

An appeal

- by -

Mr. Ron Buddenhagen PH.D.LL.B, Personal Law Corporation
("Buddenhagen")

- 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: Carol L. Roberts

FILE No.: 2007A/34

DATE OF DECISION: June 5, 2007

DECISION

SUBMISSIONS

Ron Buddenhagen on behalf of John Buddenhagen, Personal Law Corporation
Graham Jickling on behalf of the Director of Employment Standards
Kim Wake on her own behalf

OVERVIEW

1. This is an appeal by John Buddenhagen, Ph.D. LL.B. Personal Law Corporation (“Buddenhagen”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued August 4, 2006.
2. Kim Wake worked as a secretary/bookkeeper for Buddenhagen from September 21, 2005 until August 31, 2006. Ms. Wake filed a complaint alleging that she was owed compensation for length of service.
3. The Director’s delegate held a teleconference hearing into Ms. Wake’s complaint on November 22, 2006. The employer was represented by Mr. Buddenhagen, and Ms. Wake represented herself. At issue was whether Buddenhagen had just cause to terminate Ms. Wake’s employment without written notice.
4. Following the hearing, the delegate determined that Buddenhagen had contravened Sections 58 and 63 of the *Employment Standards Act* in failing to pay Ms. Wake wages and annual vacation pay. He concluded that Ms. Wake was entitled to wages and interest in the total amount of \$597.26. The delegate also imposed a \$500 penalty on Buddenhagen for the contravention, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. Buddenhagen contends that the delegate erred in law in finding that the employer did not have just cause to terminate Ms. Wake’s employment without notice. Buddenhagen submits that the delegate ignored crucial evidence in arriving at his conclusion.
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I conclude that this appeal can be adjudicated on the written submissions of the parties.

ISSUE

7. Whether the delegate erred in law in finding that Buddenhagen did not have just cause to terminate Ms. Wake’s employment without written notice.

ARGUMENT

8. The material facts for the purposes of the appeal are as follows.
9. Ms. Wake contended that Buddenhagen gave her 2 ½ days notice of her termination, saying that she was “not suited for the position”. She claimed that Buddenhagen promised her two weeks’ ‘severance pay’, but that amount was not included in her final paycheque. She alleged that Buddenhagen refused her request for ‘severance’ because she had “botched the trust books”. Ms. Wake testified that she was not properly trained on the books. She also testified that she had been employed for eleven months prior to her termination, and although Buddenhagen had said that he was not happy, she had never been reprimanded about her work. Ms. Wake also testified that she had some difficulty using a software program, and when she contacted the company, it suggested that the software be upgraded.
10. Buddenhagen testified that he had a number of problems with Ms. Wake’s clerical abilities and bookkeeping skills that led to his decision to terminate her employment. Specifically, he said that her difficulties in reconciling the general ledger led to not meeting time deadlines, which almost led to the loss of his licence to practice law.
11. Mr. Buddenhagen testified that his accountant, Robert Haley, had difficulty getting the necessary information to reconcile the trust account reports, and that he incurred additional expenses reconstructing and reconciling the books. Mr. Buddenhagen also testified that he was unaware of Ms. Wake’s bookkeeping difficulties until he was required to undergo a trust audit in August 2006. Mr. Buddenhagen confirmed that he had not reprimanded Ms. Wake for her poor performance, or told her that her job was in jeopardy. He testified that he found Ms. Wake personable, and that he could not fire her for her spelling, but he could not tolerate the “mess of the books”. He said that he did not detect the bookkeeping problems because he was not skilled at it. Mr. Buddenhagen was fined \$212 by the Law Society for filing a late trust report.
12. Mr. Haley, a C.G.A. with 30 years’ experience, testified that his fees to Buddenhagen doubled as a result of the difficulty he experienced reconciling or reconstructing entries. His evidence was that although Ms. Wake sought his advice on a number of matters, she did not ask him about business accounting matters. Mr. Haley’s evidence was that Law Society trust account rules provide that any discrepancies in excess of \$2500 had to be reported to the Law Society, but that Buddenhagen’s discrepancies did not exceed that amount. According to the delegate, Mr. Hagen had to reconstruct the entries Ms. Wake had made back to May 31 in order to reconcile the accounts and balance ledgers as the software did not allow them to reverse them.
13. The delegate reviewed section 63 and Tribunal jurisprudence on what constituted just cause for termination (*Re British Columbia* RD #122/03). He noted that Buddenhagen had not undertaken corrective discipline with respect to Ms. Wake’s work. He noted she had never been given any training or guidance or assistance in improving her work practices. He also noted that Ms. Wake had never been advised that her continued employment was in jeopardy if she failed to improve. He concluded that, although Buddenhagen may have had some discussions with Ms. Wake, those discussions and the events leading to her termination did not constitute just cause for dismissal.
14. The delegate concluded that Buddenhagen had not demonstrated that he gave Ms. Wake fair warning about her deficiencies and gave her an opportunity to correct them.

15. The delegate also concluded that there was no evidence to suggest that Ms. Wake's conduct was sufficiently serious to justify summary dismissal without the requirement of a warning. He found no evidence of intentional manipulation of the trust accounting, and that "clerical and or bookkeeping errors or difficulties experienced with certain software applications are not serious enough to justify summary dismissal without notice". The delegate found that Buddenhagen had not substantiated just cause for termination without notice, and found it liable for one week compensation for length of service.
16. Buddenhagen contends that the delegate ignored crucial evidence, that is, that Ms. Wake made so many errors that his accountant missed the Law Society's deadline for filing for the trust audit, and, as a result, the Law Society threatened to suspend his practice certificate. Buddenhagen also submits that the delegate ignored the undisputed fact that he was fined \$212 for the late delivery of the audit report, as well as Mr. Haley's evidence that Ms. Wake's bookkeeping efforts were "the poorest he had ever seen". He says that, because of Ms. Wake's incompetence, the Law Society threatened to put him out of business.
17. Buddenhagen also says that the delegate suggested that he allowed the bookkeeping errors to continue without taking corrective action. He submits that he had no bookkeeping knowledge of his own, and that he relied on Ms. Wake's representations that she was a competent bookkeeper. Mr. Buddenhagen argues that, because he had no bookkeeping training of his own, he was unable to detect the errors or omissions in the first place.
18. The delegate denied that he ignored crucial evidence, and submitted that the appeal was an attempt to re-argue the issue. He seeks to have the appeal dismissed.
19. Ms. Wake's submission repeats arguments that I infer were made to the delegate, including the comments Mr. Buddenhagen made to her when her employment was terminated, and her difficulty with the bookkeeping software. She denies that she represented to Buddenhagen that she was a competent bookkeeper. She says that she had experience with her own books, and assisted a friend. She denied that she had experience with the legal accounting software prior to working for Buddenhagen. She further notes that Buddenhagen was never in danger of losing his right to practise law.

THE FACTS AND ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
21. The burden of establishing the grounds for an appeal rests with an Appellant. Buddenhagen must provide persuasive and compelling evidence that there were errors of law in the Determination as alleged.
22. I have concluded that Buddenhagen has not demonstrated an error of law for the following reasons.

Error of Law

23. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
24. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.
25. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.
26. The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.
27. To substantiate just cause for this first category, an employer must meet a four part test:
- A reasonable standard of performance was established and communicated to the employee;
 - 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;
 - The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 - The employee continued to be unwilling to meet the standard.
- (*Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97)
28. The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.
29. The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).
30. The delegate considered section 63, as well as Tribunal jurisprudence. I find no error in his analysis in this respect. He concluded, in my view correctly, that Buddenhagen had failed to demonstrate that Ms. Wake had not met a standard of performance or indicated her unwillingness to do so. He found no evidence that Buddenhagen had warned Ms. Wake about her performance. To say, as Buddenhagen does,

that he could not set a standard of performance because he was himself not knowledgeable about that standard does not discharge his burden of establishing cause. While I acknowledge the seriousness of Mr. Buddenhagen's failure to meet trust deadlines, his failure cannot rest on Ms. Wake. There appears to have been no evidence before the delegate of Ms. Wake's training other than her own, or her representations to Buddenhagen about her bookkeeping abilities. Given that trust accounts are monitored carefully by the Law Society, it was incumbent on Mr. Buddenhagen to put systems in place to ensure that the Law Society rules were complied with.

31. I am also unable to conclude that the delegate failed to consider crucial evidence in arriving at his conclusion. The delegate noted that Mr. Buddenhagen had been fined by the Law Society. While the delegate did not specifically note Mr. Haley's evidence about Ms. Wake's bookkeeping abilities, that failure would not, in my view, alter the conclusion that Ms. Wake was never warned about her performance. Although Buddenhagen argues that Ms. Wake's performance constituted gross incompetence, I am unable to find any evidence that would support such a conclusion. Even if the delegate had considered the "crucial evidence" advanced by Buddenhagen, I am not persuaded that Ms. Wake's performance was such to undermine the nature of the employment relationship.
32. I dismiss the appeal.

ORDER

33. I Order, pursuant to Section 115 of the Act, that the Determination, dated February 28, 2007, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal