

An appeal

- by -

4R Pet Services Inc., coba Animal Magic Pet Boutique
("4R Pet")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Marnee Pearce

FILE NO.: 2020/013

DATE OF DECISION: April 27, 2020

DECISION

SUBMISSIONS

Rebecca Stein

on behalf of 4R Pet Services Inc., coba Animal Magic Pet Boutique

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), 4R Pet Services Inc., coba Animal Magic Boutique (“4R Pet”), filed an appeal of a determination (the “Determination”) issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “Director”), on December 9, 2019.
2. The Determination found that 4R Pet had contravened section 63 (failure to pay compensation for length of service), and section 58 (failure to pay vacation pay) of the *ESA* with respect to the termination of Heather McNeely’s (“Ms. McNeely”) employment and ordered 4R Pet to pay Ms. McNeely annual vacation pay, compensation for length of service, and interest totalling \$462.39, as well as an administrative penalty of \$500.00. The total amount payable is \$962.39.
3. 4R Pet appeals the conclusion of the Director, alleging the Director erred in law and/or failed to observe the principles of natural justice.
4. In correspondence dated January 28, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal, and advised that following such review all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to 4R Pet and Ms. McNeely and no objections to the completeness of the record were raised by either party. Accordingly, the Tribunal accepts the record as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination, the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
 - (a) *the appeal is not within the jurisdiction of the tribunal;*
 - (b) *the appeal was not filed within the applicable time limit;*
 - (c) *the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;*

- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect that the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more the requirements of section 112(2) have not been met.*

7. If satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

8. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Ms. McNeely was employed by 4R Pet which operates a pet supply store and pet grooming business in Parksville, BC.
10. Ms. McNeely was employed by 4R Pet primarily as a salesperson from June 1, 2018, to December 4, 2018. At the time of termination on December 7, 2018, her pay was \$14.00 per hour.
11. The reason for the immediate termination was Ms. McNeely's use of an employee discount program, no longer available to her, on December 4, 2018; 4R Pet believes this to be theft from the employer.
12. On December 2, 2018, 4R Pet's owner, Ms. Rebecca Stein ("Ms. Stein"), told Ms. McNeely that the 20% employee discount program was being discontinued, although customer discounts would remain, including some at 20%.
13. On December 4, 2018 Ms. McNeely purchased several items using the 10% customer discount, and this resulted in her termination from employment on December 7, 2018.
14. Ms. McNeely filed a complaint alleging 4R Pet had contravened the *ESA* and claiming vacation pay and compensation for length of service following the termination of her employment.
15. During the complaint investigation process, the parties agreed that on December 4, 2018, Ms. McNeely purchased some items using the 10% customer discount. The Employer's position was that this was an intentional act of theft, whereas Ms. McNeely's position was that this was a judgement call in line with her previous practice at the store.

16. 4R Pet provided evidence concerning the discount system which showed Ms. Stein decided who was entitled to a customer discount. Ms. Stein would tell customers about their discount entitlement, the customer would tell staff who would then apply the discount when an item was rung through. The Director found in these circumstances an employee could reasonably interpret this as being a ‘relaxed’ system. This was particularly so as Ms. Stein never told employees that they could be terminated if they didn’t follow the proper procedure regarding discounts.
17. Ms. McNeely stated that she used the customer discount on December 4, 2018, to purchase dog treats for gift bags for customer’s dogs, and that she and Ms. Stein had earlier agreed to providing Christmas gift bags for special customers.
18. Ms. McNeely stated that Ms. Stein encouraged staff to give broken or otherwise unsellable dog treats to customers for free, and on one occasion Ms. McNeely assisted in the removal of spoiled dog food, taking it away in her vehicle because the food would attract crows if thrown into the communal dumpster.
19. Conflicting statements over whether there was a store practice to give away discounted or damaged dog treats, the purpose for which Ms. McNeely took away expired dog food, whether there was an agreement on customer gift bags, and the extent to which Ms. McNeely used the 20% employee discount, could not be resolved in favour of either party, and the Director found that Ms. McNeely’s explanations were plausible.
20. Of note was that that Ms. Stein did not speak to or correct Ms. McNeely over her extensive use of the 20% discount, or for taking away the expired dog food – these were not raised as issues until the investigation. Accordingly, Ms. Stein is not able to use these incidents to support a narrative of dishonest or evasive behaviour on Ms. McNeely’s part.
21. The Determination outlined the correct test, in particular, that in order to find that 4R Pet had just cause to terminate Ms. McNeely’s employment that it is not enough to find that Ms. McNeely misunderstood or misapplied the discount policy – it must be found that Ms. McNeely deliberately and intentionally used the 10% customer discount in order to steal from her employer.
22. The evidence before the Director found it more likely that Ms. McNeely honestly – if incorrectly – understood that she had the ability to apply the discount she used on December 4, 2018, rather than applying the discount in order to steal from the employer.
23. As 4R Pet did not discharge its burden to show that Ms. McNeely was terminated for just cause on the balance of probabilities, she was owed compensation for length of service, vacation pay, and interest.

ARGUMENT

24. 4R Pet reiterates their position that Ms. McNeely’s actions in using the 10% discount after being told not to was deliberate and in order to steal from 4R Pet. This fundamentally breached the trust that underlies the relationship between the employer and employee.

25. 4R Pet disagrees with the Director’s finding that there was a “relaxed customer loyalty system”, citing that Ms. McNeely did not fall into the customer appreciation category, describing the nature of intended recipients (valued customers of Ms. Stein), and the extent of Ms. McNeely’s use of the discount.
26. 4R Pet disagrees with the credibility of Ms. McNeely’s evidence concerning gift bags and queried the timing of the purchases.
27. 4R Pet disagrees that warning of termination is required when the incident resulting in immediate dismissal of an employee is theft or fraud.
28. 4R Pet submits that the evidence before the director was sufficient to illustrate that Ms. McNeely did deliberately and intentionally use the discount without approval or permission.

ANALYSIS

29. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.
30. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
31. In the context of the arguments made by 4R Pet, the error of law alleged to have been made by the Director would have to arise under any one or a combination of a demonstrated error arising under points 3, 4, and 5, in *Gemex, supra*.
32. 4R Pet’s appeal submission argues that the Director was wrong in her assessment of credibility. Credibility assessments are within the purview of the decision maker. The issue about what weight to be given to certain evidence and about credibility are questions of fact, not law. The Tribunal has no jurisdiction to decide appeals on alleged errors of findings of fact unless such findings raise an error or law. Such errors

may include making findings of fact without any evidence or where the evidence does not provide any rational basis for the finding made. The occasions on which an alleged error of fact amounts to an error of law are few (see *Britco Structures Ltd.*, BC EST # D260/03.)

33. The Director specifically addressed the conflicting information within the Determination, and found that Ms. McNeely's evidence was credible, and that the use of the discount was an honest mistake. The employer did not discharge its burden to show that Ms. McNeely was terminated for just cause on the balance of probabilities.
34. At the core of this appeal is 4R Pet's disagreement with the finding that the evidence was not reasonably interpreted by the Director and the reiteration of the employer's original position that Ms. McNeely deliberately stole from or committed fraud against her employer.
35. An appeal is not simply an opportunity to argue the merits of the claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
36. The conclusion reached by the Director was entirely reasonable and firmly grounded in the evidence.
37. The appeal represents no more than a challenge to the conclusions of fact made by the Director based on the evidence presented by the parties; it is an attempt by to have the Tribunal reach different conclusions on the facts that were made by the Director.
38. While it is apparent that 4R Pet disagrees with the Director's ultimate conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable, or that the Director misapplied the law of the *ESA* relating to just cause.
39. As the appeal discloses no error of law, this ground of appeal cannot succeed.
40. 4R Pet alleges that the Director failed to observe the principles of natural justice in making the Determination.
41. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
42. 4R Pet was informed of the case and was provided with an opportunity to respond to the allegations by providing evidence to the Director. 4R Pet was provided with the opportunity to make detailed submissions to the Director which addressed all of the issues that were before the Director. As noted above, it was well within the Director's discretion to conclude that 4R Pet had not met the burden to prove that it had cause to dismiss Ms. McNeely.
43. 4R Pet has not identified any reasonable basis that the Director was biased in favour of Ms. McNeely. That a decision maker has preferred the evidence of one party over another is not by itself evidence of bias. An apprehension of bias must be a reasonable one held by reasonable right-minded persons. (see

Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369 at page 394)
The test is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, thinks regarding whether it is more likely than not, whether consciously or unconsciously, that the decision maker would not decide fairly.

44. The Director heard evidence from both parties, provided the parties with an opportunity to make submissions on the issues and decided the case based on the evidence before her. When applying the applicable legal test for bias above, there is no reasonable basis to think that the Director would not (or did not) decide fairly. I am not satisfied on a balance of probabilities that the Director failed to observe the principles of natural justice in making the Determination.

ORDER

45. The Appellant's appeal is dismissed. Pursuant to section 115 of the ESA, I order the Determination dated December 9, 2019, be confirmed.

Marnee Pearce
Member
Employment Standards Tribunal