidents would not constitute cause for dismissal under the test set out in *Kruger*, *above*.

In my view, the delegate thoroughly canvassed the issues before him. There was nothing before me to seriously challenge his findings and conclusions. I dismiss the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 22, 2000 be confirmed.

Ib S. Petersen

Ib S. Petersen
Adjudicator
Employment Standards Tribunal