Employment Standards TRIBUNAL

An appeal

- by -

J-W Research Ltd.
("J-W")

- 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: Carol L. Roberts

FILE No.: 2014A/70

DATE OF DECISION: September 30, 2014

DECISION

SUBMISSIONS

Jenny Ferguson	on behalf of J-W Research Ltd.
Michael Thompson	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), J-W Research Ltd. ("JWR") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on April 24, 2014. In that Determination, a delegate of the Director ordered JWR to pay its former employee, Kim Webster ("Ms. Webster"), $854.65 in wages and interest. The Director also imposed an administrative penalty in the total amount of $500 for JWR's contravention of section 63 of the *Act*, for a total amount payable of $1,354.65.

2. JWR appeals the Determination contending that the Director erred in law in making the Determination.

3. These reasons are based on the written submissions of the parties, the section 112(5) "record" that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Ms. Webster was employed by JWR, a sales and marketing business, as an Account Card Representative from September 18, 2011, until April 10, 2013. On August 10, 2013, Ms. Webster filed a complaint with the Employment Standards Branch, alleging that JWR had contravened the *Act* by failing to pay her compensation for length of service. The Director's delegate held a hearing on January 29, 2014. Ms. Webster represented herself; Jenny Ferguson, JWR's Human Resource Manager, represented JWR.

5. At issue before the Director's delegate was whether JWR substantially and unilaterally altered the terms of Ms. Webster's employment such that her employment could be considered terminated.

6. The relevant evidence before the delegate may be summarized as follows.

7. Although there was no written employment agreement between the parties, Ms. Webster was given a "New Employee Sign Off Booklet" which included a code of conduct and confidentiality and non-competition agreements at the time of her hire. Ms. Webster's hours of work were set by her manager at least one week in advance. Ms. Webster's evidence was that her hours of work varied between a few hours to ten hours a day, but that prior to April 11, 2013, she had never been scheduled for zero hours in one week.

8. Ms. Webster testified that she never understood that her hours of work were dependent on her performance and specifically denied that she was told that her hours of work would decrease if her "metrics", or number of credit card applications completed in a given time, decreased.

9. Following an unsatisfactory performance review in January 2013 and again in February 2013, JWR initiated performance coaching with Ms. Webster as she was not making her sales targets. Ms. Ferguson testified that Ms. Webster was advised that her failure to improve her performance could result in a reduction of her shifts.

10. JWR conducted "Performance Audits" on January 22, February 13, and March 21, 2013. Each of the audits noted that Ms. Webster's sales were below targets and that she was not meeting performance expectations in most metric areas. JWR initiated performance coaching with Ms. Webster following the January performance audit, coaching that continued through to the end of March.

11. JWR gave Ms. Webster two "Corrective Action Notices" on January 28 and February 4, 2013. The January 28 notice indicated that Ms. Webster's sales were below targets on two of four metrics tracked by JWR. The notice further indicated that it was Ms. Webster's second notice and that a failure to improve would result in further written notice. Ms. Webster's manager, Brenda Allard, commented that Ms. Webster's failure to improve her performance would result in "decreased shifts, suspension or termination of employment for failure to meet sales targets."

12. The February 4 notice indicated that Ms. Webster's sales were below three of four metrics, that the notice was Ms. Webster's third warning and that a failure to improve would result in the termination of her employment. Ms. Allard's comments indicate that further coaching would occur and that continued failure to meet targets would result in the termination of Ms. Webster's employment.

13. The "Corrective Action Notices" submitted into evidence were unsigned. Ms. Ferguson's evidence was that she had been unable to locate the copy signed by both parties. Ms. Webster's evidence was that although Ms. Allard had presented the Notices to her, she did not recall any discussion relating to the contents and that she had refused to sign them as she disagreed with JWR's contention that she was missing her sales targets.

14. Ms. Webster's employment was suspended from April 11 to April 17, 2013. Ms. Ferguson submitted that the suspension was for Ms. Webster's failure to improve her sales, in accordance with the January 28 Corrective Action notice.

15. On April 17, 2013, Ms. Webster emailed JWR's district manager to complain about the reduction and subsequent cut to her hours of work. When Ms. Webster did not report for work on April 18, 2013, the district manager emailed her asking why she had not reported for her shift. On April 29, 2013, Ms. Webster advised the district manager that she had no confidence she would be scheduled for any shifts in the future and requested her Record of Employment (ROE) and final paycheque.

16. Ms. Ferguson contended that JWR had not altered any conditions of Ms. Webster's employment and argued that Ms. Webster had quit her employment on April 29, 2013.

17. Ms. Webster argued that because she was not scheduled for work from April 11 to April 18, 2013, this constituted a "week of lay-off". She contended that this layoff represented a substantial and adverse change to the terms of her employment and that her employment should be considered to have been terminated as of April 10, 2013.

18. The delegate noted that although JWR did not assert that it had just cause to terminate Ms. Webster's employment, had it done so, "the record of progressive discipline would not demonstrate sufficient cause for terminating" Ms. Webster's employment.

19. The delegate also noted that Ms. Webster agreed that she did not return to work following her suspension; rather, Ms. Webster relied on section 66 of the *Act* in submitting that JWR had substantially altered a condition of her employment.

20. The delegate found that JWR's handbook contained no references to variable hours of work due to poor performance or to the potential that employees may be temporarily suspended as a disciplinary measure. The only reference to discipline in the handbook, according to the delegate, was an acknowledgement by the employee that failure to meet the terms set out in the handbook would result in disciplinary action and termination.

21. The delegate concluded

> The Act acknowledges that employment contracts may provide employers with a right to lay their employees off, but it does not grant a general right for an employer to do so. Alternatively, an employee may be subject to layoff if there is a well known and industry wide practice of seasonally laying staff off, or if an employee agrees to a proposed layoff. In the circumstances at hand, I find that JWR has failed to demonstrate a contractual right to lay Ms. Webster off, that it was JWR's normal practise [*sic*] to impose periods of layoff on Ms. Webster, or that Ms. Webster agreed to the layoff imposed on April 11, 2013.

22. JWR contended that the January 28 Corrective Action Notice put Ms. Webster on notice that she might be subjected to disciplinary layoff or suspension, or to a reduction in the hours of her work. Ms. Webster denied that she had signed the Corrective Action Notice or that she had accepted its contents. The delegate found that Ms. Webster had not accepted an alteration to the terms of her employment.

23. The delegate found that JWR could not unilaterally alter an employment contract by way of a manager's comment on a disciplinary notice if that alteration was to the employee's detriment. The delegate determined that if JWR wanted to amend Ms. Webster's employment contract, it could only do so with Ms. Webster's agreement or with clear notice. The delegate stated that "absent such clear agreement or notice, JWR was entitled to continue with progressive discipline under the terms of the existing contract, which did not include disciplinary suspension."

24. The delegate concluded that JWR's layoff of Ms. Webster without contractual or customary right to do so represented a substantial alteration of the terms of Ms. Webster's employment contract, and that in doing so, JWR terminated Ms. Webster's employment on April 11, 2013.

25. The delegate found that Ms. Webster was entitled to two weeks' compensation for length of service.

ARGUMENT

26. JWR submits that Ms. Webster had never been guaranteed a set schedule or minimal hours of work as a sales associate. It argues that Ms. Webster was warned, both verbally and in writing, that her failure to meet sales targets could result in suspension or termination, and that her sales manager provided further coaching and one-on-one training to enable her to reach higher sales numbers. JWR also argued that Ms. Webster's April 11 shift was cancelled due to her poor performance and on April 15, she was given hours to work on April 18.

27. JWR says that it was made clear to Ms. Webster that her position was performance based and that although she denied that she was presented with the warning documents, she simply did not accept them.

28. In her submission, Ms. Ferguson says that JWR wishes

> …[T]he Director and Tribunal to review the case and evidence as I feel that as an employer we clearly were willing to accommodate this employee. Kim Webster no longer wanted to work under the presented conditions of her position and instead of accepting responsibilities for her actions is trying to take

> advantage of a severance package she is not entitled to. She has been provided a shift that she claims she financially needed however chose to no show and not even call the manager who is assisting her. …. JW Research has not altered her position or her schedule without consideration for the employee…

29. The Director's delegate says that the issue before him was whether or not a layoff had occurred and whether or not JWR had the right to lay Ms. Webster off. The delegate says that, while JWR is correct to say that Ms. Webster's schedule varied, there was no week in which she performed no work whatsoever.

30. The delegate says that at issue was whether JWR was entitled to impose a week of layoff, noting that in *Besse v. Machner* (2009 BCSC 1316) the Supreme Court of British Columbia held that s. 62 of the *Act* does not grant an employer the right to temporarily lay an employee off. The delegate submits that although JWR's employee policies provide that a failure to abide by policies and procedures will result in disciplinary action and possibly termination, they do not provide for disciplinary suspension. Further, the delegate submits, Ms. Webster's job description makes no mention of her hours of work being dependent on performance.

31. The delegate submits that the only document which indicated that Ms. Webster might be subjected to reduced hours of work for failure to meet performance targets was a January 28, 2013, "Corrective Action Notice" which Ms. Webster refused to sign. Accordingly, the delegate says, he was unable to find that Ms. Webster was provided with effective notice of JWR's intent to suspend her or reduce her hours, and did not agree to JWR's alteration of the terms of her employment to allow JWR to lay her off.

32. The delegate submits that Ms. Webster's employment contract did not contain a mechanism for alteration, and while JWR submitted that Ms. Webster's employment contract was not altered without consideration, it has provided no evidence as to what consideration Ms. Webster received.

ANALYSIS

33. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

34. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

35. In my view, the delegate erred in framing the issue as well as in the application of the principles of progressive discipline.

36. The question of dismissal for cause has been addressed by the Tribunal on many occasions (see, for example, *Hall Pontiac Buick Ltd.*, BC EST # D073/96; *Cook*, BC EST # D322/96; *Justason*, BC EST # D109/97; *Kruger* BC EST # D003/97; *Sambuca*, BC EST # D322/97 and *Chamberlain*, BC EST # D374/97). The principles arising from those decisions may be summarized as follows:

> 1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are minor instances of minor misconduct, it must show:

   a) A reasonable standard of performance was established and communicated to the employee;

   b) A reasonable period of time was given to the employee to meet such standard and had demonstrated that they were unwilling to do so;

   c) The employee was adequately notified that their continued employment was in jeopardy by a continuing failure to meet the standard; and

   d) The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee…

37. The evidence demonstrates that JWR was imposing progressive discipline. It had clearly and repeatedly notified Ms. Webster that she was not meeting sales targets. It clearly and repeatedly notified Ms. Webster that her job was in jeopardy if she did not meet her performance metrics. JWR also provided Ms. Webster with performance coaching over a period of three months. Although JWR was unable to locate signed copies of the Corrective Action Notices, Ms. Webster acknowledged receiving them. Her evidence was that she would not sign them because she did not agree with JWR's assessment of her performance.

38. The evidence was that Ms. Webster was aware JWR was dissatisfied with her performance and that continued failure to meet sales targets could result in decreased shifts, suspension or termination of employment. When the coaching and warnings apparently did not have their desired effect, JWR suspended Ms. Webster for one week as part of the employer's progressive disciplinary framework.

39. The delegate concluded that because the New Employee Sign Off Booklet contained no reference to possibility of temporary suspension of disciplinary measure, any subsequent attempts to discipline by suspension constituted a unilateral amendment of the employment contract.

40. The *Act* does not regulate the employer's right to discipline. As a common law concept, the steps an employer may take in imposing progressive discipline need not be set out in an employment contract. By definition, the discipline can be progressive or applied in an escalating manner, appropriate to the nature and severity of the conduct. Progressive discipline can also include suspension. While it may be preferable for an organization to have defined policies relating to disciplinary processes, a failure to do so is not an impediment to an employer's ability to impose progressive discipline.

41. In my view, *Besse v. Dr. A. S. Machner Inc.* has no application to this complaint. In that case, an employee was returning from a medical leave of absence while the dental practice she was employed at was undergoing a change of ownership. The new owner laid the employee off for a period of twelve weeks while the practice was being re-built. Not only was performance, and therefore progressive discipline, not an issue, the employee was laid off for a significantly longer period than one week.

ORDER

42. Pursuant to section 115(1)(a) of the *Act*, I cancel the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal