Employment Standards TRIBUNAL

An appeal

- by -

343004 B.C. Limited. operating as Cut N Go
("Cut N Go" 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.: 2002/629

DATE OF DECISION: February 26, 2003

DECISION

OVERVIEW

This is an appeal by an employer, 343004 BC Ltd operating as Cut N Go ("Cut N Go" or "Employer"), from a Determination dated November 26, 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 findings that the Employee was dismissed and entitled to compensation for length of service, and payment of the sum of $325.00 deducted from wages without a written authorization. This was an issue of quit or fire, and the facts found by the Delegate are set out in this Decision. The Employer filed an appeal asking the Tribunal to review the issue of resignation, without filing any detailed submission, or identifying the errors alleged to have been made by the Delegate. Upon reading the notice of appeal, the Determination, and the submissions of the parties, it is apparent that the Delegate considered the evidence, the applicable law, and did not err in the Determination. I therefore dismissed the appeal and confirmed the Determination.

ISSUE:

Did the Delegate err in finding that the employee, Ms. MacLean, is entitled to compensation for length of service, and reimbursement for an unauthorized deduction from wages?

FACTS

I decided this case after considering the submissions of the Employer and the Delegate. The Employee, Venisa MacLean (the "Employee") did not file a submission.

The employment of Venissa MacLean at the Cut N Go salon, operated by 243004 B.C. Limited came to an end on August 26, 2002. Ms. MacLean and Mr. Hakim of Cut N Go had a discussion on or about August 13, 2002, where Mr. Hakim was critical of the Employee's work with regard to lateness, breaks taken, and customer complaints. Ms. MacLean said to Mr. Hakim you might as well make your mind up, after which Mr. Hakim said that he would be giving her one week's notice of termination. Ms. MacLean replied that she would give him two weeks notice, and he could find someone else as she was finished. The Delegate found that the discussion was heated. The Delegate also found that there had been a history parties were Mr. Hakim had fired Ms. MacLean on previous occasions, and Ms. MacLean continued to work. The only other conversation between the parties was when Mr. Hakim asked her if August 25, 2002 was her last day of work and she said "yes, yes".

There was no further discussion between the parties. Ms. MacLean continued to attend at the workplace, and in particular attended on August 26, 2002. Mr. Hakim telephoned the salon at 9:00 am, and Ms. MacLean answered the phone. He told Ms. MacLean that she was no longer working there as she quit. Ms. MacLean refused to leave the salon. She left the salon, however, after Mr. Hakim said he would be contacting security and the police, to have her removed from the property. Ms. MacLean's evidence to the Delegate was that she did not intend to quit her employment.

During the investigation, the Employer argued that Ms. MacLean resigned and was not entitled to compensation for length of service. As an alternative argument, the Employer argued that it had just

cause to terminate Ms. MacLean. The Employer admits that it deducted the sum of $325 from the last paycheque.

The Delegate considered the evidence including Mr. Hakim's tape recording, the evidence of other co-workers, and the evidence of Ms. MacLean. The Delegate concluded that the comment of Ms. MacLean was made in the "heat of the moment" and there was no subjective or objective evidence of Ms. MacLean's intention to quit. In coming to her decision, the Delegate considered the decision of the Tribunal in *RTO* (Rentown Inc., BCEST #D409/97). The Delegate was not satisfied, on the basis of the evidence, that the resignation was truly and voluntarily given, that there was any subsequent conduct confirming the resignation, and was not satisfied that the words uttered in the heat of the moment represented the Employee's true intent to resign.

The Delegate went on to consider if the Employer had just cause to dismiss the Employee. The Delegate found that the Employer had not met the onus of demonstrating just cause. In particular, the Delegate found that the Employer had not proven repeated absences, lateness or customer complaints. The Delegate referred to the standard for performance based dismissals and found that the Employee was not advised of the Employer's performance expectations and was not warned that her job was in jeopardy.

The Delegate further found that the Employer had deducted the sum of $325.00 from the last paycheque of Ms. MacLean, without a written authorization. The Delegate held this to be a violation of sections 21 and 22 of the *Act*.

The Delegate found that Ms. MacLean was entitled to the sum of $713.21 consisting of $365.75 for compensation for length of service, $14.63 vacation pay, and $325.00 deducted without authorization from wages by the Employer, and interest in the amount of $7.83. The Delegate also assessed a zero dollar penalty pursuant to section 98 of the *Act*, and section 29 of the *Employment Standards Regulation, B.C. Reg. 396/95* for the unauthorized deduction from wages.

Employer's Argument:

The Employer provided an appeal form which indicates that the Delegate erred in law. The extent of the appeal submission is noted under the grounds of appeal and the full text of it reads as follows:

> By failing to give proper regard to the legal effect of the claimant's conduct in re her resignation and her debt owing to me.

The Employer filed no further written submission, but filed a number of documents, which it appears to have filed in an Employment Insurance proceeding..

Delegate's Argument:

The Delegate says that the Employer has not raised an specific error in law or fact, and that the Employer seeks the Tribunal to reconsider the arguments raised. The Delegate refers the Tribunal to the Determination, and reasoning in the Determination, and submits that the appeal should be dismissed.

ANALYSIS

New Documents:

The Employer filed as part of this appeal documents marked Exhibits 5, 9, 10, 11, 12 and 13-1. These appear to have been documents tendered at an Employment Insurance appeal. These documents were not produced to the Delegate during the course of the investigation. I decline to consider these documents in this appeal. No explanation has been advanced by the Employer for its failure to produce these documents to the Delegate. I note that the proceeding before the Tribunal, is in the nature of an appeal, and the purpose of such a hearing is to identify errors that the Delegate made during the course of the investigation, which made a difference to the result expressed in the Determination. While a result "may" be different if a party chooses to tender all documents, if that party fails to tender a document without advancing any explanation for the failure acceptable to the Tribunal, an Adjudicator may exercise his discretion not to consider the document: *Tri-West Tractor Ltd., BCEST #D268/96*. For the above noted reasons, I decline to consider the exhibits noted.

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.

In my view, it is incumbent on an appellant to raise an issue on appeal which the Tribunal must consider. An appellant should be able to point out the errors made in the Determination with some precision. In effect, all the Employer has asked for in this appeal, is for the Tribunal to re-weigh the evidence that was before the Delegate. I note that my rather brief analysis in this case is much lengthier than the one line submission filed by the Employer with the Tribunal. Without reiterating all the facts found by the Delegate, and evidence provided to the Delegate which are contained in the ten page Determination, I have reviewed the Determination, and I am satisfied that the Employer has shown no error in the Determination.

I wish to deal specifically with the issues of deduction, resignation or termination, and compensation for length of service.

Deduction:

In my view, the Delegate correctly disposed of the issue of deduction of the sum of $325.00. If this was a valid loan, there was no written authorization. In the absence of a written authorization under section 22(4) of the *Act*, the deduction of an amount by an Employer, from an Employee's wages to satisfy a credit obligation is not permitted.

Quit or Resignation:

In the context of this case, the burden of proving just cause before the Delegate rests with the Employer. The Delegate analyzed this situation as a termination rather that a resignation. The Employer has not identified any error in the Delegate's analysis. The Delegate properly identified the issue. The Delegate properly identified the law that applies to resignation. The Delegate reviewed the evidence supporting the Employer's allegation of a "quit" and the evidence supporting the Employee's allegation that she was terminated. The Delegate concluded that there was a history of the Employee continuing to work where the Employee had been fired by the Employer, and where the Employee had quit in the past. The Delegate also noted that Employee had not told any of her co-workers that she had quit. She did not

confirm her resignation in writing. The parties did not discuss a particular quitting date. The Employee showed up to work on a date, after the Employer believed her last day, and the Employer did not let her work, and threatened to phone the police. The Delegate considered the applicable facts, and law. In the absence of any specific errors in the Determination identified by the Employer, I am not prepared to interfere with what is a well reasoned Determination, in which the Delegate considered the relevant facts and law.

Further, the Delegate identified the particular standard to be applied when an Employer seeks to dismiss an employee for performance based considerations. Generally an employer is required to set the standard for performance, and identify to the Employee that the performance is deficient, and that the failure to rectify the deficiency will result in dismissal. The Employer must give the Employee the opportunity to meet that standard, before termination on the basis of a lack of performance. I see no error in the findings of the Delegate, or the application of the standard legal test to the facts of this case.

Because the Delegate correctly found that the Employee was terminated by the Employer, and did not resign, and also found that the Delegate correctly found that Employer did not have just cause to terminate the Employee, the Employee is entitled to compensation for length of service, pursuant to section 63 of the Act. As the Employer has not identified any error in the calculations of the Employee's entitlement, I confirm the amounts set out in the Determination.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated November 26, 2002 is confirmed, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal