Employment Standards TRIBUNAL

An appeal

- by -

B.C.C.E. Communications Inc.
("Appellant")

- 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: E. Casey McCabe

FILE No.: 2002/222

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by B.C.C.E. Communications Inc. doing business as Genius Communications Centre (the "employer") from a Determination dated April 2, 2002. That Determination found the employer liable for $433.29 for compensation in lieu of notice to Jillian Horsley (the "complainant"). The Director's Delegate determined that the employer had breached Sections 63(3) of the *Act*.

ISSUE TO BE DECIDED

Did the employer have just cause to terminate Jillian Horsley?

FACTS

The employer is a seller of telecommunications equipment and acts as an authorized dealer for Telus. The complainant worked for the employer from November 8, 2000 to July 1, 2001 as a Sales Representative.

The complainant was terminated on July 1, 2001 for what the employer stated was just cause. In a letter to the Director's Delegate dated September 18, 2001 the employer states that the complainant was terminated for breaching a well published company rule that the store's computers were only to be used for company business and that the computers were not to be used to "surf" the net or the play games. At a meeting with the Delegate on September 26, 2001, the employer reiterated this reason and added that the complainant "had a bad attitude and was a poor performer."

The Delegate found that while there may have been "a clear company rule in the eyes of the owners there was no clear evidence that the rule was ever put to Ms. Horsley in an unambiguous fashion" and that the reference to the complainant's attitude and performance was not "sufficiently supported by clear unambiguous evidence of notice having been given to the employee that her behaviour would lead to dismissal."

ANALYSIS

The onus is on the appellant to show that the determination by the Director's Delegate is wrong. In this case the original application for the appeal did not raise any new evidence. In a subsequent submission dated May 30, 2002 the employer raises some new evidence regarding the complainant's work history. The gist of this evidence has to do with the complainant's record of employment at different companies. I find that this evidence is irrelevant to the question to be determined by me on this appeal and therefore I do not intend to deal with the employer's contention.

In essence, the employer's appeal boils down to a disagreement over the facts as determined by the Director's Delegate. The Tribunal's role is not, absent reasonable grounds, to overturn the Delegate's finding of fact, but rather to determine if the Determination is correct in law.

The Delegate determined that the Company rule that the computers were not to be used for personal use had not been adequately drawn to the complainant's attention. This finding was based firstly on the fact that the employer could not produce the acknowledgement that the employer stated was signed by the complainant; secondly the memos that did mention the computers included an "eclectic smorgasbord of topics", a finding that on review of the memos I agree with; and thirdly at least one of the memos had been circulated prior to the complainants employment.

The question of a breach of company policy being used to support a termination has been dealt with by the Tribunal before. In International Plastics Ltd. BC EST # D243/97, the Tribunal stated:

If an employer relies on company policy to support a termination for cause it is incumbent on the employer to show that the company policy is reasonable, that it was clear and unequivocal, that it was brought to the attention of the employee before the company acted on the policy, that the employee had been notified that breach of the policy could result in serious disciplinary action up to and including dismissal and that the rule has been consistently enforced.

In the present case the Delegate determined that the policy had not been brought to the attention of the employee. I note also that on the record before me it would not appear that the employer informed the employee that a breach of the policy would result in termination. I note that the memo relied upon by the employer does state that "NO personal usage [of the computer] (ICQ, check email etc) and games are NOT allowed". However nowhere is there any indication of what the penalty would be for a breach of this policy. I also note that there is some evidence that the rule had not been consistently enforced and that the employer has not raised any evidence to dispute this aside from a bald allegation that the penalty for breach of this rule was always dismissal.

Turning to the issue of attitude and performance the employer states in its May 30, 2002 letter that the complainant had made repeated mistakes, had a negative attitude to work, that customer complaints had been received through Telus Mobility and that the employer had given her many opportunities to correct herself. It would appear that some of the allegations raised in the May 30 letter were not raised before the Delegate. The Tribunal has a long-standing policy of refusing to allow appellants to raise new evidence before the Tribunal that should have been given to the Delegate during the investigation. (See *Tri-West Tractor Ltd*. BC EST # D268/96). Notwithstanding this policy I have read and considered the employer's May 30, 2002 letter. The employer does not give any particulars to the allegations contained in the letter nor does the employer offer any evidence in support. The employer does not state that such information was given to the Delegate and ignored, nor does the employer argue that the evidence did not arise until after the Determination was made. In all the circumstances I am not prepared to overturn the finding by the Delegate that the employer has not discharged its duty to prove just cause.

ORDER

The Determination dated April 2, 2002, is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal