Employment Standards TRIBUNAL

An appeal

- by -

Dr. R.G. Haffner Inc.
(the "Employer")

- 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: Ib S. Petersen

FILE No.: 2001/870

DATE OF HEARING: April 5, 2002

DATE OF DECISION: April 8, 2002

DECISION

APPEARANCES:

Dr. Haffner	on behalf of the Employer
Ms. Ann Tancock	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director of Employment Standards (the "Director") issued on November 23, 2001. The Determination against the Employer concluded that the Employer terminated Ms. Tancock (the "Employee") without just cause and that she, in the result, was owed $1,645.00 on account of compensation for length of service. The Delegate also concluded that overtime wages were owed. The total of the award was $2,505.66, including interest and vacation pay.

ISSUES

The issues before me boils down to whether the Delegate erred in these respects: Did the Employer have cause for the termination of Ms. Tancock? Is she owed overtime wages?

PRELIMINARY ISSUE

A few days prior to the hearing, Dr. Haffner tendered additional documents in support of the Employer's appeal. These documents consists of a calendar with notations, a letter from a consultant, and Dr. Haffner's explanation of the late production of the documents. These documents had not been provided to the Delegate as part of her investigation. At the hearing, Dr. Haffner agreed that he did not need the documents to make his case and withdrew the request that I consider them. In the result, I make no ruling as to the admissibility of these documents.

FACTS

A hearing was held in Abbotsford on April 5, 2001. Dr. Haffner, Ms. Suzanne Lund and Ms. Darlene Boyle testified on behalf of the Employer. MS. Tancock testified on behalf of herself.

The following background facts may be gleaned from the determination and evidence presented at the hearing:

1. Ms. Tancock worked for the Employer, a dental practice, as a registered dental hygienist from February 1996 to October 2000. She was paid at the rate of $35.00 per hour.

2. Ms. Tancock worked regularly Wednesday through Friday.

3. On September 17, 2000, Ms. Hancock resigned, effective September 29, 2000. She had obtained employment in another dental practice.

4. Apparently the hygienists replacing her had not been found, and Ms. Tancock and Dr. Haffner agreed that she would continue working at the dental office on Tuesdays.

5. Ms. Tancock's employment was terminated October 17, 2000.

6. The reason for the termination was that Ms. Tancock removed (her) instruments from the dental office in the evening of October 10, 2000, i.e., after hours. Dr. Haffner considered that she had entered the mall, where the practice is located, making unauthorized use of a security code, contrary to mall policy, and had entered the dental office without authority.

Briefly, the Delegate findings and conclusions may be set out as follows. The Delegate found that the records kept by the employer did not meet the requirements of the *Act*. Daily hours were not included in the payroll records. The Employer did produce a calendar for 2000. This showed that Ms. Tancock did work overtime on two days, January 20 and June 1, 2000. The Delegate concluded that she was entitled to overtime wages for these hours. As well, the Delegate accepted Ms. Tancock's evidence that she did preparatory work prior to seeing her patients. The Delegate awarded her 10 minutes for each shift worked in 2000.

With respect to the termination of her employment, the Delegate accepted that Ms. Tancock resigned her employment effective September 29, 2000. In the Delegate's view, the fact that she continued to work for the Employer after September 29, constituted continuous employment for the purposes of Section 63 of the *Act*. The Delegate did not accept that the Employer had cause for the termination. The Delegate found that while her "entry was perhaps ill advised it was not of such a serious nature that either the mall or Haffner took action at the time." The Delegate awarded her four weeks' pay as compensation for length of service.

Dr. Haffner agreed that Ms. Tancock had told him that she needed to take her hygienist instruments because she at the time worked in another dental office. He explained that, at the time, he had forgotten that she had her own instruments. Dr. Haffner was upset that she removed five trays of instruments--he assumed that there would be some discussion about the ownership of all or part of these instruments. In his view, she could have taken the instruments during the day. He considered her entry into the mall, where the dental practice is located, unlawful and entry to the office after hours unauthorized. The entry into the mall was contrary to mall policy, requiring a security code to specific individuals with authority. He stated that only his employees who had work to do in the morning or who were cleaning up at the end of the day were authorized to be in the office after hours--and employees knew this." In his view, Ms. Tancock's conduct, though he did not dispute that she had a security code, was deceitful and dishonest.

Ms. Lund, who had worked for the Employer between 1978 and 1989, explained that she knew the security code. Apparently, she subsequently worked for Dr. Haffner's partner, Dr. Simon. She explained, as well, that she had used it twice to get back into the office to check whether machines had been turned off and to get shoes. She agreed with the suggestion that she did not feel she was authorized to use the code to get into the mall "any time." In cross examination, Ms. Lund agreed that the employees had the same code, and that all were aware of this code. She also agreed that she had never – until after the incident with Ms. Tancock – been told not to use the code except for specific purposes. She stated that she "could have used it if she had forgotten something."

Ms. Boyle also testified for the Employer. Ms. Boyle is Dr. Haffner's sister and his administrative assistant. She has worked for Dr. Haffner for some 26 years. Essentially, she confirmed Dr. Haffner's testimony that only certain employees were allowed to use the code to enter (in the morning) and leave (in the evening) the mall, based on the work that they did. She agreed that policy was understood in the

office. In her direct evidence, she explained, as well, that there had been changes in the permitted use of the security codes over the last 10-12 years.

Ms. Boyle testified that for the last 4-5 years, other employees had performed the preparatory work for Ms. Tancock and, therefore, that she did not do that work. Except on the odd occasion, there was no preparation time. She explained that the clean up, sterilizing of instruments, setting up trays etc. was done by these other assistants and that the instruments were "all out and ready" when the hygienist started. Ms. Tancock was expected at 8:00 a.m. and she was not there before.

In addition, Ms. Boyle stated that the instruments removed by Ms. Tancock were, in her view, worth between $1,400 and $1,700. Particularly contentious were the "tips" on the instruments. Ms. Boyle stated that about half of these tips had been replaced shortly--some two to three weeks--before Ms. Tancock left Dr. Haffner's employ. Though Dr. Haffner expressly stated that he was not arguing that Ms. Tancock had "stolen" instruments, the clear implication of Ms. Boyle's and Dr. Haffner's assertions was just that.

It is fair to say that Ms. Tancock took issue with these assertions.

Ms. Tancock testified that she did, indeed, work the additional time each day. The 10 minutes found by the Delegate was a "compromise" she agreed to. She explained that she did, indeed, write in her hours on a calendar which was then provided to the receptionist, Ms. Bremmer, Dr. Haffner's aunt, who had full control over the records. She stated that she had come in early to prepare the day's work. She took issue with the assertion that generally an assistant would prepare her trays. In fact, she stated that this rarely happened. Often these employees were in training and had other responsibilities. She also explained that she prepared patient charts and each day discussed patients with Dr. Haffner. She explained that she used to get paid for this additional time, but that in late 1999 or January 2000, Dr. Haffner told her that he would no longer pay "even straight time" for this work"--as had been the case prior to that time. Ms. Tancock testified that she was expected to be at the office 15 minutes before the first patient.

Ms. Tancock's testimony was that she was given the security code to the mall by Ms. Bremmer some six months after she started working for the Employer. At that time she was often at the dental office late, cleaning up and preparing patient charts for the following day's work. She explained that she was never told she was not authorized to use the code.

With respect to the instruments she removed from the office, Ms. Tancock explained that she purchased her own and brought them with her when she started working for the Employer. Her instruments – the five trays – were clearly marked and colour coded. She had made up a 6th set from Dr. Haffner's instruments and left those behind at the office. She stated that Dr. Haffner knew that she had her own instruments. She also stated that she told Dr. Haffner that she was going to remove her instruments from the office and that he did not, at that time, indicate any need for talking to her about this. The reason she removed the instruments was that she was at the time working at another dental office and did not want anyone else using or working with her instruments.

She agreed that the instruments had tips on them when she removed them. She explained that when she started with Dr. Haffner she brought instruments with workable tips and that these had been replaced by the Employer from time to time. She disputed Ms. Boyle's statement that the tips had been replaced a few weeks before she left. If that was true, Dr. Haffner should have receipts in evidence--and he did not. She denied that she stole the tips.

Ms. Tancock explained that she did not take the instruments during the day because they were in use. It never crossed her mind that she was not supposed to enter the office. She explained that she could have come some time when the mall was regularly open for business. When she went to the office in the evening of October 10, another employee was there and she removed other personal belongings from the office, including her diploma. He knew that she had been there, yet Dr. Haffner waited a week before he terminated her. She stated categorically that she did not take anything that did not belong to her as it was clear which instruments belonged to her.

At the hearing, Ms. Tancock told the following about the actual termination, a week later, the next work day following October 10. As mentioned above, Ms. Tancock had prepared a 6th tray from Dr. Haffner's instruments. When she came to work, she could at first not find these instruments, but after asking three times found them situated in a back cupboard. She took the instruments back to the operatory. At that time, Dr. Haffner asked her if she had brought her instruments. When she said no, he asked her to come to his office. There he told her to "give [him his] keys [to the office] and get the hell out of here." Ms. Tancoch asked what the problem was and Dr. Haffner alluded to the tips she had removed. Ms. Tancock replied "can't we discuss this," but Dr. Haffner told her to give him the keys and get out.

Ms. Tancock testified that she had patient waiting and was fully booked for that day and expected to be booked for the Tuesdays until December. Ms. Tancock did not disagree that she had resigned effective September 29, 2000. She made an agreement to continue working Tuesdays, because Dr. Haffner had not found a replacement for her, until at least December and after that time "it would be up in the air." She had even arranged with a friend, also a dental hygienist, to work Fridays in the Employer's office.

ANALYSIS

The burden is on the Employer, as the Appellant, to persuade me that the Determination, on the balance of probabilities, is wrong, in fact or law, or a combination thereof, and should be set aside. For the reasons set out below I am not satisfied that the Employer had met that burden.

To an extent, the resolution of this case turns on questions of fact and the parties different positions on those facts.

The B.C. Court of Appeal noted in Faryna v. Chorny, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Regrettably, those comments are apposite in the case at hand. In all of the circumstances, I prefer the evidence of Ms. Tancock where there is a conflict. I found her detailed, precise, clear and, in short, credible. Although, Dr. Haffner expressly stated that he was not going to argue that Ms. Tancock had stolen instruments, I was not impressed with the implication in his and Ms. Boyle's evidence to that effect. In order to make out a case for theft and dishonesty there must be clear and cogent evidence to that effect. That evidence was not present.

I turn first to the issue of overtime. Generally, Dr. Haffner's position was that the hours for which Ms. Tancock was paid were derived from a calendar filled in by her. On occasion, she had written, say, "plus 15" in addition to "8-4." On that basis, Dr. Haffner had difficulty with the Delegate's finding that Ms. Tancock worked an additional 10 minutes each shift doing preparatory work. Ms. Tancock's view was that she worked those minutes (and more) doing dental charts and setting up for the day. In the

circumstances, I am satisfied that Ms. Tancock did, in fact, work the time claimed. While the basis for the Determination is the preparatory work, setting up trays etc., I note that Dr. Haffner did not contradict Ms. Tancock's evidence that she conferred with him almost every morning about the day's patients before engaging in her work. As well, I take into acount Dr. Haffner's submission at the conclusion of the hearing that he did, indeed, tell Ms. Tancock in January 2000, that she was not to claim time for the time for setting up and doing charts. In short, I agree with the Delegate and see no error on her part in this respect.

I now turn to the termination. The Employer's argument boiled down to this. The Employer did not, as noted, argue that Ms. Tancock stole equipment. The Employer's argument was that her entry into the mall was unlawful--and contrary to mall policy--and that her entry into the office after hours was contrary to his policy, inappropriate, dishonest and deceitful.

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions (see, for example, Kruger, BCEST #D003/97). The principles consistently applied by the Tribunal have been summarized as follows:

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
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> 2. Most employment offenses 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 instances of minor misconduct, it must show:
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> 1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 4. The employee continued to be unwilling to meet the standard.
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> 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.
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> 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

I agree with the Employer to this extent. Ms. Tancock ought not to have entered the mall and the office to remove her instruments after hours. The fact that she did brought the parties before this Tribunal. However, in my view, the Delegate's assessment of the situation was correct, namely "entry was perhaps

ill advised it was not of such a serious nature that either the mall or Haffner took action at the time." Having heard the testimony of Ms. Tancock I am completely satisfied that she was honest and forthright in her evidence and with her Employer and I am dismayed that the Employer sought to impugn her honesty based on what can only be characterized as flimsy evidence. There was simply no basis for a claim that Ms. Tancock had stolen instruments, yet the Employer led evidence, the clear implication of which was that she did. The Employer advanced no basis for these assertions.

What Ms. Tancock did was "ill advised"--no more. Ms. Tancock had advised the Employer that she was going to remove her instruments as she had found employment with another dentist. He had not, on the evidence, indicated any desire to discuss ownership of the instruments at that time. His explanation that he did not even know she had brought her own instruments to the practice rings hollow in the circumstances. On the undisputed evidence of the final day at work, Ms. Tancock sought to ascertain what the problem was and wanted to discuss it with Dr. Haffner.

Contrary to the suggestion--express and implied--in the Employer's evidence, Ms. Tancock did not "sneak" into the office at a time when there was no-one else there. She went there openly at a time when there was another employee present. She stated that Dr. Haffner knew the following day that she had been in the office because she had removed her diploma and other things and because she had left something on his desk. This evidence was not in dispute and I accept it.

The rule or policy that the Employer sought to rely on--that Ms. Tancock entry into the mall was unauthorized--was not, in my opinion, clearly established. Dr. Haffner agreed that the mall's policy, to the extent that is a relevant factor, had changed over time. He did not establish that he had clearly communicated the policy or rule to Ms. Tancock. She denied being told that she could not go to the office and I accept that. She had, and this was not in dispute, been provided with the security code by the receptionist, Dr. Haffner's aunt. Other employees had the (same)code and this was well known, even on the evidence provided by the Employer's witnesses. Ms. Tancock had a key to the office. This was, as well, not in dispute. There was no evidence that she had obtained that key in any dishonest manner. Presumably she had--and been given--the key for a reason, namely access to the office when there was no-one else there. If the Employer wanted to limit her use of the key, I think it would have been incumbent upon the Employer to specify the limitations on the use of the key.

In my view, the appeal must fail. The employer has failed to establish that it cause for the termination of Ms. Tancock's employment and I uphold the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this matter, dated November 23, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal