Employment Standards TRIBUNAL

An appeal

- by -

3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant
("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 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2013A/5

DATE OF DECISION: April 16, 2013

DECISION

SUBMISSIONS

Moses J. Watson	counsel for 3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant

OVERVIEW

1. 3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant (the "Employer") appeals a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards dated December 24, 2012, in respect of a complaint filed by Luigi Gaudio ("Gaudio").

2. Following a hearing of the complaint conducted on October 12, 2012, the Delegate determined that the Employer had contravened section 63 of the *Employment Standards Act* (the "*Act*") when it declined to pay Gaudio compensation for length of service.

3. The Delegate ordered the Employer to pay wages and interest totalling $4,626.97. The Delegate also imposed an administrative penalty of $500.00. The total payable was, therefore, $5,126.97.

4. I have before me the Employer's Appeal Form and submission, the Determination, the Reasons for the Determination, and the record the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find the matters raised in this appeal can be decided from the Employer's written submissions, the Determination, and the material on the section 112(5) "record".

FACTS

6. At all relevant times the Employer operated a restaurant in Victoria. The restaurant was located in leased premises within a hotel. Gaudio was employed by the Employer as a cook for a period of seven years, from March 15, 2005, until April 4, 2012. On the latter date, he was summarily dismissed by the owner and operator of the Employer, Barry Chan ("Chan").

7. Until the last several weeks of his employment, Gaudio performed well in his position, and had never been the subject of discipline. In Chan's view, however, Gaudio's attitude began to deteriorate in February 2012, after Chan declined to provide a raise in pay that Gaudio had requested.

8. Sometime in February or early March 2012, the manager ("BL") of the hotel premises in which the restaurant was located confronted Gaudio about his smoking at breaks near an entrance to the property. Gaudio did not take kindly to BL's admonition, and responded with profanity. Gaudio reported the incident to Chan, who then spoke to BL. The latter confirmed the substance of what had transpired. Chan told Gaudio to apologize to BL, and assumed that Gaudio had done so.

9. Chan testified that the incident caused him concern, as he believed it might compromise the lease arrangement the restaurant enjoyed with the hotel. However, Chan gave no warning to Gaudio that his employment was in jeopardy as a result of the incident, and he acknowledged that he took no disciplinary action regarding it because Gaudio was an employee who had provided long and valuable service to the Employer.

10. BL testified that Gaudio did not apologize for his conduct. Gaudio testified that he did, in fact, provide a verbal apology to BL some weeks later. The Delegate made no finding as to the giving of the apology, and appears to have considered it of minimal probative value given that Chan did not discipline Gaudio as a result of the incident, gave him no warning that emotional outbursts of the same type could jeopardize his employment, made no reference to it at the time he dismissed Gaudio on April 4, 2012, and stated at the hearing that the smoking incident was not the reason for the dismissal.

11. Another irritant for Chan in the weeks leading to the dismissal was Gaudio's refusal to accept his share of the restaurant's tip pool. Chan stated that Gaudio told him he should keep the tips to buy new equipment. Chan took this suggestion as an affront, and he felt humiliated by it. Gaudio testified that he did not intend to give offence. He said that he knew the restaurant's business was "down," and that his declining to take his share of the tips might assist Chan to provide him with better equipment.

12. Gaudio acknowledged that he was disappointed when Chan declined to give him a raise. He said he was also frustrated by the fact that he came early and stayed late, but that other employees either would not show up for work, or would not perform their duties competently, with the result that he would have to work harder to ensure that all the work got done. Increasingly, the working conditions contributed to Gaudio's feeling "stressed out," and unappreciated.

13. The tensions in the restaurant came to a head on April 4, 2012. Gaudio felt pressured that day because a wine and cheese party had been added to his regular workload. In addition, Chan asked the employee ("P") who normally washed dishes, to assist with food prep. A further aggravating factor was that Gaudio had decided to try to quit smoking, and had not had a cigarette at all during that day.

14. At 2:00 pm, the end time for Gaudio's morning shift, Gaudio decided to stay late to wash the dishes left unattended due to P's re-assignment. Chan entered the kitchen and asked why the dishes were still dirty. Gaudio reacted poorly. He responded with profanity. The Delegate made no specific finding about who started to yell first, but everyone who observed what transpired during the following few minutes agrees that Gaudio and Chan commenced to engage in a heated discussion in which both their voices were raised to a point that was well beyond a level that was necessary in order for them to be clearly heard.

15. Gaudio offered a gratuitous, and negative, opinion to Chan about the quality of P's work, and P's marginal value to the restaurant operation, given his advancing age. Chan told Gaudio that it was his restaurant and he could operate it as he chose. He also told him that he was "out of control" and that he should "take tomorrow off."

16. A third party, Gaudio's wife ("SM"), then opened the door into the dishwashing area. She had come to pick up Gaudio, as his shift had ended. As the door was open, permitting guests to overhear the argument, and Gaudio had not ceased to lower his voice despite a request from Chan to do so, Chan told Gaudio that rather than refraining from coming in the next day he "shouldn't come in forever."

17. Before the Delegate, the Employer took the position that while Gaudio might not have been himself on April 4, 2012, whether due to his deciding to quit smoking, or for any other reason, it did not excuse his

insubordinate outburst. For the Employer, Gaudio's conduct provided grounds for immediate dismissal because it constituted a fundamental challenge to Chan's authority. As such, it caused irreparable harm to the employment relationship. The outburst was even more culpable because it occurred not only in the presence of several other employees, but also within earshot of guests at the hotel.

18. Gaudio's position at the hearing was that he had become angry, to be sure, because the restaurant had been busy, he was staying late at work, and he had not taken a break since the beginning of his shift. He acknowledged that he used profanity in his initial exchange with Chan, but that language of that sort was not uncommon in the kitchen. This fact was confirmed by other witnesses at the hearing, and Chan did not deny it.

19. Gaudio said that he only commenced to yell after Chan began to yell at him. He stated that he and Chan had had heated disagreements before – usually concerning equipment that had fallen into disrepair, and the performance of other employees – but that these discussions had normally taken place in Chan's office. He also stated that Chan was "hot-headed," he never warned Gaudio that his job was in jeopardy unless he lowered his voice, and that he was fired only after Chan himself descended into "a fit of rage."

20. The Delegate decided that the facts presented did not warrant a conclusion that the Employer had proven that Gaudio was properly dismissed for just cause. The Delegate's analysis is captured in the following excerpts from her Reasons:

> The question central to this case is whether or not a heated argument between the Complainant and his Employer, witnessed by other employees and potentially patrons, is cause for dismissal of a seven year employee with no previous record of discipline. I do not believe that it is.
>
> I do agree with the Employer that yelling at your supervisor in front of other employees is behaviour worthy of discipline. Had Mr. Chan sent the Complainant home for a day, as he threatened to do, he may have been well within his rights as an employer. What Mr. Chan fails to consider is that, by all accounts he was a willing and active participant in the argument. Given the argument and flared tempers I witnessed between the parties during the adjudication, I have no difficulty believing that both gentlemen were equal participants in the argument. Mr. Chan claims he was forced to fire the Complaint in order to "stop the madness." Mr. Chan had other options of leaving the kitchen or taking the discussion to his office. He did neither. Instead, he chose to immediately terminate a long-term employee with no record of discipline.
>
> There are a number of scenarios that may have allowed for a finding of just cause. After the incident with [BL], Mr. Chan could have disciplined the Complainant and put him on notice that further emotional outbursts would result in his dismissal. Similarly, he could have disciplined the Complainant on April 4th and put him on notice at that point that his job would be in jeopardy if outbursts like that happened in future. Had the Complainant threatened, assaulted or insulted Mr. Chan those actions may have fairly resulted in dismissal. None of these things happened. I accept the evidence that the parties were arguing about how to run the kitchen with raised voices. Mr. Chan took umbrage with what he saw as a challenge to his authority and fired the Complainant. He made a rash decision in an attempt to end an argument.

ISSUE

21. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

22. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 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.

23. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

24. The Employer submits that the Delegate erred in law, and that she failed to observe the principles of natural justice when making the Determination. It says that the Determination should be varied to declare that Gaudio was properly dismissed or, alternatively, that the Determination should be cancelled.

Error of Law

25. In a helpful submission prepared by its counsel, the Employer makes reference to the leading authority on just cause in Canada: *McKinley v. BC Tel* [2001] SCJ No. 40. In that decision, the Supreme Court of Canada endorsed a contextual approach when an employer considers whether an employee should be summarily dismissed for just cause. That approach requires, as a matter of law, that the circumstances surrounding the specific act of misconduct must be examined before the decision is made. Put differently, the act of misconduct must not be analyzed in isolation. Factors such as the nature and degree of an employee's misconduct, and whether it violates the essential conditions of the contract of employment, must all be evaluated when drawing conclusions as to the existence of just cause.

26. Notwithstanding this legal admonition, it is important to remember that the question whether an employee has been dismissed for just cause is not purely a question of law. Rather, it is a question of mixed law and fact (see *Panton v. Everywoman's Health Centre Society* [2000] BCJ No.2290 at paragraph 7). Questions of mixed law and fact are questions about whether the facts in a case satisfy the relevant legal tests. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.* BC EST # D260/03). By way of example, an extricable error on a question of law would occur if the decision-maker has applied an incorrect legal standard to the facts as found.

27. Questions of fact, *simpliciter*, are questions about what actually took place between the parties. They are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by

the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's finding of fact if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

28. The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., supra*).

29. In the context of cases dealing with contracts of employment where just cause is in issue, *McKinley* decides that it is for the trier of fact to determine, first, whether the evidence reveals employee misconduct and, second, whether the circumstances in which the misconduct occurred were sufficient to justify the employee's summary dismissal (see the review of the authorities in *McKinley* at paragraphs 35-39, and 49). Neither of these questions, then, can be said to be an extricable question of law of the type that is reviewable on an appeal to the Tribunal, absent palpable and overriding error.

30. I am not persuaded that the Delegate committed palpable and overriding error when she considered Gaudio's conduct, and determined that it was insufficient, in the circumstances, to justify summary dismissal.

31. In *McKinley*, the court stated that a fundamental element of the contextual approach is the principle of proportionality. That principle mandates that a balance must be struck between the severity of the employee's misconduct and the penalty that is imposed. The necessity for striking a balance is rooted in the sense of identity and self-worth that individuals derive from their employment. The court said this, at paragraph 54:

> Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship.... [S]uch relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position vis-a-vis their employers.... [S]uch vulnerability remains in place, and becomes especially acute, at the time of dismissal.

32. The Employer argues that Gaudio's behaviour was demeaning and disrespectful, and that his comments to Chan regarding P's performance, as well as his refusal to accept tips, shows that he was dealing with Chan in a manner that was condescending, uncooperative, and insolent.

33. I do not infer from the Delegate's Reasons that she can be said to have disagreed, fundamentally, with these characterizations. The Delegate concluded that Gaudio had misconducted himself. What she decided, as a matter of fact, however, was that Gaudio's misconduct did not warrant summary dismissal.

34. There were several factors that persuaded the Delegate that summary dismissal was too severe a sanction for Gaudio.

35. Chan did not follow up with Gaudio or BL concerning the smoking incident. He did not determine whether Gaudio had indeed apologized. He never issued a warning to Gaudio that a further outburst could jeopardize his employment. He did not mention the incident involving BL when he dismissed Gaudio, and acknowledged that it was not the reason for the dismissal. The Employer argues that the incident with BL

provided grounds for a legitimate concern on Chan's part that Gaudio's temper might jeopardize the Employer's lease of its premises at the hotel. However, this concern was never communicated to Gaudio.

36. Gaudio was an employee with seven years' service and no record of discipline. In *McKinley*, the court referred with approval to previous authority stating that the misconduct must be more serious in order to justify the dismissal of a longer serving employee whose work has contributed to the success of his employer. By all accounts, Gaudio's work was never an issue for the Employer. At the hearing, Chan acknowledged that Gaudio was "never late," and was a "hard worker." Given Gaudio's work record, and in the absence of a history of discipline for similar outbursts in the past, one could expect that an incident of misconduct of the type that occurred on April 4, 2012, would have to be particularly egregious to warrant the ultimate penalty of dismissal.

37. In her Reasons, the Delegate questioned why Chan did not discipline Gaudio after the BL smoking incident, and warn him that similar outbursts would result in dismissal. She questioned why Chan did not discipline Gaudio on April 4, and warn him then that his behaviour would not be tolerated in future. She also queried why Chan did not simply leave the kitchen, or direct Gaudio to continue the discussion in his office. Chan did none of those things, and no explanation is provided in the submissions of the Employer on this appeal.

38. The Employer argues that when Chan told Gaudio on April 4, 2012, that his yelling was unacceptable, and warned him that if it continued he should not come to work the following day, it amounted to a warning that if his attitude did not improve, his employment would be in jeopardy. Neither Gaudio nor SM appear to have made reference to this warning in their evidence. Nevertheless, and with respect, I think that Chan's statements would be taken by a reasonable person in Gaudio's position to mean exactly what was said, namely, that if Gaudio did not stop yelling, he would have to take a day off work. I do not believe that a reasonable person could have expected that if he continued to yell he would be fired.

39. The Employer submits that the confrontation on April 4, 2012, meant that the employment relationship could no longer viably subsist. I have no doubt that this was the view of Chan on the day in question, and thereafter. However, the test is objective. The Delegate found that both men were yelling at the relevant time. She also found that arguments of a similar nature regarding the operation of the kitchen had occurred between these individuals before, in circumstances where voices were raised, and no discipline had ensued. True, the previous heated exchanges appear to have occurred in Chan's office, but it was Chan who was prepared to raise his voice in the kitchen along with Gaudio on April 4. A reasonable person in Gaudio's position on that day might have concluded, therefore, that this was but another exchange, akin to those that had occurred previously, albeit in a different venue.

40. The Employer argues that the size difference between Gaudio and Chan is significant. I confess I saw no reference to this fact in the Delegate's Reasons. Moreover, she found as a fact that Gaudio did not threaten, assault, or insult Chan during the incident on April 4.

41. Given the evidence of the nature of the employment relationship between the Employer and Gaudio to which I have referred, the Delegate appears to have concluded that the single incident of yelling on April 4, 2012, which one could construe as but a more serious example of behaviour on Gaudio's part in respect of which he had received no discipline previously, was insufficient to warrant summary dismissal. I cannot conclude that there is anything perverse or inexplicable about the Delegate's findings of fact in this case. It follows that I cannot say the Delegate committed an error of law in reaching her conclusions regarding the existence of just cause.

Failure to Observe the Principles of Natural Justice

42. The Employer argues that "suspicious events" transpired at the hearing which warrant a finding that the Delegate failed to observe the principles of natural justice. Gaudio attended the hearing by telephone, as did his principal witness, his wife, SM. The Employer says that the Delegate instructed Gaudio to ensure that when he was giving his evidence he was alone and could not be overheard. When SM gave her evidence, it was revealed that she had entered the room where Gaudio was testifying by phone. SM swore, however, that she did not hear anything.

43. The Employer challenges this assertion and submits that the Delegate should have commented negatively on the credibility of both Gaudio and SM in her Reasons, given the circumstances under which they tendered their evidence. As the Delegate did not do so, the Employer submits that the fairness of the hearing was compromised in a way that was prejudicial to the Employer, and so the Determination should be cancelled.

44. In her Reasons, the Delegate did address the issue of SM's evidence, and the possibility that she overheard what other witnesses were saying before she was called upon. The Delegate noted that SM swore that she overheard nothing. She also pointed out that SM's evidence was different from that of her husband and the other witnesses, which indicated that SM had not altered her evidence in light of what the other witnesses had said.

45. Given that SM swore she had overheard no testimony from previous witnesses, and there was no objective evidence sufficient to prove the contrary, I cannot say that the fairness of the hearing was compromised because the Delegate permitted SM testify, and declined to make any adverse comment as to her credibility in her Reasons.

46. I also note that in her Reasons the Delegate states that SM had provided a written statement of her evidence, and that its contents did not materially differ from the account she delivered at the hearing. This would also support a finding that SM's evidence was not influenced by anything she might have overheard on the telephone.

47. The Employer states that there was one similar aspect to the evidence of both Gaudio and SM. It was evidence to the effect that both Gaudio and SM were of the view that Chan intentionally provoked Gaudio into losing his temper on April 4, 2012, in order to fire him. While the evidence of Gaudio and SM may have been similar on this point, it does not appear to have influenced the Delegate when it came time to issue the Determination. There is nothing in the Delegate's Reasons which indicates she gave credence to, or placed any weight on, this suggestion of a motive for Chan's conduct on the relevant day.

48. The Employer also says that SM's evidence should be discounted because she stated that she "heard everything" that was said by Chan and Gaudio when she entered the dishwashing area on April 4, 2012, yet she did not hear Chan warn Gaudio to stop yelling or he would be required to refrain from coming to work the following day. Again, I fail to see that anything turns on this. The Delegate found as a fact that Chan warned Gaudio that he would lose a shift if he did not stop yelling. By inference, then, the Delegate can be said to have decided that the evidence of neither Gaudio nor SM was reliable on this point.

49. I cannot conclude that the Employer has shown that the Delegate failed to observe the principles of natural justice at the hearing, or at all.

ORDER

50. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Robert E. Groves
Member
Employment Standards Tribunal