

An appeal

- by -

Bogie & Bacall Hair Design Inc.
("B&B")

- 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: Carol L. Roberts

FILE No.: 2008A/38

DATE OF DECISION: June 6, 2008

DECISION

SUBMISSIONS

Don J. Johnson	counsel for Bogie and Bacall Hair Design Inc.
Joe Leblanc	on behalf of the Director of Employment Standards
Tamara Turner	on her own behalf

OVERVIEW

1. This is an appeal by Bogie and Bacall Hair Design Inc., ("B&B"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 4, 2008.
2. Tamara Turner worked as a hairstylist for B&B, a hair salon, from May, 2005 until May 23, 2007. She filed a complaint alleging that B&B had contravened the *Act* in failing to pay her compensation for length of service. B&B contended that Ms. Turner quit her employment and was therefore not entitled to compensation.
3. The Director's delegate held a hearing into Ms. Turner's complaint on October 23, 2007. B&B was represented by the salon manager, Rod Robinson. Ms. Turner appeared on her own behalf.
4. Following the hearing, the delegate determined that B&B had substantially altered a condition of Ms. Turner's employment. He exercised his discretion to determine that Ms. Turner's employment had been terminated as a consequence. The delegate concluded that Ms. Turner was entitled to compensation for length of service.
5. The delegate determined that B&B had contravened Sections 58 and 63 of the *Employment Standards Act* in failing to pay Ms. Turner vacation pay and compensation for length of service. He concluded that Ms. Turner was entitled to wages and interest in the total amount of \$1,243.34. The delegate also imposed a \$500 penalty on B&B for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
6. B&B contends that the delegate erred in law in finding that B&B had substantially altered a condition of Ms. Turner's employment.
7. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). B&B did not seek an oral hearing. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

8. Did the delegate err in concluding that B&B had substantially altered a condition of Ms. Turner's employment?

FACTS AND ARGUMENT

9. According to the Determination, when Ms. Turner arrived at work on May 23, 2007, Mr. Robinson indicated that he wanted to speak to her. Mr. Robinson was upset because Ms. Turner had left him a note about the work schedule. The discussion became heated and Mr. Robinson told Ms. Turner that she was being disrespectful and asked her to lower her voice. When she did not do so, Mr. Robinson became angry. According to Mr. Robinson, Ms. Turner was waving her finger in his face and yelling at him. Mr. Robinson grabbed Ms. Turner's arm and told her either to "shut up or calm down", or words to that effect. He immediately apologized for grabbing her arm. Ms. Turner told Mr. Robinson that she could not work that day and left the salon.
10. Approximately two hours later, Mr. Robinson was contacted by the RCMP. Although no charges were laid, the RCMP told him not to contact Ms. Turner. Ms. Turner and her boyfriend collected her possessions from the salon later that day. She said that she was so shaken by the events of that day she no longer felt safe going to the salon and had to quit her employment.
11. The delegate heard evidence from a witness on Ms. Turner's behalf who indicated that Ms. Turner called her shortly after the incident and told her that she felt intimidated by Mr. Robinson because of this and some earlier incidents. The witness also testified that when she met Ms. Turner shortly after the phone call, she noticed that Ms. Turner had bruises on her forearm where Mr. Robinson grabbed her.
12. Ms. Turner also submitted a statement at the hearing. The delegate does not identify whether the witness was another salon employee, either past or current. The witness indicated that Mr. Robinson also grabbed her arm during a heated discussion and attempted to have her kicked out of a hairdressing program she was enrolled in. Mr. Robinson denied the allegations, calling them "a total fabrication". The delegate indicated that he gave no weight to the statement because it was unsworn and the author was not present to be questioned on its contents.
13. Mr. Robinson denied that he caused bruising on Ms. Turner's arm. He said that he only pulled her arm down because Ms. Turner was waving her finger in his face and he was trying to get her to calm down.
14. Mr. Robinson testified that he was upset by the incident as Ms. Turner was one of his best employees and was not seeking a confrontation with her. He disputed that Ms. Turner was too afraid of him to return to work; rather, he alleged that she wanted to, and did, open her own business. He contended that Ms. Turner quit and that she was not entitled to compensation.
15. Ms. Turner agreed that she had opened her own shop but said that it was because she was too afraid to return to B&B.

16. The delegate concluded that B&B had not provided Ms. Turner with a safe workplace environment. He cited *Haggarty v. McCulloch* (2002 ABPC 3 (QL)):

... an employer has a duty to provide a safe and proper place of work for its employees. This duty may be stated as more than a mere obligation to provide a safe place of work but an obligation to take precautions to safeguard employees from injury.
17. The delegate relied on *Morgan v. Chukal Enterprises Ltd.* ([2000] BCJ 1563 (QL)) to find that it was a condition of employment that an employee is entitled to decent treatment by their employer:

A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect and dignity.
18. The delegate then concluded that an employer's failure to provide a safe and secure work place, or a work place where the employee did not feel safe, constituted a circumstance that affected the employment relationship

particularly where these feeling exist due to the physical actions of the employer. If this perception of an unsafe work environment were generated by a dispute between the employees redress could and probably should be sought through the employer. However where it is the employer that is the source, the employee is placed in an intolerable situation where leaving employment is the only viable option.
19. The delegate accepted Mr. Robinson's evidence that he was not looking for a confrontation and that things got out of control when Ms. Turner began yelling at him and waved her finger in his face. However, he found that the confrontation escalated to a point "where a line was crossed; a line that must be recognized and respected by employers in order to maintain a safe and healthy work environment". He concluded that Mr. Robinson substantially altered a condition of Ms. Turner's employment that day, and that, as a consequence of that treatment, she reasonably felt she could not return to work.
20. The delegate determined that Ms. Turner was terminated when Mr. Robinson substantially altered a condition of her employment and that she was entitled to compensation for length of service.
21. Although B&B's grounds of appeal are on an error of law, it asserts additional facts. While B&B does not dispute any of the evidence as set out by the delegate, it adds that the note left by Ms. Turner indicated that she was refusing to work a shift for which she had been scheduled. It also says that Mr. Robinson spoke to Ms. Turner behind a wall but within hearing range of other employees and customers.
22. B&B submits that Ms. Turner's refusal to work a shift for which she had been scheduled, yelling and swearing at Mr. Robinson when asked about it and her continued yelling and swearing after being asked to stop, constitutes insubordination. It says that this single act of insubordination can constitute immediate grounds for dismissal. B&B argues that the delegate erred in failing to conclude that Ms. Turner's insubordination and insolence warranted immediate termination, and that her behaviour precluded his conclusion that B&B had substantially altered a condition of Ms. Turner's employment.

23. B&B argues that it was Ms. Turner who fundamentally breached the employment contract and that the delegate erred in his conclusion.
24. B&B further argues that the delegate erred in failing to find that Ms. Turner consented to the touching which formed the basis for applying section 66 of the Act. It submits that, by swearing and yelling at Mr. Robinson and waving her finger in his face, Ms. Turner “invited some type of response, which in this case was that he grabbed her arm and pushed it down”. It contends that Ms. Turner’s actions cannot found the basis for a conclusion that Mr. Robinson substantially altered a condition of employment when Ms. Turner brought it on herself.
25. Ms. Turner’s submission also adds additional evidence. She says that Mr. Robinson had called her unprofessional and disrespectful immediately after reading her note. She says that when she attempted to explain that she did not intend to be disrespectful, the matter escalated. She said that Mr. Robinson grabbed her arm when she attempted to stand up for herself. She says she was merely trying to defend herself and “had to leave the salon once he put me in physical danger”. She says that the RCMP officer told her that Mr. Robinson apologized for hurting her and expected her to return to the salon. Ms. Turner alleged that Mr. Robinson had a “history” with “these kinds of situations”.
26. The delegate says that, at the hearing, B&B never argued that Ms. Turner’s conduct warranted immediate termination. He says that Mr. Robinson argued that Ms. Turner left her employment voluntarily and that she was not, therefore, entitled to compensation. The delegate contends that B&B’s argument is not properly raised for the first time on appeal. The delegate further submits that it cannot be an error of law to fail to make a decision on an argument that was not advanced at the hearing.
27. The delegate also submits that there was no argument, nor any finding, that Ms. Turner consented to be touched and a submission that she did strains the integrity of B&B’s appeal. He submits that her actions after the event cannot be characterized as indicative of consent and that there was no evidence to support such a conclusion.
28. The delegate submits that B&B has not met the burden of demonstrating that the Determination is in error and seeks to have the Determination confirmed.
29. In reply, counsel for B&B submits that it is not relying on new evidence. Mr. Johnson says that Mr. Robinson is a lay litigant and it is the delegate’s duty to apply the law to the evidence that was submitted at the hearing. He says the delegate cannot expect lay parties to know the law of constructive dismissal or what conduct might warrant immediate dismissal, but it is the delegate’s duty to apply the appropriate law to the facts.
30. Mr. Johnson also argues that the delegate misapplied an applicable principle of general law in not finding that Ms. Turner’s conduct warranted immediate dismissal. He further argues that if Ms. Turner breached the employment contract in a way that permits summary dismissal she cannot be heard to say that she has remedies due to the employer’s breach.

ANALYSIS

31. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made

Error of Law

32. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
33. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
34. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
35. In her complaint form, Ms. Turner alleged that she was entitled to compensation for length of service because she felt it was unsafe for her to return to work after an incident with her boss. B&B's response was that Ms. Turner had quit.
36. The delegate chose to hold an oral hearing into Ms. Turner's complaint rather than conduct an investigation. When the delegate elects to inquire into a complaint this way, he conducts the hearing as a judge might, hearing evidence and argument from both parties. (see *Kyle Freney* BC EST #D130/04) At an oral hearing, the parties are expected to provide whatever evidence they have in support of their respective positions.
37. The parties advanced the arguments above before the delegate at the hearing. Although counsel for B&B contends that the delegate ought to have found that Ms. Turner's actions constituted insubordination, Mr. Robinson did not suggest that they did so before the delegate. While I agree that it is incumbent on the delegate to inquire into all the facts and circumstances that may be relevant to a complaint particularly if the parties are lay litigants, as they often are, it is not the delegate's duty to make arguments on their behalf. Counsel cited no authority for his position and in my view it would be a breach of the principles of natural justice if the delegate appeared to be making a case for one party.

38. I do not agree that the delegate had a duty to determine whether or not Ms. Turner's conduct constituted insubordination in the absence of any submissions by B&B on that issue.
39. I also find no merit in B&B's submission that Ms. Turner either consented to Mr. Robinson's touching or in some way provoked Mr. Robinson's response and will not address it further.
40. Nevertheless, I find the delegate's conclusion that B&B substantially altered a condition of Ms. Turner's employment to be unsustainable.

41. Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination. Conditions of employment mean all matters and circumstances that in any way affect the employment relationship (section 1 of the *Act*). However, not all changes will constitute termination. They must be substantial, or “sufficiently material that it could be described as being a fundamental change in the employment relationship”. (see *Helliker* BC EST #D338/97, a reconsideration of *Stordoor Investments Ltd* BC EST#D357/96)
42. The test of what constitutes a substantial change includes a consideration of the following factors:
- a) the nature of the employment relationship;
 - b) the conditions of employment;
 - c) the alterations that have been made;
 - d) the legitimate expectations of the parties; and
 - e) whether there are any implied or express agreements or understandings
- (*Helliker, A.J. Leisure Group Inc.* BC EST #D036/98 and *Big River Brewing Company Ltd.* BC EST #D324/02)
43. Furthermore, the employer’s motives or the employee’s perception of the change is irrelevant; an objective assessment of the employer’s action is required.
44. While I do not disagree with the delegate’s general statements that an employee is entitled to a safe workplace and that it is an employer’s duty to provide one, I am unable to agree that there was a factual basis for the delegate’s conclusion that there was a substantial change to Ms. Turner’s conditions of employment.
45. Although the delegate sets out evidence in the Determination, he makes no explicit findings of fact. While he appears to accept that Mr. Robinson grabbed Ms. Turner’s arm, he makes no assessment of the credibility of the parties nor does he indicate what weight he gives to their evidence. For instance, Ms. Turner’s witness, who the record indicates is her foster mother, testified she saw bruises on Ms. Turner’s arm shortly after Mr. Robinson grabbed it. Although Mr. Robinson acknowledged grabbing Ms. Turner’s arm, allegedly because she was yelling and waving her finger at him, a statement Ms. Turner did not dispute, he denied that he grabbed it hard enough to cause any bruising. There is nothing in the Determination that sets out the factual foundation for the delegate’s analysis on whether there had been a substantial change in the conditions of Ms. Turner’s employment apart from a finding that Mr. Robinson grabbed Ms. Turner’s arm to stop her waving her finger at him.
46. Although the delegate relied on a case upholding a claim for constructive dismissal where one employee exhibited significant rudeness and hostility towards another for an extended period of time, there is no evidence that Ms. Turner was subjected to a “poisoned” work environment. Ms. Turner had worked at B&B for two years prior to this incident and all of the evidence pointed to this incident being an isolated one. In light of the evidence, I am not persuaded that the cases relied upon by the delegate were sufficiently similar for him to arrive at a similar conclusion in this instance.

47. Furthermore, whether or not Mr. Robinson's actions caused Ms. Turner to have bruises on her arm, the delegate did not objectively assess Mr. Robinson's actions. He appeared to place significant reliance on Ms. Turner's perceptions without assessing whether those were reasonable in the circumstances.
48. I allow the appeal and set aside the Determination.

ORDER

49. I Order, pursuant to Section 115 of the Act, that the Determination, dated March 4, 2008, be cancelled and that the Respondent's complaint be referred back to the Director of Employment Standards for a new hearing.

Carol L. Roberts
Member
Employment Standards Tribunal