Employment Standards TRIBUNAL

An appeal

- by -

Masterplan Productions Inc.
("Masterplan")

- 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: Carol L. Roberts

FILE No.: 2003A/8

DATE OF DECISION: April 8, 2003

DECISION

This is a decision based on written submissions by Dan Sabina on behalf of Masterplan Productions Inc. ("Masterplan"), Sean Farnsworth and David Freylinger, and by Kulwinder Sall, a delegate of the Director of Employment Standards.

OVERVIEW

Masterplan appeals a Determination of the Director of Employment Standards ("the Director") issued December 9, 2002, in which a delegate of the Director found that Masterplan contravened sections 18 and 63 of the *Act* in failing to pay Mr. Freylinger and Mr. Farnsworth compensation for length of service. The delegate ordered Masterplan to pay $2,979.33 to the Director on behalf of Mr. Freylinger and Mr. Farnsworth.

Masterplan argues that Mr. Freylinger and Mr. Farnsworth were both dismissed for cause, and that no compensation is owed. It further contends that, in the event that Mr. Freyliner is entitled to severance, that entitlement is limited to two weeks rather than three weeks severance.

FACTS

Both Mr. Farnsworth and Mr. Freylinger worked for Masterplan, an event production company. Mr. Farnsworth worked from February 2000 to May 14, 2002 as a commission sales representative, and Mr. Freylinger in a number of capacities from October 1999 to September 6, 2001.

Both Mr. Farnsworth and Mr. Freylinger alleged their employment had been terminated without notice or compensation for length of service. Mr. Sabina, the owner/operator of Masterplan, contended that they had been terminated for cause.

Mr. Sabina advised the delegate that Mr. Farnsworth was terminated after Masterplan implemented a new policy which required employees to start work at a definite time each day. Mr. Sabina also contended that the policy also provided that, after three warnings, an employee would be terminated. Mr. Sabina contended that Mr. Farnsworth was dismissed on May 9 after the third incident of lateness. Mr. Farnsworth advised the delegate that he was never aware of the "3 strikes you're out" rule. Mr. Farnsworth contended that, when he arrived at work on May 15, 2002, he was told to go home because he was late. Mr. Farnsworth said that he returned later that day to ask why he had been sent home, and that Mr. Sabina said he would contact him later. Mr. Farnsworth returned to work the following day, and was told by the general manager, Dave Leger, that he was fired because he was late too many times and for asking why his key was being taken away. Some time after Mr. Farnsworth's employment was terminated, Masterplan offered him $500 per week to be available for to train his replacement. Mr. Sabina contended that this constituted "reasonable alternative employment".

Mr. Sabina also contended that Mr. Farnsworth was insubordinate to Mr. Leger after he was terminated, and refused to return his keys to the premises until almost one week after he was terminated.

Mr. Sabina submitted that Mr. Freylinger was terminated for cause when he failed to show up for two events and missed an appointment with a potential client. Although these incidents occurred between April 24, 2001 and August 9, 2001, Mr. Freylinger's employment was not terminated until he returned

from vacation on September 4. Mr. Sabina advised the delegate this was because, while Mr. Freylinger was on vacation, another staff member expressed concern that Mr. Freylinger was taking kickbacks from promoters. However, in a subsequent submission to the delegate, Mr. Sabina said that Mr. Freylinger was not dismissed for taking kickbacks since the allegations were never investigated, although "it did not help [David's] situation".

Mr. Freylinger acknowledged that he failed to show up for work on three separate occasions, the first two for health reasons, of which he advised Mr. Sabina. Mr. Freylinger contended that Mr. Sabina was understanding of his situation, and never advised him that his job was in jeopardy if he was late again. Mr. Freylinger advised the delegate that, with regard to the third incident, he simply forgot about the appointment.

Mr. Freylinger also advised the delegate that, when he returned from vacation on September 4, he was offered a cheque for severance and vacation pay in exchange for signing a release. He said that he refused to sign the release, and Masterplan did not give him the cheque.

The delegate interviewed one witness, Peter Klasssen, who was the office manager and supervisor. Mr. Klassen told the delegate that, when Mr. Leger joined Masterplan, he was aware that he had to meet higher standards, including the requirement of showing up to work on time. Mr. Klassen stated that he did not recall being told specifically that failing to show up for work on time would lead to termination, nor was he aware of a "three strikes you're out" rule.

After completing his investigation, the delegate concluded that, although Mr. Farnsworth was aware of Masterplan's expectation that he show up for work at 9:45 a.m. daily, there was insufficient evidence that Mr. Farnsworth was told that continued failure to show up on time would result in termination. Further, the delegate concluded that, even if a "three strikes" rule existed, it was not followed in Mr. Farnsworth's case.

The delegate also found that because Masterplan's offer of employment was not stable and was substantially different from Mr. Farnsworth's original terms and conditions of employment, it did not constitute "reasonable alternative employment".

The delegate found that Mr. Freylinger's employment was terminated three weeks after the third "no show" incident, after allegations of kickbacks arose, and that, in any event, after Mr. Freylinger's third incident of failing to show up to work on time he was given another chance to redeem himself. The delegate rejected Masterplan's submission that Mr. Freylinger's employment was terminated after he failed to show up for the third time since it was inconsistent with its earlier submission.

The delegate concluded that Masterplan failed to demonstrate that either Mr. Farnsworth or Mr. Freylinger's employment was terminated for cause, and concluded they were entitled to compensation for length of service. He determined that both employees were entitled to three week's wages plus vacation pay and interest.

ISSUE TO BE DECIDED

At issue is whether Masterplan has demonstrated that the delegate erred in determining that Mr. Freylinger and Mr. Farnsworth were terminated without just cause. Also at issue is whether, if Mr. Freylinger was entitled to severance, the delegate correctly calculated the amount owing.

ARGUMENT

Masterplan argues that the delegate erred in law, and failed to observe the principles of natural justice in making the Determination.

The delegate seeks to have the Determination upheld. He says that there is no demonstrated error in the facts, an error in interpreting the law, or any different explanation of the facts or facts that were not considered in the Determination. He also argues that there is no evidence Masterplan was denied natural justice.

Although the delegate concedes that the Determination says that Mr. Freylinger is entitled to 3 weeks wages as compensation, he says that is a typographical error, and that in fact, the Determination reflects Mr. Freylinger's entitlement to two weeks wages.

Mr. Farnsworth and Mr. Freylinger argue that the Determination ought to be upheld. They deny the factual allegations made by Mr. Sabina in his appeal submissions, and repeat their positions to the delegate.

DECISION

The burden of establishing the basis for the appeal rests with an Appellant. The appellant in this case must provide persuasive and compelling evidence that there were errors of law in the Determination, or that there was a denial of natural justice, as alleged.

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Nothing in Mr. Sabina's submission relates to a denial of his right to know the case against him, his right to respond, or any other principle of natural justice. Furthermore, the Determination does not demonstrate any denial of natural justice on its face. Therefore, I am unable to conclude that Masterplan has substantiated this ground of appeal.

Masterplan also argues that the delegate erred in law. Once again, the appeal documents do not contain any references or submissions on this ground of appeal, and I am unable to conclude that the delegate erred.

Mr. Sabina's appeal submission consists essentially of "rebuttals" to the delegate's findings. Based on these submissions, I infer that Mr. Sabina's ground of appeal was that the delegate made factual errors. 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; or

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

Although an allegation that the delegate made a factual error does not constitute a ground of appeal under s. 112 of the *Act*, I have nevertheless considered Masterplan's submissions, since errors of fact may, in some circumstances, give rise to an error of law. Given this ground of appeal, the burden is on Masterplan

to persuade the Tribunal that there are factual errors in the Determination that justifies the Tribunal exercising its discretion to send the matter back to the delegate for further investigation.

Mr. Sabina disagrees with the Determination. I set out here just a few examples of his submissions in that respect.

Mr. Sabina contends that no employee "got away with" being late and that "numerous people were warned" including Mr. Klassen. He alleges that "Sean was warned repeated (sic) not to be late..." However, Mr. Sabina provided no evidence that the delegate's conclusions were in error.

Mr. Sabina does not dispute that an employer must establish that progressive discipline was applied in order to show just cause for dismissal. However, he concedes that he does not have "documentation and write ups of everything that was said in each of these warnings… but I guarantee you that we was warned and given ample opportunity to correct his behaviour". Given Mr. Sabina's argument that the delegate's findings were in error, he must provide evidence that they were. Mr. Sabina agrees that he does not have that evidentiary foundation.

Later in his submissions, Mr. Sabina says that "…it is his word against mine at this point as I did not document what was said and can only tell you that he was warned and knew better." This is information given to, and analyzed by, the delegate. Mr. Sabina's rebuttal arguments do not constitute evidence that the delegate erred.

Mr. Sabina also attempts to clarify Mr. Klassen's evidence in his appeal submissions, suggesting that they meant something other than the delegate concluded they did. It is not Mr. Sabina's place to attempt to put Mr. Klassen's evidence into context, or to clarify it. It speaks for itself, and was considered, along with the other information, by the delegate in arriving at his decision. In any event, the delegate says that Mr. Sabina was not present when Mr. Klassen made the statements, and Mr. Sabina presents no evidence that he was.

An appeal is not an opportunity to resubmit arguments made to the delegate in the hope that the Tribunal will reach a different conclusion than the delegate. An appellant must demonstrate with compelling and persuasive evidence that the delegate made a palpable and overriding error in the facts (see *317184 B.C. Ltd. operating as Elkin Creek Guest Ranch* BC EST #D087/03). It is insufficient to merely allege that he did. Mr. Sabina's arguments simply reiterate the submissions he made to the delegate, submissions that were clearly considered by the delegate in arriving at his decision.

I find no basis to conclude that the delegate erred in law, or denied Mr. Sabina an opportunity to be heard. Further, I find no evidence that the delegate made factual errors in his determination, and dismiss the appeal in this respect.

As to the issue of whether Mr. Freylinger entitled to 2 weeks pay rather than 3, I accept the delegate's submissions that the award of 3 week's pay was a typographical error, and that the calculations in fact reflect an award of 2 weeks pay. Therefore, I find Mr. Sabina's argument in this respect to be without merit, and deny the appeal in this respect also.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 9, 2002, be confirmed, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal