Employment Standards TRIBUNAL

An appeal

- by -

The Cash Store Inc.
("TCS")

- 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: Shafik Bhalloo

FILE No.: 2009A/081

DATE OF DECISION: August 18, 2009

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), brought by Mr. Allan Sadowsky ("Mr. Sadowsky"), a Manager-Human Resources, of The Cash Store Inc. (the "TCS") of a Determination issued against TCS on May 29, 2009, by a delegate of the Director of Employment Standards (the "Director"). The Determination found that TCS contravened Section 54 of the *Act* in respect of the employment of Ms. Teresa Zomar ("Ms. Zomar") when it terminated her employment for requesting a family responsibility leave pursuant to Section 52 of the *Act*. As a result, the Director, pursuant to Section 79 of the *Act*, ordered TCS to pay Ms. Zomar compensation and lost wages in the amount of $4,259.00 plus accrued interest of $49.47 pursuant to Section 88 of the *Act*.

2. The Determination also imposed on TCS an administrative penalty of $500.00 under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") for the said contravention of the *Act*.

3. The total amount of the Determination is $4,808.47.

4. I note that the Appeal Form, in paragraph 1, shows that Mr. Sadowsky is the "person making the appeal", however, the Determination is not against Mr. Sadowsky; it is against TCS.

5. I also note that while Section 112 of the *Act* provides that a person served with a determination may appeal the determination to the Tribunal on one or more of permitted grounds, there does not appear to be any evidence in the materials filed in the Appeal, including the Section 112(5) "record", to show that Mr. Sadowsky was served with the Determination and therefore qualifies under Section 112 to appeal the Determination. Based on the information in the extra-provincial company search of TCS in the record, the Determination appears to have been sent by registered mail to TCS at its office address in Courtenay, British Columbia and copied to both the head office of TCS in Edmonton, Alberta and a law office in Vancouver, British Columbia serving as the mailing and delivery address for TCS in British Columbia. I simply point this out because Mr. Sadowsky, although apparently not served with the Determination, is appealing the Determination. However, I also note that neither Ms. Zomar nor the Director raise the issue of standing or authority of Mr. Sadowsky to appeal the Determination. I trust both Ms. Zomar and the Director recognize that Mr. Sadowsky participated earlier in the investigation of Ms. Zomar's complaint and made submissions on behalf of TCS in the investigation and therefore appear to accept his authority to appeal the Determination on behalf of TCS. In the face of no challenge to Mr. Sadowsky's authority to appeal the Determination from these parties, I will proceed and consider the appeal on its merits.

6. The sole ground of appeal advanced by Mr. Sadowsky on behalf of the TCS is that new evidence has become available that was not available at the time the Determination was being made.

7. Mr. Sadowsky is seeking the Tribunal to cancel the Determination.

8. Pursuant to Section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in the *Act* (s.103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the Section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

9. As indicated, the sole issue in this appeal is whether there is evidence that has become available that was not available at the time the Determination was being made, and, if so, does that evidence justify cancelling the Determination.

FACTS

10. TCS is in the business of providing short-term payday advances to its clients and employed Ms. Zomar as a customer sales representative from November 26, 2007, to January 12, 2009. at the rate of $10.00 per hour.

11. On February 20, 2009, Ms. Zomar filed a complaint against TCS pursuant to Section 74 of the *Act* alleging that TCS contravened the *Act* by failing to grant her Family Responsibility Leave and terminating her employment for requesting the leave (the "Complaint").

12. The delegate investigated the Complaint and received submissions from both Ms. Zomar and TCS. On behalf of TCS, the submissions came from Mr. Sadowsky as well as Ms. Shannon Lowe ("Ms. Lowe"), the store manager of TCS in Courtney, British Columbia, where Ms. Zomar worked.

13. In the investigation of the Complaint, the delegate notes that Ms. Zomar claimed that on January 12, 2009, prior to her 9:00 a.m. scheduled start time, she telephoned Ms. Lowe and advised her that she would not be able to report to work because her son was ill and that the doctors were considering hospitalizing him. Subsequently, on January 14, 2009, when Ms. Zomar was next scheduled to work for TCS, she stated that she telephoned TCS with the intention of informing TCS that she could not report to work again as her son continued to be ill and she was unable to secure care for him. On this occasion, Ms. Zomar spoke with Ms. Lowe who informed Ms. Zomar that her employment was terminated because she was unreliable.

14. The delegate notes that Ms. Zomar acknowledged in the investigation that Ms. Lowe, at first, addressed the issue of her tardiness at work through verbal communications and later with a written warning issued to her. However, Ms. Zomar did not recall whether TCS's policy - requiring employees to call in at least 30 minutes prior to the commencement of their shift if they are going to be late or absent - was discussed with her at any disciplinary meeting. However, she said that whenever she knew she was going to be late or absent, she did call or give notice to TCS.

15. Ms. Zomar further submitted that after the termination of her employment with TCS, approximately 3 ½ months later, on May 5, 2009, she secured alternative employment at the same wage rate she earned at TCS. However, due to her loss of employment with TCS, she was unable to afford rent during the unemployment period and had to stay with her brother starting in February 2009. At the same time she had to secure alternative accommodations for her son and daughter. Her daughter stayed with her father and her son stayed with his grandmother, Ms. Willi Drury ("Ms. Drury"). Ms. Zomar says she had to pay Ms. Drury $200.00 per month for the care of her son. She produced to the delegate a signed letter from Ms. Drury confirming that she paid her a total of $600.00 for the months of February to April 2009 inclusive for caring for her son.

16. In its defence, TCS, in the investigation of the Complaint, submitted that Ms. Zomar's employment was terminated because she failed to respond to corrective discipline relating to her breaches of TCS's policies governing tardiness and absenteeism which Ms. Zomar agreed to comply with when she executed her employment agreement with TCS. In particular, TCS submitted that the termination of Ms. Zomar's employment was due to her failure, on January 12, 2009, to give TCS 30 minutes advance notice before her

scheduled shift of her unavailability to attend at work and not because she was unable to report to work because she had to take care of her ill son.

17. TCS further submitted that seven weeks prior to Ms. Zomar's termination there were eight incidents Ms. Zomar was involved in that TCS documented. These incidents included infractions such as extended breaks, absenteeism due to illness where no doctor's note was provided, and appearing to work late.

18. With respect to the incident involving tardiness on Ms. Zomar's part, TCS noted that this incident occurred on January 7, 2009 when Ms. Zomar was scheduled to start work at 11:15 a.m. but did not arrive until 11:55 a.m. As a result, Ms. Lowe completed a document called Associate Counselling & Corrective Action, which noted that Ms. Zomar was late for her shift and the issue of tardiness on her part was previously discussed with her. Ms. Zomar appears to have signed the document acknowledging the infraction in question, committing not to be late in the future and also acknowledging that if she did not change her behaviour then she "may be subject to further disciplinary action up to and including termination".

19. TCS also submitted to the delegate a document entitled Change in Personnel Status executed by Ms. Lowe on January 14, 2009, two days after the termination of Ms. Zomar's employment, noting the termination of Ms. Zomar for cause for breach of TCS's policy for failing to provide "enough notice" of her unavailability to work at her scheduled time of 9:00 a.m. on January 12, 2009, because she called in at 8:49 a.m. on the same date.

20. As concerns a remedy, TCS in its submissions to the delegate indicated that if TCS were found to have contravened Section 54 of the *Act* in terminating Ms. Zomar's employment, reinstatement would not be a reasonable remedy.

21. The delegate, after taking into consideration the submissions of both parties, notes in the Reasons for Determination that the incident leading to the termination of Ms. Zomar's employment with TCS, namely, her telephone call on January 12, 2009, to TCS in advance of her scheduled shift at 9:00 a.m. to advise TCS that she would be unable to make her shift because she needed to care for her sick child, was uncontested by TCS. Having said this, the delegate notes that the family responsibility leave provision in Section 52 of the *Act* includes caring of a child and there is no requirement regarding how much notice an employee must give an employer to obtain leave under the said section. According to the delegate, "[family] responsibilities cannot always be predicted" and it is for this reason that there is not any requirement "regarding how much notice of the leave must be given".

22. The delegate further notes that Section 54 of the *Act* is phrased in mandatory terms and requires an employer "to give an employee who requests a leave under this Part the leave to which the employee is entitled". Section 54 furthermore prohibits an employer, in no uncertain terms, from terminating the employment of an employee because of an employee's allowed leave, which includes family responsibility leave under Section 52 of the *Act*. According to the delegate, while Ms. Zomar may have agreed to follow TCS's policy in her employment agreement, TCS's policies "do not supersede the provisions of the *Act*", particularly since Section 4 of the *Act* provides that the *Act*'s provisions "are minimum requirements and an agreement to waive those requirements has no effect". Therefore, reasons the delegate, Ms. Zomar's agreement to abide by TCS's policy in question cannot override or waive her rights in both Sections 52 and 54 of the *Act* and TCS's termination of her employment on January 12, 2009, in the circumstances, was in contravention of Sections 52 and 54 of the *Act*.

23. The delegate then refers to Section 79(2) of the *Act* with a view to crafting an appropriate remedy for Ms. Zomar. In his consideration, the delegate dismisses the remedy of reinstatement of Ms. Zomar's

employment as a viable option as Ms. Zomar has secured alternative employment and furthermore TCS did not want her back. Instead, the delegate opts to consider Ms. Zomar's income loss during the period of her unemployment from January 17 to May 5, 2009. Based on Ms. Zomar's average weekly earnings with TCS of $357.50, the delegate concludes that she would have earned, during the unemployment period, approximately $6,077.50 plus annual vacation pay of $243.10 on the said amount for a total of $6,320.60. The delegate further notes that during the same period Ms. Zomar had a declared income, from a source undisclosed in the Reasons for the Determination, of $2,661.00. The delegate subtracts this amount for mitigation on Ms. Zomar's part from the $6,320.60 figure to arrive at the figure of $3,659.00 for Ms. Zomar's loss of income. The delegate adds to this amount a further sum of $600 for Ms. Zomar's out-of-pocket expense related to the payments she made to her mother, Ms. Drury, for accommodating her son during the three-month period when Ms. Drury took care of her son. The end result of this is an order against TCS to pay Ms. Zomar a total of $4,259.00, and an administrative penalty of $500.00 under the *Regulation* for breach of Section 54 of the *Act*.

SUBMISSIONS OF TCS

24. Mr. Sadowsky's appeal on behalf of TCS is based on the "new evidence" ground of appeal and in this regard he submits two new pieces of evidence. The first is a written statement dated June 4, 2009, four days after the Determination was made, of Ms. Amber Wilks ("Ms. Wilks") who purportedly trained Ms. Zomar and is now a branch manager at the Courtney, British Columbia store of TCS. Ms. Wilks indicates in her statement that she hired Ms. Zomar as a full-time customer service representative and trained and made Ms. Zomar aware of all company policies and procedures including the policy which required Ms. Zomar to provide at least 30 minutes advance notice to her employer of her inability to attend her scheduled shift. Ms. Wilks further states since she did not live in Courtney at the time and was commuting to TCS's store in Courtney, she required at least one hour's advance notice from any employee to find a replacement.

25. The second piece of new evidence Mr. Sadowsky adduces is based on sources he claims are hesitant to provide a signed Affidavit "due to the fact Courtney is a small community and news travels fast". This piece of new evidence pertains to the matter of babysitting services for Ms. Zomar's child during the termination of her employment. Mr. Sadowsky indicates that he discovered, from an unnamed source, that Ms. Zomar qualified "for and took advantage of a program through the Province of British Columbia's Ministry of Children & Family Development [entitling] her to twenty days (20), free child care according to the contract between her childcare provider and the Ministry." Mr. Sadowsky also states that he understands that Ms. Zomar's "child is still at the same daycare" and that he contacted the program coordinator at that agency but was unable to obtain "contract information due to privacy concerns", but suggests that the Tribunal should contact the agency "with any questions".

26. Mr. Sadowsky also questions Ms. Zomar's claim that she paid a total of $600.00 to her mother, Ms. Drury, for looking after her son during the three-month period she was unemployed and did not have her own residence. More specifically, he states, "what's interesting is Ms. Drury is gainfully employed and drops the boy off at the day home so she can go to work. Therefore, I am not sure when Ms. Drury was watching the child." Based on this, he questions whether Ms. Zomar was forthright about "what occurred or what proceeded [sic] and led up to her termination" when "she was not as forthcoming in regards to her babysitting needs and arrangements" and asks the Tribunal to "reconsider" the Determination.

SUBMISSIONS OF THE DIRECTOR

27. The Director submits that TCS has failed to demonstrate "why this fresh evidence could not be presented during the investigation" of the Complaint and further argues that TCS has not established "the probative

value such evidence would have". Therefore, according to the Director, the purported new evidence should be rejected as it would not satisfy the test for allowing new evidence under Section 112(1)(c) of the *Act*.

28. Further, the Director submits that TCS is also attempting to reargue its position in that the purported new evidence in the form of Ms. Wilks' statement reiterates TCS's position in the investigation that Ms. Zomar knew of the policy requiring her to provide 30 minutes advance notice of her inability to work her scheduled shift.

29. With respect to Mr. Sadowsky's contention that Ms. Zomar qualified for and availed herself of babysitting services for her son through a Government agency or program, the Director states that "it is highly unlikely [that this information] would have led the Delegate to a conclusion different than the one reached in the Determination." According to the Director, this information, even if admitted, does not mitigate or lessen the responsibility of the employer to provide up to 5 days of unpaid leave to an employee during each employment year to meet the responsibilities related to the care and health of a child in the employee's care.

30. Lastly, the Director submits that during the investigation of the Complaint TCS was apprised of the sections of the *Act* in question and the delegate offered Mr. Sadowsky who refused the delegate's offer to provide TCS with the final preliminary findings on the Complaint, which would have been a further opportunity for TCS to respond presumably with the evidence that TCS is now submitting in its appeal.

SUBMISSIONS OF MS. ZOMAR

31. Ms. Zomar, with respect to the written statement of Ms. Wilks suggesting that she was required to provide one hour's notice, states that she was only required to give 30 minutes notice as Ms. Wilks was not her manager at the time TCS terminated her employment but Ms. Lowe was who resided in Courtenay.

32. Further, Ms. Zomar states that on January 12, 2009 when her employment was terminated, she repeatedly attempted to contact Ms. Lowe starting at 8:30 a.m. when she telephoned Ms. Lowe at her home and then followed that call with another at TCS's store but there was no answer until finally when Ms. Lowe answered the phone at 8:50 a.m., ten minutes before Ms. Zomar's scheduled shift.

33. Ms. Zomar further states that with respect to the issue of babysitting services for her son, she never claimed that she had trouble finding babysitting services at any time during her employment. However, on January 12, 2009, she was unable to bring her son to the babysitter as he had pneumonia. She adds while she attempted to obtain a letter from her babysitter substantiating this fact, the babysitter was reluctant to provide such letter as the babysitter's daughter works for TCS and she did not want any problems for her daughter.

34. With respect to Mr. Sadowsky's submissions questioning the veracity of M. Zomar's payment of $600.00 to Ms. Drury for the care of her son, Ms. Zomar states that she was unable to continue renting her place because she had lost her job with TCS. She had to find a place for her son to live and asked Ms. Drury to take him in until she was able to secure new employment and a place to live. The payment she made to Ms. Drury of $200.00 a month was for providing her son accommodation to live with her during this period.

ANALYSIS

35. As indicated previously, TCS's appeal of the Determination is based on the new evidence ground of appeal in Section 112(1)(c) of the *Act*:

Appeal of director's determination

> **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:
>
> …
>
> (c) evidence has become available that was not available at the time the determination was being made.

36. In *Re Merilus Technologies Inc.* [2003] B.C.E.S.T.D. No. 171 (QL), the Tribunal established a four-part test for admitting new evidence at an appeal. More specifically, the Tribunal stated that the appellant must establish all four of the following conditions before new evidence will be admitted or considered in an appeal:

> 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> 2. the evidence must be relevant to an issue arising from the complaint;
>
> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> 4. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or with other evidence, have led the Director to a different conclusion on the material issue.

37. I have carefully reviewed the purported new evidence Mr. Sadowsky wishes to adduce on behalf of TCS in this appeal and propose to deal with each piece of evidence separately here. In the case of the written statement of Ms. Wilks that she hired Ms. Zomar as a full-time customer service representative for TCS and trained and made her aware of all company policies and procedures including the policy which required Ms. Zomar to provide at least 30 minutes advance notice of her inability to attend her scheduled shift, I find this statement is relevant and perhaps even credible but I am not convinced that this information was unavailable to TCS with the exercise of due diligence and could not have been presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made. There is absolutely no explanation offered by Mr. Sadowsky or TCS as to why Ms. Wilk's statement was not adduced or presented to the delegate during the investigation of the Complaint or at least before the determination was made. Perhaps Mr. Sadowsky and TCS would have presented it to the delegate before the Determination was made had Mr. Sadowsky availed himself of the option of receiving the final preliminary findings of the delegate on the Complaint when offered by the delegate. Accordingly, TCS fails to satisfy the first of the four conjunctive requirements for adducing new evidence on appeal in *Re Merillus Technologies Inc.*, *supra.*

38. Further, I also find that the statement of Ms. Wilks is not of high probative value in the sense that, if believed, it could on its own or with other evidence, have led the Director to a different conclusion on the material issue. In my view, Mr. Sadowsky previously presented the substantive evidence in Ms. Wilk's statement in his letter of March 12, 2009 to the delegate and the latter considered it in making his Determination. In the circumstances, I find Ms. Wilks' statement effectively constitutes a re-argument of TCS's position in the investigation that Zomar was aware of and contractually bound by TCS's policy to report at least 30 minutes in advance of her scheduled shift of her inability to work. The delegate dealt with this argument when she reasoned in the Determination that the policy in question does not in any way lessen or reduce the obligation of TCS to comply with Sections 52 and 54 of the *Act* and that TCS could not contract out of the minimum obligations of the *Act.* Accordingly, I refuse to consider Ms. Wilks statement in the appeal as new evidence.

39. The second piece of new evidence Mr. Sadowsky adduces, based on sources he claims are hesitant to provide a signed Affidavit, pertains to the matter of babysitting services for Ms. Zomar's child during the termination of her employment. As indicated previously, Mr. Sadowsky submits that he discovered, from an unnamed source, that Ms. Zomar qualified "for and took advantage of a program through the Province of British Columbia's Ministry of Children & Family Development [entitling] her to twenty days (20), free child care according to the contract between her childcare provider and the Ministry." According to Mr. Sadowsky Ms. Zomar's "child is still at the same daycare" and while he was unable to obtain information about Ms. Zomar's "contract information due to privacy concerns", he suggests that the Tribunal should contact the agency "with any questions". In the case of this information, I find it at least fails on three of the four criteria in *Re Merilus Technologies Inc., supra.* First, TCS again offers no explanation of why it did not provide this information to the delegate during the investigation or at least before the Determination was made. It appears to be the sort of information that TCS could have, with the exercise of due diligence, discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made.

40. Secondly, I find the evidence in question irrelevant to the material issue arising in the complaint, namely, the failure of TCS to provide family responsibility leave to Ms. Zomar and the termination of Ms. Zomar's employment for requesting such leave. Alternatively, if the purpose of Mr. Sadowsky providing this information in the appeal is to challenge the expenditure of $600 on the part of Ms. Zomar or to suggest that Ms. Zomar was untruthful about having to pay the said amount to Ms. Drury during her unemployment period in order to take care of her child since babysitting for her son was available to her through the government program or agency, I find TCS's purported new evidence irrelevant on this issue. Ms. Zomar indicated during the investigation and subsequently reiterated in the appeal that her son stayed with Ms. Drury during the three months of her unemployment, as she could not afford to continue to rent her residence. During this same period Ms. Zomar placed her daughter with the latter's father and she herself went to live with her brother. The $600 payment by Ms. Zomar to Ms. Drury was to give her son a place to live and that was not something the government program was providing Ms. Zomar.

41. Thirdly, I find the evidence lacking high probative value, even if it were credible (which I do not need to decide here). It is not the sort of evidence that would have led the Director or the delegate to a different conclusion on a material issue, particularly since it is irrelevant to any material issue in the matter.

42. I also find irrelevant and lacking of any probative value, even if true, Mr. Sadowsky's submission that Ms. Drury is gainfully employed and drops Ms. Zomar's son at daycare and heads to work thereafter. Mr. Sadowsky and TCS present this evidence apparently to question when Ms. Drury would have time to look after Ms. Zomar's son and thus earn the $200 per month payment from Ms. Zomar. As indicated previously, the payment to Ms. Drury was not for babysitting Ms. Zomar's son but for taking him in to live with her during Ms. Zomar's period of unemployment. Therefore, even if Ms. Drury were working during the daytime and dropping off Ms. Zomar's son at the daycare, this does not mean that Ms. Drury did not earn or receive payment from Ms. Zomar for providing accommodation to the latter's son.

43. Having said this, I also point out that I find myself in agreement with the interpretation of the delegate of sections 52 and 54 of the *Act* in the Reasons for the Determination. More specifically, I agree with the delegate that section 54 of the *Act* is phrased in mandatory terms and requires an employer to provide to an employee who requests a leave to which he is entitled under the *Act,* including family responsibility leave under section 52. There is also no time preconditions in terms of how much advance notice the employee must give her employer when seeking a family responsibility leave because the employee may not always be in a position to know in advance when she will need to take family responsibility leave. While this may inconvenience an employer where the employer does not, as in this case, receive sufficient advance notice to

obtain coverage for that employee, the employer cannot retaliate against an employee in such case by terminating her employment. *Section* 54 of the Act is very clear in this regard and expressly prohibits an employer from terminating the employment of an employee because of an employee's allowed leave. I further agree with the delegate that based on section 4 of the *Act*, the requirements of the *Act* are minimum requirements that cannot be waived or contracted out of by the employer and therefore any policy of TCS including the policy requiring Ms. Zomar and other employees of TCS to provide 30 minutes' advance notice of their inability to work their scheduled shift cannot supersede the minimum terms of the *Act*, in this case sections 52 and 54 of the *Act*.

44. In the circumstances, I find that the Determination was decided on correct legal principles and the purported new evidence of TCS does not qualify as "new evidence" under the criteria set out in *Re Merilus Technologies* decision and therefore, I dismiss the appeal of the Determination.

ORDER

45. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued together with whatever additional interest may have accrued pursuant to Section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal