Employment Standards TRIBUNAL

An appeal

- by -

D & G Gill Tire and Auto Ltd.
("Gill Tire")

- 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: Marnee Pearce

FILE No.: 2017A/72

DATE OF DECISION: July 31, 2017

DECISION

SUBMISSIONS

Tom Kiesling on behalf of D & G Gill Tire and Auto Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), D & G Gill Tire and Auto Ltd. ("Gill Tire") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 10, 2017.

2. The Determination concluded that Gill Tire had contravened section 63 (failure to pay compensation for length of service), and section 58 (failure to pay vacation pay) of the *Act* with respect to the termination of David Berrecloth's ("Mr. Berrecloth") employment and ordered Gill Tire to pay Mr. Berrecloth wages in the amount of $2,000.00, annual vacation pay in the amount of $80.00, accrued interest pursuant to section 88 of the *Act* equalling $24.31, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $2,604.31.

3. This appeal alleges the Director erred in law with respect to the findings, and requests a cancellation of the Determination.

4. A form of appeal was filed with the Tribunal on May 15, 2017, which substantially met all of the requirements laid out in the Appeal Form but provided incomplete or illegible documents.

5. The statutory appeal period expired on May 18, 2017. Additional material, in the form of the requested documents in complete and legible condition, was received by the Tribunal on May 23, 2017.

6. On June 1, 2017, the Tribunal received a written request to extend the appeal period, which included an explanation for Gill Tire's failure to complete the request for appeal within the statutory limit.

7. In correspondence dated June 28, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.

8. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy was emailed to Gill Tire on June 7, 2017, allowing the opportunity to object to its completeness. No objection has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.

9. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (provided to the Tribunal as part of the record), the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
>
> a. *the appeal is not within the jurisdiction of the tribunal;*
>
> b. *the appeal was not filed within the applicable time limit;*
>
> c. *the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;*
>
> d. *the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> e. *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> f. *there is no reasonable prospect that the appeal will succeed;*
>
> g. *the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> h. *one or more the requirements of section 112(2) have not been met.*

10. If satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Respondent and the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

11. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

12. Gill Tire operates an automotive business, and part of this includes an auto wrecking and used parts business.

13. Mr. Berrecloth was employed to manage the auto wrecking and used parts portion of the business from August 26, 2015 to November 2, 2016, at the rate of $25.00 hourly and over a 40-hour work week.

14. Thomas Kiesling ("Mr. Kiesling") purchased the shares of Gill Tire effective August 2, 2016, and became the sole director of the company; Mr. Berrecloth's employment terms were not altered as a result of the ownership change.

15. Mr. Berrecloth filed a complaint under section 74 of the *Act* alleging that Gill Tire failed to pay him annual vacation pay and compensation for length of service following the termination of his employment on November 2, 2016.

16. A hearing was conducted by the Director on April 5, 2017, and Mr. Berrecloth, Mr. Kiesling, and Mr. Kiesling's son provided evidence.

17. As the findings related to the outstanding vacation pay have not been challenged, this does not need to be addressed in this appeal.

18. In September 2016 Mr. Kiesling spoke to Mr. Berrecloth about cleaning up the yard, his failure to keep up with his inventory duties, and his rudeness to employees on the service side of the business.

19. In September 2016 Mr. Berrecloth countermanded a decision communicated by Mr. Kiesling concerning the purchase of a customer's vehicle for parts, telling the client to move the vehicle or be charged for storage. Ultimately, this resulted in an apology to the customer by Mr. Kiesling's son, also involved in the management of Gill Tire.

20. On October 11, 2016, there was an oil spill in the Gill Tire yard, and Mr. Kiesling spoke to Mr. Berrecloth about cleaning up the spill. Mr. Berrecloth did not believe the problem was his, refusing to take responsibility for the incident.

21. On October 12, 2016 Mr. Kiesling hand delivered a document titled "Final Written Warning" to Mr. Berrecloth. This document reads:

> This is a Final Written Warning. It is a formal disciplinary sanction and a copy will be placed in your personnel file.
>
> You have caused yourself to receive this Final Written Warning as a result of your conduct during the week of Oct 3-7th. During this time you instructed or authorized your mechanic to carelessly place a truck in the yard with its transmission hung by wires. As a result of your reckless behaviour the transmission ended up on the ground spilling several liters of oil and contaminating soil. As Warehouse manger [sic] it is your responsibility to adhere to the strict environmental policies we must follow. Further during the investigative process you refused to take responsibility and stated "we always do that".
>
> By issue of this Final Written Warning, you are being given formal notice that any further incidents will result in further disciplinary action, up to and including dismissal.

22. Some time later, Mr. Berrecloth's dealings with a customer concerning returned items was unsatisfactory to the customer, resulting in a negative posting on the Facebook page of Gill Tires. As a result, Mr. Kiesling terminated Mr. Berrecloth on November 2, 2016.

23. A letter from Mr. Kiesling to Mr. Berrecloth dated November 21, 2016, outlined that the record of employment ("ROE") was to be considered the written notice of termination, and that: "on top of numerous verbal warnings you received about your disrespectful behaviour towards fellow staff and customers. [sic] There were also numerous other instances of insubordination".

24. The Director found that Gill Tires did not have just cause to terminate Mr. Berrecloth's employment.

25. The Director outlined that in this circumstance, where Gill Tires alleges a series of transgressions, an employer must demonstrate that it has set a reasonable standard for the employee to meet, warned the employee that failure to meet the standards would result in termination, and provided the employee with a reasonable period in which to meet the standards. This was not done.

26. The Director found that the Final Written Warning addressed Mr. Kiesling's concerns about the oil contamination, and Mr. Berrecloth's refusal to take responsibility for the spill, and could not therefore have warned Mr. Berrecloth that he could face termination for rudeness or misconduct towards customers. There was no evidence to indicate that Mr. Berrecloth was warned that he could be terminated after the first customer incident in September.

27. Based on the evidence presented, the Director found Mr. Berrecloth was entitled to compensation for length of service. As Mr. Berrecloth was an employee of greater than one but less than three years' service, he was entitled to two weeks' regular wages as compensation for length of service, and annual vacation pay on these outstanding wages as well as interest.

28. On May 15, 2017, the Tribunal received an appeal form from Gill Tires, with the selected ground of appeal that the Director erred in law. The appeal was incomplete in that it provided incomplete or illegible documents. The necessary documents were not received until May 23, 2017, five days after the appeal period expired on May 18, 2017; the written request to extend the appeal period was received on June 1, 2017.

ARGUMENT

29. In his appeal submission filed with the Tribunal on May 23, 2017, and on behalf of Gill Tire, Mr. Kiesling argued that the Director had found the employer had numerous disciplinary conversations with Mr. Berrecloth regarding his rudeness to customers and fellow staff, and was told this was unacceptable. Mr. Berrecloth was also spoken to regarding work performance, in particular, his failure to address inventory issues. These incidents lead up to the Final Written warning letter.

30. The Final Written warning letter, last paragraph, refers to "any further incidents", not any further incidents of "this nature", could lead to termination. This broadly encompasses infractions of any nature that could result in an employee's termination, including rudeness to customers.

31. Mr. Berrecloth had been previously warned that his rudeness towards customers was unacceptable, had been progressively disciplined, and had no stated mental incapacities or disabilities, and "had no reason not to understand he was on thin ice."

32. On June 1, 2017, the Tribunal received Mr. Kiesling's written reasons for an extension of the appeal period. Mr. Kiesling briefly summarized the circumstances of the delay, noting that he had faxed his application for appeal on May 13 or 14, 2017, and on May 15 or 16, 2017, he was contacted by the Tribunal and told that the fax was not clear and that the Tribunal did not receive a copy of the Determination. He was asked to email this information. Mr. Kiesling instead mailed it on May 17 as he had an available second copy, and this was received by the Tribunal after the May 18, 2017, deadline.

ANALYSIS

33. Gill Tire seeks an extension of the time period for filing an appeal contained in section 112(2) of the *Act*. The issue here, however, is not the timeliness *per se* of the appeal but rather the completeness of the appeal and the sufficiency of the appeal documentation. This is not simply a play on words. An Appeal Form was submitted on May 15, 2017, three days before the end of the appeal period. In that sense, there was a timely appeal. The question is whether the Appeal Form and the contents of the appeal submission filed in support of the appeal complied with the requirements of the *Act* and the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") in terms of its content, and if not, whether the Tribunal should permit the appeal to proceed nonetheless.

34. The initial filing did not comply with the *Rules*, as the submitted documents were missing pages from the Determination and the Reasons for the Determination, and the faxed submission also had a blank line running down the middle of all the pages rendering a section of each page illegible.

35. The question is whether the Tribunal should extend the time limits allowed for the appeal. There is a sensitive balance to be struck between the interest of ensuring the process of adjudication moves quickly and with finality, and the interest of ensuring that appellants are not effectively denied access to the process by an overly technical application of the rules. In *Stohlstrom,* BC EST # D453/98, the Tribunal adopted a relatively informal approach to the sufficiency of an appeal, looking at whether the information contained in the appeal

was sufficiently "adequate" to provide a reasonably good understanding on the basis upon which the Determination was being challenged.

36. I intend to approach the appeal and the request for an extension with a view to the above considerations, but will reserve my final comments on the effect of this approach to a later point in this decision.

37. 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 being made.

38. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

39. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

40. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam*), [1998] B.C.J. No. 2275 (B.C.C.A.):

> 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 facts which could not reasonably be entertained; and
> 5. Adopting a method of assessment which is wrong in principle.

41. The burden of establishing just cause rests with an employer (see *Kenneth Kruger*, BC EST # D003/97). Therefore, Gill Tire has the onus of establishing that it had the grounds to terminate Mr. Berrecloth's employment for just cause.

42. In *Kruger, supra,* the Tribunal set out the following principles:

> Most employment offences are minor instances of misconduct by the employee and not sufficient on their own to justify a dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
>
> 1. A reasonable standard of performance was established and communicated to the employee;
> 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
>
> 4. The employee continued to be unwilling to meet the standard.
>
> Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
>
> In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

43. The Tribunal has followed and applied these principles to the question of just cause on many occasions. In *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas,* BC EST # D374/97, the Tribunal noted that:

> …the concept of just cause requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in dismissal. The principle reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving the employee a false sense of security that his or her work performance is acceptable to the employer.

44. The Director found that the October 12, 2017 Final Written Warning letter addressed Mr. Kiesling's concerns about an oil spill and Mr. Berrecloth's refusal to take responsibility for this spill. It was not a written warning that Mr. Berrecloth could face termination for rudeness or misconduct towards customers, and the evidence did not support that Mr. Berrecloth was warned that his employment was in jeopardy following the prior customer incident in September 2017.

45. Mr. Kiesling has argued that the wording of the Final Written Warning letter was phrased such that "any further incidents" could lead to termination, and accordingly, covered infractions of any nature including rudeness to customers; this was not found to be sufficient by the Director. As noted in paragraph 42 above, there are important reasons for requiring clear and unequivocal warnings - the matter came before the Director as Mr. Berrecloth allegedly believed he had not been provided with notice that his conduct could result in termination of his employment.

46. On the just cause question, the Director correctly set out the legal test used under the *Act* for assessing the requirements in instances of an accumulation of minor misconducts, namely that the employer must set a reasonable standard to meet, warn the employee that failure to meet the standards will result in termination, and provide a reasonable period in which the employee must meet the standard.

47. I find no error of law in the Determination. The conclusion reached by the Director on the section 63 issue followed an analysis of the evidence presented by the parties during the complaint process, and is rationally supported by the facts and law. While I appreciate that Gill Tires disagrees with the conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse or inexplicable, or that the Director misapplied the law or the *Act* relating to section 63.

48. Gill Tire has not met the burden of showing an error of law in the Determination; there is no reasonable prospect of the appeal succeeding. The appeal is dismissed on this basis. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

49. I return briefly to the matter of the request for an extension of time. From my conclusions on the merits of the appeal generally, I would not have granted an extension of time. The appeal is not strong or persuasive. Even adopting a less "technical" approach to the sufficiency of this appeal, applying the appropriate principles to its elements, an extension of time would add nothing to its merits.

ORDER

50. Pursuant to section 115(1) of the *Act,* I order that the Determination dated April 10, 2017, be confirmed in the amount of $2,604.31, together with any further interest that has accrued under section 88 of the *Act.*

Marnee Pearce
Member
Employment Standards Tribunal