Employment Standards TRIBUNAL

An appeal

- by -

Christopher Rasmussen
("Rasmussen")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2000/755

DATE OF HEARING: January 19 & April 25, 2001

DATE OF DECISION: May 2, 2001

DECISION

APPEARANCES:

Pamela J. Quesnel, Barrister & Solicitor	for Christopher Rasmussen
No appearance	for Villa Agencies Inc./Go Transport Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW OF PREVIOUS PROCEEDINGS

There is some history to this matter.

On June 26th, 1998, Christopher Rasmussen ("Rasmussen"), the present appellant, filed a complaint with the Employment Standards Branch claiming his former employer, Villa Agencies Ltd. and Go Transport Ltd., owed him about $14,600 in unpaid overtime pay, statutory holiday pay and compensation for length of service.

On April 16th, 1999 a delegate of the Director of Employment Standards (the "Director") issued a determination under file number 088-565 (the "Determination") pursuant to which Villa Agencies Ltd. and Go Transport Ltd. were held jointly and severally liable to Rasmussen for $2,105.12 in unpaid wages. In regard to the claim for compensation for length of service, the delegate held that Rasmussen's employment was properly terminated for cause because: "He received oral warnings regarding the sexual harassment and verbal abuse of a female co-worker". Accordingly, Rasmussen was not awarded any compensation for length of service [see section 63(3)(c) of the *Act*].

Villa Agencies Ltd./Go Transport Ltd. and Rasmussen both appealed the Determination. The two appeals were heard together before Adjudicator Jamieson on October 1st, 1999 and on October 19th, 1999 he issued reasons for decision (B.C.E.S.T. Decision No. D435/99). By agreement of the parties, Rasmussen's claim for compensation for length of service was referred back to the Director for further investigation and, accordingly, Adjudicator Jamieson made the requisite order.

A new delegate conducted an investigation into Rasmussen's claim for compensation for length of service. The delegate's report to the Tribunal's Vice-Chair, dated March 31st, 2000 and received by the Tribunal on April 4th, 2000, concludes:

> "Based on information received and on the balance of probabilities, Rasmussen did engage in behaviour that was harassing to [a named female employee]. I am satisfied Villa warned Rasmussen that his behaviour was inappropriate and had cause to terminate his employment."

THE PRESENT APPEAL

In essence, the second delegate confirmed the earlier finding, set out in the Determination, that Rasmussen was dismissed for just cause. Thus, the present proceedings amount to an appeal of the Determination (as confirmed following the reinvestigation ordered by Adjudicator Jamieson) only as it relates to Rasmussen's claim for compensation for length of service.

This appeal was scheduled to be heard on January 19th, 2001 at which time Rasmussen and his legal counsel appeared but nobody on behalf of the employer. At my direction, a Tribunal staff member telephoned the employer's office and was advised that the employer did not know that the appeal was to be heard that morning. Inasmuch as the hearing notice had been sent out by ordinary mail, I agreed to adjourn the matter to a new date.

Subsequently, Rasmussen's appeal was rescheduled to be heard on April 25th, 2001 and all parties were so notified. A few days before the April 25th hearing date, a representative of the employer, apparently frustrated with the length of time proceedings had taken to date, telephoned the Tribunal and stated, in effect, that the employer did not intend to appear at the appeal hearing. The Director's delegate also advised the Tribunal that he did not intend to appear at the appeal hearing. On April 25th, Rasmussen appeared, with his counsel, but the employer did not appear nor, as expected, did the delegate. In light of all the circumstances, I agreed to proceed with the appeal.

FINDINGS

It is ordinarily the employer's burden to prove that it had just cause for dismissal. However, when an employee appeals a determination that his or her employer had just cause, the burden shifts to the employee to show that the determination is incorrect (*i.e.,* that the circumstances relied on by the employer do not constitute just cause). The employee's appeal may amount to an attack on the findings of fact set out in the Determination ("I did not do that which has been alleged against me") or it may amount to an attack on the legal consequences of a given set of facts ("Even if I did that which is alleged against me, that is not just cause for dismissal"). Rasmussen's appeal is more in the nature of the former attack; he simply--and vigorously--denies that he harassed the female employee in question.

If Rasmussen committed, as he is alleged to have done, numerous acts of sexual harassment and verbal abuse directed toward a female co-worker (and was repeatedly warned to stop such behaviour), I do not doubt that his dismissal would have been for just and sufficient cause. However, there is simply *no* evidence before me of any such behaviour.

I heard the testimony of three witnesses in addition to Rasmussen. Ms. King, an investigator with the federal employment insurance agency, testified that the employer's principal never, *at any time* during her investigation (Rasmussen applied for employment insurance benefits), mentioned anything about sexual harassment or verbal abuse. As recorded in her notes and official report, Rasmussen was terminated because of a "poor attitude" stemming from a disagreement that arose when Rasmussen was not assigned to drive a comparatively new truck after its former driver left the firm. Ms. King also testified that the employer suggested it terminated Rasmussen because he was threatening to try and bring a union into the workplace. I should note, at this point, that attempting to organize one's fellow employees into a trade union is lawful and protected activity under the B.C. *Labour Relations Code.*

Two former employees, colleagues of both Rasmussen and the other female employee, both testified that they never witnessed nor heard anything that might be construed as sexual or verbal abuse by Rasmussen toward the female employee. They both testified that all communications over the company radio--it had been alleged that some incidents were in the nature of derogatory comments broadcasted over the company's two-way radio system--would have been heard by all drivers and that they never heard any such comments. I might add that both of these employees apparently left Villa on good terms and testified before me under summons.

Both former employees, however, did testify that they knew--as did most drivers, so it would appear--that Rasmussen was upset with the employer when the new truck was not assigned to Rasmussen. The failure to reassign the truck to Rasmussen was apparently contrary to a standing practice that the most senior driver would normally be given "first choice" to drive a newer vehicle once that vehicle's former driver left the firm.

As it turns out, the driver assigned to drive the new truck was the female employee in question. Rasmussen frankly concedes that he was upset by that assignment and made his feelings known to the employer. He denies that he harassed the female driver in any fashion although he did tell her that in his view he, rather than she, ought to have been assigned the newer truck.

Although there are a couple of letters from present employees in the material before me that purport to support the employer's position regarding harassment, these letters are unsworn and, in large measure, the allegations contained therein consist entirely of hearsay. Based on the evidence before me, I am not satisfied that the employer had just cause to terminate Rasmussen's employment on or about June 19th, 1998.

I must say that I remain puzzled as to why the employer has taken such an apparently truculent attitude toward this matter and has refused to submit any *viva voce* evidence that might corroborate its position that it had just cause for termination. The allegations made against Rasmussen are particularly loathsome and, since I have only heard one side of the story, it cannot be fairly said that these reasons will entirely vindicate Rasmussen's reputation--a matter that is obviously important to him.

Rasmussen's employment spanned about 3 1/2 years. Thus, he is entitled to 3 weeks' wages as compensation for length of service. Applying the formula set out in subsection 63(4) of the *Act* results in an amount due to Rasmussen of **$1,796.18**, calculated as follows:

> $4,605.60 (last 8 weeks' wages) ÷ 8 weeks = $575.70/week x 3 weeks = 1,727.10
> plus 4% vacation pay = $1,796.18

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate that Villa Agencies Ltd. and Go Transport Ltd. are jointly and severally liable to pay an additional sum to Christopher Rasmussen, on account of compensation for length of service, of **$1,796.18** together with interest payable pursuant to section 88 of the *Act* as and from June 19th, 1998.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal