

An appeal

- by -

Culprit Coffee Company Inc.
(“CCC”)

- 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.: 2016A/47

DATE OF DECISION: June 13, 2016

DECISION

SUBMISSIONS

Troy Wolfe

on behalf of Culprit Coffee Company Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Culprit Coffee Company Inc. (“CCC”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on February 25, 2016.
2. On November 9, 2015, Yana Tarassova (“Ms. Tarassova”) filed a complaint with the Director alleging that CCC contravened the *Act* in failing to pay her wages and compensation for length of service.
3. Following a hearing, a delegate of the Director concluded that CCC had contravened sections 40, 58 and 63 of the *Act*. The delegate determined that Ms. Tarassova was entitled to overtime wages, compensation for length of service, annual vacation pay and accrued interest in the total amount of \$435.56. The delegate also imposed two administrative penalties in the total amount of \$1,000 for CCC’s contraventions of the *Act*, for a total of \$1,435.56.
4. CCC contends that the Director failed to observe the principles of natural justice in making the Determination. CCC also says that evidence has become available that was not available at the time the Determination was being made.
5. At the time CCC filed its appeal, it sought an extension of time to make additional submissions. Troy Wolfe (“Mr. Wolfe”), CCC’s sole director and officer, stated that he had requested the adjudicator’s hearing notes and wanted an additional two weeks to review those notes to make any further submissions. On April 6, 2016, the Tribunal notified Ms. Tarassova and the Director of the appeal and sought disclosure of the section 112(5) record. The Tribunal requested that CCC provide any additional submissions no later than May 4, 2016.
6. On April 11, 2016, Mr. Wolfe informed the Tribunal that he would be away from Canada until May 6, 2016, and would not have the opportunity to prepare the evidence he would like to present. Mr. Wolfe sought a further extension of time until June 30, 2016, to provide additional appeal documents. The Tribunal granted CCC with an extension of time in which to provide additional submissions in support of its appeal by May 20, 2016.
7. On April 14, 2016, the Tribunal disclosed the Director’s section 112(5) record to CCC and gave it an opportunity to provide objections, if any, to the completeness of the record by May 20, 2016. No objections were received and the Tribunal did not receive any additional submissions from CCC.
8. These reasons are based on CCC’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. I have considered CCC’s application for a further extension of time in which to present evidence and am of the view that any such extension, if granted, would not assist me in deciding this matter.

ISSUE

9. Whether or not CCC has demonstrated any statutory ground of appeal.

FACTS AND ARGUMENT

10. The delegate held a hearing into Ms. Tarassova's complaint on January 29, 2016. Mr. Wolfe appeared on behalf of CCC, Ms. Tarassova appeared on her own behalf. Briefly, the evidence and facts as found by the delegate are as follows.
11. Ms. Tarassova was employed by CCC from April 21 to October 16, 2015. Initially hired as CCC's head baker and manager, she resigned as manager on August 18. Thereafter, she was employed as CCC's head baker. Ms. Tarassova's employment was terminated on October 16, 2015, without notice or pay in lieu of notice.
12. After Ms. Tarassova resigned from the manager position, CCC's former general manager Lisa returned on a temporary basis. Lisa set Ms. Tarassova's schedule and Ms. Tarassova's hours were changed to accommodate CCC's baking schedule and Ms. Tarassova's request for reduced responsibilities.
13. The parties did not dispute that, on October 15, 2015 CCC's assistant manager Karl and Ms. Tarassova "had words." Karl later texted Mr. Wolfe to advise him that he had questioned Ms. Tarassova about the length of her breaks and that Ms. Tarassova told him she did not respect his authority and challenged his right to direct her. Karl also advised Mr. Wolfe that some staff disliked working with Ms. Tarassova and had changed their schedules to avoid working with her.
14. Ms. Tarassova's evidence was that she had never been told that Karl was her manager and that Lisa had been the person who set her schedule. She also said that the business premises had a "coffee side," where Karl worked, and a "baking side", and that she was often running errands for the business during what appeared to be her breaks.
15. After receiving Karl's report, Mr. Wolfe met with Ms. Tarassova and asked her about her meeting with Karl. Ms. Tarassova informed Mr. Wolfe that she did not respect Karl and would not take direction from him.
16. Mr. Wolfe informed Ms. Tarassova that, as an assistant manager, Karl had the right to address issues with her. Mr. Wolfe said that he also asked Ms. Tarassova if she would take direction from him, and that she laughed and did not respond. After several questions, Mr. Wolfe told Ms. Tarassova that if she refused to respect his authority and that of CCC's other managers, she was no longer employable and terminated her for cause.
17. Mr. Wolfe testified that he first learned of issues with Ms. Tarassova's performance and her discord with other workers after the October 15, 2015, text from Karl. As a result, she had never been subject to previous discipline or performance management.
18. Although Mr. Wolfe had a copy of Karl's text, he did not make copies of it for the hearing, nor did he submit it as evidence in advance of the hearing.
19. Mr. Wolfe conceded that he had never informed Ms. Tarassova that Karl was her manager, stating that he expected Lisa would have explained that to her.
20. Mr. Wolfe agreed that Ms. Tarassova was not paid overtime after she ceased being a manager on August 20, 2015, and did not dispute her overtime claim.

21. The delegate found that Ms. Tarassova was entitled to compensation for length of service. She found that CCC's allegations of insubordination and insolence had not been established. While the delegate found that Ms. Tarassova challenged Karl's authority, she also determined that there was no evidence Ms. Tarassova had ever been informed that Karl had any supervisory authority over her. The delegate also noted the absence of any exercise of any performance management of Ms. Tarassova by either Mr. Wolfe or Karl, suggesting that Mr. Wolfe's failure to address any performance issues that Karl referred to gave credence to Ms. Tarassova's claim that she was unaware of Karl's authority over her.
22. The delegate also found that Mr. Wolfe's allegations of Ms. Tarassova's conduct with him the following day when he raised the incident with her was not supported by the evidence. The delegate noted that Mr. Wolfe's e-mail summary of the reasons for terminating Ms. Tarassova's employment, while alleging tardiness, poor performance and treatment of co-workers, made no mention that she defied or challenged his authority. The delegate also found no evidence that Ms. Tarassova refused to take direction from Mr. Wolfe in any of the e-mail correspondence between them.
23. The delegate considered the inconsistencies and was unconvinced by Mr. Wolfe's evidence that Ms. Tarassova defied his authority, refused to comply with his direction, or called Mr. Wolfe names. She concluded that CCC had not met the burden of proving it had just cause to terminate Ms. Tarassova's employment.

ARGUMENT

24. Mr. Wolfe argues that the delegate failed to observe the principles of "natural law". He also contends that the delegate declined to consider certain evidence at the hearing that supports his position. As I understand Mr. Wolfe's argument, the delegate's finding that he was not credible was wrong. He submits that his evidence was not refuted or challenged by Ms. Tarassova at the hearing.
25. Mr. Wolfe contends that during the hearing he made repeated attempts to present evidence consisting of text messages and contemporaneous notes made during and after staff meetings to the delegate, and that she refused to indicate to him whether she would consider the evidence. He contends that she did, however, review time clock data that he had on his laptop which he also had not submitted in advance. He argues that the delegate applied an "arbitrary standard" about what evidence she would consider at the hearing.
26. Mr. Wolfe says that, at a previous Employment Standards hearing, the hearing officer insisted that he present evidence only at the hearing so that the hearing officer could verify its authenticity. He also points to the letter that was sent to him in advance of the hearing stating that the parties were to bring all evidence that he wished to be considered at the hearing.
27. Mr. Wolfe contends that the process and the Determination are unjust due to the "inconsistency" and "arbitrariness" of the application of the rules of evidence.
28. Finally, Mr. Wolfe makes references to what appear to be conversations with another Employment Standards Branch (the "Branch") officer. I also note that the "Notice of Hearing" to which Mr. Wolfe refers regarding evidence was in fact a mediation. I infer that the Branch officer to whom Mr. Wolfe attributes comments about Ms. Tarassova was a mediation officer. I have neither recounted those comments nor considered them in this decision. Mediations are confidential processes designed to assist parties settle their disputes. Comments by any party in a mediation, whether accurately recounted or not, are not appropriately part of the record.

ANALYSIS

29. 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;
 - (c) evidence has become available that was not available at the time the determination was being made.
30. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
31. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker who provides a cogent explanation or reasons, for the Determination. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
32. There is no evidence that Mr. Wolfe was denied a fair hearing. He knew the allegations he had to meet, and was able to present evidence both in advance and at the hearing.
33. The Branch "Fact Sheet" on complaint hearings provides that the parties must provide the Branch with two copies of any documents they intend to rely on in advance of the hearing. (underline mine) The Determination notes that Mr. Wolfe did not make copies of Karl's text message in advance of the hearing, as instructed by the Fact Sheet. Nevertheless, the Determination shows that the delegate fully considered Mr. Wolfe's evidence about the contents of that text message.

Error of law

34. The Tribunal as 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.) in a number of decisions including *J.C. Creations Ltd. (o/a.) Heavenly Bodies Sport* (BC ST # RD317/03):
1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
35. Mr. Wolfe's appeal submission appears to suggest that the delegate was wrong in her assessment of credibility. Credibility assessments are within the purview of the decision maker. The issue about what weight to be given to certain evidence and about credibility are questions of fact, not law. The Tribunal has no jurisdiction to decide appeals on alleged errors of findings of fact unless such findings raise an error of law. Such errors may include making findings of fact without any evidence or where the evidence does not provide any rational basis for the finding made. The occasions on which an alleged error of fact amounts to an error of law are few (see *Britco Structures Ltd.*, BC EST # D260/03).

36. I am not persuaded that the delegate's findings of fact were made without any evidence or were irrational. There was sufficient evidence before the delegate to support her conclusion.
37. The Tribunal has repeatedly stated that, in the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate just cause by proving that reasonable standards have been set and communicated to the employee, that the employee was clearly warned that his/her continued employment was in jeopardy if those standards were not met; a reasonable period of time was given to the employee to meet such standards; and the employee did not meet those standards (see *Silverline Security Locksmith Ltd.*, BC EST # D207/96).
38. Although Mr. Wolfe contends that he made notes on his phone during or immediately after meeting with Ms. Tarassova that the delegate refused to consider, there is no evidence that CCC issued Ms. Tarassova written warnings about her performance. There is no evidence CCC met the burden of showing just cause, and I find no arbitrariness or unfairness in the delegate's refusal to consider Mr. Wolfe's personal cell phone notes to support this test.

New evidence

39. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
40. Although CCC argued that it had new evidence as a ground of appeal, there was nothing in the appeal submission that clearly addressed this ground.
41. Even if I am incorrect in concluding that there is no new evidence, I am not persuaded that this evidence could not have been discovered and presented to the Director during the investigation of this matter and find no basis for this ground of appeal.
42. Although CCC sought an extension of time to make further argument based on the delegate's hearing notes, I find that it has had sufficient opportunity to make his arguments. Mr. Wolfe indicated that he had requested a copy of the delegate's hearing notes, as I understand it, to support his argument that the delegate had unfairly refused to consider some text messages he attempted to present at the hearing. Notes made by a delegate during the oral hearing process are not properly part of the "record" (see *United Specialty Products Ltd.*, BC EST # D057/12) and would not be disclosed to CCC even had it been granted a further extension of time.
43. In my view, CCC's appeal is simply an attempt to re-argue its case.

ORDER

44. Pursuant to section 115 of the *Act*, I order the Determination dated February 25, 2016, be confirmed in the amount of \$1,435.56, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal