

An appeal

- by -

Dr. Y. Vincent Yoshida Inc.
("Yoshida")

- 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: Carol L. Roberts

FILE No.: 2002/418

DATE OF HEARING: December 3, 2002

DATE OF DECISION: December 10, 2002

DECISION

APPEARANCES:

Dr. Y. Vincent Yoshida	On behalf of Dr. Y. Vincent Yoshida Inc.
Donna Tam	On her own behalf

OVERVIEW

This is an appeal by Dr. Y. Vincent Yoshida Inc. ("Yoshida") of a Determination of a delegate of the Director of Employment Standards issued July 10, 2002. The delegate concluded that Yoshida had terminated Donna Tam's employment without cause, and ordered that it pay Ms. Tam compensation for length of service in the amount of \$3,020.68.

ISSUE TO BE DECIDED

Whether the delegate erred in concluding Yoshida terminated Ms. Tam's employment without cause.

FACTS

Ms. Tam worked as a certified dental assistant for Yoshida, a dental office, from May 1994 to July 1998.

On July 20, 1998, Yoshida terminated Ms. Tam's employment, and Ms. Tam filed a claim for compensation for length of service.

Yoshida claimed that Ms. Tam's employment was terminated for just cause. Dr. Yoshida contended that cause was insubordination in relation to an incident that occurred on July 17, 1998. At the hearing, Dr. Yoshida contended that the delegate misconstrued the grounds for dismissal, and that, in fact, Ms. Tam's behaviour constituted misconduct and disobedience. I find little basis to distinguish the grounds.

There is no dispute that, on the morning of Friday, July 17, 1998, a compressor broke, which shut down the operations of the dental office. Dr. Yoshida was helping the repairman fix the compressor, which was located in a closet in the men's washroom. Dr. Yoshida asked Ms. Tam to stand outside the washroom door to relay messages to the repairman. Ms. Tam did so for about 10 minutes. He then asked Ms. Tam to retrieve a gasket that was left in some dirty towels. Ms. Tam did so. Ms. Tam then went back to her normal duties. There is no dispute that Dr. Yoshida then asked Ms. Tam to return to standing outside the washroom to relay messages until the repairs were completed.

At this point, the stories of the parties differ. Dr. Yoshida says that, although Ms. Tam complied with his request, she "made a face" at him, undermining his authority. He said that, although he had instructed her to remain at the door until the job was done, she again left her place, and that he had to ask her return a second time. Ms. Tam says that Dr. Yoshida only had to ask her to return once, after she retrieved the gasket, and that she remained there until the job was completed.

There is no dispute that the repairs were completed by noon, July 17, and that Ms. Tam's employment was terminated at the end of the working day, Monday, July 20, 1998.

The delegate found that Dr. Yoshida requested Ms. Tam's assistance twice, not three times that day, and Dr. Yoshida presented no evidence that conclusion was in error. Ms. Tam complied with Dr. Yoshida's first request to stand outside the washroom door. She left to comply with his request to retrieve a gasket. She also complied with his second request to return to the door, and remained there until the repairs were completed.

Dr. Yoshida claimed that Ms. Tam's refusal to remain outside the equipment room was an act of "sabotage" and a deliberate attempt to disrupt his efforts to get the office running again in an emergency situation. Dr. Yoshida advised the delegate that he called a staff meeting that afternoon at which the events of the day were discussed, and that Ms. Tam admitted she was at fault, and apologized.

He also contended that this incident shattered the employment relationship, and was of sufficient seriousness to warrant immediate dismissal.

The delegate found that Dr. Yoshida had not previously warned Ms. Tam about insubordination and/or failure to follow his directions. She found no evidence that Ms. Tam had previously failed to follow Dr. Yoshida's instructions, or that she had ever received a warning that her failure to follow his instructions would result in her immediate termination without payment of compensation for length of service. The delegate also found that Ms. Tam's failure to stand outside the washroom door was not the cause of the equipment failure, and was not of such serious nature to constitute just cause for her immediate termination without payment of compensation for length of service.

Although the delegate noted that Dr. Yoshida had warned Ms. Tam about issues of tardiness and complaints about her personality from patients, she noted those issues were not related to the terminating incident, and could not be relied upon in establishing cause.

ARGUMENT

Dr. Yoshida contends that the delegate erred in

1. failing to consider the warning letter he sent to Ms. Tam in May, 1998; and
2. failing to find that Ms. Tam's conduct on the 17th was sufficiently serious to bring the employment relationship to an end.

Dr. Yoshida says that, on May 15, 1998, he warned Ms. Tam in writing that her conduct was below that expected of a certified dental assistant. That conduct was displaying manners contrary to office standards, and failing to support him personally. In fact, the letter to Ms. Tam recited a complaint made by a patient about Ms. Tam's unfriendliness, and Ms. Tam's response to a request Dr. Yoshida made. Dr. Yoshida wrote that Ms. Tam's response "reflected [her] unfriendly personality", and noted that such behaviour was not acceptable in the office. The letter indicated that if the conduct continued, it would be grounds for dismissal.

Ms. Tam responded to this letter on May 20. She noted that the patient who complained about her found the dental procedure uncomfortable, and had nothing to do with her unfriendliness. She also noted that the

incident occurred over one year ago, and had not been raised with her at the time. She also contended that Dr. Yoshida's allegations that she was unfriendly response was unfair, since she was busy with a patient when he summoned her.

Dr. Yoshida contended that Ms. Tam was fired because she "yelled and screeched" at him, and made faces at him. He said that this conduct was below the standards required of a dental assistant, and that she had been warned about that in May. Dr. Yoshida contends that the delegate erred in failing to consider this evidence.

Dr. Yoshida also contends the delegate erred in failing to consider that the circumstances of July 17 were exceptional, being Ms. Tam's resistance to assisting him in an 'operational crisis'. Dr. Yoshida also contended that Ms. Tam had previously been warned about her attitude and behaviour towards requests for assistance, which the delegate did not properly consider.

Dr. Yoshida also contended that, 'although the incidence might be considered 'minor act of misconduct'' he justified the dismissal by

- (a) communicating a reasonable standard of performance, including what Dr. Yoshida considered "proper mannerisms"
- (b) Ms. Tam was given sufficient time to meet the required standard
- (c) Ms. Tam was notified that her employment was in jeopardy if she failed to meet those standards; and
- (d) Ms. Tam continued to be unwilling to meet the standard.

Dr. Yoshida relied on *Stein v. British Columbia Housing Management Commission* (1992) 65 BCLR 92nd 181 (B.C.C.A.) in support of his argument that Ms. Tam's actions on July 17 were inconsistent with a continuing contract of employment.

ANALYSIS

The burden is on the appellant to demonstrate that the determination is incorrect. I am not persuaded that Dr. Yoshida has discharged that burden.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

To substantiate just cause for this first category, an employer must meet a four part test:

1. A reasonable standard of performance was established and communicated to the employee;
2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

(see: *Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97)

The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

In *Stein*, the court said as follows:

...if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard- of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally. ...I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think...that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract...the disobedience must have the quality that it is “wilful”: it does... connote a deliberate flouting of the essential contractual conditions. (at p. 183-184)

Dr. Yoshida has not distinguished between acts of misconduct and poor performance, and relies on the same facts to justify both grounds.

Dr. Yoshida has not demonstrated that he set reasonable standards of performance, and clearly warned Ms. Tam that her performance was below those standards. Although Dr. Yoshida contends that the standards included “acceptable manners” there is no evidence as to what manners are acceptable, except Dr. Yoshida’s opinion, which did not appear to be written anywhere. In any event, they are vague and subjective. Ms. Tam worked at Yoshida for many years, receiving, as I understand it, one customer complaint. Ms. Tam responded to Dr. Yoshida’s May warning letter. She disputed the customer’s allegations, and noted that the incident occurred almost a year prior to the date of the letter. There is no evidence Dr. Yoshida applied progressive discipline in this, or any other incident of “unacceptable

manners”. He did not suspend her for any period of time, or require her to take courses relating to interpersonal conduct.

There is also no evidence that Ms. Tam failed to follow Dr. Yoshida’s instructions to stand outside the washroom door, or that he told her if she failed to do so, she would be dismissed. Dr. Yoshida has not met the four step test required to establish just cause for unsatisfactory conduct.

I also find that Yoshida has not established that Ms. Tam’s actions constitute misconduct.

There is no evidence Ms. Tam was insubordinate. On July 17, she stood outside the washroom as requested. She looked for, and located, the gasket, as requested. She returned to standing outside the washroom, as requested. None of these actions can be characterized as wilful disobedience of Dr. Yoshida’s instructions.

Dr. Yoshida alleges that Ms. Tam “made a face” at him. There is no evidence, other than Dr. Yoshida’s allegation, that she did so. However, even if Ms. Tam “made a face”, in my view, that act does not constitute disobedience of a grave or serious character. At most, it would give rise to a letter of discipline.

Therefore, I am unable to conclude that the delegate erred in finding that Ms. Tam was terminated without cause. The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the determination, dated July 10, 2002, be confirmed in the amount of \$3,020.68, together with such interest as may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal