

BC EST #D 583/97

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 -

(“ Teemac Holdings Ltd. operating as Camera Expert - 1 Hour Photo”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

Adjudicator: Paul E. Love

File No.: 97/766

Date of Decision: January 14, 1998

DECISION

OVERVIEW

This is an appeal by Teemac Holdings Ltd. operating as Camera Expert - 1 Hour Photo ("Camera Expert"), pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination issued on September 25, 1997. In this appeal, the employer's claim that it had just cause to dismiss Teri McGrath, is rejected.

ISSUES TO BE DECIDED

Did the employer have just cause to dismiss Teri McGrath?

FACTS

Teri McGrath was employed as a photographic technician with Camera Expert from March 13 to October 9, 1995, in Kelowna, British Columbia. She had previously been employed with this employer. While the employer viewed her as a marginal employee at the time of hiring, it did not place her on a probationary term. At the time of hiring there appears to have been some discussions between the parties concerning the need for timeliness in attendance, and the employer had expressed a concern with the employee showing up "hung over".

On October 10, 1995, the employee was terminated when she arrived at work 40 minutes late. The employee was at a learning assistance meeting concerning her child's school performance, and that meeting continued longer than she expected. Although the employee offered to make up the time lost, she was dismissed.

On August 28, 1995 the employee was 45 minutes late for work. She apparently had problems with the repair of her car, and also was delayed due to the opening of a bridge. On September 29, 1995 the employee was 1.5 hours late, because of lack of a sitter. The employee was scheduled to work at 7:45 am on October 5, 1995. She failed to appear at work, and she phoned the employer's manager and advised that she would not be in to work because she was too intoxicated.

ANALYSIS

In a dismissal case, the burden is on the employer to demonstrate that there was just and proper cause for the dismissal. In this case there was no evidence of any written warnings to the employee. There was no evidence of any discipline being meted out to the employee prior to the termination. While the employer contends that this employee was a marginal employee, hired only because of staff turnover, it did not place her on a probationary period at the time of hire.

An employer is entitled to have timely and regular attendance by its employees. The lack of timely and regular attendance can impose hardship or harm on a business, particularly a small business, which may be less capable of adapting quickly to employee absence. If, however, an employer does not insist clearly that the employee attend in a regular and timely fashion, it will not be able to rely on this point to establish cause for dismissal on this basis. It is a question of fairness. In this particular case the Director's delegate found that Ms. McGrath was not aware her job was in jeopardy. The Director's delegate was in the position to interview all the relevant witnesses. The Director's delegate apparently did not accept the employer's evidence that it had disciplined the employee on any prior occasion for an attitude problem, or lateness.

Both the employee and the employer have made extensive written submissions on the issue of whether there was cause for the dismissal. The employer has argued that there was a "deliberate and willful flouting of the employment relationship", when Ms. McGrath failed to attend on December 5, 1995. I take this as an allegation that Ms. McGrath engaged in insubordinate conduct when she failed to attend on December 5 and attended late on December 12. I would characterize the absence on December 5, 1995 as an absence due to alcohol abuse. An employer may discharge an employee if abuse of alcoholic substances interferes with the capacity of the employee to perform the job duties. There appears to have been no immediate discipline imposed as a result of this absence. The facts alleged by the employer fall short of proof of a substance abuse problem which interferes with the capacity of Ms. McGrath to remain an employee of Camera Expert.

In my view, the 3 incidents of lateness and one incident of non-attendance in this case does not give rise to a fundamental breach of the employment relationship. The absences on August 28, 1995 and September 29, 1995, were explained by the employee and the explanations apparently accepted by the employer. No discipline ensued. Had the employer made the employee aware, prior to December 5, 1995, that no lateness or absence from work due to intoxication would be tolerated, discharge for cause would have been an appropriate penalty. While there may have been discussions with respect to work performance, no clear warning was given to Ms. McGrath that continued lateness or non-attendance would place her job in jeopardy. Had the employer given Ms. McGrath a written warning concerning her past attendance, indicating that her job was in jeopardy, or

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if the employer had given written directions to attend on time, and without fail, I would have had no difficulty in finding that the employer established just cause. In this case, I find that the employer has failed to discharge the burden of proof.

Ms. McGrath was employed for more than six months but less than a year. She is entitled to the minimum notice period set out in the act of two weeks severance pay. The Director's delegate calculated this amount at \$1,008.98 consisting of \$870.00 for compensation for length of service, \$34.80 vacation pay, and interest of \$104.18.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated September 25, 1997 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal