

An appeal

- by -

Wiltshire Estates Ltd. carrying on business as Greendale Market
(“Wiltshire”)

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2013A/2

DATE OF DECISION: April 4, 2013

DECISION

SUBMISSIONS

Lloyd Timm

on behalf of Wiltshire Estates Ltd. carrying on business as
Greendale Market

INTRODUCTION

1. Wiltshire Estates Ltd. carrying on business as Greendale Market (“Wiltshire”) appeals a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on December 12, 2012, (the “Determination”). The appeal is filed under section 112 of the *Employment Standards Act* (the “Act”) and is purportedly based on all three statutory grounds, namely, the delegate erred in law and failed to observe the principles of natural justice, and on the basis that Wiltshire now has evidence that was not available when the Determination was being made (see subsections 112(1)(a) to (c)).
2. By way of the Determination, the delegate awarded Wiltshire’s former employee, Ms. Lisa Bertrand (“Bertrand”), a total of 5 weeks’ wages (\$1,332.33 including concomitant vacation pay calculated at 6% given her tenure, and section 88 interest) as compensation for length of service (section 63). In addition, the delegate levied two separate \$500 monetary penalties against Wiltshire. Thus, the total amount payable under the Determination is \$2,332.33. Wiltshire’s principal position is that the Determination should be cancelled since it had just cause to terminate Ms. Bertrand’s employment (see subsection 63(3)(c)).
3. At this juncture, I am considering whether this appeal should be dismissed, either in whole or in part, under subsection 114(1)(f) of the *Act* on the basis that it has no reasonable prospects for success. If I conclude that the appeal wholly lacks merit, it will be dismissed. On the other hand, if the appeal has some presumptive merit, either in whole or part, the Tribunal will advise the respondent parties and seek their submissions regarding the merits of this appeal.
4. I am adjudicating this matter based on the material filed by Wiltshire in support of its appeal and I have also reviewed the delegate’s “Reasons for the Determination” (the “delegate’s reasons”) and the section 112(5) “record” that was before the delegate when she issued the Determination.

THE DETERMINATION

5. Wiltshire operates a corner grocery store in Chilliwack known as the “Greendale Market”. Ms. Bertrand was employed at the store from March 2006 until January 31, 2012, when she was dismissed, allegedly for just cause. Wiltshire maintained that she was stealing funds from the company using a scheme of making phoney purchases and refunding the funds to her own personal bank account. Wiltshire also reported the matter to the local R.C.M.P. I understand that the R.C.M.P.’s investigation resulted in a determination that no theft occurred.
6. Following her termination, Ms. Bertrand filed a timely complaint under section 74 of the *Act* and the parties appeared by teleconference at the complaint hearing held on July 12, 2012. Mr. Lloyd Timm appeared on behalf of Wiltshire and Ms. Bertrand appeared on her own behalf. There were no other witnesses. Although Ms. Bertrand originally sought both compensation for length of service and statutory holiday pay, she subsequently abandoned the latter claim. On December 12, 2012, the delegate issued the Determination and her reasons upholding the complaint, awarding Ms. Bertrand compensation for length of service and

penalizing Wiltshire for having contravened section 63 of the *Act* and for having failed to produce payroll records pursuant to a lawful demand (*Employment Standards Regulation*, section 46).

7. The delegate's central finding on the "just cause" issue was that Wiltshire failed to prove that any theft occurred. As previously noted, it appears that the R.C.M.P. investigation also failed to uncover any clear evidence of a theft. The principal problem appears to be that Wiltshire's business records were rather disorganized. Since Wiltshire did not produce any payroll records, the delegate calculated Ms. Bertrand's unpaid wage entitlement based on her record of hours worked and on a \$14 hourly wage rate (her wage rate does not appear to have been in dispute).

REASONS FOR APPEAL

8. As noted above, Wiltshire appeals the Determination based on all three statutory grounds. Unfortunately, its appeal documents are rather disorganized and are set out in a somewhat rambling and confused fashion. The appeal materials largely consist of various banking statements and account summaries without any supporting summary information about how or why these statements are relevant. Accordingly, I have endeavoured to extract what I understand to be the central thrusts of Wiltshire's appeal from its rather extensive materials.
9. With respect to the first ground of appeal – error of law – Wiltshire's position appears to be that the delegate erred in finding that it did not have just cause to dismiss Ms. Bertrand. I am unable to extract anything in Wiltshire's materials that relates to a possible breach of the rules of natural justice on the delegate's part. The "new evidence", so far as I can tell, consists of several handwritten statements (although one is typed) from various individuals. In general, the thrust of these statements is to cast aspersions on Ms. Bertrand's character and to challenge the veracity of her testimony.
10. With respect to Wiltshire's "new evidence", I note that none of these witnesses testified at the July 12, 2012, complaint hearing (and these statements appear to have been prepared strictly for purposes of the appeal since all are dated near mid-January 2013). Most of these statements are, and I am putting this charitably, only marginally relevant, and there is nothing in Wiltshire's submission that even attempts to explain why these witnesses could not have provided their evidence to the delegate at the complaint hearing. In light of the principles set out in *Davies et al.*, BC EST # D171/03, none of this evidence is admissible under subsection 112(1)(c) of the *Act*.
11. Since Wiltshire has not submitted any evidence or argument relating to a possible failure by the delegate to observe the principles of natural justice, and given that its so-called "new evidence" is, on its face, inadmissible, I shall now turn to the one and only issue that remains, namely, whether the delegate erred in determining Wiltshire failed to prove that it had just cause to dismiss Ms. Bertrand.

ANALYSIS – THE "JUST CAUSE" ISSUE

12. The question of whether an employer has "just cause" for dismissal is a matter of mixed fact and law. In other words, the decision-maker must apply a legal standard to a set of facts (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). When an employer asserts that it has "just cause" for dismissal, it is essentially asserting that the employee has by his or her conduct fundamentally repudiated the employment contract thus entitling the employer to treat the contract as discharged. A contract is not repudiated where the breach is relatively minor; rather, the breach must be substantial and, in the case of an employment contract, the decision-maker must determine "whether the employee's dishonesty gave rise to a breakdown in the employment relationship...for example...just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is

fundamentally or directly inconsistent with the employee's obligations to his or her employer" (*McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at para. 48).

13. While theft, except in the most extraordinary circumstances, would give an employer "just cause" for dismissal, the burden of proving that the employee actually stole the employer's property lies on the employer. The employer must prove, on a balance of probabilities, by evidence that is "sufficiently clear, convincing and cogent" (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 46), that the theft occurred. In the instant case, the delegate concluded, based on a careful evaluation of the evidence before her, that no theft actually occurred. Wiltshire continues to assert that Ms. Bertrand is a thief but that does not change the simple fact that there is no cogent and convincing evidence supporting the assertion. Wiltshire, through Mr. Timm, maintains that "I showed cause for firing" but no matter how forcefully one might assert that something is so, and no matter how fervently one might believe the assertion to be true, decision-makers must rely on credible evidence. Mr. Timm asserts that Ms. Bertrand's evidence was a tissue of "errors, omissions, lies under oath etc." and that the delegate should have seen through her charade. However, in this case, there was simply no clear and cogent *evidence* showing that Ms. Bertrand actually stole any money from Wiltshire.
14. In my view, this appeal must be dismissed under subsection 114(1)(f) as having no reasonable prospect of success.

ORDER

15. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Accordingly, it follows that the Determination is confirmed as issued in the amount of \$2,332.33 together with whatever additional interest that has accrued since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal