

An appeal

- by -

Budget Rent-a-Car of Victoria Ltd.
(“Budget”)

- 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 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2011A/181

DATE OF DECISION: February 22, 2012

DECISION

SUBMISSIONS

David Hunt	on behalf of Budget Rent-a-Car of Victoria Ltd.
Jennifer Carmona	on her own behalf
Tami Wilson	on behalf of the Director of Employment Standards

OVERVIEW

1. In this appeal, Budget Rent-a-Car of Victoria Ltd. (“Budget”) challenges a determination of a delegate (the “Delegate”) of the Director of Employment Standards dated November 18, 2011 (the “Determination”). The Determination was issued following a hearing conducted by the Delegate on November 2, 2011.
2. In the Determination, the Delegate held that Budget had contravened the *Employment Standards Act* (the “Act”) when it failed to pay a former employee, Jennifer Carmona (“Carmona”), compensation for length of service and annual vacation pay pursuant to sections 63 and 58, respectively.
3. The Delegate determined that Budget owed \$2,536.07 in respect of these items, together with accrued interest. In addition, she imposed an administrative penalty of \$500.00. The total found to be due and owing was therefore \$3,036.07.
4. I have before me, and I have reviewed, Budget’s Appeal Form and submissions, the Determination, the Reasons for the Determination, a submission from Carmona, and the record delivered on behalf of the Director to the Tribunal pursuant to its statutory obligation under section 112(5) of the *Act*.
5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter, an electronic, hearing.

FACTS

6. Budget operates a vehicle rental agency. It employed Carmona as an accounting clerk from June 26, 2006, until August 26, 2010.
7. Carmona appears to have performed well while at work. However, she was chronically late for work, and on many other occasions she was absent altogether. Budget tendered evidence that it communicated numerous verbal warnings to Carmona regarding her lack of punctuality, and her absences. It also sought to document its concerns in writing. After each communication, Carmona’s attendance would improve for a time, but inevitably, her absenteeism would soon re-commence.
8. Throughout, Budget was aware of the fact that Carmona was experiencing turmoil in her personal life, due at least in part to the apprehension of her child by the Ministry for Children and Families. What Budget does not appear to have known until the hearing was that Carmona was also enduring an abusive relationship with

a live-in boyfriend. Indeed, it was the violent behaviour of the boyfriend which had triggered the intervention by the Ministry.

9. On June 25, 2007, Budget issued a letter to Carmona expressing concern regarding her attendance at work. In my view, the salient portions of this correspondence are these:

The small nature of the department is such that it can only afford to employ people who can be relied upon to attend work on a regular and consistent basis. As much as they can be anticipated, absences need to be planned for to ensure that our work flow remains uninterrupted without putting undue pressure on other staff members.

We understand that there may be extenuating circumstances for your absences ... We are also sympathetic to your personal situation.

It is necessary however for us to ensure that you are aware of the obligation you have to making sure that you are able to attend work on a regular and reliable basis.

We are hoping that we will see an improvement in the situation in the coming weeks so that we are not put in the position of either having to have this conversation again or having to take further action.

10. Sixteen months later, on October 27, 2008, Budget again wrote to Carmona, this time regarding lateness. The following excerpts reveal the message Budget sought to communicate:

Over the past few weeks you have consistently arrived to work late which is unacceptable.

We have provided written and verbal warnings in the past and while there may be some improvements, it is generally short term in nature and the same issue keeps arising.

This letter is final warning that this situation must improve on a consistent basis from this point forward otherwise you will leave us no alternative but to terminate your position at our convenience and without notice.

11. A year passed, and on October 27, 2009, Budget emailed Carmona to say that if she would be arriving at work late she should contact named managers with an explanation, rather than simply advising other staff members. The email also said this:

If you are sick, then you should stay home and get better.

This continual coming in whenever you appear to feel like it has got to stop. Your hours are 8am to 4.30pm.

We are not going to tolerate any other process than the above and we are not going to continually (*sic*) allow you to be late without their (*sic*) being further action taken.

12. Just short of two months later, on December 16, 2009, Budget again wrote Carmona. The letter said this, in part:

This is a follow up to our conversation where it was pointed out that over the last 32 work days you have reported late 15 times.

As we discussed, this situation cannot continue. We have discussed your lateness many times before both verbally and in written form yet you are still consistently late.

...

I am writing to advise that should this continue into January of 2010 your employment with Budget will be terminated with no further warnings and no further notice.

13. Notwithstanding this final warning, the evidence the Delegate heard from Budget at the hearing was to the effect that from January to August 2010 Carmona was late for work over 25 times, and that from June to August 2010 she was absent altogether for parts, or all, of 14 days.
14. The culminating series of events which resulted in Budget's terminating Carmona's employment commenced on Monday, August 23, 2010. Carmona attended at work that morning, but she left suddenly before noon, for personal reasons, and did not return. She did not attend at work on August 24, 25, or 26, either, but left messages advising that she would not be in.
15. At the hearing, a Budget manager testified that she and Carmona spoke on the 26th, and Carmona told her that she would return to work the next day. Carmona disputed this, but acknowledged that in one of her communications to Budget she may have indicated that she hoped to re-attend on the 27th.
16. Carmona's absences at this time were particularly galling for Budget because it was a busy time of the year, and all employees were aware of a corporate policy that precluded them from taking time off during this period. Management at Budget believed they had provided Carmona with ample opportunity to resolve her difficulties with attendance, and so, on August 26, it was decided to terminate Carmona's employment when she attended at work the following morning.
17. However, Carmona did not attend at work on August 27. Instead, she emailed Budget later that day, advising that she could not report for work due to circumstances beyond her control, and owing to severe stress. She also stated that she would be seeing her physician regarding the necessity for a leave so that she could "deal with" her "personal life."
18. Carmona then prepared a letter addressed to Budget dated August 29, 2010, advising that she would not be attending at work "at the present time," as she could not fulfill her work duties due to stress. She confirmed that she had a medical appointment the following week where she would obtain documentation verifying her condition. She stated that she would be conferring with counsellors, her lawyer, and the Ministry as she continued her fight for custody of her daughter. She apologized for the "mayhem" her absence might cause, but said that she needed to be home with her family in order to resolve her personal issues.
19. Carmona testified that she sealed her August 29, 2010, letter in an envelope addressed to her manager. She then delivered it to a customer service representative at Budget.
20. On Monday, August 30, 2010, Budget emailed Carmona advising her that her employment was terminated, due to her continued failure to attend at work in a consistent manner.
21. Carmona did consult her physician, who issued a note stating that she was unwell, and would not be fit for work for a period of 8 to 12 weeks. Carmona subsequently delivered a copy of the physician's note to Budget.
22. At the hearing, Budget alleged that Carmona had been properly dismissed for cause, based on her chronic absenteeism. For her part, Carmona asserted that Budget management only decided to dismiss her after she informed them she would be seeking an authorization from her physician to take a medical leave.

23. The basis for the Delegate's concluding that Budget had failed to prove that the dismissal was for cause is captured in the following excerpts from the Delegate's Reasons for the Determination:

While I sympathize with the Employer, and believe that Budget granted much lenience towards Ms. Carmona due to the gravity of her personal circumstances, I find that Budget essentially condoned her misconduct during the final eight months of her employment. From December 2009 until her termination in August 2010, Ms. Carmona was late in excess of twenty-five times, and absent fourteen full, or part, days. By allowing Ms. Carmona to continue this unacceptable behaviour eight months beyond the final warning letter without any further disciplinary action amounts to condonation, which nullifies the impact and effect of the written warning.

With such a long period of time between a final warning and further discipline, it is reasonable for an employee to conclude they are no longer under a serious or imminent threat of termination. Dismissing Ms. Carmona for absenteeism in August 2010, after allowing her to be habitually absent and tardy for eight months does not amount to just cause for dismissal. Consequently, I find Budget did not have just cause to dismiss Ms. Carmona for absenteeism and tardiness.

ISSUE

24. Has Budget established that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

25. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

26. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

27. Budget asserts that the Determination should be cancelled due to the Delegate's committing an error of law. It states that while the Delegate referred to correspondence from Budget which set out its concerns relating to Carmona's absenteeism, she appears to have concluded, incorrectly, that the final piece of correspondence was dated December 16, 2009. In fact, Budget argues, there was a further communication, via email, which occurred on July 13, 2010, which also related to Carmona's taking time off work. Budget advises, and a review of the record confirms, that a copy of that email correspondence was included in the material that was before the Delegate at the time the Determination was issued, yet the Delegate did not refer to it in her Reasons.

28. I digress to say that the mere fact the Delegate did not allude to a particular piece of evidence in her Reasons is insufficient, on its own, to warrant my deciding that she erred in law, unless the circumstances give rise to a reasoned belief that she must have forgotten, ignored or misconceived the evidence in a way that affected the Determination. I must also assume, absent good cause, that the Delegate considered and weighed all the evidence and found every fact it was open to her to find based on that evidence which was necessary to support the conclusions she reached (see *Housen v. Nikolaisen* (2002) 286 NR 1).
29. The July 13, 2010, email correspondence from Budget to Carmona was a response to an email from Carmona earlier that day requesting a day off to have an unsupervised visit with her daughter. Budget's email reply indicated that Carmona's taking time off for that purpose was approved. However, the email went on to state that:
- “...this will be the last time granted for time off.”
30. In light of this communication, Budget asserts that the Delegate's basing the Determination on a finding that the “final warning” occurred in December 2009, and that Budget condoned repeated absences thereafter, was in error, and so the Determination should be reversed. I disagree.
31. In employment law, condonation occurs when an employer elects to ignore or forgive unacceptable conduct by the employee. In the third edition of his *Wrongful Dismissal Handbook*, at paragraph 4.2(a)(ii), Justice Sproat says this:
- Any condonation of conduct may suggest to the Court that that type of conduct is not serious and may undercut the credibility of later complaints concerning similar conduct. Further, and again as a practical matter, the greater the history of condonation, the greater the obligation of the employer to give very specific and definite warnings prior to termination.
32. In my view, the July 13, 2010, email communication can be construed as supporting the conclusions drawn by the Delegate, rather than refuting them. It supports the inference, which other evidence on which the Delegate relied also amply demonstrates, that there had been many instances of absenteeism on Carmona's part after the December 9, 2009, letter, and her employment had been continued, notwithstanding that the December correspondence had stated unequivocally that if the pattern continued into January 2010 her employment would be terminated.
33. I note further that the record contains another document that was also tendered by Budget, and which became Exhibit 14 at the hearing conducted by the Delegate. That document is dated August 12, 2010. It is a summary of the time missed by Carmona from June 25, 2010, to August 11, 2010. It reveals that Carmona missed several days, or parts of days, after July 13, 2010, and before the absences during the week of August 23, 2010, which resulted in her dismissal. Again, the inference to be drawn is that Budget continued to express its concern about Carmona's absences, as witnessed by the July 13, 2010, email, but then failed to act when further absences occurred shortly thereafter.
34. Finally, the July 13, 2010, email did not contain a specific warning; indeed, it was in no way disciplinary, unlike the other written communications to which the Delegate referred. It merely stated that Budget would not grant further requests for time off. Given that further absences occurred over the next several weeks and no disciplinary sanctions appear to have been imposed, it would not be unreasonable for Carmona to have concluded that the July 13 email was nothing more than yet another communication in which Budget expressed its concerns relating to her absenteeism, but that her employment would be continued nevertheless.

35. In the circumstances, I decline to accept that the July 13, 2010, email impairs the force of the Delegate's conclusion that Budget effectively condoned Carmona's absences until August 26, 2010, the day it decided to dismiss her. Having said that, I wish to make it clear that when I use the term "condoned" I do not mean that Budget agreed that it was acceptable for Carmona to be taking so much time off. Clearly, Budget was unhappy with Carmona's continuous pattern of non-attendance, and wanted it to stop.
36. However, the repeated failure of Budget to act decisively when new instances of absenteeism occurred after it had taken steps to admonish, and even warn, Carmona about her attendance could send no other message than that the absences would continue to be tolerated. This was especially so, in my view, considering the major reason why Carmona appeared to be chronically absent from work. That reason related to the fact her child had been apprehended by the Ministry at least in part due to her stormy relationship with her boyfriend, which resulted in protracted negotiations relating to the custody of the child, and further conflict in her home. It was in no way related to a wrong-headed belief on Carmona's part that she had the right to pick and choose her own hours of work, regardless of what her employer might think about the matter. Budget was aware of the general nature of Carmona's personal problems, and repeatedly indicated that it was prepared to be patient with her in order to assist her in dealing with them.
37. The record does not reveal whether Budget was aware of the specific circumstances that caused Carmona to be absent during the week of August 23, 2010. However, the uncontradicted evidence from Carmona at the hearing was to the effect that her absences during that week were due to her being held hostage, essentially, by her boyfriend. Clearly, Carmona never developed an intention to abandon her employment. Carmona communicated with the Budget office each day, advising that she would not be in. In these circumstances, I am of the opinion that it was incumbent on Budget to communicate a further warning to Carmona that she must attend at work within a stipulated, albeit perhaps very short, time period in order to avoid a finding by the Delegate that Carmona's continued absences were being condoned. That did not happen. Instead, Budget simply decided to dismiss her.
38. It follows that I have decided the Delegate did not err in law in finding there was no cause for Carmona's dismissal, due to Budget's condoning her absenteeism.

ORDER

39. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated November 18, 2011, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal