Employment Standards TRIBUNAL

An appeal

- by -

636230 B.C. Ltd., operating as Vera's Burger Shack
("Vera's" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/612

DATE OF DECISION: February 18, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Vera Burger's Shack ("Vera's" or "Employer"), from a Determination dated November 14, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Employer seeks to appeal the Delegate's finding that Jake Kinney (the "Employee") was dismissed without just cause, and that he was therefore entitled to compensation for length of service. This was a case of disputed facts, concerning the event of May 12, 2002 which precipitated the Employer's dismissal of Mr. Kinney. The Delegate found that the Employer failed to establish that it had warned the Employee that his performance or attendance was unsatisfactory, or warned the Employee that his job was in jeopardy, prior to its dismissal of the Employee.

The Employer did not demonstrate any error in the manner in which the Delegate approached the fact finding process, or any error in the legal standard. The single incident alleged to be insubordinate was not sufficient to justify the termination of the Employee. The Employer failed to demonstrate any error in the approach of the Delegate to the Employer's allegation of poor past attendance, performance, and attitude of the Employee. I therefore dismissed this appeal, and confirmed the Determination, in the amount of $557.56 for compensation for length of service, and interest.

ISSUE:

Did the Delegate err in finding that the employee, Jake Kinney, was entitled to compensation for length of service?

FACTS

I decided this case after considering the written submission of the Employer, Employee, and the Delegate.

Mr. Kinney worked for the Employer between May 2000 to May 2002. Mr. Kinney was on vacation in Mexico and returned from Mexico on or about May 11, 2002. Mr. Kinney failed to attend at the workplace for a shift on May 12, 2002 between 11:00 am and 6:00 p.m. The Employee was unaware that he was scheduled to work that day. Mr. Tritt of the Employer phoned Mr. Kinney, at his girlfriend's house on May 12, 2002. Mr. Kinney admits to being angry that the Employer contacted him at his girlfriend's house but denies rude or belligerent behaviour alleged by the Employer during the telephone conversation. Mr. Kinney was terminated on May 13, 2002.

No documents were provided to the Delegate which indicated any evidence of warnings by the Employer to Mr. Kinney concerning job performance concerns or absenteeism concerns, prior to his termination. There is in particular, no documentary or oral evidence that the Employer set a standard for attendance, or performance, and informed the Employee that his attendance or performance, was sub-standard, or that the job was in jeopardy.

The Delegate found that there was a disagreement as to what occurred during the May 12, 2002 telephone conversation. The Delegate found that this single incident was not sufficient or severe enough to constitute just cause. The Delegate also found that while the Employer alleged past conduct with regard

to absenteeism (missed one shift previously), and attitude, that there was no evidence that the Employer had warned or attempted to correct any previous problems, prior to the termination following the May 12, 2002 incident. The Delegate found that Mr. Kinney was not advised by the Employer that he was scheduled to work on May 12, 2002. While the Employer was aware that Mr. Kinney had been in Mexico, the Employer did not receive a request from Mr. Kinney for a day off work on May 12, 2002.

The only live issue in this appeal was compensation for length of service. No issue is taken by the Employer with the calculations for compensation for length of service. The Delegate found that Mr. Kinney was entitled to the sum of $557.56, consisting of $546.00 in compensation for length of service, and $11.56 in interest. The Delegate investigated complaints made by Mr. Kinney related to the Employer's failure to pay overtime wages and vacation pay. The Delegate also found that the Employer breached provisions of the *Act* related to overtime pay and vacation pay, but by the time of the Determination, the Employer had paid in trust to the Delegate the sum of $192.00 on account of overtime wages, and $226.93 on account of vacation pay. The Delegate found that the Employer breached Part 8 and, and section 63(2) of the *Act* (failing to pay compensation for length of service), and ordered that the Employer cease contravening the *Act*.

Employer's Argument:

The Employer filed an appeal alleging that the Employee was dismissed for just cause for insubordination and absenteeism. The insubordination relates to rude and belligerent conduct of the Employee, alleged by the Employer to have occurred on a telephone conversation on May 12, 2002.

The Employer argues that Mr. Kinney was not a model employee, failed to show up for shifts, was rude and disrespectful to other employees, and had a bad attitude,. The Employer further submitted that the letters of support submitted by Mr. Kinney and reviewed by the Delegate were biased and from his mother, sister and sister's best friend. The Employer alleges that Mr. Kinney failed to mitigate his losses, because he did not look for a job during the summer. The Employer seeks to cancel the Determination based on a failure to observe the principles of natural justice and because of new evidence not available at the time the Determination was made.

Employee's Argument:

The Employee denies he had a poor attitude, was disrespectful to other workers or to Mr. Tritt the manager of the employer, or that he missed shifts.

Delegate's Argument

The Delegate submits that the Employer has established no error in the facts found.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that this appeal is a challenge to the fact finding process of the Delegate. The Employer does not allege any error in the mathematical calculation of the Employee's entitlement, or identify any error made in the law applied by the Delegate, in assessing the information before him.

New Materials:

On this appeal the Employer filed a witness statement which was not provided to the Delegate. The Employer's new material is an email from Jessica Huget dated December 7, 2002. The Employer does not explain why the material was not available during the time of the investigation. In response to the Employer's appeal, the Employee filed an undated email from "Emily". The Tribunal has developed a policy as expressed in *Tri-West Tractor Ltd., BCEST #D 268/96*, that an appellant is not permitted to "lie in the weeds", and produce for the first time on appeal, materials which should have been provided to the Delegate. I note that the process before the Tribunal is an appeal from a Determination, and not a "first instance" investigation of a complaint. The focus is on errors made by the Delegate. While a result "may" be different if a party fully cooperates and adduces all information to the Delegate, it is not an error for the Delegate to rely on the information provided at the time of the investigation. For the above noted reasons, I decline to consider the new materials filed by the Employer, and new response materials filed by the Employee.

Just Cause:

I have considered the balance of the material filed by the Employer, and all other materials including the Determination, to assess the Employer's argument that the Delegate erred, and the Determination should be cancelled. In this case the Employer says that it had just cause to dismiss Mr. Kinney, and therefore it is not obliged to pay compensation for length of service. The Employer seeks to challenge the Delegate's finding that the Employee was dismissed without just cause, alleging insubordination, undue absenteeism and poor work performance.

Section 63 is the applicable section of the *Act*, dealing with the Employee's entitlement to compensation for length of service, and the relevant portion is produced below:

> 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.
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> (2) The employer' liable for compensation for length of service increases as follows:
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> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (3) The liability is deemed to be discharged if the employee
>
> (c) terminates the employment, retires from employment , or is dismissed for just cause.

I note that in the investigation before the Delegate, the burden rests with the Employer to establish that it had just cause to dismiss an Employee. If the Employer cannot establish just cause, the Employee is entitled to compensation for length of service. I agree with the Delegate that the single incident on the telephone call of May 12, was not serious enough to result in termination. I further note that there is no evidence that the Employee knew that he was scheduled to work on May 12, 2002. There was no doubt some basis for each party to be "angry" at the other; Mr. Tritt because he thought that Mr. Kinney had missed a shift, and Mr. Kinney because he did not know he had to work and was contacted on a day off. There is simply one incident that seems to have an explanation. In my view, there is nothing here that shows irreparable damage to the employment relationship such that the relationship was at an end. There is no evidence of deliberate disobedience to a lawful order, or a flouting of an essential contractual condition by the Employee.

I note that the Employer argues that the fact that he only gave verbal warnings did not make the "performance more meritorious". There is no doubt that an Employer can dismiss an employee for excessive absenteeism, or substandard work performance, however, the Employer must be in a position to prove this, if the facts are disputed. It is entirely within the prerogative of the Employer to manage its work force. If the Employer fails to "manage" its work force, and fails to document the steps taken with regard to performance or absenteeism, it is trite, that an Employer will have difficulty meeting its burden of proof.

The Employer did not provide any documentation of warnings given to the Employee that his job was in jeopardy due to either absenteeism or performance concerns (including poor attitude) prior to terminating him.

The Employer alleges that the Employee was not a "model employee". This statement is of no assistance in assessing whether or not the Employer had cause to dismiss Mr. Kinney, and whether the Delegate erred in his assessment. I am not satisfied that the Employer has shown any error in the manner in which the Delegate approached the investigation, the facts found by the Delegate after investigation, or the legal standard applied by the Delegate to the facts.

Further Arguments Advanced by the Employer:

In the notice of appeal the Employer raises the issue of breach of natural justice and bias. The Employer has not developed any argument to demonstrate that the Delegate failed to observe the rules of natural justice in making the Determination. While the Director relied on information provided by the Employee and also family members, there is nothing that the Employer identified which illustrates a bias or error in the information considered.

I note that the Employer alleges that the Employee failed to mitigate his losses and therefore is not entitled to compensation for length of service. I note that compensation for length of service is a minimum employment standard and is not subject to a duty to mitigate.

For all the above reasons, I therefore dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated November 14, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal