Employment Standards TRIBUNAL

An appeal

- by -

565682 B.C. Ltd.
("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.: 2002/218

DATE OF DECISION: June 25, 2002

DECISION

OVERVIEW

This is an appeal filed by 565682 B.C. Ltd., operating as "South Country Chrysler", (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 "Director") on April 15th, 2002. By way of the Determination, the Employer was ordered to pay the sum of $5,984.43 to its former employee, Kathryn Van Steinburg ("Van Steinburg"), on account of six weeks' wages as compensation for length of service, concomitant vacation pay and section 88 interest (the "Determination").

Further, and in light of the Employer's contravention of the *Act*, the Director also assessed a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

By way of a letter dated June 6th, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

REASON FOR APPEAL

The Employer says that the Determination (including the $0 penalty) should be cancelled because it had just cause [see section 63(3)(c) of the *Act*] to terminate Ms. Van Steinburg's employment.

FINDINGS AND ANALYSIS

Background Facts

The Employer operates a motor vehicle dealership in Cranbrook. Ms. Van Steinburg commenced her employment with that dealership's predecessor on August 8th, 1995 as a "warranty clerk". Over five years later, she was promoted to be the "Assistant Service Manager" and then, effective April 1st, 2001, was promoted to Service Manager. Her employment was terminated on November 6th, 2001, allegedly for cause.

Ms. Van Steinburg's termination letter, dated November 6th, 2001, states in part: "Due to your lack of performance over the past 4 months your position of Service Manager at South Country Chrysler is terminated with cause effective November 6, 2001." At the point of termination, Ms. Van Steinburg was earning a monthly salary of $4,000 plus a bonus based on the service department's profit.

The material before discloses that Ms. Van Steinburg received the following written warnings about her performance prior to being terminated:

- August 7th, 2001: Ms. Van Steinburg received a written warning regarding service vehicles that were delivered to customers without being cleaned and vacuumed and the general untidiness of the service area.

- August 23rd, 2001: Ms. Van Steinburg received a written warning about tardy processing of warranty claims and service work orders and was told that unless her performance improved her position was in jeopardy.
- September 17th, 2001: Ms. Van Steinburg was told to process all outstanding warranty claims within the next 10 days;
- September 19th, 2001: Ms. Van Steinburg received a written warning that certain performance criteria be satisfied by October 31st, 2001 or she will be terminated; and
- October 18th, 2001: Ms. Van Steinburg received a written memorandum to the effect that she obtain proper written authorization for certain activities.

Ms. Van Steinburg, for her part, says that the Employer made little or no effort to support her role within the organization. She maintains that training was sporadic, many performance expectations were unrealistic, the volume of work was, at times, overwhelming thus necessitating many overtime hours and that many of the allegations made against her are simply untrue.

The Determination

The delegate addressed the matter of Ms. Van Steinburg performance at page 6 of the Determination:

> "...[Ms. Van Steinburg] with an outstanding non disciplined [sic] record of employment was promoted into a Service Manager position and performed with no discipline in that position until 3 months after being promoted. It is very probable that the New General Manager and the more involved Partner decided to implement new standards of performance or to enforce established standards that had previously been ignored. It is also quite probable that the claimant may have been promoted into a position that was beyond her scope of performance. There is no dispute from the evidence provided by the Employer that the claimant could not meet the established criteria of performance expected of her and the Employer subsequently subjected the claimant to a performance review process that eventually led to the claimant's dismissal.
>
> However, based on a balance of probabilities, in view of the claimant's record prior to being promoted, and her very short experience time as a Service Manager, it is felt that the claimant could have been offered alternate employment, retrained to meet established performance criteria, or dismissed with compensation for length of service...While there is evidence to show that the claimant did not meet the standards established by the Employer, there is no evidence to show that the claimant knew what to do and deliberately did not do it."

Governing legal principles

As noted above, the Employer took the position that it had just cause to terminate Ms. Van Steinburg based on her poor performance. The *Act* states that an employer need not pay any compensation for length of service if the employee is dismissed for "just cause". "Just cause" is a legal term of art; it encompasses a very wide range of circumstances from culpable to innocent, from willful to negligent. It should be noted that the Employer did not allege any misconduct by Ms. Van Steinburg and, accordingly, that matter need not have been addressed in the Determination. Inadequate performance is quite a distinct matter from misconduct and although just cause may be founded on either ground, those two issues involve separate legal considerations.

An employer seeking to justify a termination based on inadequate performance must satisfy the following criteria:

- the employee was given a clear, objectively reasonable and achievable performance standard;
- the employee was given appropriate instruction and training in order to meet the performance standard;
- despite such instruction and training, the employee failed to achieve the requisite standard; and
- the employee was advised that a ongoing failure to achieve the standard would result in termination.

(see e.g., *Hall Pontiac Buick Ltd.*, BC EST # D073/96; *Cook*, BC EST # D322/96; *Kruger*, BC EST # D003/97; *Wilson*, BC EST # D062/99)

I am not satisfied, based on the material before me, that the Employer satisfied any of the first three criteria noted above.

Evidence submitted in the form of a report from the manufacturer (DaimlerChrysler Canada) for July 2001--the only month I have before me--showed that the dealership had slightly lower (within the local dealership area) ratings (at most, at few percentage points) in some areas of the "customer satisfaction index" but did very well in other areas such as "quality of work performed", service advisors' functions and telephone handling. Interestingly, although Ms. Van Steinburg was taken to task about the tidiness of the service area, the dealership facility received truly superior ratings (100% customer satisfaction over the previous one-, three- and twelve-month period) in terms of its overall appearance and tidiness. Thus, the independent evidence shows that the dealership's service--for which Ms. Van Steinburg, as service manager, was responsible--was comparatively deficient in some areas and superior in others.

I do not doubt that the Employer was dissatisfied with Ms. Van Steinburg's performance. The Employer created a "paper trail" evidencing its concerns about Ms. Van Steinburg performance and demanded that she improve. However, there is no evidence before me showing that Ms. Van Steinburg failed to achieve objectively measured and reasonable performance criteria.

For whatever reason, this Employer became very dissatisfied with Ms. Van Steinburg as an employee and embarked upon a course of action designed to create an aura of "just cause". There may well have been a personality clash between Ms. Van Steinburg, on the one hand, and the Employer's General Manager and its principal shareholder, on the other. Ms. Van Steinburg says that the latter made inappropriate sexual comments and advances. I am not able to make any finding with respect to that allegation. However, dissatisfaction with an employee's performance, no matter how strenuously or repeatedly communicated, is not enough. Unless the employer's dissatisfaction flows from the employee's failure to achieve objective, reasonable and achievable *bona fide* performance criteria, that dissatisfaction does not give the employer a right to summarily dismiss the employee without having to pay compensation or give written notice in lieu of compensation (see section 63).

The available independent and quantifiable evidence suggests that Ms. Van Steinburg was not incompetent. Perhaps she was not a truly superior or outstanding employee; most employees, of course, will not fall into that category unless we are prepared to strip that term of any real meaning. The evidence shows that Ms. Van Steinburg was, at least in the Employer's eyes, a below-average employee.

Nevertheless, the Employer has not met its most fundamental evidentiary burden, namely, proving that Ms. Van Steinburg actually failed to achieve reasonable, objectively-measured, performance criteria.

The burden of proving just cause lies on the Employer. I entirely agree with the delegate's conclusion that the Employer failed to discharge its evidentiary burden in this case.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $5,984.43 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

In light of the foregoing, it follows that the $0 monetary penalty levied by way of the Determination is similarly confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal