

An appeal

- by -

Pacific Coast Parking Inc.
("Pacific Coast" or "Employer")

- 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: Paul E. Love

FILE No.: 2001/658

DATE OF DECISION: November 20, 2001

DECISION

OVERVIEW

Pacific Coast Parking Inc. (the "Employer" or "Pacific Coast") appealed a Determination issued by a Delegate of the Director of Employment Standards ("Delegate"), made August 23, 2001, pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "Act"). The Delegate found that Heather Milligan (the "Employee"), was terminated by her Employer, and was entitled to one week of compensation for length of service, plus vacation pay and interest on that entitlement. The Employer argued that the Delegate erred in finding a termination, and submitted that the Delegate should have found that Ms. Milligan was suspended on January 26, 2001, and quit on January 27, 2001, when she walked out of a meeting. Alternatively, the Employer argues that it had just cause to terminate the Employee. The issue of quit or termination was largely an issue of fact, and the Employer had not shown any error in the findings made by the Delegate. I therefore confirmed the Determination.

ISSUE

Did the Delegate err in finding that Heather Milligan was entitled to compensation for length of service?

ARGUMENT

The Employer argues that Ms. Milligan quit her employment, or in the alternative, was terminated by the Employer for just cause. The Employer says that the Delegate erred in finding that the Employee was terminated without just cause. The Employer says that the Delegate erred by failing to interview Rivi Puar, another employee. The Employer has tendered a written statement from Ms. Puar. Both Ms. Milligan and the Delegate argue that the Determination is correct.

THE FACTS

I decided this case on the basis of written submissions of the parties, without an oral hearing. Pacific Coast Parking Inc. is a company which is in the parking enforcement business in the City of Vancouver. The company patrols parking lots, issues tickets for parking infractions, and collects the fines assessed from violators that it refers to as "customers". Heather Milligan was employed by Pacific Coast Parking Inc. as a receptionist in the company's front office. She worked for the Employer between August 16, 2000 and January 26, 2001. Ms. Milligan alleges that she was terminated, without cause, and that she was entitled to one week's wages, as compensation for length of service.

The facts concerning Ms. Milligan's departure from the Employer are in dispute. On the morning of January 26, 2001, the Employer discovered that she "had without authorization approved a

credit of \$300 to \$400". Mr. McKenzie, the Employer's owner, says on being confronted she said that she obtained approval from the patrol supervisor before she authorized the credit, which was untrue. The Employer alleges that Ms. Milligan was suspended on January 26, 2001, and that she quit on January 27, 2001 when she walked out of a meeting. Ms. Milligan was sent home by Mr. McKenzie on January 26th, 2001. Part of the Employer's submission was that it had just cause to terminate Ms. Milligan because she gave an "unauthorized credit" to a customer, and that she lied to the Employer, indicating that she had authority to do so from the patrol supervisor. The true facts appear to be that the Employee found canceled tickets in a file, and made the computerized book entries necessary to reflect those facts. While it may have been an error for her to do this without checking out the facts further, this is not an error of the magnitude suggested by the Employer, nor is there any proof offered by the Employer of the "unauthorized" aspect of the transaction, or of the "lie" by the Employee.

The Employee says that when she was sent home she believed that she was fired, as Mr. McKenzie had threatened to fire her several times before. Ms. Milligan alleges that she was terminated on January 26, 2001. Mr. McKenzie had to go out of town. On January 26, 2001, Ms. Milligan was invited to a meeting by the Employer's patrol supervisor, scheduled for the next day. In her written statement, she indicated that the patrol supervisor indicated that McKenzie "felt guilty about firing her for the reasons that he did". She subsequently attended a meeting at the offices of the Employer on January 27, 2001. She walked out of the meeting after the Employer made the comment "she should have been fired a long time ago". Ms. Milligan appears to have responded with the comment "then what is the point of me being here", and walked out of the Employer's office. The Delegate also relied on a written statement from Chris Dodds, who attended to the Employer's premises, with Ms. Milligan, on Saturday January 27, 2001. Mr. Dodds apparently waited outside of Mr. McKenzie's private office, and heard what transpired between Ms. Milligan and Mr. McKenzie. Mr. Dodds is the boyfriend of Ms. Milligan, and has given a written statement, verifying what he heard on January 27th, which is consistent with what the Employee claims occurred at that meeting. Mr. Dodds indicated in the course of the meeting on the 27th Mr. McKenzie said that she should have been fired a long time ago, and that McKenzie yelled and screamed at Ms. Milligan to try to change her work habits.

The Employer did not provide any information from the patrol supervisor to contradict Ms. Milligan's version of the invitation to the meeting. The Employer did not provide any information from the patrol supervisor to support his assertion that Ms. Milligan lied about the "authorization". The Employer did not provide any information which indicates how the tickets came to be canceled and in the file, which contradicts Ms. Milligan's version of events.

As part of its appeal notice, the Employer stated that "the employee who replaced Heather could verify that Heather bragged to her on Monday when she came to pickup her personal belongings and return the key that she had walked out on me and if Rivi was smart she would do the same". The Employer tendered a written statement from Rivi Puar, as part of his appeal materials. This is not supported by the statement of Ms. Puar. Ms. Puar claims that on January 29th she encountered Ms. Milligan at the Employer's office when the Ms. Milligan came to pickup personal effects and turn in a key. Ms. Puar claims that Ms. Milligan stated that it was not a nice

place to work and that is why she left, and had it not been for the fact that her brother had worked here for several months she would have left earlier. This version is denied by Ms. Milligan .

Whether Ms. Milligan encouraged or discouraged Ms. Rivi from working for the Employer is of no assistance to me in determining whether on an early date Mr. McKenzie dismissed Ms. Milligan. I find that the statement is of no assistance in determining the “quit” or “fire” issue.

The Delegate found that Ms. Milligan had worked more than three months, but less than a year. He found that Ms. Milligan was entitled to one weeks wages, pursuant to s. 63(1) of the *Act*, plus annual vacation pay on this amount, and interest. At the time of the dismissal Ms. Milligan earned \$1,400 per month or \$16,800 per year, which translates to \$323.07 per week. The Delegate calculated the vacation pay at 4 % as 12.94, and interest in the amount of \$13.40, for a total of \$369.39. The Delegate further ordered , pursuant to Section 79(3) of the *Act*, that Pacific coast Parking Inc. cease contravening, Sections 18(2) and 63(1) of the *Act*.

ANALYSIS

In an appeal under the *Act*, the burden of proof rests with the appellant, in this case the Employer, to demonstrate an error in the Determination such that I should vary or cancel the Determination. The Delegate determined that the Employer terminated Ms. Milligan on January 26, 2001. Ms. Milligan apparently met with the Employer the following day hoping to get her job back, at the invitation of the patrol supervisor.

In my view this case is primarily an issue of fact, as to whether Ms. Milligan was terminated or whether she quit. The only helpful evidence as to what happened on January 26, 2001 was the evidence of Ms. Milligan and Mr. McKenzie. There were no collateral witnesses privy to the conversation relating to quit or termination on January 26, 2001. The Delegate preferred the evidence of Ms. Milligan. The Delegate found that McKenzie said at the meeting on January 27 that "she should have been fired a long time ago" and afterwards the fact of Ms. Milligan, swearing and walking out of the Employer's office did not strike him as evidence of a quit. The Delegate was persuaded that Ms. Milligan was terminated on the 26th, and the Employee attended hoping that the Employer would offer her job back. The Delegate also found that the Employer's intent may have been to rehire Ms. Milligan after the meeting on the 27th.

While the Employer argues that the Delegate should have interviewed Ms. Puar, it is my view that in reading the statement of Ms. Puar, there is no helpful information which bears on the issue of whether Ms. Milligan quit or was fired. The failure by the Delegate to interview Ms. Puar, did not amount to an error in this case. The Delegate, as the investigator, has to make a decision as the level of investigatory resources which ought to be brought to bear in the investigation of a complaint. If the Delegate fails to interview a key witness, it may be that the Determination will be set aside by an Adjudicator, on the basis that the Delegate did not reach the correct conclusion on the facts. It cannot be said that the Delegate did not “go far enough” in

the investigation of this complaint. The Delegate interviewed the persons who could assist the Delegate with regard to findings of fact related to the events on January 26th and 27th, 2001.

I see nothing in the material filed by the Employer that shows that the Delegate erred in his interpretation of what was said and done by the parties on January 26th and 27, 2001. The Employer's material suggests that the Employer believed it had cause for terminating Ms. Milligan. The Employer had this information at its disposal on January 26, 2001. There is no new conduct of Ms. Milligan, after the 26th, which could have caused the Employer to believe it had additional grounds to terminate Ms. Milligan.

The Employer argues that it would not have terminated Ms. Milligan when the principal of the company, Mr. McKenzie, intended to go out of town. Employment relationships are complex, and often "volatility" in emotions plays a part in what the parties say or do. In this case, the Employer believed it had cause to terminate Ms. Milligan, and made statements on the 26th which are consistent with a termination, and were taken by the Employee to mean that she was terminated.

While it is possible that the Employer did suspend the Employee on the 26th, and then the Employee walked out of a meeting the following date, I find that this is not the most probable interpretation to be put on the disputed facts.

I note that the Employer has raised inconsistent defences in this matter. On one theory, the Employer alleges that it did not terminate Ms. Milligan, but suspended Ms. Milligan but that she quit on January 27, 2001. On the Employer's alternate theory, the Employer alleges that it had just cause to terminate the Employee. The common thread in both theories is the Employer's belief that it had just cause to terminate the Employee. I accept the submission made by the Delegate that these two theories appear to be inconsistent. I note that the burden here is on the Employer, and the inconsistency between the two theories is something that I can take notice of when I am deciding this case which involves a factual issue. I am not persuaded that the Employer has shown any error in the Determination. For all the above reasons, I dismiss the Employer's appeal.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination of August 23, 2001.

Paul E. Love
Adjudicator
Employment Standards Tribunal