Employment Standards TRIBUNAL

An appeal

- by -

Nathan S. Ganapathi, Personal Law Corporation operating as Ganapathi and Company

(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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/131

DATE OF HEARING: July 3, 2003

DATE OF DECISION: July 8, 2003

DECISION

APPEARANCES:

Nathan Ganapathi, Barrister & Solicitor	for Nathan S. Ganapathi Personal Law Corporation
Todd McPherson, Barrister & Solicitor	for Sandra L. Therrien

INTRODUCTION

Nathan S. Ganapathi Personal Law Corporation (the "Employer") appeals, pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on March 27th, 2003 (the "Determination"). By way of the Determination, the Employer was ordered to pay Ms. Sandra L. Therrien ("Therrien") the sum of $5,972.95 on account of 8 weeks' wages as compensation for length of service ($5,665.30), unpaid regular wages ($85.69) and accrued section 88 interest ($221.96).

This appeal was heard at the Tribunal's offices in Vancouver on July 3rd, 2003 at which time I heard the testimony (under oath) of Mr. Nathan S. Ganapathi, the Employer's principal, and Ms. Therrien on her own behalf. In addition, Ms. Christine Ballantyne testified on behalf of the Employer. In adjudicating this appeal I have also considered the various submissions filed by the parties.

REASONS FOR APPEAL

The Employer appeals the Determination on two separate grounds, namely:

- The Director's delegate erred in law [section 112(1)(a) of the *Act*]; and
- The Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b) of the *Act*].

With respect to the first ground, the Employer says that the delegate erred in concluding that the Employer did not have just cause for dismissing Ms. Therrien. The second ground of appeal relates to two documents that the Employer says were not disclosed to him during the course of the delegate's investigation.

I shall address each ground in turn.

FINDINGS AND ANALYSIS

Just Cause

If an employer has just cause for dismissing an employee, that employee is not entitled to any compensation for length of service [section 63(3)(c) of the *Act*]. Whether an employer has just cause for termination is an issue of mixed fact and law. In my view, a particular Director's decision with respect to the matter of just cause may be characterized as an error of law if that finding was not supported by a

proper evidentiary foundation or if the delegate did not correctly instruct herself with respect to, or otherwise correctly apply, the governing legal principles.

In this case, the Employer's position is that it had just cause for terminating Ms. Therrien's employment because she stole or otherwise misappropriated certain property belonging to the Employer. The Employer characterized Ms. Therrien as a "thief". As will be seen, I am not satisfied that the Employer has met its evidentiary burden of proving that latter allegation and, in my view, the delegate quite correctly rejected the Employer's assertion that it had just cause to dismiss Ms. Therrien.

This dispute arises from the dissolution of a law firm; Mr. Ganapathi was the principal of this firm and, so far as I can gather, one other lawyer (whom I shall refer to as "Mr. C") was associated with Mr. Ganapathi in some fashion but not as Mr. Ganapathi's partner. Ms. Therrien was employed by the law firm as Mr. C's legal assistant, although in carrying out her duties she had a reasonable degree of autonomy. Mr. C's practice was primarily a litigation practice whereas Mr. Ganapathi's practice was primarily a solicitor's practice.

In the spring of 2002 the law firm was in serious financial straits. Mr. Ganapathi determined, on May 3rd, 2002, that the firm could no longer continue as it was presently constituted. Thus, he personally prepared a short memorandum and then directed the firm's receptionist/bookkeeper, Ms. Ballantyne, to deliver the memorandum to the other two staff members, one of whom was Ms. Therrien. The memorandum, signed by Mr. Ganapathi, stated:

> Our office has reached a financial position where we cannot carry on any longer. I therefore regret to advise that all staff will be laid off effective Monday, May 6, 2002 and I will no longer be responsible for your wages.

Although the Employer referred to this notice as a temporary layoff notice, I think a fair reading of the memorandum justifies the conclusion that it was intended to be a notice of dismissal. In any event, the proper characterization of the notice is not particularly relevant since it is common ground that Ms. Therrien was never recalled by the Employer and thus, by reason of section 63(5) of the *Act*, was deemed to have been terminated as of May 6th, 2002. Accordingly, Ms. Therrien was presumptively entitled, given her 14 years' service with the Employer and its predecessor firms, to 8 weeks' wages as compensation for length of service [section 63(2)(b)].

In and around the same time period, Mr. Ganapathi and Mr. C were in negotiations about whether Mr. C might continue to occupy a suite of offices in the Employer's premises under some sort of space sharing arrangement. These negotiations did not produce an agreement between the two parties and in the latter part of May 2002 Mr. C opened up his own law office and hired Ms. Therrien as his assistant.

The nub of the Employer's case is that Mr. C and Ms. Therrien were co-conspirators in a scheme to unlawfully remove client files from the Employer's office. The Employer says that on or about May 9th he discovered that Ms. Therrien had surreptitiously removed a number of client files from the office and that this removal amounts to a theft of the Employer's property justifying summary dismissal. Mr. Ganapathi says that he formally, though verbally, terminated Ms. Therrien on May 10th.

I wish to comment, albeit briefly, on the events of May 10th. While Mr. Ganapathi may have believed that Ms. Therrien was involved in removing files from his office, that belief does not, in my view, justify his boorish behaviour on that day. I do not intend to recite, in precise detail, what actually transpired. However, it is undisputed that Mr. Ganapathi directed very profane, degrading, abusive and insulting

comments to Ms. Therrien and, in my view, such action on his part--no matter what his subjective belief may have been--was totally uncalled for and, indeed, reflected conduct unbecoming any employer, let alone a professional person. The appeal hearing presented an opportunity for Mr. Ganapathi to apologize to Ms. Therrien for his outrageous behaviour; sadly, he did not avail himself of that opportunity.

The files in question all involved litigation matters that were being conducted by Mr. C. Ms. Therrien was working on about 20 of these files. There is no doubt that the files, approximately 75 in number, were removed from the Employer's office--indeed, a few weeks after the files were removed, Mr. C provided the Employer with a list of the files that had been removed. I understand that there is an ongoing dispute between the Employer and Mr. C with respect to these files.

Based on the evidence before me, I am not prepared to conclude that the removal of the client files amounted to a theft. It would appear that Mr. C assumed that he had an unfettered right to take the files to his new office and, even if it turns out that Mr. C was incorrect in that assumption, I am unable to conclude, on the evidence before me, that a criminal act occurred with respect to the files. I note that even though the files were removed from the Employer's premises over one year ago, the Employer has never obtained an order directing that the files be returned to him; no criminal charges were ever filed and, so far as I know, the police were never even contacted with respect to the files. Mr. Ganapathi testified that he has not yet complained to the Law Society of B.C. which I find to be rather unusual in light of Mr. Ganapathi's vehement assertion that the files in question were unlawfully removed from his custody. Mr. Ganapathi says that the removal was wrongful but he has not provided any evidence to justify that assertion; it may well be that Mr. C had every legal right to remove the files in question. Thus, a key preliminary issue, namely, whether or not a "theft" actually occurred, has not been proven to my satisfaction.

Further, even if there was a theft, the evidence before me falls well short of implicating Ms. Therrien in that endeavour. With respect to Ms. Therrien, the simple fact is that there is *no* direct evidence before me that Ms. Therrien personally removed any of the disputed files from the Employer's office. No one saw Ms. Therrien remove the files; when she was confronted by Mr. Ganapathi with respect to the matter, she denied having removed the files and her denial has been consistently maintained throughout this entire dispute. This is not a case like, say, *Codfather's Fish and Chips Ltd.* (B.C.E.S.T. Decision No. D323/96)--relied on by the Employer--where the employee admitted taking the property in question.

Both Ms. Ballantyne and Mr. Ganapathi readily conceded that all staff had access to Ms. Therrien's office (since it was not locked) in and around the time when the files went missing. Ms. Therrien may have been involved in removing some files but I cannot conclude, on a balance of probabilities, that is so. An allegation of theft is a serious allegation and the Employer bears the burden of proving this allegation by clear and cogent evidence. There was no such evidence before the delegate and there is no such evidence before me. The most reasonable conclusion that can be drawn from the available evidence is that the files were removed by Mr. C--either by Mr. C personally and/or by unknown third parties acting on his instructions--since he is the person who now has custody of the files.

I wish to make two further observations with respect to the Employer's position that it had just cause for terminating Ms. Therrien's employment. First, if Ms. Therrien was dismissed, allegedly for cause, on May 10th, one has to question why the Record of Employment issued by the Employer on May 17th, 2002 identified the reason for issuance as code "K" ("Other")--further particularized as a "temporary layoff"--rather than code "M", which is the code for "dismissal". Even if this Record of Employment was issued in error, I note that over one year later this "error" has never been corrected.

Second, as I noted earlier, the most reasonable view of the facts is that Ms. Therrien was terminated on May 3rd, effective as of May 6th, 2002. The Employer' evidence is that the client files were taken sometime on either May 8th or 9th, 2002. Even if Ms. Therrien was involved in removing the files, this conduct would have occurred *after her employment had already been wrongfully terminated* (since Ms. Therrien was not given compensation for length of service, or proper written notice in lieu of compensation) on May 3rd, 2002.

This is not a case of alleged "after acquired cause" where the alleged misconduct occurs during the subsisting employment relationship but is not discovered until after the employment relationship has ended. In the latter case, the employer may rely on the misconduct for purposes of proving just cause. However, behaviour that occurs after dismissal cannot be relied on by the employer to justify the dismissal.

These principles are summarized below:

> After acquired cause is a concept which allows employers to justify an employee's dismissal with behaviour that did not come to their attention until the individual's employment had already been terminated, that is, an employee's conduct can act to establish just cause for termination despite the fact that the employer was unaware of it at the time the employee was fired. However, *the conduct can only be relied upon if it took place prior to the dismissal. Misbehaviour or other conduct that occurs after an employee is terminated cannot serve to constitute just cause.* (my *italics*)
>
> Malcolm J. MacKillop, Damage Control: An Employer's Guide to Just Cause Termination, at p. 13 (Canada Law Book, 1997)

Accordingly, it follows that whether or not Ms. Therrien was involved in removing client files is simply not relevant to the issue of just cause.

Denial of Natural Justice

Mr. Ganapathi did not press this point at the appeal hearing and properly so. The delegate conducted an investigation and during the course of that investigation gave the Employer several opportunities to provide evidence to support its position and to respond to the evidence provided by Ms. Therrien. The Employer says that two documents that were provided to the delegate were not, in turn, provided to the Employer. Both documents were letters from witnesses.

One letter--or at least the substance of it--was disclosed to the Employer and, in any event, since it simply contradicted the Employer's assertion with respect to an issue that is no longer relevant, I do not consider the Employer's point regarding this letter to be meritorious. This letter, from one of Mr. C's clients, simply stated that, contrary to Mr. Ganapathi's assertion, she became upset not because of anything Ms. Therrien had said to her but, rather, because of the conduct of Mr. Ganapathi himself. At one point, Mr. Ganapathi appeared to take the position that Ms. Therrien's conduct with respect to this client could justify summary dismissal but, before me, Mr. Ganapathi completely abandoned that position (and rightly so).

The other letter also related to an issue not in dispute before me and, in any event, was not given any weight by the delegate in making her Determination. In other words, the delegate did not rely on this letter in making any sort of determination adverse to the Employer. During the course of an investigation

a delegate may well be supplied with numerous documents that are not relevant or that otherwise have no evidentiary value; I do not consider it a breach of the rules of natural justice for the delegate to simply set such documents aside and not disclose them to the other party.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$5,972.95** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal