Employment Standards TRIBUNAL

An appeal

- by -

Sun Wah Foods Ltd.
("Sun Wah")

- 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 Roberts

FILE No.: 2006/109

DATE OF DECISION: November 20, 2006

DECISION

SUBMISSIONS

Lorraine Shore, Barrister and Solicitor	on behalf of Sun Wah Foods Ltd.
Ivy Hallam	on behalf of the Director of Employment Standards
Elsa Heung	on her own behalf

OVERVIEW

1. This is an appeal by Sun Wah Foods Ltd. ("Sun Wah"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued August 4, 2006.

2. Elsa Heung worked as a clerk for Sun Wah, a wholesale food business, from January 14, 2004 until February 24, 2006. Ms. Heung filed a complaint alleging that she was owed compensation for length of service.

3. The Director's delegate held a hearing into Ms. Heung's complaint on June 28, 2006. The employer was represented by an agent, Corine Suen, the complainant represented herself.

4. The delegate determined that Sun Wah had contravened Sections 63 and 58 of the *Employment Standards Act* in failing to pay Ms. Heung compensation for length of service. She concluded that Ms. Heung was entitled to compensation, vacation pay and interest in the total amount of $782.94. The delegate also imposed a $500 penalty on Sun Wah for the contravention, pursuant to section 29(1) of the *Employment Standards Regulations.*

5. Counsel for Sun Wah contends that the delegate erred in law in determining that Sun Wah did not have grounds to terminate Ms. Heung's employment and in finding that she was entitled to compensation for length of service. Sun Wah also says that evidence has become available that was not available at the time the Determination was being made.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Sun Wah did not seek an oral hearing, and I have concluded that this appeal can be adjudicated on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination

ISSUE

7. a) Did the delegate err in law in concluding that Sun Wah had not demonstrated grounds for terminating Ms. Heung's employment for cause; and

8. b) Is there new and relevant information that was not available at the time the Determination was being made that would lead the delegate to a different conclusion on a material issue?

ARGUMENT

9. The facts, as set out by the delegate, are as follows.

10. On February 15, 2006, Ms. Heung requested vacation leave from February 17 to February 24, 2006. Sun Wah's manager, Corine Suen, refused her request because Mr. Heung had not followed company policy by giving two weeks notice of the vacation leave. Ms. Heung's evidence was that she was unaware of the vacation policy, and thought that vacation leave could be approved with short notice.

11. Ms. Suen advised Ms. Heung that she would approve her vacation request from February 20 until February 23 only, as there would otherwise be an insufficient number of employees in the department on February 24. Ms. Heung then submitted a vacation leave request from February 20 to February 21.

12. Ms. Heung did not report for work or call Ms. Suen on February 22. Her evidence was that on the evening of February 22, she telephoned a colleague at home to tell her she would be taking a couple of days off due to an urgent family matter. On February 23, Ms. Suen called Ms. Heung's home telephone, but did not get an answer and left no message on her answering machine.

13. Ms. Heung did not report for work or call Ms. Suen on February 23 or 24. Ms. Suen's evidence was that the company was very busy and some customers complained because there was only one person working in Ms. Heung's department. Ms. Heung said she telephoned Ms. Suen both in the morning and the afternoon of February 24, but was told she was unavailable. She did not leave a message on either occasion. Ms. Heung eventually spoke to Ms. Suen 20 minutes before the store closed on February 24. Ms. Suen said that Ms. Heung did not clearly explain why she took unauthorized leave. Ms. Heung's evidence was that Ms. Suen was so upset she did not allow her to explain why she was absent from work. Ms. Suen terminated Ms. Heung's employment on the phone.

14. Although it is not specifically noted as a finding, it appears that the delegate concluded that Ms. Heung was unaware of Sun Wah's vacation policy. The delegate noted that the policy was not in writing and Ms. Heung testified that she was unaware of it. However, the delegate did find that Ms. Heung was told that she could not take her vacation on February 24. The delegate also found that Ms. Suen was aware of Ms. Heung's absences on February 22 and 23, even though Ms. Heung did not speak to her directly.

15. In analyzing whether Ms. Heung's conduct constituted wilful misconduct or wilful disobedience, the delegate had regard to nine factors outlined in *Levitt, the Law of Dismissal in Canada*, and found that Ms. Heung's actions met five of the nine factors, but not the balance.

16. Although she does not expressly say so, I infer that the delegate concluded that, had Ms. Heung requested vacation leave on February 22 and 23, Ms. Suen would have approved them, and considered Ms. Heung's absence on those days to be of little consequence.

17. The delegate considered Ms. Heung's failure to show up at work on February 24 to be a serious but isolated act of disobedience, and was not convinced that the incident irreparably damaged the employment relationship. The delegate noted that Ms. Heung had no prior problems reporting to work, and that she had not been warned that her job would be in jeopardy if she failed to report to work on

February 24. Although the delegate was "troubled" by Ms. Heung's explanation for her failure to contact Ms. Suen earlier in the day on the 24th, she was of the view that a reprimand, rather than summary dismissal, was a more appropriate response. She concluded that Sun Wah had not demonstrated just cause for Ms. Heung's termination.

18. Counsel for Sun Wah argues that Ms. Heung's failure to show up at work on February 24 was not an isolated act; in fact, counsel submits that it was undisputed that Ms. Heung failed to show up for three days – February 22, 23 and 24. Counsel submits that it is an error in law to treat the three days absence as "one 'lump'" because Ms. Heung made a decision on each of those days to be absent.

19. Counsel also submits that the delegate erred in failing to recognize that Ms. Heung's absence was a deliberate act, and was insubordinate in that she had been refused permission to be absent on the 24th. She submits that this is a serious breach of the employment relationship and constitutes grounds to terminate Ms. Heung's employment for just cause. Counsel further argues that the delegate failed to realize that attendance at work is a fundamental obligation which need not be enforced by written notice.

20. Counsel also submits that the delegate failed to critically assess the employee's evidence as to why she was absent in light of the employer's refusal to grant her permission to take vacation on the 24th, particularly in light of the fact that the employee provided no support for her alleged excuse. Counsel argues that Ms. Heung's conversation with another employee, whose name she said she did not recall, is both implausible, given the size of the company and the fact that there were no new employees, and is not sufficient notice to the employer.

21. Counsel submits that Ms. Heung's actions constitute insubordination, damages the employment relationship irreparably, and provides just cause for the employer's termination of the employment relationship.

22. The delegate argues that Sun Wah's submission on the fact that there had been no new hires should not be accepted on the grounds that it was evidence available at the time the Determination was being made. In reply, counsel for Sun Wah submits that the employer was not legally represented and the delegate was required to treat the parties in an even handed fashion. She submits that because the delegate herself expressed some doubt as to Ms. Heung's explanation, she ought to have asked questions as to why Ms. Heung did not speak to Ms. Suen until late in the day on February 24, 2006.

23. The delegate submits that the Determination stands on its merits, and seeks to have the appeal dismissed.

24. Ms. Heung's submissions were essentially evidence and arguments that I infer she made before the delegate and need not be reconsidered.

ANALYSIS

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

> the director erred in law
>
> … or

evidence has become available that was not available at the time the determination was being made

26. As I have concluded below that the delegate erred in law and referred the matter back for a new hearing, I need not address the question of whether new evidence has become available.

27. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

1. A misinterpretation or misapplication of a section of the Act;

2. A misapplication of an applicable principle of general law;

3. Acting without any evidence;

4. Acting on a view of the facts which could not be reasonably entertained; and

5. Exercising discretion in a fashion that is wrong in principle

28. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd*., BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

29. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories. The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures. To substantiate just cause for this first category, an employer must meet a four part test:

1. A reasonable standard of performance was established and communicated to the employee;
2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

(see: *Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97*)*

30. The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

31. The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

32. In Stein v. British Columbia Housing Management Commission (1992) 65 BCLR 92nd 181 (B.C.C.A.), the court said:

> …if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard- of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally. …I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think…that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract…the disobedience must have the quality that it is "wilful": it does... connote a deliberate flouting of the essential contractual conditions. (at p. 183-184)

33. The delegate found, inexplicably, that Ms. Heung was absent from work without approval for one day. The fact is that Ms. Heung was absent for three days without the employer's consent or permission. However, I do not find that this factual error necessarily led to an erroneous legal conclusion. The evidence supports a conclusion that Ms. Suen would have permitted Ms. Heung to take vacation on the 22nd and 23rd had she requested it.

34. The delegate did not err in finding that Ms. Heung's absence was an isolated act. There was no evidence that Ms. Heung had any prior disciplinary problems, and in particular, that she had ever been absent without permission prior to February 22.

35. Although counsel for Sun Wah argues that the delegate "substituted her own opinion" for the discipline that had been decided by the employer, I find that the delegate determined that Sun Wah had not met the burden of substantiating just cause. The delegate, however she expressed it, concluded that Sun Wah did not have grounds to terminate Ms. Heung's employment for her unexplained absence on February 24.

36. There is no doubt that the employer has the right to manage the attendance of its employees. As the Tribunal held in *Glenwood* (*supra*), absence from work without the employer's permission may amount to just cause, depending on the circumstances. However, it is also clear that being absent from work without permission is not, in and of itself, just cause. As the member in *Glenwood* (*supra*) noted, the cases seem to focus on the reasonableness of the employee's decision to take time off as well as the harm done to the employer.

37. The delegate failed to assess Ms. Heung's credibility, and did not inquire into the validity of the reasons she provided for her absence. In particular, the delegate made no attempt to reconcile the evidentiary difficulties in light of the factual background leading to the unauthorized absences.

38. An employee's refusal to carry out lawful and reasonable orders will generally suffice as cause for dismissal. The refusal, however, must be intentional and deliberate. (Harris, Wrongful Dismissal, 1990 ed. P. 3-103).

39. In *Aeichlele v. Jim Pattison Industries Ltd. (c.o.b. Jim Pattison Toyota)* [1992] B.C.J. No 1952, 44 C.C.E.L. 296, the court held that an employee's failure to report to work constituted a wilful disregard of a reasonable and specific order of his employer, and constituted just cause for termination. In arriving at

this conclusion, the court applied the test for wilful disobedience as set out in *Hayes v. First City Trust Co.* (1982) 12 A.C.W.S. (2nd) 104 (B.C.S.C.):

> Wilful disobedience is, of course, a ground upon which an employer may dismiss without notice. In order to justify the dismissal on those grounds there is an onus on the defendant to establish there were acts wilfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well know by the employee as being necessary in the fulfilment of the employer's objectives.

40. The delegate made no attempt to ascertain whether Ms. Heung's absence was an intentional and deliberate refusal to follow what was, in effect, the employer's order to report for work on the 24th. The delegate appeared to accept Ms. Heung's explanation that she took time off due to an urgent family matter without any evidence other than Ms. Heung's own testimony. She did not assess whether Ms. Heung's explanation that she was visiting a sick relative was a valid or credible one.

41. Although the delegate noted that Ms. Heung left messages with her colleagues rather than calling her employer directly, she did not inquire into Ms. Heung's reasons for doing so.

42. In short, I find that the delegate erred in law in failing to fully ascertain and properly assess the circumstances of Ms. Hueng's absence. In the absence of that information, it is impossible to determine whether Ms. Heung's actions were an intentional and deliberate refusal to carry out the employer's lawful orders, and thus a fundamental breach of the employment relationship.

ORDER

43. I Order, pursuant to Section 115 of the Act, that the Determination, dated August 4, 2006, be cancelled, and the matter referred back to the Director for a new hearing.

Carol Roberts
Member
Employment Standards Tribunal