

An appeal

- by -

Showstar Online.com Inc. and Showstar Online (Canada) Inc. Associated
Corporations)
("Showstar")

- 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: Norma Edelman

FILE No.: 2002/046

DATE OF DECISION: April 12, 2002

DECISION

OVERVIEW

This is an appeal by Showstar Online com.Inc. and Showstar Online (Canada) Inc. (Associated Corporations) (hereinafter referred to as "Showstar") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards on January 11, 2002.

The delegate determined that Showstar owed its former employee, Douglas Marshall ("Marshall"), the sum of \$\$18,105.68 representing a bonus and compensation for length of service.

Showstar appealed the Determination on the basis that Marshall is not entitled to compensation for length of service and the bonus because it had cause to dismiss him and he did not meet the performance standards required for the bonus.

This appeal was decided based on the written submissions of the parties.

ISSUES TO BE DECIDED

Is Marshall entitled to a bonus and compensation for length of service?

FACTS AND ANALYSIS

Showstar is a developer of internet websites and e-commerce solutions. According to the delegate it is no longer in operation.

Marshall commenced employment with Showstar on November 8, 1999 and was dismissed on October 31, 2000.

Marshall filed a complaint at the Employment Standards Branch on December 15, 2000 alleging he was owed severance pay, a bonus, stock options and expenses.

The delegate determined that Marshall's claim for stock options and expenses were not within the jurisdiction of the *Act*. The delegate further determined that Marshall was owed a \$15,000.00 bonus and one weeks wages representing compensation for length of service. The delegate did not accept that Marshall was fired for cause, as alleged by Showstar, because the company provided no evidence to substantiate its position. He also did not accept, as alleged by Showstar, that Marshall was not entitled to the bonus because it was subject to an assessment of performance and Marshall failed to meet the standard. In finding that Marshall was owed the bonus, the delegate relied on the written contract between the parties which stated the bonus was payable at the six month anniversary of the contract.

Showstar appealed the Determination on February 4, 2002. Showstar requests that the Determination be cancelled. Its complete reasons for the appeal are as follows:

Mr. Marshal was hired to replace two senior individuals who could not perform and meet deadlines. All his people who he hired were to receive bonus's based on performance and he was instructed to convey that on hiring.

Mr. Marshall did not meet the performance expected of him and two different occasions was told so. His hiring and performance were for the express purpose of bringing projects and upgrades in on time. This was not done, therefore he was let go for cause when the "portal" concept kept being put off.

Mr. Marshall is not entitled to any payments and it would be unfair to have him receive a performance bonus when the performance was not there.

(reproduced as written)

The delegate and Marshall filed submissions in reply to Showstar's appeal.

The delegate said that Showstar's allegations on appeal (that Marshall was told he did not meet performance expectations, his hiring and performance were to bring projects and upgrades in on time and this was not done and that he was let go for cause when the "portal" concept kept being put off) were not made during the investigation process. As a result, these allegations should be inadmissible on the appeal. The delegate further said that no documents are produced to support the appeal nor is there any evidence to support the allegations. As well, the new allegations, even if they were proved in their entirety, are still insufficient to establish just cause. Finally, the delegate reiterated his position that the bonus was not dependent on performance.

Marshall said he had a contract with Showstar that provided for a bonus payable on his 6 month anniversary, with no attached conditions. Marshall enclosed a copy of the contract. He also said he offered no bonuses to any of the employees he hired; at no time was any concern raised regarding his performance until his termination interview on October 30; his performance was exemplary; the company has provided no specifics regarding dissatisfaction with his performance; and the Portal project was taken out of his control at the beginning and all the other projects for which he had control were delivered on time.

Showstar was invited to reply to the submissions of the delegate and Marshall. The Tribunal received no reply.

The burden is on the Appellant, Showstar, to show that a Determination is wrong. In this case, I am not satisfied that Showstar has met that burden.

The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see *Specialty Motor Cars* BCESTD#570/98).

The delegate argues that Showstar's allegations on appeal, which go to the issue of cause for dismissal, should not be admitted, as they were not made during the investigation process. I agree. Showstar does not challenge the delegate on this matter and it has provided no explanation why this information was not provided to the delegate during his investigation. For that reason alone the appeal is dismissed with respect to the issue of whether Marshall is entitled to compensation for length of service. The information provided on the appeal could have and should have been presented to the delegate in the initial investigation. However, even I admit the information, I would still dismiss Showstar's appeal as it relates to the issue of compensation for length of service.

Under Section 63 of the *Act* an employer is liable to pay an employee compensation for length of service (or notice in lieu) unless the employee quits, retires or is dismissed for just cause. Marshall did not quit or retire. The only issue is whether he was dismissed for just cause as alleged by Showstar.

The Tribunal has addressed the question of dismissal for just cause on many occasions (see for example *Kenneth Krueger* BCEST #D003/97). The Tribunal has said that where there are instances of misconduct or allegations of poor performance, the employer must show, in order to establish just cause, that a reasonable standard of performance was communicated to the employee; the employee was given a sufficient period of time to meet the required standard of performance and had demonstrated an unwillingness to do so; the employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and the employee continued to be unwilling to meet the standard.

In this case Showstar says it told Marshall on two occasions that he was not meeting the performance expected of him. It also says Marshall was not bringing projects in on time and he was let go when the "portal concept" kept being put off. Marshall denies this and Showstar has provided no evidence to support these allegations. Moreover, Showstar does not state it ever warned Marshall his job was in jeopardy if he failed to improve his performance. Accordingly, I am not satisfied that Showstar has established it had just cause to dismiss Marshall and I concur with the delegate that Showstar owes Marshall one weeks wages as compensation for length of service

I also agree with the delegate that Marshall is owed the bonus. The employment contract between Marshall and Showstar as it pertains to the bonus states:

7. A bonus of \$15,000 payable at the 6 month anniversary of the contract.

The only condition attached to the payment of the bonus is its timing. The bonus is payable at the 6 month anniversary of the contract. The contract is silent with respect to any other conditions being attached to the payment of the bonus, including any conditions relating to performance. Showstar has not provided any evidence to support its claim that the bonus was conditional on certain performance standards. Moreover, Marshall denies any performance conditions were attached to the payment of the bonus. Accordingly, from the material before me, I am satisfied Marshall is owed the bonus which was payable prior to his dismissal.

ORDER

I order under Section 115 of the *Act* that the Determination be confirmed.

Norma Edelman, Vice Chair
Employment Standards Tribunal