Employment Standards TRIBUNAL

An appeal

- by -

Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.
(the "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: W. Grant Sheard

FILE No.: 2002/334

DATE OF DECISION: August 20, 2002

DECISION

OVERVIEW

This is an appeal based on written submissions by Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on May 22, 2002 wherein the Director's Delegate (the "Delegate") ruled that the Appellant had contravened Sections 18 and 63 of the *Act* regarding payment of wages owing and compensation for length of service and ordering the Appellant to pay regular wages (bonus), 8 weeks regular wages as compensation for length of service, vacation pay and interest for a total due of $13,317.45. In a separate Determination another Delegate issued a penalty as a disincentive to promote compliance with the *Act* and to prevent a repeat contravention, but assessed a zero dollar penalty.

ISSUES

1. Use of new evidence on appeal.

2. Was there just cause for dismissal without notice or compensation for length of service in lieu of notice?

3. Were regular wages (bonus for a commission sales person) due?

ARGUMENT

The Appellant's Position

In a written appeal form and letter dated June 13, 2002 filed with the Tribunal June 14, 2002 the Appellant asserts that the Delegate made an error in the facts found in the Determination, that there is a different explanation of the facts, that there are other facts that weren't considered during the investigation and that it was denied the opportunity to respond to the investigation.

The Appellant submits that its representative during the investigation, its General Manager, was out of the country when the Appellant was informed of a deadline for a response to the Delegate's preliminary findings and therefore did not have an opportunity to fully present its case. The Appellant requests that the Determination be cancelled and that there be further investigation.

In the letter attached to the appeal form the Appellant notes that it received a fax from the Delegate on May 6, 2002 clarifying the complaint made. The Appellant had earlier discussions with a different Delegate and understood that there were different issues involved regarding the issue of a bonus. The Appellant wishes to offer further information with respect to the bonus and states that the complainant agreed verbally to a number of exceptions which applied to payment of this bonus and, for a number of reasons asserted, the exceptions applied such that no bonus was due. Regarding the issue of just cause, the Appellant notes that it did not have a written policy in place regarding 50 Point Inspections on dealer traded vehicles, but in any event sales persons are not at liberty to purchase used inventory for the dealership. (This was the culminating incident which the Appellant had relied upon for just cause). The

Appellant also says that their calculation for severance is not the same as the Delegate's and asks for verification of numbers.

The Respondent's Position

In a written submission dated June 25, 2002 filed with the Tribunal on June 26, 2002 the Respondent replies to a number of documents which the Appellant provided with their appeal regarding just cause. In particular, the Respondent replies to a review of performance and several warning notices which the Appellant had given to the Respondent prior to his termination. The Respondent either denies or offers explanations with respect to the various incidences which are referred to in his performance review and the warning notices.

The Director's Position

In a written submission dated July 10, 2002 and filed on the same date with the Tribunal the Director's Delegate notes that the Appellant filed with its material a fax coversheet with a request from a B.D. Garland (hand written and dated May 3, 2002) requesting an extension to the Delegate's deadline for further submissions or information on the preliminary findings prior to a Determination being issued. The Delegate says that there is no record for an extension having been received by the Prince George office of the Branch but notes that, if the request for an extension had been received, it likely would have been granted. The Delegate notes that several documents were provided on appeal which were not given to the Delegate during the investigation including a "Annual Employee Review", and several "Employee Warning Notices". The Delegate says that with the exception of one document these documents were apparently available to the Employer prior to the issuance of the Determination and that they should not be admissible at this time. The Delegate says that the Employer had many opportunities prior to (and an opportunity subsequent to) the preliminary findings letter to submit evidence as part of the investigation into the complaint.

In the alternative, the Delegate submits that, if the Tribunal accepts this new evidence, the information is not helpful to the Employer's position as there is no indication that the Employer put the complainant on notice that his performance and/or behaviour could result in the termination of his employment.

THE FACTS

The Appellant is an automobile dealership. The Respondent worked for the Appellant from March 2, 1992 to October 19, 2001 as a sales consultant on a commission basis. The Employer terminated the Respondent's employment. The Respondent filed a complaint claiming he was owed regular wages (bonus) and compensation for length of service.

On May 3, 2002 the Delegate investigating the complaint sent the Employer a preliminary findings letter indicating that the complainant did appear to be entitled to compensation for length of service and regular wages (bonus) as he alleged. The Employer was advised that, unless it presented further evidence to the contrary by a deadline of May 8, 2002, a Determination would be issued accordingly.

The Delegate did not receive a response from the Employer by May 8, 2002 and, in the result, on May 22, 2002 issued the Determination now appealed from ordering the Appellant to pay 8 weeks compensation for length of service, regular wages (bonus due), vacation pay and interest for a total due of $13,317.45.

Notwithstanding that the Delegate did not receive any further information by the deadline imposed of May 8, 2002 and notes that the Prince George office of the Branch has no record of receiving any request for extension from the Appellant, the Appellant has filed with its material a hand written note dated May 3, 2002 to the attention of the Delegate advising that its General Manager who has been handling the matter was away on vacation until May 10, 2002 and requesting an extension of time accordingly. There is no fax confirmation sheet regarding the date that this was transmitted, if at all, but it certainly appears from the content of the message to have been sent on the date referred to in it.

ANALYSIS

1. *Use of new evidence*

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.,* BC EST #D570/98 there is reference to the "Tri-West/Kaiser Stables Rule". This issue was decided in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97. In *Tri-West (supra),* the adjudicator there held evidence inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it…The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors* (supra) held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria."

In the present case I find that the written employee review, warning notices, and documents relevant to the issue of a bonus are important and could well impact on the factual basis of the Determination. Further, there appears to be a compelling reason why this material was not initially provided to the Delegate during the investigation and prior to the issuance of the Determination. Although it may have been produced prior to the deadline set in the Delegate's preliminary finding letter, an invitation was made by the Delegate to provide further information. It appears that a request was made by the Appellant for an extension which, for reasons unknown was not received by the Delegate. There does not appear to be significant prejudice to the Respondent in the admission of this material except for delay which is always inherent in such matters. He has been able to respond to this material. Accordingly, I find that this new material is admissible on this appeal.

2. *Was there just cause for dismissal without notice or compensation for length of service without notice?*

The onus is on an Appellant to establish on a balance of probabilities an error in the finding of the Delegate.

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

> ***Section 63***
>
> *(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
> *(2) The employer's liability for compensation for length of service increases as follows:*
> *a) After 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
> *b) After 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus 1 additional week's wages for each additional year of employment, to a maximum of 8 week's wages.*
> *(3) The liability is deemed to be discharged if the employee*
> *a) is given written notice of termination as follows:*
> *i) one week's notice after 3 consecutive months of employment;*
> *ii) two weeks' notice after 12 consecutive months of employment;*
> *iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
> *b) is given a combination of notice and money equivalent to the amount the Employer is liable to pay, or*
> *c) terminates the employment, retires from employment, or is dismissed for just cause.*

Thus, section 63 (3)(c) provides that an Employer may avoid liability for compensation or notice for length of service if the Employee is dismissed for just cause.

In the case of *Silverline Security Locksmith Ltd.*, BCEST #D207/96, this Tribunal delineated a four part test for determining whether just cause exists or not. In that case it was said as follows:

> Paragraph 11. The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
>
> Paragraph 12. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an Employer must be able to demonstrate "just cause" by proving that:
>
> 1) reasonable standards of performance have been set and communicated to the Employee;
>
> 2) the Employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
>
> 3) a reasonable period of time was given to the Employee to meet such standards; and
>
> 4) the Employee did not meet those standards.
>
> Paragraph 15. The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally that his or her performance is unacceptable and that failure to meet the

> Employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an Employee a false sense of security that their work performance is acceptable to the Employer.

In the present case I cannot find that the Delegate erred in ruling that just cause had not been established. In the Annual Employee Review dated October 18, 2000 there is nothing warning the Employee that his continued employment is in jeopardy if the standards required were not met. Similarly, in the Employee Warning Notice dated October 7, 2001 there is no warning to the Employee that his employment was in jeopardy or a reasonable time given to meet such standards. In the two Employee Warning Notices dated October 19, 2001, the first suggests that he may be liable to immediate dismissal and the second notes that he is dismissed with grounds/cause. From a review of these two documents it is clear that a reasonable period of time was not given to the Employee to meet the standards of the first Warning Notice of October 19, 2001. Further, the Appellant has conceded that there was no written policy in effect with respect to the 50 Point Inspections on dealer traded vehicles or proscription against sales people purchasing used inventory for the dealership. As such, I cannot find that the failure to have this 50 Point Inspection conducted or purchasing a used vehicle for the dealership amounted to a fundamental breach of the employment relationship such that it amounted to just cause in and of itself.

3. ***Were wages (bonus) due?***

In the Appellant's written submission of June 13, 2002 it asserts that the Respondent agreed to certain exceptions with respect to the payment of a bonus. The Respondent has not replied to this specific assertion in his written material. Further, issues of credibility may arise in resolving this issue which I cannot do without the parties before me.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated May 22, 2002 and filed under number 43-963, is confirmed insofar as it deals with compensation for length of service. I order that the matter be referred back to the Director for further investigation regarding the issue of whether regular wages (bonus) are due.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal