Employment Standards TRIBUNAL

An appeal

- by -

Tanaka Offset 2000 Services Ltd.
("Tanaka 2000")

- 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

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2002/454

DATE OF DECISION: January 6, 2003

DECISION

Pursuant to section 112 of the *Employment Standards Act*, Tanaka Offset 2000 Services Ltd. ("Tanaka 2000") filed an appeal from a Determination by the Director of Employment Standards (the "Director") dated August 1, 2002, concerning a complaint by a former employee, Elizabeth Calacal ("Calacal"). The Director's delegate found that the employer had contravened section 63(2) of the Act by failing to pay sufficient compensation for length of service. The Director ordered the employer to pay $3,196.31, which included interest.

On August 26, 2002, the employer appealed the Determination on the grounds that the employer had just cause to terminated Calacal's employment and, therefore, did not owe any compensation for length of service.

ISSUE

Did the Director err in determining that Tanaka 2000 owed Calacal 8 weeks pay as compensation for length of service?

BACKGROUND

Tanaka 2000 is a business that buys and sells new and used printing equipment. Calacal commenced employment in April 1990 with Tanaka Offset Services Ltd. In December 1999 the company was sold and the name was changed to Tanaka Offset 2000 Services Ltd. The company moved its offices in May 2001. The Director found that Calacal worked as a clerk, at the rate of $14.75 per hour. Her employment continued with the new company.

Calacal left for vacation on December 5, 2001 and when she returned on January 7, 2002, her employment was terminated. Tanaka 2000 gave her the equivalent of 3 weeks salary. Calacal claims she was entitled to 8 weeks, because she worked for the former company. Tanaka 2000 says she was not entitled to any compensation for length of service because the company had just cause to fire her. However, Tanaka says the company gratuitously gave her 3 weeks salary and, when completing the Record of Employment, called it severance pay for convenience.

The Director set out the positions of both parties concerning the 'for cause' issue. Tanaka 2000 submitted that Calacal was not capable of correctly using the computer accounting program despite additional training provided by the employer. Additionally, in August 2001, the company was broken into and the computer stolen and, since Calacal had not been backing up the systems, all records were lost. In addition to saying there was just cause, Tanaka contested liability for compensation based on the time Calacal was with the former employer.

Calacal submitted that the employer told her she was being fired because of her lack of accounting/computer skills. However, she submitted that her job description never included "accountant" and that she had been hired as a clerk to answer the telephone, take orders and do company postings. She stated that she had never been told her performance was an issue and believed she had been fired so that the employer could hire another individual.

The Director found that the employer had failed to demonstrate that Calacal was terminated for just cause. Although acknowledging that Tanaka 2000 may have raised some performance issues with Calacal, the Director found that Tanaka 2000 had not warned her that job was in jeopardy. Further, section 97 of the *Act* provides that when a business is sold, employment is deemed to be continuous and uninterrupted and thus Tanaka 2000 is responsible for compensation for the full length of Calacal's employment.

SUBMISSIONS

Tanaka 2000 submitted a statement from the President of the company, and letters from the company's accounting firm and accounting program consulting firm. The president gave a chronology of events following their purchase. He submitted that at purchase it was made clear to the new owners that Calacal was the company bookkeeper. Tanaka 2000 implemented a new accounting program and provided Calacal with training. At the end of the first fiscal year (which I take to be November 2000, not 2001 as stated), the accountants alerted the company to numerous errors made by Calacal and suggested more training, which the president states was provided. Tanaka 2000 instructed Calacal to advise the company if she was not sure about the program. In August 2001 there was a break in and the computer was stolen. Because files had not been backed up, it took Calacal 4 months to input the missing data. At the end of the fiscal year, November 2001, the accounting firm again discovered problems which resulted in Tanaka 2000 bringing in a consultant, who spent two days with Calacal prior to her going on vacation

The president states,

> After assessing the situation [the consulting firm] informed us that it would take months to fix the problem and to make any sense of the data in the computer. They informed us that in their opinion Ms. Calacal was incapable of following the instructions and therefore it was their recommendation that Ms Calacal not be permitted to further use the MYOB program. This was for fear that more errors would be made that would be detrimental to the operation of the company.
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> In December 2001, Ms. Calacal was informed that if the situation did not improve that we would have to make a change. When Ms. Calacal came back from her holiday in January of this year she was told that we would have to let her go and we gave her three weeks severance pay. The reason for calling it severance pay was that there are few choices for explanations on the Record of Employment form. What were we supposed to call it? We could not refer to it being holiday pay or any other name.
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> In conclusion, our work to clean up Ms. Calacal's mess was far from over after letting her go as we were five months late in producing our year-end statement. We were also unable to collect on numerous accounts receivables due to the lack of records and elapsed time. To summarize, we gave Ms. Calacal every opportunity to learn the program and/or bring to our attention when she did not understand and she did not do either. Based on the facts that I had discussed over several telephone conversations with Ms. Esposito, we feel that the Delegate of the Director of Employment Standards, Adriana Esposito, made the wrong judgment.

The accounting firm confirmed that Calacal had difficulty using the software program, although she provided them with a good set of accounting records. After she had re-entered the data following the computer theft, the firm found "significant errors throughout the ledger. No reconciliations had been prepared for the bank account, accounts receivable sub-ledger or the accounts payable sub-ledger. Calacal manually prepared some very elaborate schedules, which appeared to accurately reflect some

areas of the activity of the company, but she seemed unable to post transactions to the general ledgers that would serve its intended purpose. The general ledger was useless in providing a basis from which we could prepare the year-end financial statements."

Calacal submitted a statement and a letter from her former employer, Mas Tanaka. He stated that her job description included receptionist, taking orders from customers, filling out work order, order parts and supplies for stock, posting daily transactions, receiving and shipping and cleaning machinery. Calacal stated that her job description was to answer phone calls, take orders, dispatch the service technicians and do company postings. She said she was never trained by an accountant to do the company's trial balance and stressed that she is not a bookkeeper. She disputed the president's claim that she had been trained on the new software program, other than how to do postings. She stated she was not trained to balance to general ledger, trial balance and "whatever internal accounting was". She stated that she was able to print out journal sales reports, receivables and statements without any problems. She also stated that Tanaka 2000 did not tell her orally or in writing that there was a problem with her performance, until the day she was terminated.

In his reply to Calacal's submission, the president submitted that she was hired as an accounting bookkeeper and he produced a business card showing her as being in 'accounting'. He also challenged her assertion about her job description noting that, if she was not the bookkeeper, who does she say was the bookkeeper?

LEGISLATION

The pertinent sections of the *Employment Standards Act* are:

Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Sale of business or assets

97 If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

ANALYSIS

An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the Act. Consistent with that approach, the burden is on Tanaka 2000 to demonstrate such an error.

It is apparent that Tanaka is challenging the determination on mixed law and fact. Tanaka 2000 submits that it had just cause to terminate the employment. However, Tanaka 2000 does not challenge the finding that it did not at any time tell Calacal that her employment was in jeopardy. Therefore, on this latter point, I take it that Tanaka is raising a point of law, that it was not required to give that warning.

One of the leading cases in British Columbia on 'just cause' is *Silverline Security Locksmith Ltd (re)* [1996] B.C.E.S.T.D. No 200; BCEST # D207/96, July 31, 1996. At paragraph 11, the tribunal stated:

> The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
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> It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:
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> 1. Reasonable standards of performance have been set and communicated to the employee;
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> 2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
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> 3. A reasonable period of time was given to the employee to meet such standards; and
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> 4. The employee did not meet those standards.

And at paragraph 15, the tribunal stated:

> The concept of "just cause" requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

This case proceeded before the Director on the issue of whether Tanaka 2000 had established 'just cause', in the sense discussed in the preceding paragraph. Tanaka 2000 maintain that it told Calacal in December 2001 that if the situation did not improve changes would have to be made. It is not apparent this was evidence before the Director but, in any event, I find that it does not satisfy the requirement that an employee be given clear and unequivocal warning that failure to meet certain standards might result in termination. Accordingly, I find that the Director did not err on this point.

Although that was the basis on which the Director proceeded, it appears to me that there is a suggestion by Tanaka 2000 that Calacal's performance was so poor as to amount to gross incompetence, which would be grounds for immediate dismissal, without warnings and without compensation. Tanaka 2000 has not directly stated this, but it is implied. It is not a point that the Director addressed.

It is not clear to me how much of the information before me was available to the Director, such as the evidence from the accounting firm or the former employer. What strikes me about this case is that there was a significant misunderstanding between Tanaka 2000 and Calacal concerning her job duties. The former employer's job description is far from that of an accountant bookkeeper. Perhaps under the former employer, there was someone else who did the bookkeeping. In any event, it appears that Tanaka 2000's assumption when they purchased the company did not accord with the employment relationship with the former owner. From the description given by the accounting firm, it appears that what Calacal was doing correctly corresponds with what she says was her understanding of her job duties.

Tanaka 2000 submitted that the business card was proof of Calacal's position in accounting. However, I note that business card was produced after the company moved its office and, therefore, does not assist in determining the employment relationship at the time Tanaka 2000 purchased the company.

I find that Tanaka 2000 has not demonstrated that the standards they want to impose, in fact, were the requirements of the job Calacal was hired for. Tanaka 2000 has not demonstrated a reasonable expectation that Calacal would have the skills of an accountant bookkeeper. The evidence shows that she was performing some bookkeeping functions well. I find that Tanaka 2000 has not established a case for alleging gross misconduct that would permit immediate termination of Calacal's employment.

Before the Tribunal, Tanaka 2000 did not make an issue of whether it would be responsible for compensation based on Calacal's employment with the former owner. I have considered the Director's findings based on s. 97 and find there is no error. Accordingly, I concur with the Director that Tanaka 2000 owes Calacal compensation based on a total of 8 weeks liability.

I find that Tanaka 2000 has not substantiated grounds to cancel the determination.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued August 1, 2002.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal