

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

P.A. Building Maintenance Ltd.

(“P.A. Building”)

-of a Determination issued by-

The Director Of Employment Standards

(the “Director”)

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/002

DATE OF HEARING: January 26, 1996

DATE OF DECISION: May 3, 2001

DECISION

OVERVIEW

This is an appeal by Yuan pursuant to Section 112 of the Employment Standards Act (“the Act”) against Determination Number CDET 00016 issued by John Hartmann (Hartmann’), a delegate of the Director, on November 20, 1995. The Determination states that World Journal Ltd. (“World Journal”) has not contravened the Act for the following reason : “As per my letter of November 6, 1995, after contacting your former employer I received submissions regarding progressive steps of discipline taken against you. Reviewing these I came to the conclusion that your employer produced cause for termination. Taking into consideration your experience and the culminating incident, I found that there was not liability of severance owing as per Section 63 (3) (c) of the Act.”

Yuan submitted an appeal on November 26, 1996 claiming World Journal owed him compensation for length of service.

Written submissions were received from Yuan and World Journal, and information was provided by the Director. Subsequently, an oral hearing was conducted on Jan 16, 1996 in Vancouver, British Columbia.

Persons in attendance at the hearing were:

The Appellant:

Yuan

For World Journal:

Sue Wang (‘Wang’), Supervisor of Personnel
David Shih (“Shih”), Pressman Supervisor
Tien Fu Kuo (“Kuo”), Production Manager
Samual Tung (“Tung”), General Manager

For the Director:

Hartmann, Industrial Relations Officer
Michael Fu (“Fu”), Industrial Relations Officer

The Employment Standards Tribunal provides interpreters at the request of a party to an appeal. It is the responsibility of a party to an appeal to make the request in advance of a hearing date. In this case, there was no request for an interpreter. Shortly after the hearing commenced, it became evident Shih and Kuo, and, to a lesser degree Yuan, required an interpreter. The parties agreed to have Fu act an interpreter and accepted his interpretation of evidence provided by Shih, Kuo and Yuan.

After considering all the information and evidence provided by Yuan, World Journal and the Director, I conclude that World Journal owes Yuan compensation for length of service.

FACTS

Yuan was employed by World Journal as an Off-Set Press Technician from March 1, 1992 to September 9, 1995. His weekly earnings were \$ 428.80.

Yuan's supervisor was Shih. Shih reports to Kuo.

On September 9, 1995, Yuan's employment was terminated by World Journal without notice or compensation.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer's liability to pay compensation for length of service has been discharged under Section 63 (3) (c) of the Act. That is, has World Journal demonstrated, on the balance of probabilities, that Yuan was dismissed for just cause.

ARGUMENTS

Like Hartmann, World Journal argues that Yuan is not entitled to compensation as his employment was terminated for just cause. Yuan continually made mistakes and had a poor attitude. When these matters were brought to his attention, he responded badly. He would not take responsibility for his mistakes and blamed others. Given his many years of service and inability to correct his behavior, World Journal decided to terminate Yuan's employment.

The following instances of misconduct were cited by World Journal:

1. On March 8, 1995, Yuan left work early and refused to return after several phone calls from Kuo. Kuo stated he told Yuan on March 9, 1995 that if he did this again he would be fired. Kuo stated that by this he meant if Yuan did anything serious again, he would be fired. Kuo sent a report on this incident to Tung. In his report dated March 13, 1995 Kuo requests approval to fire Yuan.

According to Wang, sometime after this report was sent to Tung, Yuan met with the President of World Journal, Chien Wu Hsiung (“Chien”) , and Chien gave Yuan another chance.

2. On June 24, 1995 and June 28, 1995, Yuan was given warning letters regarding mistakes and wastage of materials. The June 24, 1995 letter which was written by Shih states that Yuan is not excused from making so many mistakes and Shih requests immediate improvement. The June 28, 1995 letter which was written by Wang states that Yuan’s record of wastage will be included into his annual performance appraisal and each department should research a method of improvement.

Shih stated he spoke to Yuan on many occasions about his work attitude and mistakes and warned him during these times that he would be disciplined and terminated if he did not change. Shih stated that Yuan knew he was in trouble because when a new employee was hired in April 1995, Yuan asked if he was being replaced. Shih replied that Yuan should not worry if he did a good job, but if he continued as he was, then he could be replaced.

3. On July 21, 1995, when he was off duty, Yuan accessed the company computer without prior permission. Yuan was given a warning letter dated August 1, 1995 which states the incident will be kept in his personnel file and a punishment will be in place in case there is another occurrence or any other major mistake.

Yuan signed a confession dated July 30, 1995 regarding this incident which states he promises not to make the same mistake again. On the confession there is also an entry that states Yuan will be punished if he ever makes any other mistake.

4. On September 3 and 4, 1995, Yuan improperly processed film for a lantern festival ad. Shih stated that when he told Yuan to re-do the ad, he refused and was very argumentative with him and other staff. Shih stated that Yuan should have been able to do the correction but would not take responsibility. Shih re-did the ad on September 5, 1995 using the same materials available to Yuan. Shih stated the incident was very serious. The customer lost trust in World Journal and World Journal was obliged to refund the cost of the ad to the customer. This incident convinced World Journal that Yuan would never improve his conduct and so he was fired on September 9, 1995.

Yuan argues that he is entitled to compensation. The following is his response to the above four points:

1. Yuan stated he refused to return to work on March 8, 1995 because he believed that Kuo had no authority over him. Shih was his supervisor, not Kuo. Further, he denies he was

told by Kuo that he would be fired or terminated if he did this again. He does not remember Kuo ever saying anything about termination.

2. Yuan agrees he received the two warning letters but points out that neither state he will be terminated if he does not improve. Yuan admits he made mistakes while employed at World Journal. He admits he had a feeling about his job but did not know for certain that his job was in jeopardy. In August, when a new employee was hired, he asked Shih about the employee because he had a feeling the company wanted him to go. He said Shih responded by asking him why he wanted to know about the new employee as there was no problem. Yuan stated that Shih never told him, prior to his termination on September 9, 1995, that he would be fired if he did not improve or change. He said Shih only told him to do better and not to make mistakes. Yuan stated he was “60% shocked” when he was terminated by World Journal.

3. Yuan does not dispute the incident concerning the computer. He said Chien told all the employees that they should learn to use the computer and so he did. He did not know he was to get prior permission.

4. Yuan agrees a mistake was made on the ad but claims it was not his fault or responsibility. It was the responsibility of Mr. Tong and Mr. Jiaw who told him to print it at 10-30% opacity. Furthermore, Shih approved the printing of the two runs. Later, on September 5, 1995, Shih re-did the ad at 50% opacity. This was the correct opacity. Yuan claims he was not able to make the changes like Shih. Yuan agrees he got into an argument with a staff member on September 4, 1995 but the argument was not over the ad. He also claims that World Journal suffered no loss on the ad.

ANALYSIS

Section 63 of the Act states that when an employer terminates an employee, the employer is liable to pay the employee compensation for length of service. An employee with three years of service, like Yuan, is entitled to an amount equal to three weeks wages. This liability is discharged, however, if written notice is given to the employee or if the employee is dismissed for just cause.

The burden of proof for establishing that Yuan was dismissed for just cause rests with World Journal.

It is widely accepted that in order to sustain a dismissal for just cause, the employer must establish the following:

1. That reasonable standards of performance have been set and communicated to the employee;
2. That progressive discipline has been given to the employee for failure to meet such standards;
3. That the employee has been made clearly aware that his/her continued employment is in jeopardy if such standards are breached
4. That a reasonable period of time has been given to the employee to meet such standards; and
5. That the employee did not meet those standards, i.e. that there was a provable culminating incident.

I conclude, on the evidence before me, that World Journal has not established Yuan was dismissed for just cause.

I am not satisfied that Yuan was progressively disciplined for his conduct and clearly made aware that if his conduct persisted his employment with World Journal would be terminated.

There is no written documentation to show that prior to his termination Yuan was advised his employment was in jeopardy. The written warnings which were given to Yuan indicate that he needs to improve and that he will be punished if he makes further mistakes, but there is no reference to his job being in jeopardy.

Both Kuo and Shih allege they verbally advised Yuan prior to his termination that his job was in jeopardy. This is denied by Yuan, and after considering all the evidence, I prefer Yuan's evidence on this issue for the following three reasons.

First, World Journal and the Director did not bring forward any evidence on this issue prior to the hearing. That is, in the written materials provided by World Journal and the Director to the Employment Standards Tribunal in advance of the hearing, there is no specific mention that Kuo and Shih verbally warned Yuan that his job was in jeopardy. Second, Kuo's evidence regarding the statement he made to Yuan on March 9, 1995 is inconsistent with what he wrote in his report on March 13, 1995. Third, Shih's failure to terminate Yuan on June 24, 1995 or to make mention that his job was in jeopardy in the letter of warning issued on June 24, 1995 causes me to doubt Shih's claim that he told Yuan in April 1995 that if he continued in the same way he could be replaced. Alternatively, if I accept Shih's evidence that he verbally warned Yuan on many occasions that his job was in jeopardy, then I must conclude that Yuan's conduct was condoned as Shih failed to impose his threatened penalty on each of these many occasions. Where an employer does not dismiss an employee at the time of the act of misconduct, then the employee's conduct

will be held to be condoned and the employer will be precluded from dismissing the employee for that act at some later date.

Progressive discipline obliges an employer to clearly advise an employee of his/her deficiencies and that dismissal will ensue unless he/she makes specified improvements. The rationale for being crystal clear with an employee about the consequences of their behavior is to avoid any misunderstanding such as lulling them into a false sense of security that his/her performance is tolerable.

In this case, Yuan admits he had a feeling the company wanted him to go, but he claims Shih assured him there was no problem when he asked about his job in August. Yuan also admits he was “60% shocked” when he did get dismissed. Having a feeling that your employer wants you to go and being “60% shocked” does not indicate that Yuan was clearly and unequivocally put on notice that his job was on the line.

Finally, regarding the incident over the ad, I do not find that this incident in and of itself constitutes just cause for dismissal. There was insufficient evidence to suggest that this act was wilful, deliberate, and of such a consequence to repudiate the employment contract and, there was no corroborating evidence regarding World Journal’s claim about the consequences of the mistake to the company. While the incident may have been deserving of some form of discipline, I find the discipline imposed, which was termination, to be excessive in the light of the absence of any provable prior progressive discipline.

For the above reasons, I conclude, on the balance of probability, that World Journal has not met the onus of proving Yuan was dismissed for just cause.

ORDER

Pursuant to Section 115 of the Act, I order that Determination Number CDET 00016 be cancelled. I further order World Journal to pay Yuan the amount of 1286.40 as compensation for length of service.