

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 -

Remedios & Company, Barrister & Solicitors
("Remedios")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 97/426

DATE OF HEARING: October 17, 1997

DATE OF DECISION: October 30, 1997

arrangement with Remedios". Remedios gave Murray notice to vacate his office at the same time.

On December 12, 1996 Baxter, at the request of Murray, prepared a summary of accounts (the "December 12 summary of accounts") which had been paid directly to Murray during the period July 31 to December 12.

On December 17, 1996 Murray was given notice by Remedios that he was to immediately vacate his office. At the same time Baxter was dismissed by Remedios. She was provided with a letter which stated:

Further to our telephone conversation of today's date, we confirm William F. Murray's immediate termination with Remedios & Company. It has also come to our attention that various actions by you as an employee of Remedios & Company warrant dismissal for cause. As a result of Mr. Murray's termination and your actions, we provide you with notice of termination of your employment with Remedios & Company effective immediately.

Following her dismissal by Remedios, Baxter continued to work for Murray.

Robert Nelles ("Nelles"), on behalf of Remedios, argues that if Remedios was the employer of Baxter it had just cause to terminate her employment. Nelles stated that Baxter breached a duty of care and good faith to her employer by misleading it and by committing a breach of trust. All billings of clients of Murray were to be paid directly into the accounts of Remedios. Baxter was fully aware of this policy and yet she knowingly assisted Murray in depositing these funds directly into his accounts. Further, she was directly questioned on numerous occasions by him and Anthony Remedios about collection of these accounts and she withheld the fact that various amounts had already been collected and deposited in Murray's accounts.

Nelles further stated that Baxter was advised on numerous occasions that she should consult with him if she perceived herself to be receiving instructions from Murray contrary to Remedios policy or if she felt she was in a conflict situation. She did not do so. Baxter perceived Murray to be her boss and she was loyal to him and not to Remedios. Baxter failed to appreciate that she owed an ultimate duty of loyalty to Remedios as her employer and not to Murray. An employer is owed an absolute duty of honesty and Baxter breached that duty by her deceit. On December 13, 1996 Remedios learned of the December 12 summary of accounts that had been paid into Murray's accounts. As a result, Baxter was dismissed for her deceit and for her concealment of the fact that accounts were secretly paid to Murray.

Nelles also argues that if Remedios was not the employer, then Baxter's complaint against Remedios is without jurisdiction or it should be against Murray and not Remedios.

Nelles submitted an Affidavit from Anthony M. M. Remedios sworn on May 28, 1997. In the Affidavit Anthony Remedios states that he is the principal of Remedios and Baxter was an employee of Remedios. He further states that the secretaries of Remedios and the lawyers are responsible for keeping track of payment of accounts and the collection of both billed and unbilled disbursements. In October and November of 1996, he questioned Baxter whether they had been paid certain accounts and she said that she had not and that she would continue to collect the accounts in the normal course. Anthony Remedios goes on to state that during the period in question he continued to periodically discuss with Baxter the status of collections and at no time was he ever informed by her that payment had been made. A copy of the December 12 summary of accounts was attached to the Affidavit. It is the position of Anthony Remedios that Baxter continuously deceived him and other members of Remedios on the matter of payment of these files. Upon Remedios discovering the summary it immediately terminated Baxter's employment for cause.

Baxter denies that she was ever informed by anyone at Remedios that all Murray's receivables had to go into Remedios' accounts. Nelles replied to this statement by saying that Baxter wasn't told this because they did not know that payments were going into Murray's accounts.

Baxter also denies that she was told to seek the assistance of Nelles if she perceived herself to be receiving instructions by Murray contrary to firm policy or if she perceived a conflict. She further said that Anthony Remedios and Nelles never asked her if any of Murray's receivables had been collected, nor did they ever discuss with her the status of collections. She said that Anthony Remedios from time to time would strut around the office yelling "Receivables, receivables, receivables. Let's collect those receivables, gang" however those comments were not directed to anyone in particular, but to his own so called "A team". Baxter said she never lied or deceived anyone at Remedios regarding the status of Murrays' receivables.

Baxter stated that she believed that Murray owned his receivables and in particular he owned the receivables listed in the December 12 summary of accounts. Although she admits that she was aware of a dispute between Murray and Anthony Remedios, including a dispute respecting receivables, she was not privy to the details of their dispute or arrangement. She said she was only a secretary and their dispute was not her dispute. She did not, on her own initiative, tell Anthony Remedios or Remedios' bookkeeper that the December 12 summary of accounts had been paid because she thought that these were Murray's receivables; she wanted to stay out of the dispute between Murray and Anthony Remedios and just do her job and not get into trouble; and because she is not a snitch and wanted to keep her hands clean and not get involved in office politics. In reply, Nelles stated that although Baxter was in a difficult position due to Murray telling her to do one thing and Remedios telling her to do another she nevertheless chose to take Murray's position. She knew she was wrong and she breached her duty of honesty to Remedios.

Baxter further stated that Murray hired her and was her boss. She took instructions from him and did what he asked her to do on the job. She tried to support him and stay out of the conflict between him and Anthony Remedios. She did not perceive herself to be in

any conflict situation. Baxter said that she felt her duty was to Remedios and Murray, but in so doing she pleased no one. Although she felt loyal to Murray she cannot say she did not feel loyal to Anthony Remedios. She claims she was dismissed because Murray was locked out of his office and therefore Remedios also had to get rid of her.

Murray stated that there was no arrangement with Remedios whereby all his receivables were to be directed to Remedios' accounts and neither Baxter nor Nelles were privy to the specific arrangement he had with Anthony Remedios. He stated that the December 12 summary of accounts were accounts which were owed to him and not Remedios. He said that Anthony Remedios owed him money, and when he realized he was not being paid, when a cheque came in on one of the accounts listed on the December 12 summary he deposited it into his own account as the cheque was made out to him. Although he admits that some of the invoices on some of his accounts requested that the cheques be made payable to Remedios this was not the case on all accounts, but regardless, these were his billings and to have some of them paid to Remedios was a matter of convenience between him and Anthony Remedios.

Murray stated that he had Baxter prepare the December 12 summary of accounts in order to comply with the Law Society accounting rules. He did not conceal this list from Remedios nor did he conceal that the accounts had been paid to him. Further, he did not instruct Baxter to conceal the list from Remedios. He stated that he had no discussion with Nelles or Anthony Remedios at any time regarding these accounts.

Murray further stated that he did not believe that Nelles or Anthony Remedios spoke to Baxter about his accounts or about being in a conflict situation. He said he never knew Anthony Remedios to speak to any staff person about a particular receivable.

Murray stated that he was Baxter's boss, but Remedios was her employer. Anthony Remedios recommended that he hire Baxter but she was fired by Remedios. As her boss, he expected Baxter to follow his instructions which included preparing the December 12 summary of accounts.

ANALYSIS

The burden is on the Appellant to show that a Determination is in error. On the evidence presented, I am unable to find that burden has been met in this appeal.

First, I am satisfied that Remedios was the employer of Baxter. Baxter was dismissed by Remedios and in her letter of dismissal Remedios acknowledges that she was its employee. Further, Anthony Remedios in his Affidavit states that Baxter was an employee of Remedios. Finally, the Appellant has not provided sufficient evidence to establish that Murray, in contrast to Remedios, was ultimately responsible for the employment of Baxter.

Second, I am not satisfied that Baxter was dismissed for just cause.

In order to establish just cause for termination of employment the employer must show that a reasonable standard of performance was established and communicated to the employee; the employee was given sufficient time to meet the standard and demonstrated that he/she was unwilling to do so; the employee was adequately warned his/her employment was in jeopardy by a continuing failure to meet the standard; and the employee continued to be unwilling to meet the standard. In exceptional circumstances, a single act of misconduct by an employee which is a deliberate flouting of the employment contract may be sufficient to justify summary dismissal without the requirement of a warning.

The reason provided by Remedios for the dismissal of Baxter was that she assisted Murray in depositing funds into his accounts and she concealed this fact from Remedios. There is no evidence that Baxter was warned prior to her dismissal that her job was in jeopardy if she continued to engage in this conduct. Therefore, Remedios must prove that no warning was required as Baxter engaged in a deliberate act which caused a fundamental breach of the employment relationship. That is, it must be shown that Baxter engaged in an act of misconduct knowing it would result in her dismissal.

In this case, there is no dispute that payments on certain of Murray's accounts went directly to him and not to Remedios. However, I am not satisfied that this was in contravention of company policy. Anthony Remedios was not present at the hearing to directly challenge Murray's claim that all billings belonged to him and that neither Nelles or Baxter knew the details of his arrangement with Anthony Remedios.

Even if I were satisfied that payments made to Murray's accounts were in contravention of company policy, I am not persuaded that Baxter knew that all billings of Murray's clients were to be paid to Remedios and not to Murray and that she knowingly assisted Murray in depositing these funds into his account and, when questioned, deliberately failed to disclose these facts to Remedios. Baxter said she was never told all of Murray's billings were to be paid into Remedios' accounts and she denied being questioned about Murray's accounts. As indicated above, Anthony Remedios did not attend the hearing to give direct evidence and be cross-examined on these issues. As well, although Nelles initially stated that Baxter was aware of the policy concerning Murray's billings, he also said that Baxter wasn't told that all deposits were to be made to Remedios because Remedios was not aware that payments were going directly to Murray. Furthermore, Nelles was not able to provide any specific and exact dates when he spoke to Baxter about the accounts. Finally, Murray supported Baxter's position insofar as he stated that he doubted that Nelles or Anthony Remedios spoke to Baxter about his accounts and he said he never instructed Baxter to conceal the December 12 summary of accounts from Remedios.

Moreover, the evidence does not establish an element of willfulness in Baxter's conduct. I am not convinced that Baxter realized that she risked being dismissed for her conduct on the job. Baxter was aware of a dispute between Anthony Remedios and Murray, including a dispute over receivables, but it is not unequivocally established that she was

aware at the time, or would have been able to predict, that her conduct, including her failure to inform Remedios of the December 12 summary of accounts, could result in her dismissal, but she nevertheless engaged in the conduct. The Appellant, Remedios, has not established that Baxter at any time acted outside of what she perceived as acceptable or permissible limits.

When I review all of the evidence on this appeal, I am not persuaded that Baxter's conduct was willful and that she fundamentally breached the employment relationship. On balance, I find the evidence is supportive of a conclusion that Baxter was not dismissed for just cause.

For all these reasons, I must conclude that the Director's delegate did not err in finding that Baxter is owed compensation for length of service by Remedios.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 6, 1997 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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