

An appeal

- by -

Mary Colleen Dyck, formerly Mary Colleen Hawryluk, operating as Optimal
Collection & Tracing Services
("Optimal")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/195

DATE OF DECISION: January 4, 2005

DECISION

SUBMISSIONS

Mary Dyck	on behalf of Optimal Collections & Tracing Services
Lynne L. Egan	on behalf of the Director of Employment Standards
Janie Collins	on her own behalf

OVERVIEW

This is an appeal by Mary C. Dyck operating as Optimal Collection & Tracing Services ("Optimal"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued September 28, 2004.

Janie M. Collins worked as an office manager and tracer for Optimal, a skip tracing and collection business, from October 29, 2002 until November 27, 2003, when her employment was terminated. Ms. Collins filed a complaint alleging that she was owed a bonus and compensation for length of service.

The Director's delegate held a hearing into Ms. Collins' complaint on August 26, 2004, and determined that Optimal contravened Sections 18 and 63 of the *Employment Standards Act* in failing to pay Ms. Collins wages and compensation for length of service. She concluded that Ms. Collins was entitled to wages, compensation, vacation pay and interest in the total amount of \$1,858.010. The delegate also imposed a \$1,000 penalty on Optimal for the contraventions, pursuant to section 29(1) of the *Employment Standards Regulations*.

Although Ms. Dyck sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

1. Whether the delegate erred in law in determining that Optimal had failed to discharge the burden of establishing just cause; and
2. Whether the delegate failed to observe the principles of natural justice in making the determination.

FACTS

On occasion, Optimal paid its employees bonuses for good performance. The delegate found that Ms. Dyck took her staff to lunch in October or November, 2003. Ms. Dyck's evidence was that she announced to her staff they would receive a bonus of \$250.00, once she had "crunched the numbers", or, contingent on finalizing the company's performance, and each employees' contribution to that performance. Subsequently, Ms. Dyck paid the bonus to all the staff but Ms. Collins. Her evidence was that Ms. Collins did not receive a bonus because she had not met her performance target.

Ms. Collins' evidence was that at the luncheon, Ms. Dyck announced that all of the staff would be getting a bonus, and that it was not contingent on performance. She also testified that Ms. Dyck told staff that they could receive the bonus immediately, or wait until Christmas. All three of the other employees said they would take their bonus immediately, Ms. Collins said she would wait until Christmas. Ms. Collins said that, in November, Ms. Dyck told her that she did not qualify for the bonus.

The undisputed evidence is that all other staff members received their bonus immediately. Ms. Dyck also did not dispute that Ms. Collins had always received a bonus each time the other employees received their bonuses, even though she had never met her performance targets during the period of her employment.

The delegate heard evidence from another employee, Ms. Cobb, on behalf of the employer. Ms. Cobb agreed with a question posed by Ms. Dyck that employees would receive a bonus if the employee reached a target following a financial analysis.

The delegate discounted Ms. Cobb's evidence on the basis of her ongoing loyalty to her employer, as well as the leading nature of the questions put to her by Ms. Dyck.

The delegate noted difficulties in the conduct of the hearing as follows:

The hearing proceedings quickly became disruptive with constant arguing, interrupting, and name-calling. It was very difficult for me to extract the evidence required for finding of fact. Questions that I posed to the employer were met with defensiveness. The employer stated that, from my questions and body language, it was clear to her that I had made my decision. She questioned my authority to interpret the Act and to apply the jurisprudence with respect to just cause termination. Both parties accused the other of being responsible for what both described as a high-tension workplace environment.

The delegate ultimately concluded that Ms. Dyck did not make the payment of the bonus contingent on performance. She found it was more probable that a bonus would be paid because the mood at the luncheon was upbeat, and that she was thanking her staff for work well done. She also found that, had Ms. Collins elected to receive her payment immediately, as other staff did, she would have received it. She found that "something happened in November to cause [Ms. Dyck] to renege on her promise to pay the bonus to [Ms.] Collins". There was evidence before the delegate that the relationship between the parties deteriorated severely in November, leading to Ms. Collins' dismissal on November 27, 2003.

The delegate concluded that Ms. Dyck promised the payment of the \$250.00 bonus, and the payment was not contingent on Ms. Collins' performance. She noted that bonus payments were discretionary, but when it was paid, it was based on performance or efficiency. She determined that the bonus payment fell within the definition of wages in the Act, and thus enforceable by the Director. She further determined that Ms. Collins was entitled to the bonus, and that Ms. Dyck's failure to pay it constituted a contravention of section 18.

Ms. Dyck's evidence at the hearing was that Ms. Collins' employment was terminated for cause, specifically, poor attitude and performance. The delegate considered the conflicting evidence of the parties, noted that Ms. Dyck had not advised Ms. Collins that her employment was in jeopardy, and further noted that Ms. Dyck was unable to provide evidence of specific client complaints about Ms. Collins, incorrect information which Ms. Collins might have been responsible for, or any analysis establishing that Ms. Collins' error rate was higher than other staff members.

The delegate determined that Ms. Dyck failed to discharge the burden of establishing that Ms. Collins' employment was terminated for cause. She found no evidence that Ms. Collins had fundamentally breached the employment relationship. The delegate also concluded that Ms. Dyck had not established that Ms. Collins' work was below acceptable standards, or that Ms. Collins had been warned that her employment was in jeopardy if she failed to reach acceptable performance levels. The delegate found that Ms. Collins was entitled to compensation for length of service.

ARGUMENT

Ms. Dyck does not set out what errors of law the delegate allegedly made, nor does she say how the delegate failed to observe the principles of natural justice. Her submission is largely argumentative, and, I infer, a repeat of arguments she made at the hearing.

Ms. Dyck contends that the delegate erred in discounting Ms. Cobb's evidence due to a fear of losing her employment. She submits that Ms. Cobb was never asked whether she considered her job in jeopardy, nor had she implied that in her evidence. Further, she said that only two tracers were at lunch, not three, that the lunch was held on October 1, 2003, and the bonus was paid to the secretary and one tracer on October 3, 2003. She said that the third tracer was not hired until October 16, 2003, and therefore was not entitled to a bonus.

Ms. Dyck also says that Ms. Collins never met her performance targets, and that she had been verbally warned on at least two occasions that that her behaviour was unsatisfactory. She contends that Ms. Collins "knew full well that should her behaviour continue it would not be tolerated..."

The final paragraph of Ms. Dyck's submission states, in part, as follows: "...obviously, my interpretation of "Just Cause" set out in the Act is not that of the Ministry's..."

Included with Ms. Dyck's submission is a letter from Ms. Cobb, who indicated that she was never afraid of losing her job at Optimal, and in fact had contemplated not returning to work after her maternity leave. She also stated that it was not Ms. Dyck's management style to deal with office problems or issues in writing.

The delegate provided the record of materials before her at the hearing.

Ms. Collins submits that Ms. Dyck failed to provide any evidence that would negate the delegate's findings. She submitted a letter from the secretary who spoke to how bonuses were paid during the period of his employment. His letter supported Ms. Collins' evidence at the hearing, stating that Ms. Dyck had made no mention of number crunching during the luncheon; rather this condition arose only in November.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
- or

- (c) evidence has become available that was not available at the time the determination was being made

The burden is on the appellant to demonstrate, with persuasive and compelling evidence, that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.

Ms. Dyck did not clearly state what errors of law the delegate made, or how the rules of natural justice may not have been observed. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the “rules of natural justice” and the other grounds identified under the Act, the grounds for an appeal “are often an opaque mystery to someone who is untrained in the law.” The Tribunal found that appeals should not be “mechanically adjudicate[d]... based solely on the particular “box” that an appellant has – often without a full, or even any, understanding – simply checked off.”

I have attempted to address Optimal’s concerns in light of the grounds identified. The first is the allegation that the delegate failed to observe the principles of natural justice.

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker. There is nothing apparent on the face of the record that persuades me there was a breach of the principles of natural justice. Ms. Dyck was present, and had the opportunity to make extensive submissions, call a witness and cross examine Ms. Collins. I note from Ms. Dyck’s appeal submissions that she was tired, just having arrived on a delayed trip to Europe. While Ms. Dyck’s lack of sleep may have accounted for what the delegate characterized as “disruptive” proceedings, I am unable to find that she was denied natural justice.

With respect to the allegations of errors of law, Optimal must show that the delegate made palpable and overriding errors in determining that the bonus payment constituted wages, and that Ms. Collins was dismissed without cause.

The palpable and overriding test may be described as a finding that the factual conclusions are inadequately supported, or wholly unsupported by the evidentiary record. The burden of proving an error of law on a question of fact is a heavy one. The Tribunal is not entitled to interfere with findings of facts merely because it may take a different view of the evidence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04)

The delegate weighed the evidence of the parties, and made a determination on the issue of whether the bonus was discretionary based on her assessment of the credibility of the parties. The delegate preferred the evidence of Ms. Collins. The delegate’s preference of one party’s evidence over another does not constitute an error unless it is wholly unsupported. Having regard to all of the evidence before the delegate, I am unable to find the delegate erred in preferring Ms. Collins’ evidence over that of the employer.

I am similarly unable to find that the delegate erred in finding that Ms. Collins was entitled to compensation for length of service. The delegate set out the tests for determining what constituted just cause for dismissal. Ms. Dyck provided no clear and compelling evidence that the delegate erred in her conclusion that Ms. Collins had not been discharged for just cause. There was no evidence that Ms.

Collins was advised her conduct was unsatisfactory, or that there were minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures. Indeed, Ms. Cobb's letter in support of Ms. Dyck's appeal notes that Ms. Dyck did not deal with office problems in writing. Ms. Dyck's submission notes that her own view of what constitutes just cause does not accord with that of the "Ministry". I find that the delegate applied the law correctly in arriving at her conclusion.

I am not persuaded that the delegate erred in her factual conclusions or her application of the law such that the Determination should be cancelled.

ORDER

I Order, pursuant to section 115 of the Act, that the Determination, issued September 28, 2004, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal