

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act

- by -

Crosby Property Management
("Crosby")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 95/008

DATE OF DECISION: May 3, 2001

DECISION

APPEARANCES

Les Porter (“Porter”), Senior Vice- President, on behalf of the Appellant
Ann Richards (“Richards”), Project Coordinator, on behalf of the Appellant
Wayne Mackie , Delegate of the Director of Employment Standards (the “Delegate”)
William Gray (“Gray”), the Other Party

OVERVIEW

This is an appeal by Crosby Property Management Ltd. (“Crosby”) pursuant to Section 112 of the Employment Standards Act (the “Act”) against Determination No. CDET 000042 issued by the Director of Employment Standards on November 9, 1995. In this appeal Crosby claims no compensation for length of service is owed to Gray under Section 63 of the Act.

This appeal was conducted by way of a hearing which was held at the Tribunal’s offices on February 29, 1996.

FACTS

Gray was employed by Crosby as a Property Manager from December 30, 1991 to June 30, 1995. Gray’s employment was terminated by Crosby without notice or compensation. At the time of his termination, Gray earned \$3700.00 per month. The parties agree that if compensation is owed to Gray, then the amount is \$2561.55, as indicated on the Determination.

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 Crosby demonstrated, on the balance of probabilities, that Gray was terminated for just cause.

ARGUMENTS

Porter, on behalf of Crosby, argues that Gray is not entitled to compensation as he was dismissed for just cause.

At the hearing, Porter testified that Gray was dismissed due to problems with his attitude and performance. Porter stated that the company had reservations about Gray beginning in early 1995 because he was losing numerous projects.

On March 1, 1995 Porter had a meeting with Gray to discuss the termination of their management contract with Strata Plan LMS 1222 - Deercrest Estates. On March 3, 1995 he sent a follow-up memo to Gray listing the concerns of Lorne McGlenaghan, Council Chairman (Memo #1 of Exhibit #1).

On April 7, 1995, Richards, who was Gray's supervisor, sent a memo to Gray regarding feedback from Nona Saunders, Council Chairman for LMS 600- Lakeside Terrace (Memo #2 of Exhibit #1).

On May 8, 1995 Porter had a conversation with Gray regarding concerns raised by Ron Ostermeier, Council Chairman for LMS 908- Princess Gate. On May 11, 1995 he sent a follow-up memo to Gray listing the concerns and frustrations of the Ostermeier. The memo reads in part : "... Ron has stated that the reason that our contract was terminated was because of your performance and that everything he ever gave you to do just disappeared in the "Black Hole"...I have heard these comments before and trust that you understand that we cannot continue to operate in this manner as it will only jeopardize your other accounts." (Memo #3 of Exhibit #1).

On June 1, 1995 Porter sent a memo to Gray summarizing previous discussions concerning his performance as a Property Manager and the attitude displayed to Crosby's clients. The memo reads in part:

"...I am concerned about the attitude you have apparently displayed in dealing with our clients. They feel that you are confrontational, aggressive and at times rude. This attitude became worse after our contract was canceled.

Obviously this behavior is unacceptable and does nothing to enhance this company or you personally and will not be tolerated in the future.

I am encouraged by your willingness to accept these criticisms and your apparent desire to strive to improve your negative approach towards our clients and trust that no further complaints will be received.

If there is any indication that these concerns have again become evident I will have no alternative but to reevaluate your employment with Crosby..." (Memo #4 of Exhibit #1).

Porter stated that the last sentence above meant that if concerns about Gray again became apparent, then he would make a decision on whether Gray would continue to work for the company. When asked by the Delegate whether he was satisfied that Gray knew this

meant he would be fired, Porter replied “ I don’t know if (Gray) understood this to mean he’d be fired.”

According to Porter, Gray became withdrawn and spent minimal time in the office after June 1, 1995. Porter said that Gray explained his absences as being “on site” but he was not at any of the buildings and many of the Council members indicated they had not seen him in months.

On June 27, 1995 Richards and Porter were summoned to a meeting with two Council Members for LMS - Lakeside Terrace. The Council members complained about the lack of direction, follow-up and timeliness of action and reporting provided by Gray. He was not doing his job and they did not want any further confrontation and arguments with Gray. Porter and Richards were instructed by the Council Members to remove Gray as the Property Manager if Crosby wished to retain their account. As a result, Porter terminated Gray on June 30, 1995. Porter stated the Lakeside project consisted of one-half of Gray’s portfolio and with its removal they had no confidence that Gray’s remaining projects would stay with Crosby.

Porter contends that Gray was in receipt of all the above four memos and was fully aware of the above problems and concerns as documented in the memos. He was, therefore, dismissed for just cause.

Gray claims he only received the June 1, 1995 memo. He disagrees with the content of the memo and said he assumed that the sentence referring to a re-evaluation of his employment meant that his salary would be reduced if he kept losing projects. He said he heard nothing further about his attitude after June 1, 1995 and therefore he assumed there were no problems.

In a letter to the Delegate dated September 8, 1995, Gray states he was not made aware of any serious problems with the Lakeside Terrace project prior to his termination and he denies he was absent from work after June 1, 1995. He also denies the claims of Porter as listed in the March 3, 1995 and May 11, 1995 memos.

The Delegate argues that Crosby has not established just cause for termination. None of the four memos constitute progressive discipline. Furthermore, Gray denies he received 3 of the 4 memos.

ANALYSIS

Section 63 of the Act provides that when an employer terminates the employment of an employee, the employer is liable to pay the employee compensation for length of service. 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 Gray was dismissed for just cause rests with Crosby.

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

1. Reasonable standards of performance have been set and communicated to the employee;
2. Progressive discipline has been given to the employee for failure to meet such standards, which includes ensuring that the employee has been made clearly aware that his/her continued employment is in jeopardy if such standards are breached;
3. A reasonable period of time has been given to the employee to meet such standards; and
4. The employee did not meet those standards.

In this case, I am not satisfied that Gray was progressively disciplined by Crosby. In particular, it has not been demonstrated that prior to his employment being terminated on June 30, 1995, Gray was clearly aware his job was in jeopardy.

The concept of “just cause” obliges an employer to inform employees, clearly and unequivocally, that their performance or behavior is unacceptable and that failure to meet the employer’s standards will result in termination of employment. The principal reason for giving a clear and unequivocal warning is to avoid any misunderstanding and giving employees a false sense of security that their performance or behavior is acceptable to the employer. None of the memos provided by Crosby clearly and unequivocally put Gray on notice that he would be terminated if he did not meet specific standards within a reasonable period of time. Nor is there any evidence he was made aware, by some other means, such as verbally, that his employment was in jeopardy.

For these reasons, I conclude, on the balance of probabilities, that Crosby has not met the onus of proving Grays’ employment was terminated for just cause.

ORDER

Pursuant to Section 115 of the Act, I order that Determination No. CDET 000042 be confirmed in the amount of \$2561.55.

Norma Edelman
Registrar
Employment Standards Tribunal

May 3, 2001
Date

NE:nc