

An appeal

- by -

Valerie Hartt
(“Hartt”)

- 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: Shafik Bhalloo

FILE No.: 2010A/56

DATE OF DECISION: June 28, 2010

DECISION

SUBMISSIONS

Raelene Fitz	on behalf of The Good Samaritan Society
Theresa Robertson	on behalf of the Director of Employment Standards

OVERVIEW

1. Valerie Hartt (“Ms. Hartt”) was employed as a Health Care Aid (“HCA”) with the Good Samaritan Society (“Good Samaritan”) at its seniors’ care facility in Kelowna called Mountainview Village (“Mountainview”) from July 17, 2007, to July 8, 2009, when her employment was terminated by Good Samaritan for cause.
2. On July 28, 2009, within the time period allowed under the *Employment Standards Act* (the “*Act*”), Ms. Hartt filed a complaint, alleging that Good Samaritan contravened the *Act* by failing to pay her compensation pay for length of service upon the termination of her employment (the “Complaint”). A delegate of the Director (the “Delegate”) conducted a hearing into Ms. Hartt’s Complaint over two (2) days on November 5 and December 17, 2009 (the “Hearing”). Ms. Hartt attended at the Hearing on her own behalf and attending on behalf of Good Samaritan were its Human Resources Manager and Human Resources Coordinator, Raelene Fitz (“Ms. Fitz”) and Barb Rathwell (“Ms. Rathwell”) respectively. Good Samaritan also produced several other witnesses at the Hearing including some colleagues of Ms. Hartt.
3. At the Hearing, Good Samaritan argued that it had just cause to dismiss Ms. Hartt and thus was not subject to any obligation to pay her compensation pay for length of service when it terminated her employment. Through the direct testimonies of its witnesses, Good Samaritan submitted numerous incident reports, investigation notes and disciplinary letters to support its position and to show that Ms. Hartt failed to perform her duties as an HCA to the standards expected by Good Samaritan. The evidence of the witnesses also showed that Good Samaritan made a concerted effort to provide her with guidance to meet the standards expected of her and when she failed to meet those expectations, Good Samaritan administered discipline in the form of warnings and suspensions. The evidence of the witnesses also confirmed that Ms. Hartt was apprised that her employment with Good Samaritan was in jeopardy if she failed to improve her performance as specified by Good Samaritan. Subsequently, when she failed to improve her performance and it was clear to Good Samaritan that the health and well-being of those under Ms. Hartt’s care was at risk, Good Samaritan had little choice but to dismiss Ms. Hartt for cause.
4. On Ms. Hartt’s part, she disputed whether some of the incidents Good Samaritan alleged took place as reported, or whether they took place at all. The Delegate in concluding that Good Samaritan had cause to terminate Ms. Hartt’s employment, assessed the veracity of the testimony surrounding the incidents Ms. Hartt disputed. While I have carefully reviewed the submissions of both parties pertaining to the incidents in dispute, I do not find them necessary to reiterate here. I do note that the Delegate, in reviewing the same applied the correct test for assessing credibility of witnesses delineated in the oft-quoted decision of the British Columbia Court of Appeal in *Farnya v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.) and went on to conclude:

Applying the tests set out in *Farnya v. Chorny*, Ms. Hartt’s recollection and accounts of the events lack clarity and consistency. Overall, I preferred Good Samaritan’s account of the events leading to its decision to dismiss Ms. Hartt and therefore accept that the events occurred as described by the employer.

The only matter now to be decided is whether Good Samaritan has proven it had cause to dismiss Ms. Hartt without compensation. Based on the foregoing, I am satisfied that Ms. Hartt took a number of actions that were contrary to Good Samaritan's protocols with regard to resident care, I am satisfied that she was made aware of the employer's concerns in this regard and I am satisfied that she was warned on May 22, 2009, her job was in jeopardy if her performance did not improve. In addition, I am also satisfied that Good Samaritan made what efforts it could to assist Ms. Hartt in improving her performance. Finally, I am satisfied that subsequent to the May 22nd warning, Ms. Hartt, on several occasions, failed to meet the performance standards expected and as such the employer had cause to dismiss her.

In conclusion I find Good Samaritan has met the onus of proving it had just cause to dismiss Ms. Hartt without notice or compensation for length of service.

5. As a result, the Delegate found that there was no contravention of the *Act* on the part of Good Samaritan and that no wages were owed to Ms. Hartt for length of service at the time her employment was terminated. Accordingly, the Delegate dismissed Ms. Hartt's Complaint in her determination dated March 17, 2010 (the "Determination").
6. On April 23, 2010, within the time limit for filing an appeal, Ms. Hartt appealed the Determination. In the Appeal Form, while Ms. Hartt is requesting the Tribunal cancel the Determination, she leaves unchecked the boxes in paragraph 2 of the Appeal Form that call for the appellant to check-off grounds of appeal. However, she makes some limited written submissions on the Appeal Form in support of her appeal which submissions I will review under the heading "Submissions of Ms. Hartt" below.
7. Pursuant to section 36 of the *Administrative Tribunals Act* (the "ATA"), which is incorporated in the *Act* pursuant to section 103 and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this case neither party has requested an oral hearing of the appeal and in my view the appeal may be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

8. Is there any appealable error identified in the submissions of Ms. Hartt such as to warrant a cancellation of the Determination?

SUBMISSIONS OF MS. HARTT

9. Ms. Hartt's written submissions are very brief and contained in the small blank space provided under the signature line in the Appeal Form and because of their brevity; I propose to set them out verbatim below:

@ ARBITRATION HEARING

I WAS MISQUOTED AS WRITTEN IN DETERMINATION LETTER
WITNESSES FROM EMPLOYER LIED

MY VIEWS WERE NOT PROPERLY OR FAIRLY REPRESENTED

I WISH TO APPEAL THIS DETERMINATION

SUBMISSIONS OF GOOD SAMARITAN

10. Ms. Fitz, on behalf of Good Samaritan, responded in writing stating that Ms. Hartt has failed to indicate her grounds of appeal and that the statement of Ms. Hartt in her Appeal Form (which is set out verbatim under the preceding heading) fails to support any grounds of appeal under the *Act*.
11. With respect to Ms. Hartt's allegation that she was misquoted in the Determination, Ms. Fitz submits that the Determination contains no direct quotes from Ms. Hartt and that Good Samaritan finds the Determination to be "a very accurate and factual account of the hearing into this matter".
12. Ms. Fitz further submits that all witnesses of Good Samaritan were required to swear an oath prior to giving their statements and Ms. Hartt was provided an opportunity to cross examine them, but failed to demonstrate through her cross examination "that any of the witnesses were not telling the truth".
13. Ms. Fitz further submits that Ms. Hartt, in representing herself at the Hearing, "stated repeatedly that she was consulting with legal counsel" and she was "uniquely qualified to represent her own views" and therefore it is inaccurate for her to say that "her views were not properly or fairly represented".
14. Finally, Ms. Fitz submits that this is a case of Ms. Hartt being unhappy with the outcome of the Determination, but her disappointment in the outcome does not constitute a ground for appeal under the *Act*.

SUBMISSIONS OF THE DIRECTOR

15. The Director states that the Determination "speaks for itself regarding the findings related to Ms. Hartt's complaint".
16. The Director further submits that Ms. Hartt's Appeal does not contain any or sufficient particulars or examples to support Ms. Hartt's allegations, and is simply an attempt on the part of Ms. Hartt to re-argue her position.
17. The Director also states that while one cannot respond to Ms. Hartt's allegations in light of her failure to provide particulars in support of her general allegations, the delegate, in the Determination, assessed conflicting testimony of the parties and where necessary provided reasons as to why one party's testimony was preferred over the other. Furthermore, the Director notes, in response to Ms. Hartt's contention that her views were not properly or fairly represented at the Hearing, that the Hearing was adjourned for approximately six (6) weeks at Ms. Hartt's request to allow her to "deal with personal issues and to seek legal counsel".

ANALYSIS

18. The *Act*, in section 112(1) delineates the limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director. The section reads as follows:
 - 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.

19. The onus is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which the appellant's appeal may be dismissed.
20. In this case, the appellant, Ms. Hartt, as indicated by Ms. Fitz in her submissions, has failed to identify on the Appeal Form her grounds for appealing the Determination. However, failure to check-off the boxes identifying the grounds of appeal on the Appeal Form is not, in itself, fatal to an appellant's appeal. This Tribunal in *Re Flour Child Bakeries Corp.*, BC EST # D094/06, adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, wherein the Tribunal expressed the view that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off". In *Triple S Transmission Inc.*, the Tribunal stated:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.
21. Adopting the view expressed in *Triple S. Transmission Inc.* above, I have reviewed the very limited written submissions of Ms. Hartt set out on the Appeal Form with a view to determining the nature of Ms. Hartt's challenge of the Determination and whether that challenge invokes any of the statutory grounds of appeal. However, as with the Director, I find that Ms. Hartt's submissions are lacking any specificity when she states that she was "misquoted as written in the Determination" or that "witnesses from employer lied" or that her "views were not properly or fairly represented". It is not for me to divine particulars in support of the said allegations. The onus is on Ms. Hartt as an appellant to provide sufficient particulars in support of her general allegations.
22. Having said this, I have reviewed very carefully the Reasons for the Determination, including the section 112(5) "record" and the written submissions of the parties, and find that there is no statutory basis for Ms. Hartt's appeal. In my view, the delegate properly applied the principles of law governing the determination of the credibility of witnesses and arrived at a determination based on a view of the facts which could reasonably be entertained. I also find that there is no question of natural justice arising in this case, as Ms. Hartt was not only provided sufficient opportunity to present her case and cross examine the witnesses of Good Samaritan, but she was also granted an adjournment of the Hearing to, *inter alia*, accommodate her desire to seek legal counsel. In the result, I find Ms. Hartt's appeal without any merit and, accordingly, I dismiss the appeal.

ORDER

23. Pursuant to section 115 of the *Act*, this appeal is dismissed and the Determination, dated March 17, 2010, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal