

An appeal

- by -

Metasoft Systems Inc.
("Metasoft" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/560

DATE OF DECISION: January 15, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Metasoft Systems Inc. (“Metasoft” or “Employer”), from a Determination dated October 22, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Employer seeks to appeal the Delegate’s finding that Leanne Brock (the “Employee”) was dismissed without just cause, and was therefore entitled to compensation for length of service. The Employer sought to introduce documents on appeal, which were not provided to the Delegate, and no explanation was provided by the Employer for the failure to provide the additional documents to the Delegate. I refused to consider the additional material, consistent with the approach of the Tribunal, set out in *Triwest Tractors Ltd., BCEST #D 268/96*. This was a case of disputed facts, and the Employer failed to establish before the Delegate that it had warned the Employee that her performance or attendance was unsatisfactory, or warned the Employee that her job was in jeopardy, prior to its dismissal of the Employee. The Employer did not demonstrate any error in the manner in which the Delegate approached the fact finding process, or any error in the legal standard. I therefore dismissed this appeal, and confirmed the Determination, in the amount of \$2,039.55 for compensation for length of service, vacation pay, and interest.

ISSUE:

Did the Delegate err in finding that the employee, Leanne Brock, was entitled to compensation for length of service?

FACTS

I decided this case after considering the written submission of the Employer, and the Delegate. The Employee did not file a submission with the Tribunal.

The employee, Leanne Brock, worked for Metasoft Systems Inc., an internet sales and marketing company from September 5, 2000 to April 29, 2002. Ms. Brock was dismissed from her employment by a letter dated April 30, 2002 which reads as follows:

I regret that your declining work performance since February 2002, and repeated absenteeism have reached unacceptable levels. You have not reported for work for 5 business days, nor have you notified me directly that you would be absent for the week of April 29, 2002.

I am forced therefore to terminate your employment with Metasoft Systems Inc. as of April 30th, 2002. Company benefits will also be terminated as of April 30, 2002.

Please return your Office key and access card.

I regret that matters could not have been redressed in a more amicable manner.

No documents were provided to the Delegate which indicated any evidence of warnings by the Employer to Ms. Brock concerning job performance concerns or absenteeism concerns, prior to the termination

letter. There is in particular, no documentary evidence that the Employer set a standard for attendance, or performance, and informed the Employee that her attendance or performance, was sub-standard. There is no documentary evidence that the Employer provided her with an opportunity to improve her attendance or performance or warned her that her job was in jeopardy. The information before the Delegate from the Employee was that she never received any verbal or written warnings concerning work performance, and she did not believe that her job was in jeopardy.

No issue is taken by the Employer with the calculations for compensation for length of service. The Delegate found that Ms. Brock was entitled to the sum of \$1,923.08, plus 4 % vacation pay in the amount of \$76.92, plus interest in the amount of \$39.55, for a total of \$2,039.55. The Delegate found also that the Employer breached sections 18(1) of the *Act* (failing to provide all wages to an employee within 48 hours after termination, and section 63(2) of the *Act* (failing to pay compensation for length of service).

Further the Delegate found that the Employer “forced” the Employee to sign a release of all liabilities in order to obtain her cheque for vacation pay. The Delegate found that any such release was contrary to section 4 of the *Act*.

Employer’s Argument:

The Employer filed an appeal alleging that the Employee was dismissed for just cause due to absenteeism, and declining work performance. The Employer seeks to cancel the Determination, or alternatively, have the Determination sent back for further investigation. The appeal form filed by the Employer suggests that there was an error in the facts, that there were other facts that weren’t considered by the Delegate, and the Employer refers to “extra documentation to support case”.

Delegate’s Argument

The Delegate submits that the Employer has submitted with its appeal “additional information” consisting of an undated letter from Mark Spence, an October 25, 2002 e-mail from Bruce Morrison to Trevor Skillen regarding attendance, and pages taken from Metasoft’s employee manual, which was not provided during the course of the investigation. The Delegate submits that he considered and addressed in the Determination, the information supplied by the Employer, and the Employee, and the appeal should be dismissed.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that this appeal is a challenge to the fact finding process of the Delegate. The Employer does not allege any error in the mathematical calculation of the Employee’s entitlement, or identify any error made in the law applied by the Delegate, in assessing the information before him.

Exclusion of New Evidence:

On this appeal, the Employer seeks to file “additional information” consisting of an undated letter from Mark Spence, an October 25, 2002 e-mail from Bruce Morrison to Trevor Skillen regarding attendance, and pages taken from Metasoft’s employee manual. I note this was a case where the Delegate demanded records from the Employer. The additional records tendered in this appeal were not produced to the Delegate during the investigation. No reason is provided by the Employer as to why the documents were not produced. The documents seem to bear on the issue of just cause, and should have been produced to the Delegate, and may have caused the Delegate to further investigate the case. In the absence of any explanation, for the Employer’s failure to produce the documents at the investigative stage, I decline to consider the documents in this appeal.

In my view, the introduction of new evidence falls to be determined on the principles of *Triwest Tractors Ltd., BCEST #D 268/96*. A party is not permitted to “lie in the weeds”, and advance its case to the Tribunal on appeal, when the facts should have been advanced to the Delegate investigating the case. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. In my view, the Delegate cannot be said to have “erred” in a fact finding process, where the Employer failed to participate in that process, by providing documents.

Just Cause:

I have considered the balance of the material filed by the Employer, and all other materials including the Determination, to assess the Employer’s argument that the Delegate erred, and the Determination should be cancelled, or alternatively, that the matter should be sent back for further investigation.

In this case the Employer says that it had just cause to dismiss Ms. Brock, and therefore it is not obliged to pay compensation for length of service. The Employer seeks to challenge the Delegate’s finding that the Employee was dismissed without just cause, on the basis of undue absenteeism and poor work performance. Section 63 is the applicable section of the *Act*, dealing with the Employee’s entitlement to compensation for length of service, and the relevant portion is produced below:

- 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’ liable for compensation for length of service increases as follows:
- (a) after 12 consecutive months of employment, to an amount equal to 2 weeks’ wages;
- (3) The liability is deemed to be discharged if the employee
- (c) terminates the employment, retires from employment , or is dismissed for just cause.

I note that in the investigation before the Delegate, the burden rests with the Employer to establish that it had just cause to dismiss an Employee. If the Employer cannot establish just cause, the Employee is entitled to compensation for length of service. There is no doubt that an Employer can dismiss an employee for excessive absenteeism, however, the Employer must be in a position to prove this, if the facts are disputed. It is entirely within the prerogative of the Employer to manage its work force. If the Employer fails to “manage” its work force, and fails to document the steps taken with regard to performance or absenteeism, it is trite, that an Employer will have difficulty meeting its burden of proof.

The Employer did not provide any documentation of warnings given to the Employee that her job was in jeopardy due to either absenteeism or performance concerns prior to terminating her. I note that the Delegate appears to have preferred the information given by the Employee that she was not warned that her job was in jeopardy prior to the termination.

I am not satisfied that the Employer has shown any error in the manner in which the Delegate approached the investigation, the facts found by the Delegate after investigation, or the legal standard applied by the Delegate to the facts. I therefore dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated October 22, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal