Employment Standards TRIBUNAL

An appeal

- by -

537192 B.C. Ltd.
("537192")

- 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: Lorne D. Collingwood

FILE No.: 2002/558

DATE OF DECISION: January 28, 2003

DECISION

OVERVIEW

537192 B.C. Ltd. (the "employer" or the "Appellant") appeals, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 21, 2002. The Determination is that Sukhminder Mann is entitled to compensation for length of service, $540.12 including vacation pay and interest.

The Appellant wants the Determination cancelled. The Appellant claims to have been treated unfairly by the delegate. The Appellant claims that the employee was an unsatisfactory worker, that she was warned to improve, and terminated when she did not improve. The Appellant also claims that the employee has a history of not telling the truth and that she stole food from the restaurant.

I have decided to confirm the Determination. There is in fact no evidence of theft or unfairness. The credibility of the employee is not an issue. What I must decide is whether the employer does or does not have just cause. In that regard, I find that I am not shown that the employee was ever told that her job was in jeopardy unless her performance improved. The employer also fails to show that it provided the employee with any training or assistance.

This case has been decided on the basis of written submissions.

ISSUES

The issue is whether the employee is or is not entitled to compensation for length of service. Underlying that issue is one of just cause. The employer claims that the employee was a lazy, unproductive worker who failed to improve even though she was warned that her job was in jeopardy.

The appeal was filed before November 30, 2002. It is for me to decide whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

537192 operates as a restaurant. The current owner of 537192 is Barbra Chan.

Sukhminder Mann was hired by Paul Chang. Chang ran the restaurant at one time but Chan launched legal proceedings against Chang and was successful in wresting control of the company from Chang.

When Chan took over the restaurant she asked Mann to cook an omelette. She was horrified to discover that Mann was unable to cook an omelette and that she was not a trained cook.

According to Chan, the restaurant needed a fully trained cook but it was decided that Mann would be kept on as kitchen help. When that did not work out, Mann was terminated. According to Chan, Mann was a lazy, unproductive worker.

The delegate interviewed other workers. One worker, the person that actually hired Mann, said that Mann was a good worker. Another worker, a cook, said that Mann "was sitting around and not doing her job".

On appeal, a third worker, Chanderpaul Bains, a chef at the restaurant, writes to say that Mann was a difficult co-worker and of little assistance to him. According to Bains,

> "I am a cook at … (the restaurant). My shift was at the same time as Ms. Sukhminder Mann. I was on sick leave and I have returned … as a cook. From the beginning of Ms. Mann's employment to her firing Ms. Mann did not listen to me nor did she wanted to complete her tasks. I complained to Mr. Paul Chan the previous owner -- he did not do anything about her. I felt stressed and I was depressed because Ms. Mann was supposed to be my helper and she was a hired as a cook. Sometimes I felt like quitting my job … because of her. The only thing that Ms. Mann did, was sit around and do nothing."

Chan claims that Mann was warned to improve verbally and told "many times" that unless she improved she would be fired. Man was "fired on the spot" when it was realised that the employee was not going to improve.

Theft is alleged in this case. I find that the Appellant does not produce evidence to support its claim, however. There is in fact no evidence of theft at all.

ANALYSIS

Section 63 of the *Act* imposes a liability on employers to pay their employees compensation for length of service where their employment lasts for more than 3 consecutive months. That liability can be discharged, however.

> **63** (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**.
>
> (my emphasis)

The Tribunal has said that it will be guided by the following principles in cases where it is argued that termination is for cause (*Kenneth Kruger*, BCEST No. 003/97).

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
>
> 2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
>
> 1. A reasonable standard of performance was established and communicated to the employee;
> 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
> 4. The employee continued to be unwilling to meet the standard.
>
> 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options,

such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

It follows from the above that this is not a case which turns on credibility but whether the employer is able to show just cause for reason of repeated minor misconduct or a demonstrated inability to do the job. While an act of serious misconduct is alleged, namely theft, there is in fact no evidence of theft at all.

Whether it is for reason of minor misconduct that the employee was fired, or a demonstrated inability to meet the requirements of her job, the employer must show that the employee was adequately notified that her job was in jeopardy for a failure to meet some reasonable standard of performance and that the employee did not improve even though she was given adequate time to improve. In my view, and I have said this in numerous decisions (*Kevin O'Donnell and K. O'Donnell Holdings Ltd. operating as Abbotsford Mohawk*, BCEST No. D119/97 for example) that requires proof that the employee was plainly and clearly warned that his or her employment was in jeopardy because of a failure to meet a reasonable standard of performance. In this case, the employer does not show me that the employee was given plain, clear warning that her job was in jeopardy because it cannot. It did not issue any written warnings, only verbal warnings, and there are not witnesses to verify or confirm what was said.

Where there is a demonstrated inability to do a job, the allegation here, an employer must also make at least some effort to provide the employee with training or to assist the employee to do the job. I am not shown that Mann was given any additional training or any help in meeting the employer's expectations.

It is not shown that the employer had just cause. The Determination is therefore confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 21, 2002 be confirmed in the amount of $540.12 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal