Employment Standards TRIBUNAL

An appeal

- by -

Marilyn D. Rubin Sales and Service Inc. carrying on business as Canadian Tire
("Rubin")

- 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: David B. Stevenson

FILE No.: 2007A/61

DATE OF DECISION: September 4, 2007

DECISION

SUBMISSIONS

Marilyn Rubin	on behalf of Marilyn D. Rubin Sales and Service Inc.
Tami Stachoski	on behalf of Luke Stachoski
Amanda Welch	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Marilyn D. Rubin Sales and Service Inc. ("Rubin") of a Determination that was issued on May 23, 2007 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Rubin had contravened Part 8, Section 63 of the *Act* in respect of the employment of Luke Stachoski ("Stachoski") and ordered Rubin to pay Price an amount of $564.94, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Rubin under Section 29(1) of the E*mployment Standards Regulation* (the "*Regulation*") in the amount of $500.00.

3. The Determination was issued following a complaint hearing which was held on October 24, 2006.

4. The total amount of the Determination is $1,064.94.

5. Rubin says the Director failed to observe principles of natural justice in making the Determination. Essentially, the appeal takes issue with the Director's conclusion that Rubin had not established just cause to summarily dismiss Stachoski and he was, as a result, entitled to length of service compensation.

6. Rubin does not seek an oral hearing, nor is the Tribunal required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45, including section 36 which states, in part: ". . . the tribunal may hold any combination of written, electronic and oral hearings". The Tribunal has reviewed the material and the parties' submissions and in its discretion has concluded this appeal can be decided on the written material in the appeal file.

ISSUE

7. The issue here is whether Rubin has shown any reviewable error in the Determination.

THE FACTS

8. At the relevant time, Rubin operated a Canadian Tire retail store in Squamish. Stachoski commenced employment at the store on April 25, 2003. He was terminated on April 23, 2006 for allegedly participating in the theft of a car stereo on March 5, 2006, from the store. At the time of his termination, he was employed at the store as an assistant manager.

9. The facts relating to Stachoski's termination are found in the Determination. They need not be repeated here. The Director found Rubin had not proven on a balance of probabilities that Stachoski had participated in the theft, as alleged. The following facts and factors weighed in the Director's decision:

- Rubin did not provide any specifics or evidence in support of the position that there was just cause for dismissal;
- Rubin conducted no independent investigation of the alleged involvement of Stachoski in the theft and was unable to provide details of the RCMP investigation;
- While Stachoski was charged with theft, he denied the charge; he was not tried or convicted and the charge was stayed;
- The individual who had admitted the theft and pled guilty on the charge was not available to discuss or verify his statement implicating Stachoski; and
- Stachoski continued to work for six weeks after the other individual was caught stealing and had implicated Stachoski in the theft.

10. The Determination provided the following statement of principle regarding summary dismissal for an alleged theft:

> It is not necessary for an employee to be convicted of theft in court to prove a theft in the workplace occurred. The mechanics of dismissing an employee for theft are no different than those involved in dismissing an employee for incompetence or insubordination: the employer bears the burden of proving the employee did something wrong and proving the wrongful behaviour amounted to a fundamental breach of the employment relationship which justifies dismissal.

ARGUMENT AND ANALYSIS

11. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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 made.*

12. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.

13. Rubin has grounded this appeal in the allegation that the Director failed to observe principles of natural justice in making the Determination. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).
>
> Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

14. There is no evidence in this case that Rubin was not provided an opportunity to know the claim being made by Stachoski and an opportunity to present their position on that claim. There are no submissions in the appeal specific to this ground. I find, therefore, that Rubin has failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.

15. At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by Rubin with the conclusion that just cause to summarily dismiss Stachoski was not established. In that respect, I make two points.

16. First, while a decision about whether there is just cause for dismissal does include questions of law, it is predominantly fact driven. That is apparent from an examination of the appeal submission, which primarily comprises points of disagreement and clarification to the recitation of evidence and argument and findings of fact in the Determination. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). Rubin has not shown any error of law in respect of the findings of fact made by the Director. In the circumstances, the allegation made against Stachoski had to be supported by cogent evidence. The conclusion made in the Determination followed an analysis of the evidence presented by the parties during the complaint process and is rationally supported. While I appreciate that Rubin disagrees with the conclusion, it is not shown that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable.

17. Rubin says the Director failed to mention in the Determination that Stachoski and his father spoke with the General Manager of the store, Scott Clegg. The Director says that is not entirely accurate; there is reference on page 8 of the Determination to that discussion. It is acknowledged by the Director that the discussion should also have been included in the outline of Rubin's evidence, but in the final analysis the contents of the discussion were considered and were not helpful to Rubin's position. Rubin has submitted a written statement from Mr. Clegg dated March 9, 2006. The written statement is not included in the Section 112(5) record and the Director says it was not provided during the complaint investigation. Rubin has given no indication in the appeal that new or additional evidence was being submitted with the appeal or request that the Tribunal accept that evidence. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal. Such evidence is allowed only where

it meets certain conditions (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03). This document does not meet those conditions and will not be considered.

18. The second point is that Rubin has not shown the Director erred in applying the principles of just cause for theft to the facts as found. The Tribunal has identified and consistently applied several principles to questions of just cause for dismissal (see *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97). A fundamental element in the established principles is that the burden of proving just cause is on the employer.

19. In sum, Rubin has not shown there are any grounds for the appeal that are reviewable under Section 112, and, accordingly, it is dismissed.

20. Finally, Rubin says the Determination is wrong in stating Stachoski was being paid $12.50 an hour. Even if that is so, the amount of wages payable was not calculated from Stachoski's hourly rate, but from his gross wages recorded in Rubin's payroll records for each of the last eight weeks of normal or average hours of work, which is consistent with the requirements of Section 63(4) of the *Act*. I see no error in the method of calculation or the result.

ORDER

21. Pursuant to Section 115 of the *Act*, I order the Determination dated May 23, 2007 be confirmed in the total amount of $1,064.94, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal