Employment Standards TRIBUNAL

An appeal

- by -

Net Nanny Software International Inc.

- 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: John M. Orr

FILE No.: 2002/310

DATE OF DECISION: September 3, 2002

DECISION

OVERVIEW

This is an appeal by Net Nanny Software International Inc. ("Net Nanny") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated May 10, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Net Nanny employed Mathew Crossley and Paul Crossley (collectively referred to herein as "the Crossleys" or "the employees") in the development of their software programs. The employment terminated in January 2002. During the fall of 2001 the employees were not receiving wages and it was agreed that they could work from home. When their employment was terminated they were not paid compensation for length of service or vacation pay.

The Director determined that both Crossleys were owed compensation for length of service and vacation pay. Net Nanny has appealed. Net Nanny claims that the Crossleys took holidays, even more than their entitlement, and therefore were not entitled to holiday pay. Net Nanny also claims that both Crossleys were terminated for failing to actually work when allegedly working at home.

ISSUES

The issues in this case are whether the employees were entitled to vacation pay or compensation for length of service.

FACTS AND ANALYSIS

The basic facts that are not disputed are that the Crossleys were employees on Net Nanny and that in the fall of 2001 they were given permission to work from home. In the appeal Net Nanny does not dispute this but alleges that the Crossleys were not working productively and that therefore there was just cause for dismissal.

This allegation appears to have been made for the first time on this appeal and it could well be argued that it should not be considered at this stage in the process. However, this ground for appeal cannot succeed for two reasons. Firstly, the evidence to support the allegation that the Crossleys were not working is far from sufficient to support a claim of just cause. Secondly, even if the Crossleys' work performance was inadequate Net Nanny has not established that due process was undertaken prior to dismissal.

Section 63 of the *Act* creates a liability for employers:

> 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 one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

This liability is deemed to be discharged if an employee is given written notice or is "dismissed for just cause" [see Section 63(3)(c)].

The burden of proof for establishing that there is "just cause" to terminate the Crossleys' employment rests with Net Nanny.

The leading case in British Columbia's employment standards jurisprudence on the interpretation of "just cause" for the purpose of Section 63 of the *Act* is Re: *Silverline Security Locksmith Ltd.* BCEST #D207/96. In that case the Tribunal held that "just cause" could include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.

It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary. In the absence of a criminal act, gross incompetence, wilful misconduct or a significant breach of the workplace policy 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.

In this case there is no evidence that the employer set any standards for employees working at home. There is no evidence presented that the Crossleys were warned that their employment was in jeopardy. There is certainly no indication, or even allegation, that the Crossleys were guilty of any criminal acts or misconduct that could give cause for immediate dismissal.

The employer has not met the onus of establishing that there was just cause for dismissal and therefore the Crossleys are entitled to compensation for length of service as determined by the Director.

In terms of vacation pay the only argument presented by the employer is that the Crossleys had taken more vacation than they were entitled to take. This does not exempt the employer from paying vacation pay. The *Act* is clear and unequivocal that vacation pay must be paid to an employee at least seven days before the beginning of the employee's annual vacation or, if agreed, on scheduled paydays. There is no

evidence that vacation pay was paid at all. As the vacation pay is supposed to be paid at least seven days before the beginning of the vacation it can hardly be argued that overextended vacation somehow eliminates the requirement to pay vacation pay.

I am not persuaded that there was any valid reason not to pay the vacation pay and therefore the Director's finding on this issue will be confirmed.

The employer also refers to some recent literature in relation to amendments made to the *Employment Standards Act* in 2002. It is suggested that the claimants must first attempt to resolve the dispute with the employer prior to an investigation and determination by the Director. In my opinion these provisions do not apply to claims filed prior to proclamation of the amendments.

In conclusion I am not satisfied that Net Nanny has met the onus of establishing that the determination was wrong in fact or law. I conclude that the determination should be confirmed.

ORDER

I order, under section 115 of the *Act,* that the determination dated May 10, 2002 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal