Employment Standards TRIBUNAL

An appeal

- by -

Dr. Maria Rado Inc. operating as Metro Art Dental Clinic
(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

TRIBUNAL MEMBER: John E. Savage

FILE No.: 2004A/99

DATE OF DECISION: August 23, 2004

DECISION

SUBMISSIONS

Dragan Radovanovic	for Dr. Maria Rado Inc., operating as Metro Art Dental Clinic
Ivy Hallam	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by Dr. Maria Rado Inc. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act")*. The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Delegate") on June 9, 2004.

An oral hearing was held September 26, 2003. After the hearing the Delegate determined that the Employer had contravened Section 63 of the *Act* by failing to pay compensation for length of service. Compensation for length of service and interest was ordered to be paid in the amount of $571.38. An Administrative Penalty was assessed in the amount of $500.00 pursuant to Section 29 of the *Employment Standards Regulation*, B.C. Regulation 396/95.

The Vice-Chair communicated to the parties that this appeal was being adjudicated solely on the basis of the parties written submissions. Before me are the original appeal documents filed by the Employer, the Director's submission, and the section 112(5) record filed by the Director.

THE DETERMINATION

On December 20, 2002 Vesna Vukasovic ("Vukasovic") resigned from her position with the Employer giving 2 weeks notice. Vukasovic continued to work until December 26, 2002. On December 26 Vukasovic took the attendance book home to take photocopies of her hours of work. On December 27, 2002 she arrived at work with the attendance book. Dr. Radovanovic asked her if she had taken the attendance book home. She admitted this and apologized. Dr. Radovanovic terminated Vukasovic's employment forthwith.

Before the Delegate, Dragan Radovanovic, Dr. Radovanovic's husband, argued that the Employer is required by law to keep employee attendance records at the work site. This incident was therefore cause for dismissal. Alternatively, there were problems Vukasovic had with other employees, which was confirmed in letters from two fellow employees, and taking the attendance record book was a culminating incident that warranted dismissal.

Vukasovic took issue with the matters raised in the letters from the fellow employees. Vukasovic had not received any written warnings and in fact had received salary increases during the period of her employment.

The Delegate found that the taking the attendance book overnight was wrongful. The Delegate found further, however, that this was not "serious misconduct which ruptures the essential aspect of the employment relationship" such that discharge was appropriate.

With respect to the issues with fellow employees the Delegate found that these stemmed from personality conflicts and no reasonable standard of performance had been established and communicated to Vukasovic. Moreover, there was no clear warning or time period given to reach acceptable performance.

ISSUE ON APPEAL

The stated grounds for appeal are that the Director failed to observe the principles of natural justice in making the determination, specifically, it was alleged that in the reasons for Determination "the Delegate did not present important facts and aspects of this matter". A letter dated June 11, 2004 to the Tribunal was appended which detailed the various facts and circumstances that it is asserted should have been considered.

THE ARGUMENTS

Employer

The Employer notes in its submission that the Determination was made on June 10, 2004 after a hearing held September 26, 2003. It complains that it was given only one week to appeal which is unfair given the length of time required to issue the Determination.

The second point concerns two errors in the Determination. Dr. Rado is referred to instead of Dr. Radovanovic, and Vukasovic's start date is incorrectly referenced as October 12 instead of October 5, 2000.

The third point is that the Delegate "missed very important statement portions from our previous written material, including the statement portions from our two other employees".

The fourth point is that while Dr. Radovanovic did not give an written warning to Vukasovic, this was because it was not her style, but she did speak to Vukosovic which was a "nice way to warn her about her behavior (sic), without making her upset".

The fifth point is that the Delegate failed to mention that there was a copy machine in the office and if Vukasovic wanted to make a copy of the attendance book she could have done this in the office.

The sixth point is that further warnings would have been futile during the last week of employment as it would not have any impact on Vukasovic.

The Director

The Director says that the Employer was given more than a month to appeal. The Determination was dated and mailed out on June 9, 2004 and the last date allowed for the appeal was July 19, 2004 which is set out on page 3 of the Determination.

The Director says that whether the start date of Vukasovic was October 10, 2000 or October 5, 2000 does not make a difference to entitlement or calculation of the compensation for length of service. October 10, 2000 is given on the complaint form and October 2, 2000 is given on the Record of Employment. There is no record that indicates that employment started October 5, 2000.

The Director says that the arguments made in the Employer's submission were made before the Delegate and there is nothing to show a denial of natural justice or error of law and no new evidence has been submitted.

FINDINGS AND ANALYSIS

Time for Appeal

The Determination was made June 9, 2004. The letter of Mr. Dragan Radovanovic accompanying the appeal is dated June 11, 2004 and the Appeal Form is signed June 14, 2004. If the Employer did not receive page 3 of the Determination Letter it could have contacted Employment Standards or reviewed the provisions of the *Employment Standards Act* concerning appeal periods. In any event, the appeal was received in a timely manner. There is no denial of natural justice made out on these facts.

Factual Errors Alleged

As noted by the Director, the start date was unclear based on the material filed with the Director. Whether employment commenced October 2, October 5, or October 10, 2000 is not material to compensation for length of service in this case.

The error naming Dr. Maria Radovanovic as Dr. Maria Rado is probably because the clinic owner is "Dr. Maria Rado Inc." While this is an error it is not material to the issues in the appeal.

Overlooked Evidence

Despite the submissions of the Employer, I cannot find support for the assertions that the Delegate overlooked the witness statements. At page 8 of the Reasons for Determination the Delegate notes:

> "Radovanic submitted two documents: one from Wendy Mak ("Mak") office manger of Dr. Rado and the other from Catalina Joaquin ("Joaquin") dental assistant of Dr. Rado. These documents were submitted in support of Radovanic's claim of Vukasovic's problems with the other employees".

In general, the Delegate's Reasons for Determination review the evidence of these letters and analyzes them in the context of the all of the evidence.

Although the Reasons for Determination do not specifically deal with the assertion in Mak's statement that a photocopier was available to make copies in the office, the Delegate finds that the taking of the attendance book was wrongful and the Employer could have disciplined Vukasovic for this matter. The Delegate found, however, that dismissal was excessive in the circumstances.

No Clear Warning

The Employer did not take issue with the proposition that no clear warning was given to Vukasovic of the consequences of the problematic behaviour. The Employer argued that this was not the style of Dr. Radovanic and would have been upsetting to the employee.

While the position of the employer is perhaps understandable, the law requires that the Employer communicate an objective standard of conduct and bring home to the employee the consequences of failing to achieve that standard: *Re Balint*, [2003] B.C.E.S.TD. No. 103, (25 March 2003), BCEST #D103/03. This requirement is founded on the principle of reasonableness and fairness and allows an employee a reasonable opportunity to correct the problematic behaviour: *Re British Columbia (Director of Employment Standards)*, [2003] B.C.E.S.T.D. No. 122, (8 April 2003), BCEST #RD 122/03. So while an employee has a right to know what standard is required and that the standard is not being met, an employer has a corresponding obligation to be frank with an employee about the standard and the failure to meet that standard. An employer ignores that obligation at its own peril.

While applying these principles might have seemed futile to the Employer, since Vukasovic was leaving her employment the following week, the employment relationship requires candour at the time misconduct occurs. The Delegate noted that Dr. Radovanic did not warn Vukasovic that her job was in jeopardy when the various events occurred for reasons of style and to avoid unpleasantness. Those reasons do not excuse the Employer from communicating a standard, advising the employee that the standard was not met, and clearly enunciating to the employee that the consequence of failing to meet the standard would be termination of employment.

CONCLUSION & ORDER

In the circumstances there was no breach of natural justice as alleged.

Pursuant to Section 115 of the *Act* I order that the Determination be confirmed as issued together with whatever additional interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance of the Determination.

John E. Savage
Member
Employment Standards Tribunal