

An appeal

- by -

Dze L K'Ant Friendship Centre Society
(the "Society")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/713

DATE OF DECISION: December 17, 2001

DECISION

OVERVIEW

This is an appeal filed by the Dze L K'Ant Friendship Centre Society (the "Society") pursuant to section 112 of the *Employment Standards Act* (the "Act"). The Society appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on September 24th, 2001 (the "Determination").

The Director's delegate determined that the Society owed its former employee, Brenda Wilson ("Wilson"), the sum of \$4,912.02 on account of 8 weeks' wages as compensation for length of service (see section 63), 6% vacation pay on that latter amount and section 88 interest.

The parties were previously advised by the Tribunal's vice-chair that this appeal would be adjudicated based on the parties' written submissions (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Both the Society and Ms. Wilson have filed various submissions with the Tribunal as has the Director's delegate.

ISSUES ON APPEAL

The only issue before the delegate was whether or not the Society had just cause to terminate Wilson's employment. The delegate concluded that the Society had not met its evidentiary burden of proving just cause.

On appeal to the Tribunal, the Society, in essence, advances two grounds of appeal.

First, the Society says, at least by implication, that the delegate failed to comply with section 77 of the *Act* and otherwise failed to conduct a "proper" investigation. Section 77 states: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

Second, the Society says that it had just cause to terminate Ms. Wilson's employment [see section 63(3)(c) of the *Act*].

BACKGROUND FACTS

Ms. Wilson was employed by the Society from July 1st, 1992 to August 28th, 2000 as a "Program Director/Child and Community Service Worker" at a \$15.40 per hour wage rate. The Society works, inter alia, with aboriginal youth and Wilson was expected to be a role model for those individuals. In that latter regard, the Society indicated that it has a "zero tolerance" policy with respect to on-duty alcohol consumption and intoxication. The Society terminated Wilson's

employment based on certain performance deficiencies but, perhaps more importantly, primarily because of on-the-job alcohol abuse.

The delegate concluded (Determination, page 5) that:

In reviewing the discipline record, I find 2 letters of reprimand, which pre-date the termination by over two years. In addition, I find a letter of reprimand dated a few days prior to the termination which indicates that it is a final warning on the issue of providing narrative reports. With respect to the events of 25 August 2000, the Employer has provided no clear evidence to prove, on a balance of probabilities, that Wilson was intoxicated while at work. The Employer has provided no evidence to support that there had been an irredeemable breach of the employment relationship such as would justify summary dismissal. Considering all of the evidence and argument presented I find that the Employer did not have just cause to terminate Wilson.

The evidence before me with respect to alcohol consumption is as follows. On June 20th and 21st, 1997, Ms. Wilson was absent from work without excuse. A letter of reprimand issued to Ms. Wilson at that time referred to previous unexcused absences and suggest that Ms. Wilson's "personal matters" needed to be addressed, by counselling if necessary. Ms. Wilson acknowledged, in writing, that she was sorry for "letting down the Friendship Centre...by not being able to fulfill my duties as Program Director". She indicated that "I hope with this time off I'll be able to do my job again".

On June 30th, 1998, Ms. Wilson was once again issued a written warning. This latter document referred to her alcohol consumption on June 27 and 28, 1998 (for which she was sent home) at the very same event which gave rise to a disciplinary letter the year before. This letter concludes: "To be sent home by your co-workers on Saturday morning is a strong indication of the gravity of the problem. If you are scheduled for a job you must be there ready to work in a sober condition".

On Friday August 25th, 2000, Ms. Wilson was again observed, apparently by three separate individuals, to be under the influence of alcohol while at work. The Society's Executive Director observed Ms. Wilson's speech to be slurred, there was a strong smell of alcohol and inappropriate "giggling" during conversation. This latter circumstance was a key factor leading to Ms. Wilson's termination on August 29th, 2000. The Society's termination letter, dated August 29th, refers to a number of performance deficiencies and unexcused absences as well as the events of August 25th. In a letter dated September 5th, 2000 from Ms. Wilson to the Society she acknowledged a prior suspension for "alcohol mis-use" but asserted that she had not consumed any alcohol on August 25th although she conceded that "I may have had an odor of alcohol on my person as I had consumed alcohol the night before".

Janet Pete is a Society board member. She has provided a written statement indicating that she was aware of some sort of personal dispute between Ms. Wilson and the Society's Executive

Director (this dispute is also referred to by Ms. Wilson in her submissions). Further, Ms. Pete stated that she spoke with Ms. Wilson on two occasions on August 25th, 2000 and that “When I talked to Brenda she was not intoxicated nor had I seen her drink any alcohol”.

FINDINGS

The Society’s Executive Director asserted, in her letter to the delegate dated June 7th, 2001, that “I would like to strongly emphasize that the chief reason for Ms. Wilson’s termination was her being intoxicated at work” (my italics).

The law is clear that the burden of proving just cause rests with the employer. Undoubtedly, and given the nature of its programs, alcohol abuse is taken very seriously by the Society. There is evidence before me of a history of alcohol abuse by Ms. Wilson and consequent disciplinary action having been taken. If I was satisfied that Ms. Wilson was, in fact, intoxicated on August 25th I do not doubt (especially in light of her work history) that the Society would have had just cause for termination.

However, I must concede that, as was the delegate, I am far from satisfied about the evidence on that latter point. The Society’s Executive Director provided something in the nature of a statement about Ms. Wilson’s condition on the day in question. Ms. Wilson, for her part, denies being intoxicated on August 25th although she does admit to consumption the night before. One has to wonder, of course, about the nature of that consumption if, the very next day, she was still “smelling of alcohol”. Nevertheless, off-duty consumption is an entirely separate matter from on-duty intoxication.

The Society’s Executive Director says that two other individuals also witnessed Ms. Wilson’s impaired condition on August 25th but, tellingly, I do not have a corroborating written statement from either person before me. The only “independent” statement that I do have before me (and I note that this statement is also from a person in authority at the Society) is much more in keeping with Ms. Wilson’s assertions than those of the Executive Director.

The Society says that Ms. Wilson was subject to a contractual provision that she abstain from all alcohol consumption; that is simply not so. The Society entered into a contract, apparently in 1993, with a funding agency and there is a term in that agreement whereby the Society agrees that its employees who will be delivering certain programs will “have two years sobriety”. To the extent that there is any contractual obligation in this latter regard, that obligation binds the Society and the funding agency; Ms. Wilson was not a party that agreement and there is no evidence before me that sobriety (including both on and off-duty) was a condition of employment.

I do not doubt that Ms. Wilson was obliged, in accordance with her general obligations as an employee, to refrain from reporting to work in an intoxicated state but, as I have previously

noted, it has not been proven, on a balance of probabilities, that Ms. Wilson breached this obligation by reporting for work on August 25th in an intoxicated state.

In short, I too must find, as did the delegate, that the Society has simply failed to discharge its evidentiary burden of proving just cause.

Finally, the material before me clearly indicates that the Society was given every reasonable opportunity to prove its case to the delegate (and to this Tribunal). The delegate, in my view, fully complied with the dictates of the section 77 of the *Act*.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$4,912.02 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal