Employment Standards TRIBUNAL

An appeal

\- by -

Tanya Tortorella

(“Tortorella”)

\- 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:	David B. Stevenson
FILE No.:	2008A/31
DATE OF DECISION:	May 22, 2008

DECISION

SUBMISSIONS

Tanya Tortorella	on her own behalf
Gagan Dhaliwal	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Tanya Tortorella ("Tortorella") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 22, 2008.

2. The Determination was made on a complaint filed by Tortorella against Weldco-Beales Mfg. B.C. Ltd. ("Weldco-Beales"). Tortorella alleged Weldco-Beales had contravened Sections 54 and/or 63 when it terminated her employment.

3. The Director found there had been no contravention of the Act by Weldco-Beales and issued a Determination to that effect.

4. Tortorella has appealed that part of the Determination finding Weldco-Beales had demonstrated just cause to discharge Tortorella and, as a result, had discharged its liability under Section 63 for length of service compensation.

5. Tortorella has not requested an oral hearing on the appeal. The Tribunal has a discretion in that respect. In this case, the Tribunal has reviewed the material and the parties' submissions and in its discretion has concluded this appeal can be decided on the written material in the appeal file.

ISSUE

6. The issue in this appeal is whether the Director erred in law in finding Weldco-Beales had discharged its liability under Section 63 of the *Act*. More particularly, the question is whether, as a matter of law, Weldco-Beales had just cause to terminate Tortorella.

THE FACTS

7. For reasons which will be more clearly stated later in this decision, I accept the findings of fact made in the Determination. The section 112 Record has been provided and I will refer to material in that record to assist in explaining or, when necessary, to providing more detail relating to the findings made.

8. Tortorella was employed by Weldco-Beales from March 8, 2004 to May 7, 2007 as an administrative and accounting clerk. She was terminated on May 8, 2007 for events which occurred on May 3, 2007. Weldco-Beales did not provide Tortorella with reasons for her termination at the time it occurred other than to indicate it related her inability to maintain the confidentiality of certain information to which she

was privy. In response to a step in the "self-help" process, Weldco-Beales provided a letter containing the following statement:

> As discussed in your exit meeting, Weldco-Beales Mfg BC Ltd terminated your employment with "just cause". The basis of that "just cause" was the breach of company confidentiality policy. Within your position you were privy to confidential payroll//employee information. That information was held to be in the strictest confidence. It is our belief that certain information was not kept confidential.

9. The information which was considered by the company to be confidential, and which Tortorella was found to have disclosed, concerned the layoff of an employee. The Director found that Tortorella had told another employee that an employee by the name of Ken Mann had been let go (laid off) and this was overheard by another employee.

10. The general circumstances relating to Tortorella's termination are found in the Section 112 record and the Determination. On April 30, 2007, Weldco-Beales had made a decision to lay off eight individuals from the production floor of their Langley shop. There were four individuals from each of two shifts being laid off. All of the paperwork related to the lay offs had been completed on May 2, 2007. The identities of the individuals being laid off were known to a limited number of people. On May 3, 2007, the foremen of the affected individuals from the day shift were provided with employee packages for each of them. The packages were given to the affected employees as they arrived for work in the morning. At that point, the fact of lay offs on the day shift became public knowledge, but it was not public knowledge that any persons from the night shift would be laid off. Weldco-Beales intended that information to become public knowledge only when the remaining four affected employees arrived for shift later in the day on May 3, 2007 and were given their packages. Mr. Mann was one of the night shift employees to be laid off.

11. Tortorella had been given the names of the individuals by Karen McLean, who was the HR Coordinator in the Langley office at the time, because Tortorella needed those names when inputting time card information from the previous day. Tortorella was not told the information she was being given was confidential, but the Director found it "hard to accept that she would not be aware that information in relation to lay offs would not be confidential".

12. During the complaint process, Weldco-Beales provided the Director with a copy of Weldco-Beales' Confidentiality and Non-Disclosure Policy. The policy is dated 28 June 2004. Tortorella was aware of the Policy. The policy defines "confidential information" as:

> . . . personal information regarding employees or clients as set out in the Company's Client and Employee Privacy Policies, as well as trade secrets, confidential business or financial information, technical information, bidding information, information related to regulatory and industrial relationships, supplier information and information related to proposed projects or Clients.

13. The Privacy Policies referred to in the definition were not provided to the Director. The Policy also states that, "each employee is required to keep confidential information, and not disclose to any person, without the permission of the Company, the confidential information except as required in order to perform the employee's applicable job duties". The Director found that the disclosure of Ken Mann's lay off to the other employee was not conveyed to that employee in order for her to perform her job duties.

14. Weldco-Beales also provided the Director with a copy of Tortorella's job description, which contained the following paragraph pertaining to the "confidentiality" of the position:

> This position is privileged and has access to financial information. Disclosure or release of such information to unauthorized individuals will not be tolerated, as it compromises our competitive edge and will negatively impact the success of WBM.

15. The Director considered the information which Tortorella conveyed to the other employee was confidential information which she had released without authorization and, although it was a single act of misconduct, was sufficiently serious to justify summary dismissal. In reaching this conclusion, the Director relied on a statement from H.A. Levitt, *The Law of Dismissal in Canada*, that "Improper disclosure of confidential information constitutes just cause for discharge . . ."

ARGUMENT

16. Tortorella argues the Director erred in concluding summary dismissal was an appropriate response to the breach of confidentiality that occurred. She says the incident should have resulted, at most, in some form of reprimand.

17. Her submissions express disagreement with many of the findings and conclusions of fact made in the Determination.

18. Weldco-Beales has not filed a response to the appeal.

19. The Director says the Determination was made on the evidence presented. The Director disagrees with Tortorella's view that certain witnesses were not telling the truth, indicating in both the Determination and the response that the evidence of those witnesses was credible and probable in the circumstances. The Director says the appeal does not show an error of law was made.

ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *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 made.*

21. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

22. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see

Britco Structures Ltd., BC EST #D260/03). Accordingly, unless Tortorella can show the findings of fact amount to an error of law, I am statutorily compelled to accept the findings of fact as made.

23. Tortorella says the Director made an error of law.

24. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
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> 2. a misapplication of an applicable principle of general law;
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> 3. acting without any evidence;
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> 4. acting on a view of the facts which could not reasonably be entertained; and
>
> 5. adopting a method of assessment which is wrong in principle.

25. I am not convinced any of the findings of fact made by the Director can be said to be an error of law. Nor can I conclude the Director erred in law in summarizing the applicable principles the issue of just cause. In *Kenneth Kruger*, BC EST#D003/97, the Tribunal summarized those principles:

> 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.

26. The above principles have consistently been applied by the Tribunal. This case involves summary dismissal for a single incident.

27. If an error of law can be said to exist, it must be found in the conclusion that Weldco-Beales had discharged its liability for length of service compensation or, put in the context of the circumstances of this case, had demonstrated the misconduct of Tortorella justified summary dismissal.

28. The Director relied on a statement from Levitt's text on the law of dismissal, that improper disclosure of confidential information constitutes just cause for dismissal. That is an inaccurate statement of the law as it presently exists. Any such statement must be tempered by the comments of the Supreme Court of Canada in *McKinley v. B.C. Tel*, [2001] S.C.C. 38; [2001] S.C.J. No. 40 that a contextual approach must be taken in assessing whether an employer is justified in dismissing an employee for misconduct. In the words of the Court:

> . . . whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. (at para. 48)

29. The Court concluded that only conduct going to the core of the relationship would amount to cause for dismissal. Underlying the Court's approach is the principle of proportionality, which the Court says should seek to strike a balance "between the severity of an employee's misconduct and the sanction imposed". The concept underlying this balancing approach is the "sense of identity and self-worth of individuals frequently derive from their employment" (at para 53).

30. In McKinley the misconduct alleged was dishonesty, but the contextual analysis applies to any case where just cause is alleged: "the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract": see *Jim Pattison Chev-Olds*, BC EST #D643/01 and *Nedco, A Division of Westburne Industrial Enterprises (WEIL) Ltd.*, BC EST #D547/01 (Reconsideration refused BC EST #RD233/02).

31. Notwithstanding the inaccurate reference to the comment from Levitt, I do not find the Director failed to engage in a contextual analysis of Tortorella's misconduct, finding the sensitive nature of the information disclosed, the potential effect of its disclosure on the affected employee, the potential damage to legitimate interests of the company and the confidential nature, generally, of her position seriously undermined the employment relationship and made its continuation impossible.

32. For the above reasons, I find Tortorella has not shown the Director erred in law and the appeal is dismissed.

ORDER

33. Pursuant to Section 115 of the *Act*, I order the Determination dated February 22, 2008 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal