

An appeal

- by -

Deming Yang

- 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.: 2002/554

DATE OF DECISION: December 17, 2002

DECISION

This is a decision based on written submissions of Deming Yang, Asif Bandeali on behalf of Fairdeal Import & Export Ltd., and Diane MacLean, on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Deming Yang, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued September 23, 2002. The Director dismissed Mr. Yang's complaint that Fairdeal Import & Export Ltd. ("Fairdeal") contravened the Act in dismissing him while on parental leave, and failing to pay him overtime wages.

ISSUE TO BE DECIDED

There are two issues on appeal. The first is whether the delegate erred in finding that Mr. Yang was not entitled to overtime wages. The second is whether the delegate erred in concluding that Fairdeal had discharged its burden of showing that it had terminated Mr. Yang's employment for reasons unrelated to his parental leave.

FACTS

Fairdeal employed Mr. Yang as a customer service representative from April 30, 2001 to October 31, 2001. Mr. Yang then took one month parental leave in November 2001. His employment was terminated on November 30, 2001. Fairdeal paid Mr. Yang one week's severance pay.

Mr. Yang contended that he was told upon being hired by Mumtaz Bandeali, the Vice President of Fairdeal, that he would be on probation for three months, after which he would receive a pay increase. After that time, Mr. Bandeali, Fairdeal's general manager, told him he was satisfied with his performance, and gave him a raise in pay.

Mr. Yang said he was to have two 15 minute coffee breaks each day, but never received them. He also said that his lunch hour was often interrupted by telephone calls.

Mr. Yang says that he advised Fairdeal that his wife was pregnant, and that he would have to take one month off work. On November 30, Mr. Bandeali advised Mr. Yang that Fairdeal was not happy with his performance, and had decided to terminate his employment. Mr. Yang was not given any details.

Mr. Bandeali advised the delegate that, when Mr. Yang was on leave, Fairdeal discovered that Mr. Yang was making a number of errors. He decided to terminate Mr. Yang's employment, and told him the reasons for the termination. He denied that it had any relationship to Mr. Yang's parental leave.

Mr. Bandeali advised the delegate that he discovered that, although Mr. Yang indicated on his resume that he had computer experience, he in fact had next to no computer skills. As a result, Munira Kasamali, the customer service manager and head of accounting, had to spend a significant amount of time with Mr. Yang, explaining what he was to do. After a certain point, Ms. Kasamali complained to Mr. Bandeali, advising him that she was spending more time at work because she spent so much time assisting Mr.

Yang. Ms. Kasamali also advised the delegate that Mr. Yang was not proficient in many programs, although his resume said he was. Ms. Kasamali gave the delegate examples of the errors made by Mr. Yang, including failing to include taxes on accounts receivables, requiring Fairdeal to either re-issue invoices or assume liability for the taxes, and making errors on customer accounts. Ms. Kasamali indicated that she did not see Mr. Yang's performance improve over the period of his employment.

Mr. Bandeali stated that he received a number of complaints from customers about Mr. Yang being rude and failing to answer questions appropriately. Fairdeal did not give Mr. Yang any written warnings about his performance.

Mr. Bandeali also advised the delegate that Mr. Yang sought a pay increase after three months, and, although company policy was to review salaries after six months, he paid the increase in any event because he wanted to "have peace in the office" and thought Mr. Yang would earn the increase in the future. Mr. Bandeali advised the delegate that he and Ms. Kasamali had to double check all of Mr. Yang's work because of the errors, which impacted their efficiency. Mr. Bandeali cited examples of Mr. Yang's errors as charging wrong invoices to customer Visas, wrong product being shipped, and charging Visas for orders that had been paid by cheque. Mr. Bandeali acknowledged that his sister "wasn't fond" of Mr. Yang.

The delegate concluded that Mr. Yang had been paid for his lunch break, which he was not required to work. Because Mr. Yang could not substantiate the time he worked during his lunch hours to the delegate's satisfaction, she dismissed this aspect of the complaint.

The delegate also found that Fairdeal had discharged the burden of establishing that Mr. Yang's leave was not the reason for terminating his employment. The delegate noted that the leave was only one month long, rather than the 37 weeks Mr. Yang was entitled to. She found no evidence Fairdeal was distressed about Mr. Yang's leave, or treated him differently because of the leave. The delegate concluded that Fairdeal presented convincing evidence that the reason for Mr. Yang's termination was that he was not suited to his employment, he was making too many mistakes and causing extra work for his co-workers. She also accepted that Mr. Yang's wage increase after three months was a desire to have peace in the office and not a reflection of his job performance.

However, the delegate says that Fairdeal did not have just cause for terminating Mr. Yang's employment in the absence of written warnings that his job was in jeopardy. However, she noted this was not an issue because Fairdeal paid Mr. Yang one weeks severance.

ARGUMENT

Mr. Yang argues that the delegate erred in finding that the employer failed to discharge the burden of establishing that the reason for his termination had anything to do with his leave.

Mr. Yang notes that Mr. Bandeali, Mumtaz Bandeali and Munira Kasamili are siblings, and as such, their evidence should be suspect. He alleges that he was never told that his work was unsatisfactory, that he never heard complaints from clients and that he has good references that contradict Fairdeal's allegations of poor customer service. Mr. Yang says that he applied for the position of customer service, and after he was hired, he was asked to do bookkeeping, bank deposits and mailing in addition to his customer service responsibilities. He says that it was impossible to charge wrong visas to customers since every customer had their own file with visa numbers. Mr. Yang contends that the Bandealis' allegations are entirely

without foundation, and, had the delegate sought proof of them, she would have discovered the allegations were untrue. Further, Mr. Yang alleges that, the day before he went on parental leave, Mr. Bandeali asked him to train another employee. He says that if he was incapable of performing his job, he would not have been asked to do this work.

Mr. Yang also contends that, when he asked for a wage increase, Mr. Bandeali said he would discuss it with his father, the President of Fairdeal. Mr. Yang says that, after a day, Mr. Bandeali told him that his father had approved the increase, saying they were happy with his performance. Further, Mr. Yang says that he was invited to attend Ms. Bandeali's wedding, contending that, if Mr. Bandeali was not happy with his performance on the job, he would not have received the invitation.

Mr. Yang also says that, one day prior to going on leave, he had a discussion with Mr. Bandeali regarding the date of his return. He says he advised Mr. Bandeali that he needed to return to work as soon as possible because of his financial circumstances, but that when he returned, he wanted to be able to leave work a little earlier each day. He says that this arrangement would have made it difficult for Ms. Kasamali to also leave work early to pick up her son. Mr. Yang alleges this was the main reason Fairdeal terminated his employment.

The delegate notes that, even had just cause for dismissal been the reason for Mr. Yang's termination, Fairdeal has fully complied with the Act by paying Mr. Yang compensation for length of service.

The delegate notes that Mr. Yang's evidence regarding his discussion with Mr. Bandeali the day prior to his leave was not information he told her at any time during the investigation of his complaint. She says that, had Mr. Yang told her about it, she would have made appropriate inquiries to Mr. Bandeali and Ms. Kasamili during the investigation.

The delegate submits that Mr. Yang could not accurately assess how much of his lunch time he spent answering the telephone, so she made no order. However, she says that, had she determined that Mr. Yang had indeed worked during all his lunch hours, because those were paid lunch hours, the amount owing would be \$62.92. Given that Mr. Yang did not claim that he worked all lunch hours, the order, had one been made, would have been for less than this amount.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. I find that Mr. Yang has discharged that burden, insofar as it relates to the section 54 grounds. Given that the most the delegate would have awarded Mr. Yang for overtime was \$62.92, and Mr. Yang had no reliable estimate of the hours he worked over lunch hours, I am unable to find the Determination in error in this respect.

Section 54(2) provides that an employer must not, because of an employee's [parental] leave, terminate an employee's employment.

Section 126(4)(b) places the burden of establishing that an employee's leave is not the reason for terminating the employment of that employee, on an employer.

In my view, the delegate erred in accepting Fairdeal's reasons for terminating Mr. Yang's employment without either an assessment of credibility or an assessment of the evidence supporting the reasons. Given that the burden of disproving the allegation that Mr. Yang's employment was terminated because of his leave, the delegate had a duty to review the employer's documentation supporting its allegations that Mr. Yang committed the errors he did. The delegate did not appear to review any of the documentation in support of the employer's explanation of his competence. I note that Fairdeal's complaints about Mr. Yang relate to competencies he was not required to possess given his position. As a customer service representative, Mr. Yang's ability to process Visa statements should not be material to his performance as a customer service representative. The delegate appears to have accepted the verbal explanation of the principals of Fairdeal, who are all closely related to the owner and each other without any assessment of credibility.

The delegate also accepted Mr. Bandedali's explanation of why he gave Mr. Yang a raise after three months despite his alleged incompetence, without question. In my view, the explanation defies credibility, and is unsupported by any evidence.

The delegate referred to the Tribunal's decision in *Tricorn Services v. Director of Employment Standards*, BC EST #D485/98 in arriving at her conclusion, but distinguished it on the facts. In my view, there is little to distinguish that case from this one. In *Tricorn*, the employer attempted to justify the employee's termination after leave for cause. The Tribunal found the employer did not have just cause for termination.

The delegate did not go behind the submissions of Fairdeal to determine whether there were, in fact, grounds for dismissal. While it is clear that just cause is not the issue under s. 54, where an employer attempts to justify dismissal at the time of the leave on causal grounds, the circumstances and reasons must be examined carefully, and an assessment made of the credibility of the parties. Given that the delegate found no grounds for dismissing Mr. Yang for cause, she ought to have turned her mind to why Mr. Yang was in fact terminated, if not because of the leave.

There was evidence before the delegate that the employer hired a new employee the last day of Mr. Yang's employment. There is evidence Ms. Kasamali complained to her brother about Mr. Yang, and told him she "wasn't fond" of him. There is no evidence Fairdeal communicated any displeasure at Mr. Yang's work prior to his leave. There is also subsequent evidence that Mr. Yang's request for a shortened day would make it difficult for Ms. Kasamali to leave early.

In all of the circumstances, I find the delegate erred in failing to apply the proper evidentiary burden on Fairdeal in assessing whether Mr. Yang's complaint had merit.

Therefore, I allow the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated September 23, 2002 be referred back to the delegate for further investigation.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal