Employment Standards TRIBUNAL

An appeal

- by -

Valeysen Moothoo
("Moothoo")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/77

DATE OF DECISION: August 21, 2014

DECISION

SUBMISSIONS

Valeysen Moothoo — on his own behalf

INTRODUCTION

1. On August 1, 2012, Valeysen Moothoo ("Moothoo") was dismissed from his employment as a "security manager" with Gateway Casinos & Entertainment Limited ("Gateway"). Gateway's position was that it had just cause for dismissal. Mr. Moothoo challenged his dismissal and, on August 23, 2012, filed a complaint under section 74 of the *Employment Standards Act* (the "*Act*") claiming compensation for length of service and unpaid vacation pay. Mr. Moothoo's complaint was the subject of a complaint hearing before a delegate of the Director of Employment Standards (the "delegate") on February 18, 2013, at which both parties attended, with witnesses, and presented their evidence and argument. Gateway presented the testimony of three witnesses; Mr. Moothoo testified on his own behalf and called one further witness.

2. On May 20, 2014, the delegate issued a Determination dismissing the complaint in its entirety. The delegate, in very brief reasons, found that Gateway had just cause for dismissal (see subsection 63(3)(c)) and thus was not required to pay any compensation for length of service (see subsection 63(3)(c)). Further, and based on her review of the payroll records, she concluded that Mr. Moothoo was not owed any vacation pay. Pursuant to section 81 of the *Act*, Mr. Moothoo requested written reasons for the Determination and on June 16, 2014, the delegate issued her reasons for decision. On June 26, 2014, Mr. Moothoo filed an appeal based on the sole ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)).

3. Mr. Moothoo's employment was terminated on August 1, 2012, and he filed a timely complaint. However, a complaint hearing was not conducted until February 18, 2013, some 6 ½ months after his complaint was filed. The delegate did not issue a Determination until May 20, 2014, about 1 year and 3 months after the complaint hearing was concluded. Mr. Moothoo requested written reasons in early June 2014 and these were issued on June 16, 2014 (the "delegate's reasons"). In my view, and I am in no way intending to criticize the delegate since I have no knowledge about her caseload or any other factor that might have adversely affected the timely resolution of this matter, the delay involved in adjudicating this matter is not in keeping with the stated section 2(d) purpose of the *Act* that matters be adjudicated efficiently. In the absence of extenuating circumstances I fail to understand why the Determination, consisting of only 2 pages of summary findings, could not have been issued within a few days, or at most, a few weeks, after the complaint hearing ended. A 1 year 3 month delay is, in my mind, inexplicable.

4. At this juncture, I am adjudicating this appeal based on the written submissions filed by Mr. Moothoo in order to determine if the appeal should be summarily dismissed under subsection 114(1)(f) of the *Act*. In addition to Mr. Moothoo's submissions, I have reviewed the Determination, the delegate's reasons and the subsection 112(5) "record" that was before the delegate when the Determination was issued.

BACKGROUND FACTS

5. Mr. Moothoo's disciplinary history included a November 2011 incident when he directed a member of the cleaning staff to clean his personal vehicle. He admitted he should not have made the request, apologized and indicated that such an incident would not re-occur. In May 2012, a former employee arrived at the

casino with some other individuals (two women) who could not prove they were of legal drinking age and thus were denied entry. The former employee then asked for a supervisor to be called to review the matter – the supervisor confirmed the denial of entry. The former employee then made a cellular telephone call to Mr. Moothoo (who was off-duty and thus had no supervisory authority at the time) and Mr. Moothoo directed the security manager to allow the group to enter – video surveillance confirmed that while in the casino, the two women consumed alcohol that had been purchased for them by another individual. This incident was particularly problematic because, firstly, the former employee was not permitted to enter the casino and, secondly, the provincial regulator was becoming increasingly concerned (and conducting surreptitious audits) to deal with the problem of minors in casinos. Mr. Moothoo conceded he exercised poor judgment and, as a result of this incident, he was given a 2-day suspension without pay. His suspension letter included the following warning: "Please be advised that any further incidents of a disciplinary nature could result in disciplinary action up to and including termination".

6. Shortly after the "casino entry" incident, Gateway's Corporate Security Manager was informed by a security supervisor that Mr. Moothoo had been purchasing cartons of "duty free" cigarettes (while on duty in the casino) from a subordinate employee and that, by way of exchange, this subordinate was receiving unfair favourable treatment in the allocation of overtime. Gateway's employment records showed that this subordinate had received nearly seven times the amount of overtime hours compared to the departmental average. In large part, this pattern was explained by Mr. Moothoo regularly assigning the subordinate a 10-hour shift, effectively guaranteeing him two overtime hours each shift.

7. When confronted with the duty-free cigarettes/overtime allocation issue, Mr. Moothoo conceded that he had been purchasing duty-free cigarettes but maintained that it was not a "serious issue" although, he also conceded that it was inappropriate behaviour. He denied any favouritism in the allocation of overtime. That denial, in my view and given the preponderance of evidence, was a deceitful assertion that, standing alone, was worthy of serious discipline.

8. Gateway is a unionized operation and the employer was concerned that the allocation of overtime could contravene the collective agreement. Ultimately, given the highly regulated nature of the casino business and the need to have strict compliance with the highest of ethical standards, Gateway determined that it had lost faith in Mr. Moothoo and that he could no longer be trusted to properly act in a managerial role. Accordingly, his employment was terminated. Gateway has maintained throughout this matter that it had just cause for dismissal.

9. The delegate considered the evidence from two perspectives. First, she held that the termination was the culminating incident in a series of inappropriate behaviours and, since Gateway had properly applied the principles of corrective discipline, summary dismissal was an appropriate response. Second, the misconduct precipitating the dismissal constituted a repudiation of the employment contract justifying Mr. Moothoo's summary dismissal (delegate's reasons, page R9 – R10):

> ...I find the final culminating incident...sufficient to warrant the complainant's termination. The employer clearly established the high standard expected of its employees and especially of its management. The employer communicated this explicitly to its employees. A significant reason for such high standards is the nature of the gaming industry and that the employer in turn is subject to a high level of scrutiny by its governing legislation and regulatory bodies. Given these circumstances, I am satisfied the complainant's actions fundamentally breached the employment contract...[and] the employer had just cause to terminate the complainant's employment.

ANALYSIS OF THE APPELLANT'S REASONS FOR APPEAL

10. As noted above, Mr. Moothoo's appeal is based on the "natural justice" ground set out in subsection 112(1) of the *Act*. However, having reviewed his material, it would appear that he also maintains, without expressly saying so, that the delegate erred in law (subsection 112(1)(a)) in finding that there was just cause for dismissal. Mr. Moothoo seeks a section 63 compensation for length of service award; he does not challenge the dismissal of his vacation pay claim. Mr. Moothoo's position is more fully set out in a 3-page letter that is appended to his Appeal Form in which he addressed four matters.

11. First, Mr. Moothoo explained that he "made a mistake" regarding the "car cleaning incident" and that this matter was dealt with by way of a "coaching" session and that "nothing further" transpired. This point of clarification has no relevance to whether Mr. Moothoo was dismissed for just cause inasmuch as it nonetheless represents part of his uncontroverted disciplinary history.

12. Second, with respect to the "casino entry" issue, he says that he "admitted his mistake and served a 2-day suspension". Mr. Moothoo now asks "how can the employer use this ground again for termination?" and says that he considers Gateway's reliance on this past misconduct as creating a "double jeopardy" situation. While it would be inappropriate for an employer, some time later, to issue supplementary discipline (say, in the form of a dismissal) for conduct that has already been sanctioned, that misses the point that this misconduct forms part of his disciplinary history for corrective discipline purposes. Gateway was absolutely entitled to raise this matter before the delegate, not as a stand alone justification for termination, but as evidence relating to Mr. Moothoo's past disciplinary history and to show that it had followed a corrective or progressive disciplinary approach that culminated in termination.

13. Third, the delegate noted that one of the employer's concerns was that Mr. Moothoo's misconduct (especially relating to the assignment of overtime) could result in Gateway having to address one or more grievances filed under the collective bargaining agreement. Mr. Moothoo notes, and this does not appear to be in dispute, that a grievance was never filed. While that might be so, the fact remains that the inequitable assignment of overtime could have resulted in one or more grievances being filed. Whether grievances were, or were not, filed does not ameliorate the misconduct. Further, Mr. Moothoo continues to maintain (and this is a problem since his continuing denial further explicates his lack of trustworthiness) that he never exhibited any favouritism in the assignment of overtime. However, the evidentiary record is such that the delegate did not err in finding that there had been preferential assignment of overtime. Indeed, in my view, if the delegate had taken a contrary view of the evidence, that would have been problematic.

14. Finally, with respect to the "duty-free cigarette/overtime allocation" matter, Mr. Moothoo, while admitting that he did purchase the cigarettes as alleged, feels that his employer did not "directly" communicate to him that he would be terminated when he was first questioned about the matter – he had the impression that he would be disciplined but not terminated. Again, this assertion has no relevance to whether the employer had just cause for dismissal. Gateway was entitled to consider Mr. Moothoo's explanation and then, at a later point, decide after a full review of the matter whether or not it would proceed with summary dismissal.

15. Mr. Moothoo also made a number of further assertions in the last two paragraphs of his 3-page memorandum. None is consequential. He says that he did not receive a Record of Employment from Gateway; if that is so, he should deal with the matter through the appropriate federal government agency – it has no bearing on whether he was terminated for proper cause. He also says that there is a discrepancy in the date of the Determination (dated May 20, 2014, but apparently post-marked May 16, 2014) – even if this statement is correct, it is not relevant to the just cause issue. Mr. Moothoo asserts that during the hearing process "the employer and representative failed to provide their documents on time and no action was

taken". Mr. Moothoo does not say if he objected to the admission of these documents at the hearing nor has he provided any further particulars about possible prejudice suffered as a result of alleged untimely document disclosure. Mr. Moothoo does not contest the authenticity of any documents submitted to the delegate and, in sum, I do not see that this assertion constitutes a proper ground of appeal. Lastly, he says that he feels insufficient "consideration was given for my severance pay for years of service and undue stress caused." Certainly, a lengthy unblemished service record can be a factor in assessing whether an employer had just cause for dismissal in a given case. However, Mr. Moothoo's employment record was not unblemished and, quite apart from his tenure, the one event relating to the cigarettes and the inequitable allocation of overtime was, in my view, of itself a sufficient basis for summary termination. I consider the termination to be all the more appropriate if this latter event is viewed as a "culminating incident" in a pattern of misconduct where progressive discipline was applied.

16. In sum, Gateway amply demonstrated just cause for dismissal and the delegate did not err in making that finding. Mr. Moothoo's reasons for appeal, on their face, lack merit and accordingly, this appeal must be summarily dismissed.

ORDER

17. Pursuant to subsection 114(1(f) of the *Act*, this appeal is dismissed because there is no reasonable prospect that it will succeed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal