Employment Standards TRIBUNAL

An appeal

- by -

MBS Computers Ltd.
("MBS")

- 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: Lorne D. Collingwood

FILE No.: 2001/843

DATE OF HEARING: April 3, 2002

DATE OF DECISION: April 9, 2002

DECISION

OVERVIEW

MBS Computers Ltd. (I will use "MBS" and "the employer" for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 29, 2001. The Determination orders MBS to pay Carey A. Jones $2,990.49 in wages, vacation pay and interest included.

The Determination is that the employee worked overtime on a number of Thursdays and Fridays in 1999 and the year 2000 and that he is entitled to be paid overtime wages for reason of that work. The Determination also awards length of service compensation to the employee. MBS claimed "just cause" but the delegate rejected the claim because of the nature of what was said to be misconduct and a lack of clear evidence that there was either further misconduct or proper warnings.

On appeal, the employer argues that the Determination is wrong in all of the above respects. The employer also finds fault with the delegate's calculations. As matters have been are presented to me, however, it is the case that the employer has failed to show that the Determination is in any way in error.

A hearing has been held in this case.

APPEARANCES:

Kulraj Gurm	On behalf of MBS
Carey A. Jones	On his own behalf

ISSUES

At issue is the matter of whether the employee did or did not work overtime as set out in the Determination.

At issue are the circumstances of the employee's termination. The employer is claiming that it had just cause.

The delegate's calculations are at issue. The employer claims that it overpaid the employee by 4 days not 3 ½ days.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS AND ANALYSIS

MBS is owed by Kulraj Gurm and his wife. Mr. Gurm and his wife also own and operate an internet café. That business is adjacent to MBS, indeed, they are connected to one another such that one can easily pass from one business to the other.

Carey Jones is a computer technician. Mr. Jones worked for MBS from March 1, 1997 until May 22, 2001. On reporting for work on the 22nd, a Tuesday, he was fired. In firing Jones, the employer said only that Jones was "not a team player".

The employer paid Jones a form of severance pay in that it paid him to the end of the week (the Friday).

I find that the initial agreement on pay is that Jones would receive $15 an hour. That is what he was paid by his former employer.

The Determination is that Jones worked one extra hour (to 6:30 p.m.) on each of the Thursdays and Fridays that he worked in the years 1999 and 2000 and that he is entitled to overtime pay for that work because the work was after eight hours. The employer, on appeal, argues that Jones did not in fact work any overtime at all. Jones on the other hand claims that he was, at the outset of his employment, told to work an extra hour on Thursdays and Fridays so that there would always be two people in the store and that his hours of work were never changed by the employer.

As the facts are presented to me, I find that there is not any hard evidence to show that Jones did not work overtime as set out in the Determination. This employer did not keep a record of hours worked and there are not documents to confirm what are the employee's hours of work.

In that there are two competing claims, I must decide what is credible. Deciding credibility is seldom an easy task. There are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions."

I am in this case led to believe the employee. It is likely that the reason that the employee consistently stayed late on Thursdays and Fridays is that it was his job to do so.

At the investigative stage, Gurm did not deny that Jones stayed for an extra hour on the Thursdays and Fridays. He said that Jones was not always working and that, to the extent that there was work, it was not

work which the employee was directed to perform but work which he decided to do on his own initiative. As matters are presented to me, however, I find that the employer is no longer suggesting that Jones voluntarily stayed at work. The employer is now claiming that Jones was not working at all: It is said that the reason that Jones stayed behind as he did on all of those Thursdays and Fridays is so that he could play computer games. I find that the employer is both vague and inconsistent.

The employer tailors evidence so that it will suit its case. The employer now knows, the Determination having been issued, that an employer must pay overtime even where work is voluntary, section 35 of the *Act* being what it is. So on appeal it is said that there was no work of any sort, just computer game playing.

It is unlikely that it was out of a desire to play computer games that Jones stayed late on all of those Thursdays and Fridays as he did. That might explain why he stayed late on some occasions but it does not explain why he chose to remain at work until 6:30 as consistently as he did. I am satisfied that the employee was led to believe by the employer that he was to work 9 hours on Thursdays and 9 hours on Fridays, there not being clear evidence to the contrary.

The employer terminated the employee on a Tuesday and, in doing so, it paid him for the rest of the week. The delegate has taken that into account and deducted 3 ½ days pay.

THE APPEAL

The Appellant has no case.

The employer claims on appeal that the employee did not work any overtime but it does not submit clear evidence of that and, as matters are presented to me, I have been led to believe that the employee did work overtime.

The employer claims that Jones was overpaid by 4 days, not 3 ½, but it is clear to me that Jones is entitled to be paid for half a day on Tuesday, May 22, 2001 for the simply reason that he reported for work on the 22nd. He is entitled to 4 hours pay under section 34 of the *Act*.

> 34(1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
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> (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
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> (b) if longer, the entire period the employee is required to be at the workplace.
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> (2) An employee is entitled to be paid for a minimum of
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> (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, … .
>
> (my emphasis)

Section 63 of the *Act* imposes a liability on employers to pay length of service compensation once a person's employment reaches 3 consecutive months. Subsection 63 (3) of the *Act* provides, however, that the liability to pay compensation for length of service can be discharged.

> 63 (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> (i) one week's notice after 3 consecutive months of employment;
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> (ii) 2 weeks' notice after 12 consecutive months of employment;
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> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
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> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
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> (c) terminates the employment, retires from employment, or is dismissed for just cause.
>
> (my emphasis)

A single act of misconduct may justify an employee's immediate dismissal but it must be shown that there was a fundamental breaching of the employment. Depending on the circumstances, misconduct of a much less serious nature, or the chronic inability of an employee to meet the requirements of a job, can also provide an employer with grounds to terminate an employee.

Where minor misconduct is alleged, it is the well established view of the Tribunal [see for example *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that, in order to show just cause, an employer must show the following:

> a) A reasonable standard of performance was established and communicated to the employee;
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> b) the employee was warned, clearly and unequivocally, that his or her employment was in jeopardy unless the standard was met;
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> c) the employee is given the sufficient time to improve for the purpose of meeting the standard; and
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> d) the employee failed to meet the standard.

In this case, the employer accuses the employee of being a chronic waster of time in that he visited pornographic websites and used the internet for personal communication purposes during work hours. As matters have been presented to me, however, it is not made clear that Jones did anything untoward but,

even when I assume that he is guilty of the misconduct of which the employer alleges, I find that it remains that the employer does not show just cause.

It is not gross misconduct of which the employer speaks but nothing more than minor misconduct. It follows therefore that a finding of just cause requires proof that the employee was plainly and clearly warned that he was failing to meet a standard which can be expected of him and that his job was in jeopardy unless there was improvement. The employer in this case is simply unable to show that it issued any warning. It did not issue a written warning and, while the employer claims that there were verbal warnings, even the employer admits that there are not witnesses to confirm that there were any warnings. It follows from this alone that the employer fails to show that it had just cause.

The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 29, 2001 be confirmed in the amount of $2,990.49 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal