

Citation: ☼



Date: ☼

File No: 10-34026
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Small Claims)

BETWEEN:

PHUNG HO

CLAIMANT

AND:

CENTURY PLAZA LTD.

DEFENDANT

**REASONS FOR JUDGMENT
OF
HIS WORSHIP DONALD YULE**

Counsel for the Claimant:

F. Wynne

Appearing for the Defendant:

G. Wu, Articling Student

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

April 6, 2011

Date of Judgment:

April 21, 2011

[1] The Claimant, Phung Ho (Ms. Ho) claims for general damages of \$5,000.00 for wrongful dismissal from her employment as a restaurant server and busser and hotel room service attendant at the Defendant, Century Plaza Ltd. (Century Plaza). It is not disputed that she was dismissed from her employment on September 15, 2010.

Century Plaza says however that the dismissal was for just cause. The just cause was a pattern of harassing behavior of other employees. Century Plaza relies upon Ms. Ho's conduct after an August 25, 2010 meeting at which it is also not disputed that Ms. Ho was warned that she would be fired if certain conduct persisted. There is however disagreement regarding the conduct that was discussed at that meeting.

Background to the August 25, 2010 Meeting

[2] Ms. Ho had been employed by Century Plaza since June 2006. She says that there were no problems until the arrival of Anthony Bain (Mr. Bain) as the new food and beverage manager. In June 2010 Ms. Ho was given a one week suspension for having failed to show up for her shift on June 26, 2010. On July 9, 2010 Ms. Ho was given a warning for arriving 30 minutes late for work on July 7, 2010 with notice that she would be suspended for one week on a next offence. Around August 21, 2010 it was reported to Mr. Bain that Ms. Ho had showed up late for work on August 17, 2010. Ms. Ho was given a one week suspension from August 22 to August 28, 2010. Ms. Ho complained to the Century Plaza's owner, Sergio, about the suspension and also raised additional complaints against Mr. Bain. This resulted in the meeting of August 25, 2010 attended by Ms. Ho, Mr. Bain, and Century Plaza's financial controller, Lena Jang.

The August 25, 2010 Meeting

[3] Ms. Ho's evidence is that at this meeting her suspension for allegedly being late for her shift on August 17 was lifted. The hotel's internal video system showed that she had not been late for work. Mr. Bain apologized to her and said that he should have investigated more fully prior to instituting the suspension. Ms. Ho was scheduled to work further shifts in order to make up for some of the time suspended.

[4] Ms. Ho also says that Ms. Jang told her that she was not to phone or send text messages to other employees. One particular employee, David Prokop, was identified. Ms. Ho was not given any particulars of any alleged "harassment". There was no mention of "stealing" tables from other servers, or arguing with other employees in the presence of customers. She was not given a copy of any employee warning record nor asked to sign any such document.

[5] Mr. Bain's evidence is that he called the meeting of August 25, 2010 because he had received complaints of harassment by Ms. Ho from Mr. Prokop and because of a confrontation involving another co-worker in front of customers. Although Ms. Ho's suspension was revoked, she was nevertheless told that she was being put on probation. She was required to show up on time, not to be disruptive or bullying or intimidating to other workers, and not to have any contact with Mr. Prokop outside of work. A violation of any of these terms would result in immediate dismissal. Mr. Bain denied wanting to terminate Ms. Ho but agreed that he wanted to create a record that could be relied on and wanted Ms. Ho to have a clear understanding of what was required of her. Mr. Bain initially said that he gave Ms. Ho copies of all the written

employee warning records and always had employees sign them except when the employee refused. Ms. Ho had “sometimes” refused to sign her employee warning records. A written employee warning record was completed for the August 25, 2010 meeting. It was filled out entirely by Ms. Jang. Neither Mr. Bain nor Ms. Ho signed it. The warning record is self evident. It refers to “harassing behavior” but does not provide any details of the harassment. Mr. Bain himself did not know the full details of the harassment. He had not at that time seen any of the text messages from Ms. Ho to Mr. Prokop. He had not given Ms. Jang details of the harassment.

[6] Ms. Jang’s evidence is that she had been instructed by the owner Sergio to attend this meeting, with advice that there had been complaints on both sides, i.e. by both Mr. Bain against Ms. Ho and by Ms. Ho against Mr. Bain. Ms. Jang had not spoken with Mr. Prokop prior to the meeting nor seen any of the text messages. Ms. Ho was told not to cause any more complaints from other employees but to do her job and get along with other staff members. She was specifically told not to make phone calls to or send text messages to other employees. Ms. Jang prepared the written employee warning record for this meeting. It is noted to be an “oral warning for payroll file”. The warning record states as follows:

“We have received complaints from staff of harassing behavior. Oral warning given to Phung in meeting with Anthony Bain. Warning given – if this occurs again – Phung to be terminated.”

As noted, the warning record is not signed by Ms. Ho.

Post August 25, 2010 Meeting Conduct

[7] On August 25, 2010, at 3:26 p.m., Mr. Prokop recorded two text messages from Ms. Ho. The first was "Hey David call me it me Phung" and the second was "Do u have phil number". The meeting with Mr. Bain and Ms. Jang had occurred around noon or 1:00 p.m., prior to sending these messages. Ms. Ho offered no explanation as to why she sent these messages in an apparent violation of a just issued oral warning not to do so.

[8] On September 8, 2010 another worker Mr. Russell emailed Mr. Bain with a complaint that on September 5, 2010 Ms. Ho had "taken" a table that was not in her section. Although Mr. Russell indicated that it was not his place to speculate on why Ms. Ho had done this, he indicated that in her defence she may have felt like she was not getting her fair share of tables. Mr. Russell nevertheless wanted the matter addressed.

[9] On September 13, 2010 Mr. Prokop emailed Mr. Bain indicating that there had been a problem with Ms. Ho leaving early and that he had received more text messages from Ms. Ho. Mr. Bain had a further discussion with the owner Sergio and emailed Ms. Jang on September 13, 2010 indicating there were further issues with Ms. Ho "harassing and bullying (staff members) on shift and by text messages". Sergio had recommended Ms. Jang speak with Ms. Ho about this as an absolute final warning.

[10] An employee warning record was completed by Ms. Jang for September 14, 2010 with reference to an incident on September 13, 2010 when Ms. Ho left the floor without completing her closing duties and came back to argue (have a discussion) with

the hostess resulting in subordination with her superior. This appears to be a reference to the first issue raised in Mr. Prokop's September 13, 2010 email. The employee warning record is not signed by Ms. Ho.

[11] Unfortunately likely owing to the exigencies of time, neither Ms. Ho nor Ms. Jang gave evidence respecting any direct communications between them on September 14, 2010.

[12] On September 13, 2010 there was an exchange of five text messages between Ms. Ho and Mr. Prokop. The exchange appears to have been initiated by Ms. Ho and relates to the allegation that Ms. Ho had left early. The exchange includes the following:

- a) Ms. Ho telling Mr. Prokop to "...stop making things up I'll (sic) will go talk to him about this";
- b) Mr. Prokop telling Ms. Ho not to threaten him;
- c) Ms. Ho denying any threat but saying that "...if you guy want to deal hard way please I insist the manerger (sic) to deal with this"; and
- d) Ms. Ho ending by saying "You can say all the stuff you want it ok I know what kind ppl u are anyways. I just don't care".

September 15, 2010

[13] There are two employee warning records dated September 15, 2010. One, completed by Mr. Bain, refers to an incident on September 4, 2010 alleging that Ms. Ho argued with an employee in front of guests. The second warning record, also completed by Mr. Bain, indicates Ms. Ho had requested to leave early on a shift that had not yet been scheduled and when asked about it "responded in a very poor and uncooperative manner". Neither of these warning records is signed by Ms. Ho.

[14] Ms. Ho's evidence is that she had asked a new manager if she could leave a bit early one day. Subsequently Mr. Bain approached her and accused her of harassing the new manager with respect to a schedule that had not yet been made out. Ms. Ho was asked to go to Ms. Jang's office at 2:30 p.m. where she was handed copies of the employee warning record dated September 14 and the two employee warning records dated September 15 and told that she could not work there anymore. Ms. Ho asserts that this was the first time she had ever seen any of these employee warning records.

[15] Mr. Bain's evidence is that there was an incident on September 15, 2010 in which Ms. Ho had argued in front of a customer. This led to the meeting with Ms. Jang and the outcome of dismissal because Ms. Ho was breaching the conditions of her employment.

[16] Mr. Prokop also gave evidence. He has been an employee with Century Plaza for five years as a server. Although the employment relationship with Ms. Ho was okay for the first two years, it had then deteriorated. Ms. Ho bullied him and other employees. She argued, stole tables, and told the kitchen staff how to cook. She called him "baldy" and referred to him as the "gay guy with attitude". Mr. Prokop ended up feeling uncomfortable with Ms. Ho around because she was controlling everything. He had been told by Mr. Bain following the August 25, 2010 meeting that Ms. Ho was to have no future phone or text message contact with him. He was asked to report any violation of those terms and did so.

[17] I note that there were two other employees on Century Plaza's witness list, namely Phil Russell and Lauren Cochrane who were in the Courtroom but owing to time constraints for the hearing were not able to give evidence.

[18] The employee warning record forms used by Century Plaza have two places for an employee signature. There is a section in the middle of the form entitled "Employee's Remarks re: violation". It is a place where the employee may set out his or her position or comment on an alleged violation. At the top of the area for the employee's remarks is the sentence "THE ABSENCE OF ANY STATEMENT ON THE PART OF THE EMPLOYEE INDICATES HIS/HER AGREEMENT WITH THE REPORT AS STATED". At the bottom of the area for the employee's comments are the words "I have entered my version of the above matter". There is then a place for the employee's signature and the date. At the very bottom of the form there is another box with the words "I have read this "warning" and understand it". There is a place for the employee's signature and date. Not one of the employee warning records in evidence contains either Ms. Ho's signature or anything in the box for employee's remarks. I accept Ms. Ho's evidence that the first time she saw the employee warning record dated September 14, 2010 and the two employee warning records dated September 15, 2010 was when they were handed to her during the meeting on September 15, 2010 at which she was dismissed. I also find that the employee warning record for the August 25, 2010 meeting was not given to Ms. Ho. It is on its face described as an "oral warning". I also note that these forms contain another box for the "distribution of copies". There are five potential persons on the distribution list. One of them is the employee. None of the forms have any of the distribution boxes ticked.

[19] I find that the procedure contemplated by the form of recording oral and written warnings with written acknowledgment by the employee of written warnings was not followed in this case.

[20] I also find that in the meeting on August 25, 2010 Ms. Ho was not provided with details of her prior conduct that Century Plaza regarded as “harassment”. I find that Ms. Jang’s evidence likely aptly sums up the message given to Ms. Ho at that meeting namely to do your job, get along with your co-workers; and stop phoning and text messaging other employees, particularly Mr. Prokop, or you will be fired.

Submission of the Parties

[21] Ms. Ho submits that there is a heavy onus on an employer in seeking to establish just cause for dismissal. The employee’s conduct viewed in all of the circumstances must be seriously incompatible with her duties and the conduct must go to the root of the employment relationship. The principal of proportionality requires an effective imbalance between the severity of an employee’s misconduct and the sanction imposed. The employee’s conduct must be assessed from an objective and contextual view point. Ms. Ho asserts that the sole ground for dismissal is alleged “harassment” and that her conduct does not meet the definition of harassment which requires something more than mere annoyance and has to involve repeated, continual or chronic attacks that result in the victim fearing for personal safety (reliance is placed upon *R. v. Ryback* [1996] 71 B.C.C.A. 175, leave to appeal refused [1996] 2 S.C.C.A. No. 135). Ms. Ho submits that there are only two text exchanges following the August 25, 2010 meeting. Two exchanges cannot satisfy the requirement of repeated, chronic or

continual attacks. In addition, the content of the August 25, 2010 messages is innocuous. The text messages on September 13, 2010 are at worst an argument but in any event contain no threats or foul or demeaning language. Accordingly the defence of just cause has not been made and Ms. Ho is entitled to damages.

[22] Century Plaza submits that the conduct warned about in the August 25, 2010 meeting was broader than merely not phoning or texting co-workers. There was no improvement in Ms. Ho's conduct as she was involved in further incidents of "taking" tables on September 7, 2010, leaving early on September 13, 2010, and arguing in front of a customer on September 15, 2010. But in particular, Century Plaza relies on Ms. Ho's wilful violation of the specific prohibition against texting Mr. Prokop. Mr. Prokop had complained about Ms. Ho's behavior to management. Management had assured Mr. Prokop after the August 25, 2010 meeting that the issue had been addressed with Ms. Ho. Ms. Ho's conduct in continuing to text Mr. Prokop was wilful disobedience of a clear and unequivocal direction. An employer's ability to maintain a co-operative workforce is an important management function. Finally, Ms. Ho had been explicitly forewarned of dismissal if the proscribed conduct continued.

Legal Principals

[23] Ms. Ho relies upon the B.C. Court of Appeal decision in *R. v. Ryback*, supra, for the propositions that harassment requires repeated or continual conduct that torments, troubles or plagues someone to the point of causing fear for that person's safety. *Ryback* however was a criminal prosecution for violation of the "stalking" provision in Section 264 of the Criminal Code. In abbreviated form, Section 264 provided that no person shall, knowing that another person is harassed, engage in conduct described in another subsection that causes the other person reasonably in all the circumstances to

fear for their safety. The proscribed conduct was repeatedly following someone from place to place or repeatedly communicating with them or watching and besetting the place where they lived etc. or engaging in threatening conduct directed at the other person. In my view, the elements of repeated conduct and fearing for one's safety are explicit requirements of Section 264 and are not necessarily inherent in the ordinary meaning of harassment. However, at paragraph 37 of the *Ryback* decision, the Court refers to an extract from the decision in *R. v. Sillipp* (1995) A.J. No. 615 (another Section 264 Criminal Code case) where there is reference to dictionary definitions of "harass". The Court there concludes that "the most appropriate synonyms are those which imply being tormented, troubled, and worried continually and chronically, being plagued, bedevilled and badgered." The Webster Dictionary contained the definition:

"to worry and impede by repeated attacks...to vex trouble or annoy continually or chronically..."

Thus on the harassment question I think that Century Plaza has to show that Ms. Ho's contacts with Mr. Prokop after August 25, 2010 vexed, troubled or annoyed Mr. Prokop continually or chronically.

[24] With respect to the issue of just cause, I agree that the employee's conduct must be viewed in all of the circumstances on an objective and contextual basis and must be seriously incompatible with her duties and that the principle of proportionality set out in *McKinley v. BC Tel*, [2001] S.C.R. 161 requires a balance to be struck between the severity of an employee's misconduct and the sanction imposed. In *Panton v. Everyone Woman's Health Centre Society* [2000] B.C.C.A. 621, at paragraph 24 the Court stated that the question was whether the employee's conduct

"...was so egregious in the circumstances as to permit her employer to terminate the employment relationship without providing the cushion of reasonable notice..."

At paragraph 26 in *Panton*, the Court cites a passage from *R. v. Arthurs* [1967] 2 O.R. 49, 62 D.L.R. (2d) 342 (C.A.) as follows:

“If an employee has been guilty of serious misconduct, habitual neglected duty, incompetence, or conduct incompatible with his duties or prejudicial to the employer’s business, or is he is been guilty of wilful disobedience to the employer’s order in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee” (emphasis added).

Application to the Facts of this Case

[25] I conclude that Ms. Ho’s text messages to Mr. Prokop after the meeting of August 25, 2010 do not have the requisite element of repeated, continual, or chronic behavior that is required in order to constitute harassment. The text message of August 25, 2010 is, in terms of content, innocuous. It is a request for information. The series of text message on September 13, 2010 are a different matter. I disagree with Ms. Ho’s submission that those messages contain no threats or demeaning language. There is an allegation of fabrication; a threat to take the matter to management; and a derogatory reference to Mr. Prokop. However I regard these messages as part of one incident in which Ms. Ho was responding to Mr. Prokop’s complaint to Mr. Bain about her conduct that day.

[26] The final issue is whether just cause is established by Ms. Ho’s wilful disobedience of the specific direction at the August 25, 2010 meeting of not texting Mr. Prokop. Ms. Ho says that wilful disobedience is not pled as a basis for just cause. I disagree. Although the words “wilful disobedience” may not appear in Century Plaza’s Reply, I think that the facts are pled to support that ground of dismissal. Paragraph four of the Reply alleges harassment. Paragraph five sets out particulars of the harassment which include threatening other employees via text messages and phone calls.

Paragraph six asserts that at the August 25, 2010 meeting Ms. Ho was informed that further harassment would result in immediate termination. Paragraph seven alleges further complaints of harassment and paragraphs eight and nine allege continued harassment.

[27] The question then is whether the text message exchanges of August 25, 2010 and September 13, 2010 viewed objectively and in context are sufficiently serious so as to go to the root of the employment relationship. In my view they do not. I take into consideration in particular two factors. First, the meeting of August 25, 2010 had two parts to it. One part was an apology to Ms. Ho for her wrongful suspension from work commencing August 22, 2010. The second part was the prohibition against texting or phoning other employees. The absence of details of the alleged past harassment has to be taken into account into considering the “no texting” prohibition. If the message was “get along with your co-workers and don’t harass them and don’t text Mr. Prokop”, it is not obvious that the August 25, 2010 text message was a violation at all.

[28] The second factor I take into account is the absence of delivery of any of the employee warning records to Ms. Ho and the completion of the employee warning records without her seeing them. The point of preparing written records which the employee acknowledges in writing is to cumulatively impress upon the employee the increasing jeopardy of their employment if misconduct continues. I view Ms. Ho’s text messages on September 13, 2010 as an attempt to argue her side of Mr. Prokop’s complaint about her directly with Mr. Prokop. She was entitled to have her side of any dispute with another employee aired. If Century Plaza’s position was that, in the event Ms. Ho became involved in a dispute with any other co-worker, she was not to

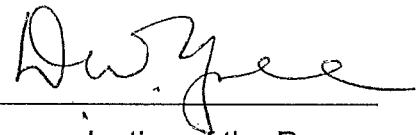
communicate directly with that co-worker but rather, presumably, to come straight some management employee, and if she did not follow that procedure, she would be dismissed, then I think that position needed to be communicated explicitly in writing. Communication with a co-worker directly concerning a complaint raised by the co-worker on one occasion, all be it in literal violation of a specific directive, does not in my view constitute so serious a violation of Ms. Ho's employment duties that it justifies termination for cause.

[29] This is not a case where a long series of otherwise comparatively minor employee offences are said cumulatively to justify dismissal for cause. Rather the conduct relied upon are the specific actions and text messages after August 25, 2010.

Damages

[30] No oral submissions were made respecting damages. In Ms. Ho's written submissions, she refers to several cases in which the notice period for similar or equivalent employment ranged between 17 weeks and six months. Under the *Employment Standards Act*, R.S.B.C. 1996 c. 113, s. 63(4) the amount an employer is liable to pay on termination of employment is calculated based on the average regular weekly wage in the six weeks prior to termination. Based on Ms. Ho's pay records, her average weekly wage over this time was \$425.08. Using the lower notice period of 17 weeks, she would therefore be entitled to \$7,226.36 less the sum of \$1,200.28 that was paid to her at the time of termination. The result is a damage assessment of \$6,026.08. This exceeds the monetary jurisdiction of the Court but Ms. Ho waived any excess in order to bring her claim in this Court.

[31] Accordingly, there will be judgment in favor of the Claimant in the amount of \$5,000.00 together with \$156.00 for filing fees and \$80.00 for service fees for a total \$5,236.00. The Claimant is also entitled to Court Order Interest on the \$5,000.00 from September 15, 2010 to the date of Judgment.

A handwritten signature in black ink, appearing to read "D.W. Yule", written over a horizontal line.

Justice of the Peace,
Donald W. Yule, Q.C.