An appeal

- by -

J.C. Creations Ltd. o/a Heavenly Bodies Sport
("HBS3")

- 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: M. Gwendolynne Taylor

FILE No.: 2002A/5

DATE OF DECISION: April 17, 2003

DECISION

This decision is based on written submissions presented by J. C. Creations Ltd., doing business as Heavenly Bodies Sport ("HBS"), Mai Ngoc Vuong, and the Director of Employment Standards.

OVERVIEW

This is an appeal by HBS from a Determination of the Director dated December 6, 2002, concerning a complaint by a former employee, Vuong. The Director's delegate found that Vuong had been terminated without just cause and was entitled to compensation for length of service (clos), plus vacation pay and interest on the clos, and was entitled outstanding wages. The delegate ordered HBS to pay $3,694.09 including interest. HBS had already deposited $946.96 in trust concerning the outstanding wages. Accordingly, the additional amount the delegate ordered to be paid is $2,747.13.

On December 13, 2002, HBS appealed the Determination on the grounds that the Director erred in law, arguing that HBS terminated Vuong's employment for just cause. HBS did not dispute the finding on outstanding wages.

HBS requested that an oral hearing be conducted. By letter dated February 28, 2003, the tribunal notified the parties that the appeal would be adjudicated based on written submissions and that an oral hearing would not be held (see section 107 of the *Act*).

ISSUE

Did the Director err in law in finding that HBS did not have just cause for terminating Vuong's employment?

i) Did the Director err in disregarding or giving insufficient weight to the employer's evidence?

ii) Did the Director err by failing to regard the employee's conduct as constituting fundamental breach of the employment contract?

THE FACTS

HBS employed Vuong for over 12 years, from November 1989 until February 7, 2002, as a sewing machine operator at a rate of $8.00 per hour. HBS terminated her employment when she did not show up for work on February 7, 2002. The letter of termination states that although Vuong requested and was denied 3 vacation days, February 5 – 7, 2002, she took February 7 as a vacation day. HBS noted that this was their busiest time of the year and, accordingly, were not able to grant the vacation request. Vuong had made the request on February 5, to be away from 2:00 p.m. that day through February 7, 2002.

In the termination letter, HBS outlined two other occasions when Vuong took unauthorized vacations. The first occasion was January to March 2001, when she unilaterally extended her vacation. The second occasion was in November 2001. The letter of termination concludes:

> As per the law and our own Policies and Procedures, the employer determines when vacation time can be taken. A signed copy of the Policies and Procedures is on file, you will find a copy

> enclosed. Twice now, within 4 months, you have taken unauthorized vacation. We feel this is just cause for termination.

Vuong's evidence to the delegate was that she had asked for the time off to look after her child. Although she worked the remainder of February 5 and on February 6, she had no alternative for February 7 and did not go into work. She claimed this was a one-time incident which had not occurred previously during her 12 years of employment. Concerning the other vacation incidents, she submitted that she did not know the company policy the first time, January to March 2001, and that the second occasion, November 2001, was a result of her brother's death. She submitted that the employer "finally agreed and let me go."

The delegate referred to a formal Policies and Procedures document signed by Vuong on June 26, 2001. The policies and procedures require employees to request vacation 2 months in advance and provide that failure to return from vacation on the proper date will be considered abandonment and will result in termination. The document also provides that failure to follow the policies will result in a warning and three warnings may result in termination of employment.

The delegate noted that the onus is on the employer to show that just cause for dismissal existed and that the conduct was such that the employer was not required to give notice or compensation in lieu of notice. The delegate outlined criteria that the director expects when an employer is terminating an employee for unsatisfactory conduct. These include adequate notice of the standards expected, reasonable efforts to assist the employee achieve those standards, the employee's failure to meet the standards and, most importantly, a warning to the employee that continued failure to meet the standards could result in termination.

The delegate considered each of the vacation incidents raised by HBS. The delegate found the first incident was not relevant because it occurred prior to the policies and procedures documents signed on June 26, 2001. For the second incident, the parties disagreed on the facts with the employer denying that permission had been granted. The delegated noted the disagreement and the fact that HBS allowed the employment to continue. The delegate found it "likely" that HBS had warned Vuong but also found there was insufficient evidence to show that HBS had "clearly and unequivocally" warned Vuong that similar conduct could result in termination. If there had been a warning for this second occasion, it was only the first warning.

The delegate found that the third incident would have been only the second warning and, therefore, did not constitute grounds for termination following the policies and procedures document..

The delegate also considered the effect of Section 52 of the *Act* which entitles an employee to as much as 5 days unpaid leave for family responsibilities. The delegate observed that HBS had a duty under s. 54(1) to grant this leave, and should have offered this option to Vuong.

The delegate concluded based on an analysis of each incident and the requirements of the *Act* that HBS had not provided sufficient evidence to demonstrate just cause for dismissal.

ARGUMENT

On appeal, HBS alleged that the delegate erred in law in finding there was no just cause for termination. HBS' main ground for appeal is that Vuong's unathorized vacation time is abandonment of her position and grounds for termination. In the appeal, HBS stressed that this case is not about whether 3 warnings

were given. HBS also submitted that the delegate based the determination on the letter of termination and did not take into consideration the additional evidence from the employer and Vuong's supervisor.

A new document submitted by HBS is a Policies and Procedures document signed by Vuong on August 8, 2000, which is almost identical to the one that was before the delegate. Another new document, is a statement from Rod Sung, the bookkeeper and Vuong's supervisor. Sung stated Vuong requested the February 2002 vacation days in order to travel with visiting relatives. He stated he denied that request, that he was aware that she then went to his superior who also denied the request, that Vuong indicated her intention to take the days anyway, and that he warned her if she did he would terminate her employment.

HBS noted what amounts to a typographical error in the body of the determination. The delegate referred to person named "Ghaffari" instead of "Vuong". In its reply to the appeal, the Director requested that the tribunal vary the determination to correct that error.

In Vuong's reply to the appeal, she denied ever saying she needed the time off to travel with visiting relatives, rather her mother was going with the relatives so Vuong needed to look after her children. She reiterated that this was the first time in over 10 years that she had taken time from work without authorization. She stated that she must have forgotten about the 2000 policies document and that she did not know what is was.

THE FACTS AND ANALYSIS

Nature of the Appeal

The appeal is brought under section 112 of the *Act*:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) The director erred in law;
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> (b) The director failed to observe the principles of natural justice in making the determination;
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> (c) Evidence has become available that was not available at the time the determination was being made.

HBS' appeal is based on error of law, saying HBS had just cause to terminate the employment and should not be required to pay compensation. Recent cases from the Supreme Court of Canada have confirmed that the standard of review for error of law is 'correctness'. (*Housen v. Nikolaisen*, [2002] S.C.J. No. 31; 2002 SCC 33; *Law Society of New Brunswick v. Ryan*, [2003] S.C.J. No. 17; 2003 SCC 20; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18. In those cases, the Court did not examine the standard of 'correctness' in the context of an alleged error relating to findings of facts. It is instructive to look at the decision of the B.C. Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No 2275 (C.A.). In that case, the Court of Appeal gave specific consideration to the elements of 'error of law', which I set out as follows:

(a) a misinterpretation or misapplication of a section of the Act;

(b) a misapplication of an applicable principle of general law;

(c) acting without any evidence;

(d) acting on a view of the facts which could not reasonably be entertained; and

(e) exercising discretion in a fashion that is wrong in principle.

Accordingly, there may be some instances when errors of fact may give rise to errors of law. However, an appeal to the tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. The tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on HBS to demonstrate that there are grounds for dismissing or varying the determination.

Evidence in the Appeal

The Appellant, HBS, has provided some evidence that was not presented to the Director.

In the past, the tribunal has held that it would not normally, without good reason, accept new evidence that could have been submitted during the delegate's investigation (see *Kaiser Stables Ltd.,* BC EST #D058/97). In this instance, HBS has presented two documents. It is apparent that the August 8, 2000 policies document, although it was available, was not presented to the delegate. The other document is a witness statement, the import of which I presume was made available to the delegate, although not in written form.

Section 112(1)(c), a relatively new provision, makes it clear that new evidence is to be accepted as a ground of appeal if was not available to the delegate. Neither document would substantiate a ground of appeal under s. 112(1)(c) and HBS did not suggest they should.

I have given consideration to whether I should accept these documents as evidence in the appeal. Having considered the nature of an appeal based on error of law and the submissions raised in this appeal, I find it appropriate to limit the evidence to that which could reasonably have been before the delegate. Accordingly, I do not accept the Policies and Procedures Document as evidence in the appeal. However, I find that the witness statement is appropriate in a written submission hearing, particularly since it is apparent that the delegate had access to oral evidence that is not part of the record before the tribunal.

Just Cause

Section 63 of the *Act* sets out an employer's liability to pay compensation following termination of employment, based on the length of the employment. An employer's liability is discharged if the employee was dismissed for "just cause." One of the leading cases in British Columbia on 'just cause' is *Silverline Security Locksmith Ltd (re)* [1996] B.C.E.S.T.D. No 200; BCEST # D207/96, July 31, 1996. At paragraphs 11 and 12, the tribunal stated:

> ¶11 The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
> ¶12 It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:
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> 1. Reasonable standards of performance have been set and communicated to the employee;

2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

It appears that the delegate viewed this case as falling into the category of "unsatisfactory conduct", rather than "fundamental breach." The delegate summarized HBS' submission on just cause as being "because she had taken unauthorized vacation on three occasions." Although that is the import from the letter of termination, HBS submits that the delegate erred by not considering the other evidence submitted during the investigation. If it was HBS' intention to argue 'fundamental breach' in the delegate's investigation, it seems quite clear from the determination that the delegate did not understand HBS to having been making that argument.

However, on appeal HBS argued, in essence, that this is a case of fundamental breach by Vuong abandoning her position. That raises a question of whether it is open to an appellant to raise a legal argument before the tribunal for the first time. I will deal with that issue later in these reasons.

In *Re: Fuggle* [2002] BC EST #D326/02, Adjudicator Orr considered a number of a cases in which fundamental breach had been considered. At paragraphs 19 and 20, he summarized some of the findings:

> **¶19** However in cases of deliberate and intentional misconduct the Tribunal has found that just cause can exist as a result of a single act where the act is wilful and deliberate and is inconsistent with the continuation of the contract of employment, or inconsistent with the proper discharge of the employee's duties, prejudicial to the employer's interests, is breach of trust, or is such as to repudiate the employment relationship. In these cases there is no requirement for warnings and certainly no requirement for progressive discipline, Re: Jace Holdings Ltd. BC EST # D132/01.
>
> **¶ 20** As noted above just cause in cases of misconduct can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, breach of trust, insubordination, or a significant breach of workplace policy, *Re: Silverline Security Locksmith Ltd*., BC EST # D207/96. It can also include such things as assault of another employee, drug use or trafficking while at work or the deliberate and wilful disobedience of a direct instruction from a supervisor.

The tribunal has held that failure to attend work can result in termination of the employment contract, see e.g. *Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97 and *Re: Roberts*, BC EST # D375/97. In *Glenwood*, the employee was away for three days, customers were affected and there was prejudice to the employer. The adjudicator found that the conduct was inconsistent with the continuation of the employment contract and, essentially, found there had been a "fundamental breach." In *Roberts*, the employee was responsible for opening the business and, therefore, it did not open on time. The employee had received numerous warnings about unsatisfactory performance and had previously been suspended. It appears the adjudicator applied the "unsatisfactory conduct" approach.

As I understand HBS' position, because Vuong's request for time off had been denied, her failure to attend work on February 7, 2002, regardless of any explanation she might have had, constituted unauthorized vacation and abandonment which was inconsistent with the continuation of the employment contract. HBS asks that I find that Vuong's behaviour, as a single act, was serious enough to warrant immediate termination.

I further understand HBS to ask that, if I don't accept the single act as just cause, I consider the February 7 instance with the previous instances, find that HBS had warned that termination could result from unauthorized absences, and find that termination was supported generally by unsatisfactory conduct. (It was in relation to this argument that HBS submitted the August 8, 2000 policies document which I have not accepted as evidence.)

I find that the evidence does not support either of HBS' contentions for just cause. Even if I accept HBS view of the evidence totally, I find that HBS has not demonstrated that the director erred in law for the reasons that follow.

Concerning the single act – the last incident - Vuong asked for three days off, was denied and attended work for 2 of the 3 days. Her supervisor said he warned her that if she took the time he would terminate her employment. The first day may have been almost over by the time her request and denial were processed but, nonetheless, she did not leave work. She attended work on the second day. She maintains that her absence on the third day was to look after her children and that her employer knew that. It is apparent that the delegate accepted her evidence. It may be, as the delegate suggested, that she was entitled to some family responsibility leave. Vuong returned to work the following day, February 8.

In considering whether the delegate erred in not finding this to be a situation of 'fundamental breach', I have considered whether the delegate's findings of fact amount to an error of law – could the delegate's view of the evidence be reasonably entertained? As noted above, it is apparent the delegate preferred Vuong's evidence over HBS' evidence. There was some reasonable basis for accepting Vuong's evidence. I find that HBS has not substantiated that the delegate's view could not be reasonably entertained.

I have also considered whether the delegate misapplied a principle of general law. It appears that the delegate did not give consideration to the general principle of 'fundamental breach'. In the cases discussed above, it is clear that conduct must be egregious to constitute a single act of 'fundamental breach'. Based on the delegate's findings of fact, I find that Vuong's one day absence does not constitute abandonment of position or such misconduct as to bring it within the circumstances of a fundamental breach. I find that the delegate's failure to find 'fundamental breach' does not amount to an error of law.

The delegate's decision was based on a consideration of the three incidents, the terms of the policies document, and application of the *Silverline* criteria. The delegate determined that the February 7, 2002 incident would have resulted in only the second warning. It is apparent that the delegate made findings of fact in which she accepted Vuong's version of certain events over that of HBS. I find that the delegate took a reasoned view of the evidence, properly applied the *Silverline* criteria, and did not err in law in coming to the determination based on the evidence presented.

New Legal Argument on Appeal

As I noted above, HBS presented an argument to the tribunal – fundamental breach - that it appears had not been presented to the delegate. I presumed HBS to be asking the tribunal to find that the delegate erred in law by failing to reach a legal conclusion, even though it had not been submitted nor argued before the delegate. Arguably, that could be an example of a misapplication of an applicable principle of general law regardless of not being argued. In deciding this case, I gave full consideration to all of the appellant's arguments. I have decided this appeal as though the appellant was entitled to appeal on a point not raised in the delegate's investigation. However, I do so with caution and note that, because the

amendments to the *Act* are recent, and because I did not receive submissions on this question, I decided to leave this issue to another case when it can be properly explored.

Variation

There having been no submissions contrary to the Director's request that I vary the determination to correct a typographical mistake, I will do so.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated December 6, 2002, be varied on page 6 to substitute the name "Vuong" for the name "Ghaffari" and, in all other respects, I order that the Determination be confirmed in the amount of $3,694.09, together with any interest that has accrued pursuant to section 88 of the *Act*.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal