Employment Standards TRIBUNAL

An appeal

- by -

Granville Toyota Ltd.
("Granville")

- 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: M. Gwendolynne Taylor

FILE No.: 2002/578

DATE OF DECISION: February 18, 2003

DECISION

OVERVIEW

This decision is based on written submissions presented by Granville Toyota Ltd. ("Granville"), Raybert Chan ("Chan") and the Director of Employment Standards ("the Director").

Pursuant to section 112 of the *Employment Standards Act*, Granville filed an appeal from a Determination by the Director dated November 6, 2002, concerning a complaint by a former employee, Chan. The Director's delegate found that Chan had been terminated without just cause and ordered Granville to pay $2,195.64 including interest.

On November 22, 2002, Granville appealed the Determination on the grounds that Granville terminated Chan's employment for just cause and gave him notice.

ISSUE

Did the Director err in finding that Granville did not substantiate that it had just cause for terminating Chan's employment?

THE FACTS

Granville employed Chan from October 17, 1998 to January 8, 2002 as a car Sales Representative.

Chan claimed monies owing for:

1. 52 hours of overtime when he was called in or was scheduled to deliver vehicles;
2. 2 hours per month for ISI training;
3. ISI training costs of $200;
4. Compensation for length of service in the amount of three weeks wages; and
5. Other items which were acknowledged and paid by Granville and are being held in the Employment Standards Trust Account.

The Director found that Chan's claims for everything but item #4 were not founded. For item #4, the Director found that Chan was entitled to $2,195.64. The Director stated:

> The Act places the burden to prove **just cause** on the employer. In this case I am not satisfied this burden was met. Given the sales history of Mr. Chan it is fairly clear his overall sales may not have been improving as his dollars earned in the last two to three years remained constant. However, this does not necessarily mean he was a poor performer or that he failed to improve. In late 2001 he may have sold less cars but his average dollars earned per unit were up. In other words, his commissions did not suffer.
>
> The employer did not identify dates and times or the specifics of what was stated to Mr. Chan by Mr. Kirkpatrick the Sales Manager beyond that noted further in this analysis and the employer did

> not prove what was claimed actually occurred. Beyond verbal evidence, the employer could not prove the specifics al any alleged warnings or that what was said in the talks that the sales manager allegedly had with Mr. Chan. In other words for something so serious as the termination of a three year employee the employer failed to document and to have Mr. Chan sign off that they had had some serious talks and that he Chan had been warned that his failure to improve would lead to his termination.

Granville had submitted that Chan was repeatedly informed that his performance was well below the standard of sales and services the employer expected, was aware of employer resources that could help him improve, and was told that if he did not improve he would be terminated. The Director weighed Granville's submissions against Chan's denial that he had been warned about performance issues. The Director found that there was no strong evidence to support Granville's claims but that there was evidence of the consistency of Chan's sales history. The Director favoured Chan's submissions.

ARGUMENT

In the appeal, Chan continued to deny that he had been warned orally or in writing that his performance was an issue. He submitted that his performance for the last three years was stable and he attached T4 slips as proof.

The Director reiterated that although Granville claimed there had been discussions warning Chan about his performance, no supporting details, dates and times, or specifics of things discussed were provided.

Granville drew attention to a letter dated July 23, 2002, submitted to the Director, in which the issue of performance was addressed. In that letter, Granville submitted that Chan's sales decreased from an average of 7.8 vehicles per month in 2000 to 4 per month in the last five months of 2001. Granville also stated in the July 23 letter that Chan's sales logs were not kept up to date and that Chan knew that his continued lack of performance was going to lead to dismissal.

ANALYSIS

An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, law, or mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the Act. Consistent with that approach, the burden is on Granville to demonstrate such an error.

Section 63 of the Act:

> **Liability resulting from length of service**
> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (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.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

One of the leading cases in British Columbia on 'just cause' (s. 63(3)(c)) is *Silverline Security Locksmith Ltd (re)* [1996] B.C.E.S.T.D. No 200; BCEST # D207/96, July 31, 1996. At paragraph 11, the tribunal stated:

The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.

It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

And at paragraph 15, the tribunal stated:

> The concept of "just cause" requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

It is apparent that the Director, in favouring Chan's submissions, found that Granville had not "clearly and unequivocally" informed Chan of the perceived performance issues. In the appeal, Granville asks the Tribunal to find that it had given Chan notice and that Chan's performance had declined so much the employer had no choice but to terminate the employment.

I find that Granville's submission to the Tribunal does not support a finding that the Director erred. The Director weighed the evidence of both parties and made a reasonable assessment. In my view, the Director's determination was justified on the basis that Granville had not demonstrated that it informed Chan "clearly and unequivocally" that his performance was unsatisfactory and his employment was in jeopardy. It may be that Granville did not have any other evidence that it could have submitted. If that is the case, it suggests that Granville could be taking additional steps to document performance discussions and disciplinary actions.

In addition to the 'notice' side of Granville's argument, I have considered its evidence of falling sales. In the submission to the Tribunal, it attached a summary of the sales record for 2001. That summary shows the following sales from January through December: 6.5, 5, 6, 10, 5, 5, 10, 3, 5, 4, 5, and 4. I do not accept Granville's contention that this shows a decline in sales for the last 5 months.

I find that Granville has not substantiated its claim that the Director erred and has not substantiated grounds to cancel the determination.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued November 6, 2002.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal