

An appeal

- by -

594047 B.C. Ltd. operating as Trail Esso
(“Trail Esso” 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.: 2001/685

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an appeal by 594047 B.C. Ltd. operating as Trail Esso (“Trail Esso” or the “Employer”) of a Determination issued by a Delegate of the Director of Employment Standards (“Delegate”) on September 27, 2001, pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113*. (the “Act”). The Employer dismissed the Employee alleging just cause, however, the investigation of the Delegate resulted in a Determination that the Employer failed to establish just cause for the dismissal. The Employer failed to file any material other than an endorsement on the appeal notice, the Determination, and a short letter. The material filed by the Employer did not demonstrate how the Delegate erred in the Determination. I reviewed the Determination, in the absence of any helpful material supplied by the Employer, and determined that the Delegate considered the positions of the parties, reviewed the evidence of parties independent of the parties in dispute, applied the applicable legal test, and determined that there was a basis for the Delegate to conclude that the Employer failed to establish just cause for the termination of the Employee. I therefore confirmed the Determination.

ISSUE:

Has the Employer shown any error in the Determination?

FACTS

In a Determination dated September 27 2,001 the Delegate found that Angela De Haan was an employee of 594047 B.C. Ltd. operating as Trail Esso and that Ms. De Haan was entitled to compensation for length of service, including 4 % vacation pay, in the amount of \$832.00 plus interest of \$14.70. The Employer operates a gas station in Trail, B.C. Ms. De Haan was employed between August 1998 and June 16, 2001. Her rate of pay was \$10.00 per hour. Ms. De Haan had filed a complaint with the Director that she had been dismissed without just cause. In the Determination the Delegate sets out his findings and determined that the Employer had not established just cause.

The Delegate investigated this matter. The Employer’s position, in its termination letter (undated) was that the Employer terminated Ms. De Haan for four reasons:

1. Failure to lock the stock room door;
2. Leaving an employee by herself who was returning to work from an injury;
3. Placing \$500. cash in a drawer instead of a safe.
4. Attitude towards the supervisor including “gestures of the finger and verbal abuse”.

In addition to the reasons advanced by the Employer in the termination letter the Delegate also investigated allegations which were advanced by the Employer during the investigation:

1. Allegations made by the Employer that Ms. De Haan had caused another employee, Paige McPhee to be terminated for false allegations that McPhee had given a customer “the finger” and refused to “serve” the customer.

2. Allegations that the Employee had “gambled” or purchased lottery tickets on company time

The Delegate determined that on one occasion Ms. De Haan forgot to make the \$500 cash drop because a number of customers came at the same time. The Delegate determined that Ms. De Haan left the workplace on one occasion while Louis Yuris was alone in the station, but that there was usually a mechanic on duty. Ms. De Haan says that her absence was occasioned by the request of the Employer’s manager, Scott Farmer, for a ride home.

The Delegate found that the Employer had not established that it was the Employee who left the stock room door unlocked. The Delegate also found that there was no evidence that the Employee was warned that leaving the stock room door open would result in termination. The Delegate determined that Ms. De Haan had visited the “lotto store”, but was unable to conclude on the information presented to him, that this event occurred during working hours.

The Delegate investigated an allegation that the Employee had caused the Employer to dismiss another Employee, Paige McPhee, on the basis of false information supplied by the Employee. It is apparent that the Employee passed on information concerning the conduct of Ms. McPhee, which she heard from another employee, Shelly Allen. The Delegate found that Allen had complained to Ms. De Haan about “rudeness” by Ms. McPhee to Ms. Allen and to customers. Ms. De Haan passed on the information to the Employer. The Delegate found that Ms. McPhee denied the “misconduct”. The Delegate found that Ms. De Haan had not fabricated the complaint that Ms. Allen had concerning Ms. McPhee, and that Ms. Allen had complained to Ms. De Haan. The Delegate further found that the “events” took place in the spring of 2000, and the Employer took no action until November of 2000.

The Delegate also found that there was some evidence of a “power struggle” between the Employee and the Defendant’s manager. The Delegate found that the Employee had made a complaint of sexual harassment, which the Delegate found “ was not particularly relevant to the matter at hand”. The Delegate found that there was no serious issue of misconduct such as employee theft, fraud, conflict of interest, serious undermining of the corporate culture, serious breach of employer rules and policies (sexual harassment violation). The Delegate, in essence found, that the events on which the Employer relied to terminate had either been exaggerated by the Employer, or that the Employer had failed to follow any process of corrective discipline, prior to discharging Ms. De Haan.

The Employer seeks to have the Tribunal reverse this decision. The Employer has filed an appeal form, received by the Tribunal on October 1, 2001. The appeal form is endorsed by the appellant with the following notation, which is the appellant's reason for filing the appeal.

There is no rule of law outlining what degree of employee misconduct constitutes just cause. There is, however, a test; it is "Did the employee behave in a manner inconsistent with the continuation of employment? Courts have recognized the following actions to be just cause for termination

- 1) wilful misconduct
- 2) serious undermining of the corporate culture

The appellant says that there is an error in interpreting the law in the Determination. The appellant seeks that the Tribunal "reverse the decision and notes:

I want the Tribunal to review the material and recognize that this past employee knew what to do and deliberately did not do it

- 1) gambling while on duty at another location
- 2) trying to get me terminated (my corporation) from Imperial Oil
- 3) gross misconduct constituting same

The Employer then filed a letter with the Tribunal dated October 29, 2001. It is convenient to set out the full text of the letter:

The Directors Delegate and the Board have made their argument based solely on a technicality. The basis for any appeal is the document given rise to the appeal" and that "an appeal is not a new trial of the information".

All the information and testimony submitted to the Directors Delegate and the Board were and continue to be ignored. Would this be the case in any Court in Canada?

The Directors Delegate states that had the Employer chosen to provide such information it would have been investigated and tested as evidence. I submit that the Directors Delegate and the Board had the information for the hearing and never acted on it. To my knowledge any critical information provided by a Plaintiff or a Defendant during any trial is admissible anytime.

Who made the Directors Delegate Judge and Jury? What is the point of Employment Standards Legislation. Do technicalities prevent the essence of this

legislation being met. The bottom line is that this employee was seriously undermining corporate culture.

In this appeal the Employer alleges that the Delegate erred with regard to the findings of lack of just cause proven by the Employer. The appeal form alleges that the Delegate erred in interpreting the law and contains the following notation:

There is no rule of law outlining what degree of employee misconduct constitute just cause. There is, however, a test; it is “Did the employee behave in a matter inconsistent with the continuation of employment. Courts have recognized the following actions to be cause for termination

- 1) wilful misconduct
- 2) serious undermining of corporate culture

ANALYSIS

When a Delegate is presented with a complaint that an Employer has dismissed an employee for just cause, the Delegate has a duty, imposed by the *Act*, to investigate the complaint. The *Act* provides that the Delegate has the jurisdiction to investigate complaints, and to make a Determination, which is binding on the parties, subject to rights of appeal and reconsideration. During the investigative phase, the burden is placed on the Employer to justify the termination by showing “just cause”. It is unnecessary in this case to elaborate on the concept of just cause. If the Employer is unable to prove just cause for dismissal, the Employee is entitled, pursuant to s. 63 of the *Act*, to compensation for length of service.

The burden of proving an error in the Determination such that I should cancel or vary a Determination lies with the appellant, in this case the Employer. Generally, with the appeal, or after filing the appeal, the parties provide some submissions which includes the “evidence” on which they rely to support their appeal. In this case the Employer filed no documents with the appeal, other than a copy of the Determination. The grounds for the appeal are endorsed on the notice of appeal. The Employer later filed a letter. This letter does not advance the appeal by providing me any information to assess whether there was any error made by the Delegate. The Employer has asserted an error in the notice of appeal, and did not carry through with any helpful submission, or documentation to demonstrate the error it alleged.

I have reviewed the Determination. It is 9 pages in length, and sets out the positions of the parties, the factual findings of the Delegate, the applicable standard of just cause, and the conclusion that the Employer had not established just cause. The Delegate noted that there were conflicts in the evidence between the Employer and the Employee. It appears that the Delegate had “different versions of the facts” from the Manager and Ms. De Haan. The Delegate appears to have attempted to obtain information from other employees in the work place, to corroborate

the information from the Manager and from Ms. De Haan. In this Determination, the Delegate correctly placed the burden of establishing just cause on the Employer. The Delegate addressed the Employer's reasons for terminating Ms. De Haan, as well as the "reasons" for terminating Ms. De Haan which the Employer advanced during the course of the investigation.

The Delegate dealt with a ground related to "leaving the stock room unlocked". The Delegate made a finding that it was unclear whether it was the Employee or the Employer who left the door unlocked. The Delegate also found that there was no evidence given to the employee in the nature of a warning concerning the stockroom door. The Delegate dealt with a ground related to "leaving another employee to work alone". The Delegate found that the Employer had not warned the Employee that this was an act that would result in termination, and that the Employer participated in the alleged misconduct by asking Ms. De Haan for a ride home. The Delegate dealt with the "one time incident" dealing with cash, and found that the Employee had an explanation, and that she was not warned that this conduct would result in termination.

The Delegate dealt with a ground related to "doing personal business", (buying a lottery ticket) and the Delegate found that it was unclear whether the personal business was transacted while the Employee was on shift. The Delegate found that the conduct had occurred weeks earlier, and no action was taken until June 14. The Delegate also found that the Employee had not been "warned as to the consequences of doing personal business during working hours". The Delegate dealt with the ground related to "false information" causing termination of another employee, and did not find that this ground was proven by the Employer.

For all the instances on which the Delegate made findings, the Delegate found that the Employer, had not engaged in any process of corrective discipline, warning the complainant that her job was in jeopardy. The Delegate determined that the Employer had not proven just cause for dismissal.

It is unusual in an Employment Standards appeal case for the appeal decision to be considerably more voluminous than the appellant's appeal package. In order to set the context for the reader, I have spent some time outlining the contents of the Determination, and the content of the appeal submission. There appears to me to be a sufficient basis for the Delegate to have determined that the Employer had not proven cause. The Delegate was in the position of having had the opportunity to deal with the parties, consider the conflicts in the evidence, and come to a reasoned Determination. Given the lack of material filed by the Employer in this matter, I find that the Employer has established no error in the Determination. I therefore dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated September 27, 2001 is confirmed, with interest calculated in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal