Employment Standards TRIBUNAL

An appeal

- by -

Black Press Group Ltd. carrying on business as The Nelson Star
("Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/148

DATE OF DECISION: April 19, 2017

DECISION

SUBMISSIONS

David Penner	counsel for Black Press Group Ltd. carrying on business as The Nelson Star
Elizabeth Simmons	on her own behalf
Jennifer L. Sencar	on behalf of the Director of Employment Standards

OVERVIEW

1. On terminating an employment relationship an employer is obliged to pay, to an employee, compensation for length of service according to sections 63(1) and 63(2) of the *Employment Standards Act* (the "*Act*"), unless relieved of that duty for one or more of the reasons listed in section 63(3).

2. Relevant to this appeal is section 63(3)(c) of the *Act* which provides, in part, that liability under sections 63(1) and 63(2) is deemed to be discharged when the employee "… is dismissed for just cause." At issue is whether or not section 63(3)(c) includes "after-acquired cause" – conduct on the part of the employee justifying immediate termination of the employment relationship occurring before, but only discovered after, its end.

3. By way of a determination issued on September 23, 2016, according to section 79 of the *Act* (the "Determination"), the Director of Employment Standards (the "Director") held that it did not, and instead found that the appellant, Black Press Group Ltd. carrying on business as The Nelson Star (the "Appellant"), owed to the complainant, Elizabeth Simmons (the "Complainant"), unpaid wages, vacation pay, and compensation for length of service in the aggregate amount of $4,531.88, together with interest calculated according to section 88 of the *Act*.

4. The Director also levied $1,000 in administrative penalties, for breaches of sections 18 and 63 of the *Act*.

5. The Appellant seeks to cancel both the monetary award and the administrative penalties, on the basis that rejecting the Appellant's "after-acquired cause" amounts to an error in law, one of the permitted grounds for appeal under section 112(1)(a) of the *Act*.

6. Having had the benefit of an opportunity to review the Determination, the Director's record (the "Record"), and submissions received from:

    (a) counsel for the Appellant, on October 24, 2016 and March 15, 2017;

    (b) the Director, on February 23, 2017; and

    (c) the Complainant, on February 23, 2017,

I conclude that this appeal should be allowed. My reasons follow.

THE FACTS AND ANALYSIS

Facts

7. Facts germane to this appeal may be summarized as follows:

(a) The Complainant was employed with the Appellant between November 11, 2011, and July 24, 2015.

(b) The Complainant failed to report for work between July 17, 2015, and July 24, 2015.

(c) The Complainant notified the Appellant on July 20, 2015, by way of text message, that she was ill.

(d) Attempts by the Appellant to further communicate with the Complainant between July 20, 2015, and July 22, 2015, were unsuccessful, and the Appellant concluded that the Complainant had abandoned her job.

(e) By letter dated July 22, 2015, the Appellant purported to confirm the end of the Complainant's employment.

(f) On July 24, 2015, the Complainant attended the Appellant's business office with a medical note to explain her absence. The Appellant did not accept the note, and re-affirmed the end of the Complainant's employment.

(g) The Appellant subsequently uncovered evidence suggesting that the Complainant had, during her tenure, engaged in conduct that the Appellant characterizes as fraudulent, and in respect of which the Complaint is alleged to have improperly received at least $6,000 (the "**Misconduct**"). I understand that a referral with respect to the Misconduct has been made to the R.C.M.P., and that criminal charges may be pending.

8. The complaint was heard on April 21, 2016. Although afforded both notice and opportunity, the Complainant did not participate.

9. Before the Director, the Appellant argued that it was not liable to pay compensation for length of service because, by abandoning her post, the Complainant terminated her employment. In the alternative, the Appellant reasoned that the Complainant's Misconduct amounted to "after-acquired" just cause. In either case, the Appellant submitted that liability to pay compensation under section 63(1) of the *Act* was discharged by the application of section 63(3)(c).

10. The Director rejected both arguments and instead found that, firstly, the Appellant did not abandon her job and, secondly, allegations of Misconduct were irrelevant because "after-acquired cause" was not "just cause" under the *Act*. (I note that, as a consequence of the finding concerning "after-acquired cause", the Director did not consider, or otherwise make any determination with respect to, evidence of the alleged Misconduct.)

11. The Appellant does not challenge the first ruling, but it argues the second to be an error in law requiring correction. The Director disagrees.

12. The Complainant's submissions address matters unrelated to the allegations of Misconduct or the relatively narrow issue that I must decide in this appeal, and I do not consider them to be particularly helpful.

Errors of Law

13. It is the Appellant's burden to show an error of law, which means that the Appellant must satisfy the Tribunal that:

(a) a section of the *Act* has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director has acted in the absence of evidence;

(d) the Director has acted on a view of the facts that can not reasonably be entertained; or

(e) the Director has adopted a method of assessment that is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] BCJ No. 2275 (BCCA) at paragraph 9).

Compensation for Length of Service

14. But for the Appellant's argument with respect to the application of section 63(3)(c) of the *Act*, the Complainant would have been entitled to receive compensation for length of service equal to three weeks' wages on termination of her employment according to section 63(2).

15. The Appellant agrees that it did not allege just cause at the time the Complainant's employment ended. However, it says that just cause exists, and may be inferred because of the alleged Misconduct, occurring before, but only discovered after, the Complainant ceased working.

16. It relies on the common-law principle enumerated by the Supreme Court of Canada in *Lake Ontario Portland Cement Co. Ltd. v. Groner* [1961] S.C.R. 553, at page 563:

> *The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:*
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> > *It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.*

17. The Director submits that this doctrine does not apply to the *Act* and instead looks for support in a past decision of this Tribunal – *Wendy Benoit and Ed Benoit operating as Academy of Learning*, BC EST # D138/00 - in which it was decided that an employer's liability under section 63(1) and 63(2) of the *Act* could not be discharged by application of the "after-acquired cause" common-law principle.

18. Amongst the Tribunal's reasons for that conclusion:

(a) Length of service compensation is a minimum statutory benefit earned with continuous employment, intended to provide the courtesy of notice, which should not be equated with common law damages for wrongful dismissal. It is an "enforced courtesy", not the adjudication of a contractual relationship (*Benoit*, at pages 12 and 13).

(b) Section 63 is cast in the present tense, suggesting that liability for length of service compensation must be determined at termination (*Benoit*, at page 14).

(c) It would be inconsistent with the purposes set out in section 2 of the *Act* if section 63(3)(c) were interpreted in a way that "rather than encouraging employers to comply with the minimum requirements, was encouraging employers to begin looking for reasons that would allow them to avoid those requirements" (*Benoit*, at page 15).

19. After-acquired cause is again addressed by this Tribunal in *BNW Travel Management Ltd.*, BC EST # D170/04, and *Kootenay Uniform and Linen Ltd.*, BC EST # D126/07, both of which draw almost exclusively upon *Benoit* in reaching a similar conclusion.

20. In my view, however, *Benoit* and *Kootenay Uniform* are both distinguishable from the present matter:

(a) In *Benoit*, "after-acquired cause" was not alleged until appeal. It was, for all intents, an application to adduce new evidence. In this matter, "after-acquired cause" was argued at the original complaint hearing.

(b) In *Kootenay Uniform*, "after-acquired cause" was not alleged at all. Rather, the appellant in that matter argued a breach of natural justice because it was it denied adequate opportunity to respond to a complaint and, as such, was denied the opportunity to discover facts amounting to "after-acquired cause". The Tribunal referred to the doctrine, but did not actually consider how it might, or might not, apply to section 63(3)(c) of the *Act*.

21. The Appellant points to other Tribunal decisions, including *Ganapathi*, BC EST # D213/03, and, more recently, *Clark Reefer Lines Ltd.*, BC EST # D114/15. It argues that the Tribunal has not yet decisively rejected the "after-acquired cause" defence.

22. In *Clark Reefer*, the Tribunal did not dismiss the possibility that "after-acquired cause" could fall within the ambit of the section 63(3)(c) 'just cause provision" (at paragraph 28), noting instead that both *Ganapathi* and *Praxis Technical Group, Inc.*, BC EST # D608/01, provide oblique support for the proposition that an employer can answer a complaint before the Director by showing cause, after the fact.

23. However, the employer in *Clark Reefer* did not strictly rely on "after-acquired cause", and the Tribunal did not further consider the question. Moreover, neither *Ganapathi* or *Praxis* consider liability under section 63(1) of the *Act* in the light of "after-acquired cause"; in the former, misconduct alleged by the employer occurred after the end of and not during employment, whereas, in the latter, the alleged misconduct did not, in and of itself, amount to just cause.

24. I agree with the Appellant's observation that these decisions reveal a difference of opinion within the Tribunal with respect to whether or not the section 63 version of "just cause" includes "after-acquired cause". *Benoit* is not determinative, in my view, and to the extent that the Tribunal's decision *BNW* relies exclusively upon that ruling, I am not convinced that I should follow it. None of the remaining cases consider the subject doctrine in a meaningful way.

25. Having weighed this matter, and having considered the comments of the Tribunal in the above-noted cases, I find that the *Act* does not preclude an employer from arguing that the obligation to pay compensation under sections 63(1) and 63(2) has been satisfied where it is shown that just cause exists even though that cause was not discovered before the end of employment.

26. I arrive at that conclusion for the following reasons:

(a) The purposes of the *Act* are set out in section 2. In addition to ensuring basic standards of compensation, the *Act* is intended to promote the fair treatment of employees and employers, to provide fair and efficient procedures for resolving disputes, and to foster the development of a productive and efficient labour force. There is nothing in the *Act* that says the Director is to accord one purpose more weight than another. The fair treatment of employees and employers is at least as important as ensuring basic standards of compensation, and both must measure equally with the promotion of productivity and efficiency.

(b) The Supreme Court of Canada has said that "[s]tatutory interpretation cannot be founded on the wording the legislation alone… the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Re: Rizzo and Rizzo Shoes Ltd.* [1998] 1 SCR 27 at paragraph 21). Similarly, section 8 of our *Interpretation Act*, R.S.B.C. 1996, c.238 provides that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." From this, I infer that section 63 must be read in a way that attempts to strike some balance between competing statutory objectives, rather than satisfying one to the exclusion of the others, at least not without good reason.

(c) Our legislature did not write a statutory definition for the term "just cause". In view of the language adopted by Mr. Justice Iacobucci in *Re:Rizzo*, I do not think that this Tribunal should exclude from that phrase anything that our courts have seen fit to read into it.

(d) I consider the Director's analysis of "tense" to be unnecessarily technical, which is not what was intended by *Re:Rizzo*. I do not read the phrase "… is dismissed" as requiring the employer to make some sort of election at termination, or preventing the employer from amending that reason within a reasonable time frame (and certainly before the issuance of a Determination.) Certainly, there is nothing in section 63 of the *Act* requiring an employer to provide the reason for dismissal. Clearly, our legislature could have so provided, as it did with section 64, when addressing group terminations. That it does not suggests to me that the *Act* does not close the door to "after-acquired cause".

(e) The right of an employer to terminate an employee for "just cause" arises at the point in time when a fundamental breach occurs, not when it is discovered. ("After-acquired cause" in my opinion is more aptly described as "after-discovered cause".) That conclusion is consistent with our jurisprudence, generally, and with *Lake Ontario*, specifically. It also allows for the possibility that what might otherwise be construed as "just cause" can be mitigated by the passage of time and one or more intervening events.

(f) The "enforced courtesy" of compensation for length of service in section 63 is not absolute. There are exceptions. Section 63(3)(c) of the *Act* recognizes that an employer may sever an employment relationship, unilaterally, where there has been a fundamental breach, including employee malfeasance. Where the employee's conduct gives rise to "just cause", any right to the courtesy of notice is forfeit, and I think it fair to say that the *Act* recognizes that an employee should not benefit from conduct which is at odds with the statutory objectives or otherwise fundamentally detrimental to the employment relationship.

(g) It is not lost on me that the section 63(3)(c) exceptions to the sections 63(1) and 63(2) obligations mirror exceptions to the common-law liability of an employer to an employee for "wrongful dismissal". It does not seem reasonable to me to conclude that our legislature

> intended to allow those same exceptions while expressly excluding the one in which the employer has discovered, a bit too late, an employee's act of malfeasance. It would be contrary to several of the section 2 purposes, I think, to allow - i.e. force - the payment of compensation to an employee where an employer has just cause but, whether by the employee's guile, sheer dumb luck, or a combination of the two, does not realize it. That would, in my view, promote something other than fairness, productivity, and efficiency, without concurrently ensuring basic standards of compensation.
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> (h) Ultimately, I do not accept that "after-acquired cause" encourages employers to look for reasons to avoid the minimum standards set out in the *Act*. The cause must still be "just", the test for that does not change simply because it is discovered after termination, and the *Act* includes provisions to deter employers looking to skirt their statutory obligations.

27. In my opinion, the Director was wrong to refuse to consider the employer's evidence of after-acquired cause. In doing so, the Director has misinterpreted section 63(3)(c) of the *Act*.

28. Accordingly, I find that the Appellant has satisfied the burden imposed by the *Gemex* test.

Remedy

29. The Appellant asks the Tribunal to cancel the Determination under section 115(1)(a) of the *Act*. Although the stated ground for appeal has been met, I do not agree that my order should end with cancellation.

30. As previously noted, the Director heard but did not in the Determination consider or make any findings with respect to the evidence relating to the allegation of Misconduct.

31. Had the Director considered "after-acquired cause", the evidence would have been evaluated to determine, firstly, if the alleged Misconduct was established; secondly, if the Misconduct was egregious enough to give the Appellant just cause for dismissal (irrespective of the date of discovery); and thirdly, if there were any mitigating facts.

32. It is not the function of this Tribunal to make findings of fact in the first instance, and I am of the opinion that it would be improper for me to draw any conclusions from the evidence when the Director has not had the opportunity to do so.

33. In my view, this matter should be returned to the Director, and the Director should consider the evidence of Misconduct previously tendered to determine whether the Appellant has established just cause, on a balance of the probabilities.

ORDER

34. I allow the appeal, cancel the determination under section 115(1)(a) of the *Act*, and refer this matter back to the Director pursuant to section 115(1)(b) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal