EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Just Ladies Fitness (Langley) Ltd., Just Ladies Fitness Ltd., Just Ladies Fitness (North Delta) Ltd., Just Ladies Fitness (Surrey) Ltd., Just Ladies Fitness (White Rock) Ltd., and Triage Holdings Ltd., associated companies

("Triage")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/565

DATE OF DECISION: October 25, 2000

DECISION

OVERVIEW

This appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by companies which have been associated pursuant to section 95 of the *Act*, namely, Just Ladies Fitness (Langley) Ltd., Just Ladies Fitness Ltd., Just Ladies Fitness (North Delta) Ltd., Just Ladies Fitness (Surrey) Ltd., Just Ladies Fitness (White Rock) Ltd., and Triage Holdings Ltd., (which I will collectively refer to as "the appellant", "the employer" and also "Triage" in this decision). Triage appeals a Determination which is dated July 27, 2000, and is by a delegate of the Director of Employment Standards (the "Director"). The Determination calls for Triage to pay Jennifer McCann compensation for length of service and related moneys.

Underlying the order to pay length of service compensation is a decision that the employer did not have just cause when it terminated the employee. Triage, on appeal, claims that it did have just cause.

ISSUES TO BE DECIDED

Triage accuses the delegate of bias. According to the employer, the Determination itself shows bias because it was issued "without backup from the employee".

The delegate is said to be wrong on the facts.

The matter of whether the employer did or did not have just cause when it terminated the employee is at issue.

What I must ultimately decide is whether the employer has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

Jennifer McCann began working for Triage as a receptionist/date entry clerk in October of 1996. She was terminated without notice on the 29th of February, 2000.

The delegate awarded compensation for length of service on concluding that the employer did not have grounds for immediate dismissal, nor was the termination justified for reason of repeated minor misconduct, the latter because the employee was not clearly warned that her employment was in jeopardy. McCann was found to have typed personal documents during office hours but the delegate found that the office was very casually run and that McCann answered the telephone for the employer on her lunch break. The delegate appears to have concluded that McCann was not late on the day that her car broke down, in that she mentions that McCann's father said that he was able to get it running. It appears that the delegate accepted that McCann was not paid when she went to the doctor, then a hairdresser. And the delegate appears

to have accepted that McCann was not paid for the deliveries that she made for Triage outside of normal work hours.

The appeal is that the employee is guilty of theft, what Triage calls the "theft of company time". It alleges that the employee spent too much time with personal telephone calls, that she was late on the day that she had car trouble yet entered in a record that she was on time, that she typed personal documents during work hours and that she skipped work while going to doctors, dentists, and a hairdresser and performing personal errands.

I accept that the employee made and accepted personal telephone calls while at work but I am unable to reach any conclusion with respect to the extent of such calls other than there were enough long ones to upset Chuck Lawson, President and CEO of Triage.

The delegate accepted that the employee typed personal wedding documents while at work.

How much of this personal typing was done is not clear. The employer claims that McCann spent long periods typing personal documents but produces nothing more than computer records which show that McCann might have spent as much as 2 hours and 49 minutes working on wedding documents. I say as much as because the record that I am shown is not a record of time spent working on the documents but the total length of time that the documents were open. There is no way to tell from the record if McCann was working at something else in periods when the documents were open, answering the telephone for the employer for example.

It is not shown that McCann was paid for time spent at the hairdresser and visiting a doctor. Triage alleges that again but it does not produce any evidence which indicates that the employee was in fact paid for time spent at a hairdresser.

It is not shown that McCann was late on the day that her car broke down. That is Daniel Gulbransen's recollection of matters but I seen no reason to attach much of any weight to that. Gulbransen is a current employee and therefore open to both direct and indirect pressure from her employer. And there is nothing which confirms what Gulbransen had to say.

I do accept that the employee was late for work, and left early, on occasion.

McCann claims that she ran personal errands for Lawson and typed several personal letters for Lawson and his son, Carl. I accept that as it is not denied by the employer.

Gulbransen told the delegate that both she and McCann would answer the telephone for the employer during their half hour lunch break. I accept that, nothing to the contrary.

Triage accepts that McCann made deliveries for her employer on her way home but says that, at the most, she made only 6 deliveries and she received equivalent time off for making the deliveries. I do not accept that. There is no evidence which clearly shows how many deliveries were made, the amount of time taken up by the deliveries, at what point in the workday the deliveries were made, and/or that the employee was in fact compensated for making the deliveries that she did.

Lawson claims that he told McCann at a meeting on December 3, 1999, that "her attitude towards co-workers was unacceptable and must change", and that he also told her that "She was also on the telephone with personal telephone calls way too much and this had to change, amongst other things, or her job would be in jeopardy." McCann acknowledges that Lawson did have something to say about her work on the 3rd of December but she says that it was in the most casual of circumstances and that she was not told that her job was in jeopardy. According McCann, it was by chance, not design, that the conversation happened at all in that it was only because of a power failure. It is the delegate's conclusion that there is no way to determine what Lawson had to say to McCann in that there were no witnesses. Gulbransen believes that McCann was given some sort of warning but she is on record as not being present when Lawson spoke to McCann.

According to the employee, Lawson uses something which is called a "Conference Report" when disciplining employees but none was issued in her case. That is not argued by the employer.

CLAIMS AND ANALYSIS

I am satisfied that this appeal can be decided on the basis of written submissions as section 107 of the *Act* allows.

> *107 Subject to any rules made under section 109 (1) (c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.*

Triage alleges bias and states that the Determination is "without backup from the employee". As the employee's submissions are considerable and significant, I am led to believe that what the employer is trying to say is that it had a far better case than the employee, so the Determination should have been in its favour, and the fact that it is not is proof of bias. It is not.

I have examined the Determination and find nothing wrong with the Determination and no evidence of bias. The onus for showing just cause is on the employer. The delegate put that onus squarely on the employer, as she should have done. And the Determination reflects nothing but Triage's failure to provide the delegate with evidence which clearly showed that McCann's termination was for just cause.

Section 63 of the *Act* imposes a liability on employers to pay length of service compensation once a person's employment reaches 3 consecutive months. Subsection 63 (3) of the *Act* provides, however, that the liability to pay compensation for length of service can be discharged.

> *(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) 2 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****.*
>
> *(my emphasis)*

A single act may be of such a serious nature that it justifies termination. As may less serious misconduct when repeated, or the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

Where there are examples of less serious misconduct, it is the well established view of the Tribunal [see for example *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST No. D374/97] that an employer will have just cause where it shows the following:

a) A reasonable standard of performance was established and communicated to the employee;

b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;

c) the employee is given the time to meet the required standard; and

d) the employee continued to demonstrate an unwillingness to meet the standard.

Where there is a chronic failing to perform work, the Tribunal may also consider whether or not the employer has exhausted other remedies which are clearly available, including the possibility of placement of the employee in another job and training.

In this case it is theft that is alleged, a single act of which may justify immediate termination. Triage also hints at fraud in alleging that while McCann was half an hour late for work on the day that her car broke down, she entered in a record that she was on time that day. But I find that there is neither clear evidence of theft, nor is fraud established. That requires that there be clear evidence of a conniving, some deliberate act, to deprive the employer of its money or some other asset. I have not been shown that is true of this case.

I agree with the delegate. The evidence points to a rather casual work environment in which there was a fair amount of give and take in respect to work hours. The employee typed personal documents, probably did make and accept too many long personal telephone calls, and she was late for work and left early on occasion but, on the other hand, she answered the telephone for the employer on her lunch break and she made deliveries for the employer after work.

What Triage complains of, the typing of personal documents, a bad attitude, making and accepting overly long personal telephone calls, being late and leaving early, can only be called minor misconduct. Was Triage, on February 29, 2000, in a position to terminate McCann for reason of minor misconduct?

The first question to ask is, Did Triage establish a reasonable standard or standards of performance and communicate that to the employee? On that I find that it is not at all clear that a reasonable standard was set and that the employee was told what the standard was. Many employers allow their employees to make and take personal telephone calls, type personal documents as time permits, go to the doctor and dentist, and run personal errands, all during work hours. I am not shown that the employer has any written rules or policies against any of that. There was clearly not a hard and fast rule against personal typing and running personal errands in that McCann ran personal errands for Lawson and typed personal documents for him and his son. Moreover, I note that Lawson is only claiming to have told McCann to reduce the amount of time spent with personal telephone calls and do something about her attitude.

Was the employee clearly and unequivocally warned that her employment was in jeopardy unless some standard or standards were met? It is not clear that the employer did so. Not just any warning will do, the employee had to have been served with plain, clear notice that her job was in jeopardy. In this case, the employer claims to have issued some sort of warning regarding telephone calls and the employee's attitude but it is not clear that the employee was plainly and clearly warned that her job was in jeopardy. That is because the warning was not in writing and there were no witnesses to whatever warning was issued, if any.

It follows from the above alone that the employer has not shown just cause and so I will not bother with an analysis of the two remaining requirements for showing just cause where there is repeated minor misconduct except to say that they are equally important.

The Determination is confirmed. Triage must pay compensation for length of service.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 27, 2000, be confirmed in the amount of $1,410.33, and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
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Adjudicator
Employment Standards Tribunal