Employment Standards TRIBUNAL

An appeal

- by -

LEP Personal Law Corporation operating as Pierce Law Group, Trial Lawyers
("Pierce")

- 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: Ian Lawson

FILE No.: 2004A/179

DATE OF DECISION: January 12, 2005

DECISION

SUBMISSIONS

Lawrence E. Pierce	On behalf of L.E.P. Personal Law Corporation operating as Pierce Law Group, Trial Lawyers
Ivy Hallam	On behalf of the Director of Employment Standards
Rauni Malhi	On her own behalf

OVERVIEW

This is an appeal by L.E.P. Personal Law Corporation operating as Pierce Law Group ("Pierce") pursuant to section 112 of the *Act*. The appeal is from Determination ER#088706 issued by Ivy Hallam as a delegate of the Director of Employment Standards on September 20, 2004. The Determination required Pierce to pay compensation for length of service, wages, vacation pay and interest to Rauni Malhi ("Malhi") in the total amount of $4,130.43, together with administrative penalties in the amount of $1,000.00.

Pierce filed its appeal on October 22, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Pierce is a law firm in North Vancouver, B.C. and employed by Pierce as a legal assistant. She commenced her employment on November 12, 1998 and worked 4 days per week at $3,000.00 per month plus a percentage bonus. On January 8, 2001, Malhi gave written notice to quit, to take effect on February 2, 2001. Prior to February 2, 2001, however, Malhi negotiated better terms with Pierce and rescinded her resignation. She continued to work as a legal assistant, but for 3.5 days per week and with a higher percentage bonus.

On February 19, 2003, while Malhi was on maternity leave, Pierce asked Malhi to attend a meeting at which she was advised there were problems with her performance. Specifically, Pierce had discovered that Malhi: missed a limitation date in March, 2001; failed to add a party to a writ, which was later amended; misfiled and failed to label an important new file (which was denied by Malhi); failed to issue a notice of trial on a file which resulted in Pierce being dismissed as counsel (which Malhi says was as a result of Pierce's failure to respond to opposing counsel's letters); missed filing a trial certificate, with the result that a trial date was cancelled and had to be re-booked; failed to leave adequate instructions to her replacement prior to going on maternity leave, with the result that a party was not added to a writ; and failing to write to ICBC on a new file. As a result of this meeting, Malhi did not return to her employment at the end of her maternity leave on April 1, 2003.

Malhi filed a complaint with the Director that she had been dismissed without cause and was owed compensation for length of service. The Delegate elected to conduct a complaint hearing, which was done on March 23 and May 31, 2004. At the hearing, Malhi told the Delegate that none of above errors

were brought to her attention, save only for the missed limitation date in March, 2001, which Malhi initially brought to Pierce's attention. Lawrence Pierce gave evidence for Pierce, and told the Delegate that at the meeting on February 19, 2003, he told Malhi she could either quit or she would be terminated upon her return to work after her maternity leave. Further, when Malhi brought the missed limitation period to Pierce's attention in 2001, Malhi was told she would be allowed to "miss this one only." Pierce alleges this made it clear to Malhi that her employment was in jeopardy should any further errors occur.

ARGUMENT

Pierce alleges the Delegate erred in law by failing to accept there was just cause for Malhi's dismissal, because she had been put on notice after missing the limitation period in 2001. Pierce further argues that a higher standard of performance is to be expected of law firm employees such as Malhi, and her cumulative defaults, in addition to the initial missed limitation period, justified her dismissal. Pierce cites *Atkinson v. Boyd, Phillips & Co.* (1979), 9 B.C.L.R. 255 (C.A.) for the proposition that cumulative defaults can justify dismissal where the employee's conduct shows a general laxity and disregard of instructions. Pierce argued before the Delegate that there was a break in Malhi's employment and a new employment contract was entered into in 2001, and further, that Malhi was not dismissed but had quit her employment. Pierce does not raise these as issues in this appeal (and appropriately so).

Malhi cites *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 for the proposition that anything less than misconduct which undermines an employer's trust and confidence is not sufficient cause for dismissal. She argues that Pierce could have used other means to correct her unsatisfactory performance, as she otherwise had a discipline-free record since beginning her employment. She alleges Pierce acted in bad faith by deciding to terminate her while she was on maternity leave, and says he did so for his own monetary benefit.

ISSUE

This appeal calls for me to determine whether any error was made by delegate in finding there was no just cause for Malhi's dismissal.

ANALYSIS

The Delegate stated the following in the Determination:

> An employer must prove just cause for dismissal. Except in the case of serious misconduct (theft, assault, etc.) the employer must satisfy all four elements of the following test:
>
> (1) a reasonable standard of performance was established and communicated to the employee;
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> (2) the employee had sufficient time and a reasonable opportunity to meet the standard;
>
> (3) the employee was clearly warned that failure to meet an acceptable level of performance would result in dismissal; and
>
> (4) the employee did not meet the required standard.
>
> I accept that Malhi had problems in handling her files, and these problems became obvious to Pierce at the time when Malhi was on her maternity leave. However, the only reliable evidence

> showing Pierce had communicated to Malhi about her performance problems was a memo by Malhi explaining about the problems on March 12, 2002, but there is no evidence to indicate Pierce warned Malhi that her job was in jeopardy when he found continued problems. Pierce cannot satisfy the last 2 aspects of the above test.

At the heart of this appeal is whether the Delegate failed to properly consider Pierce's warning to Malhi after Malhi missed the limitation period in 2001: that she would be allowed to "miss this one only." Pierce argues fair warning had thereby been given to Malhi that her job was in jeopardy and she would face termination if further errors occurred.

While there is some force to Pierce's argument that the Delegate may not have appreciated the import of the warning given to Malhi in 2001, I am not satisfied that any error has occurred. The same result would have been reached by the Delegate even if she had taken proper consideration of the warning. This is so because an employee's mistakes cannot be cause for dismissal unless they undermine or seriously impair the trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship (to paraphrase the Supreme Court of Canada in *McKinley*). The issue is not that a mistake occurred, but that the employee had conducted herself in a way that rendered mistakes likely. When an employer finds an employee has misconducted herself, the employer must not only make it clear to the employee that her job is in jeopardy as a result, but set out the standard to be expected in how the employee must perform her job in the future. This is an essential prerequisite to a successful dismissal, as the employer's trust is undermined by failure to perform the job properly, and not simply by the making of another mistake.

There are many cases before this Tribunal and the courts where this common problem is explored at length. A convenient recent example is *Re Director of Employment Standards*, [2003] BCEST #RD122/03, where a Reconsideration Panel of the Tribunal states:

> We confirm that in cases where the termination of an employee is grounded in minor instances of misconduct or an inability to meet the requirements of the job, the requirement for an employer to show reasonable standards have been set and all appropriate notices and opportunities have been given is a necessary element to the employer proving the conduct of an employee justifies dismissal. It should be emphasized that this requirement is grounded in considerations of reasonableness and fairness, which is a fundamental principle underpinning all of the provisions of the *Act*. Showing the requirement has been met is necessary to establish just cause. The failure of an employer to show this requirement has been met, is a fact or circumstance that will almost invariably mitigate against a finding of just cause. Showing this requirement has been met, however, does not, in and of itself, establish just cause and, more particularly, does not preclude a consideration of other facts or circumstances that might also mitigate against a finding of just cause for dismissal.

In this light, the Delegate correctly noted (albeit in an abbreviated manner) there was no evidence presented by Pierce that an appropriate standard of performance was established for Malhi following the first missed limitation period, and no evidence that Malhi had proven incapable of meeting that standard. As Malhi had no notice of the other defaults, and accordingly had no opportunity to improve her performance respecting these, Pierce's case for just cause is considerably weakened.

Pierce submits a high standard of performance is expected of legal assistants such as Malhi, and there is no reason to disagree with that. There is, however, a much higher standard expected of lawyers who employ legal assistants to perform tasks for which lawyers bear ultimate responsibility. Avoidance of litigation errors by legal assistants is better accomplished by establishing appropriate performance

standards and regularly evaluating each employee's ability to meet these standards, than by instilling fear of dismissal in the event an error occurs. As the Tribunal noted in the Reconsideration decision quoted above, just cause is not established simply by proof of an act of default which the employee had notice would put her continued employment in jeopardy:

> The approach taken in the original decision [which was reversed by the Reconsideration Panel] could foster results that are unfair, unreasonable and unjust. Applying the reasoning in the original decision, an employer would be entitled to dismiss an employee for just cause for just a single instance of unsatisfactory job performance, incompetence, or a minor infraction of work place rules, however insignificant, provided the employer gave the proper notices and opportunities. As a result, the consequences of unsatisfactory job performance, incompetence, or minor infractions of work place rules could always be the same, irrespective of how significantly the employee's conduct in those areas impacted on and undermined the employment relationship. It is inappropriate to assume an employee's conduct automatically mandates a dismissal, just as it would be inappropriate to assume an employee's conduct automatically precludes dismissal. Absent an analysis of the surrounding circumstances of the alleged conduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal for unsatisfactory job performance, incompetence, or minor infractions of work place rules might be an overly harsh response. In addition, allowing termination for cause wherever an employee's conduct manifests unsatisfactory job performance, incompetence, or minor infractions of workplace rules would further unjustly augment the power employers wield within the employment relationship.

I am therefore of the view that no error was made in the Determination and this Appeal should be dismissed.

ORDER

Pursuant to section 115(1) of the *Act*, the appeal is dismissed and Determination ER#088706 issued on September 20, 2004 is confirmed, with interest pursuant to section 88.

Ian Lawson
Member
Employment Standards Tribunal