

An appeal

- by -

Hamilton Stationers Ltd.
(“Hamilton”)

- 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.: 2013A/50

DATE OF DECISION: November 28, 2013

DECISION

SUBMISSIONS

Larry Wade	on behalf of Hamilton Stationers Ltd.
Paul Wade	on behalf of Hamilton Stationers Ltd.
Tracy D. Maletta	on her own behalf
Hans Suhr	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Hamilton Stationers Ltd. (“Hamilton”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on July 26, 2013. In that Determination, the Director ordered Hamilton to pay its former employee, Tracy Maletta, \$718.07 in compensation for length of service, vacation pay and interest. The Director also imposed a \$500 administrative penalty for Hamilton’s contravention of section 63 of the *Act*, for a total amount payable of \$1,218.07.
2. Hamilton appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based on the parties’ 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.

FACTS AND ARGUMENT

5. Ms. Maletta was employed by Hamilton as a shipper/receiver/purchaser from January 24, 2012, until her employment was terminated on January 18, 2013. Ms. Maletta filed a complaint with the Employment Standards Branch alleging that her employment had been terminated without just cause.
6. The Director held a hearing into Ms. Maletta’s complaint on May 16, 2013. Briefly, the facts as set out by the delegate are as follows.
7. Angie Kuhberg, a Hamilton customer, overheard a female employee say to someone in a back room that a person was a “fucking retard.” Ms. Kuhberg said that other Hamilton staff members at the front counter pretended that they had not overheard the comment. Ms. Kuhberg stated that she frequents Hamilton’s on a regular basis and that she often heard very inappropriate language coming from the same voice. Ms. Kuhberg had telephoned Hamilton’s on several occasions to report these incidents but later determined that her messages were not being received. She finally spoke to Larry Wade, who apologized and told her that he would deal with it immediately.

8. On January 17, 2013, Larry Wade received a telephone call from a friend, who told him that she had received a telephone call from Ms. Kuhberg, who reported to her that she had observed one of Hamilton's employees call a co-worker a "fucking retard." Mr. Wade instructed Paul Wade, Hamilton's Operations Manager, to deal with the issue.
9. Paul Wade contacted Ms. Kuhberg to confirm her observations. In addition to identifying the female employee as Ms. Maletta, Ms. Kuhberg also told Paul Wade that she had observed Ms. Maletta "aggressively talking down" to co-workers.
10. After a discussion with the office manager about Ms. Maletta's conduct, Paul Wade decided to terminate Ms. Maletta's employment for undermining the corporate culture, assault or harassment of a co-worker, and serious breach of company rules and practices.
11. Paul Wade discussed the customer's observations with Ms. Maletta, who did not deny her comments, but contended that she did not make them to her co-worker's face. Paul Wade told her that her comments were unacceptable and that her employment was terminated.
12. Ms. Maletta said that she did use the words she was alleged to have said, that Paul Wade told her that he had no issues with her work and that if she needed a reference, he would provide her with one and that, at no point was she offered the opportunity to provide her side of the story.
13. The delegate found that Hamilton had not established just cause to end Ms. Maletta's employment. The delegate noted that while Hamilton had alleged Ms. Maletta had undermined the corporate culture and breached company rules and practices, Hamilton provided no evidence respecting any of those issues. The delegate further noted that Hamilton provided no evidence from any co-workers, including the recipient of the comment, regarding the statements.
14. The delegate noted Hamilton's evidence that it had a high profile in the community and employed Temporary Foreign Workers (TFW's), and did not want to be associated with any possibility of poor treatment of TFW's in the workplace. The delegate also noted Hamilton considered Ms. Maletta's actions to be of such a serious nature that those actions could potentially affect its business, both financially and by reputation, in the community.
15. The delegate noted that Hamilton relied primarily on Ms. Kuhberg's evidence and that Ms. Kuhberg had not identified Ms. Maletta as the individual who uttered the statement as the individual speaking was in a back office. The delegate also noted that Hamilton had provided no evidence as to when the alleged statement was made. The delegate also considered Ms. Maletta's evidence that her comment "I didn't say it to her face" was perhaps misunderstood, but noted that she did not attempt to correct any misunderstanding, if there had been one.
16. The delegate noted Hamilton's evidence that Ms. Maletta had never been disciplined for making similar types of comments in the past. He then considered whether Hamilton had proven that the comment was made as alleged, and if so, whether it constituted a single act of misconduct serious enough to warrant summary dismissal:

There are a number of shortcomings that are apparent in the Employer's case. There was no evidence provided as to what date and/or time the "fucking retard" comment was made. Ms. Kuhberg related that on a number of occasions she witnessed behavior she found inappropriate including the comment, however, she did not say how much time passed between hearing the comment and contacting [a third party to pass along her concerns]. Ms. Kuhberg did state that she had left a number of messages at the

store for someone to get back to her and that she “finally” spoke to [a third party] about the issues. There was no evidence provided that Ms. Maletta was actually in the workplace at the time this comment was made. Ms. Kuhberg’s evidence was that she heard a voice coming from the back office make the comment however, while she stated she recognized the voice as being Ms. Maletta’s, Ms. Kuhberg does not state she actually saw Ms. Maletta on that occasion. The Employer provided no evidence from other co-workers such as the “poor girls at the front counter” who, according to Ms. Kuhberg, were “just trying to pretend they weren’t hearing this”. The Employer provided no evidence from the co-worker who was the recipient of this comment.

17. The delegate concluded that Hamilton had not proven that Ms. Maletta had made the comments it alleged she had said, and had not discharged its burden of substantiating just cause.
18. Although Hamilton argues that the delegate failed to observe the principles of natural justice, its submissions do not clearly indicate the basis for this ground of appeal.
19. With respect to the delegate’s conclusion that Hamilton had not provided sufficient evidence to demonstrate that Ms. Maletta’s comments were a serious breach of company rules and practices, undermined corporate culture and harassed a co-worker, Hamilton says it is a small family-run business with fewer than 10 employees and that it does not have an employee handbook. Mr. Wade asks, however, if there need be a company handbook that states that an employee cannot call another employee a “fucking retard.”
20. Mr. Wade also says that although the delegate found that Hamilton did not provide evidence from the co-worker who was the alleged recipient of the comment made by Ms. Maletta, Hamilton offered to bring that witness but the delegate “rebuffed” them. Mr. Wade says that the delegate “did not see the benefit of bringing [the employee] into the discussion as she didn’t hear the actual comments and therefore he would have to consider it hearsay.”
21. The delegate says that at a pre-hearing conference (held to ensure that the parties had received all relevant documents, confirm the issues and discuss witness lists), Hamilton asked about calling the witness and suggested that there might be some difficulty doing so as the witness was expected to be travelling the day of the hearing. The delegate says that Hamilton was asked to summarize the witness’s anticipated evidence and that Hamilton indicated that the witness had not personally heard the comments. The delegate says that he advised Hamilton that while the witness could be called, her evidence would be considered hearsay and, as such, would have little evidentiary value. The delegate also says that Hamilton was advised that arrangements could be made to call the witness at a pre-determined time to hear the evidence, and that Hamilton eventually declined to call the witness, stating they believed they had enough evidence.
22. Mr. Wade further alleges that, with respect to the delegate’s finding that Hamilton failed to provide evidence as to what date or time the alleged comment occurred or that Ms. Maletta was even working the day the comment was made, Hamilton submitted all Ms. Maletta’s time records to the delegate. Further, Hamilton submits that Ms. Maletta never disputed that she may not have been at work that day and that this was never an issue at the hearing.
23. Hamilton submits that the delegate erred in giving Ms. Kuhberg’s statement no weight because she did not observe Ms. Maletta making the alleged comment. Mr. Wade says that Ms. Kuhberg testified that she observed a conversation between Ms. Maletta and the employee in the front of the store which carried on in the back of the store, and at some point Ms. Kuhberg heard Ms. Maletta make the alleged comment. Mr. Wade says it should have been obvious to the delegate that it was the same two employees.

24. The delegate submits that the Determination contains an accurate recitation of Ms. Kuhberg's evidence, as evidenced by the record.
25. Finally, Mr. Wade says that he is troubled that, after all of the evidence Hamilton presented, the delegate chose to believe Ms. Maletta, who presented no evidence and simply denied the allegations. The delegate notes that this submission is also a misstatement of the conclusion, which is that Hamilton failed to discharge its burden of establishing just cause for terminating Ms. Maletta's employment.
26. The Director submitted that the balance of Hamilton's submissions are merely a re-statement or re-argument of the case it originally presented to the delegate.
27. The Director submits that Hamilton has failed to demonstrate that the delegate failed to observe the principles of natural justice and that the appeal should be dismissed.
28. In a reply submission, Mr. Wade states that Hamilton's appeal is based on "what we believe to be errors and omissions in the final decision" made by the delegate, and sets out what Hamilton believes those errors to be:
- Hamilton failed to provide any evidence with respect to the company's rules, practices or corporate culture;
 - Hamilton did not provide any evidence from the co-worker that was the alleged recipient of the comment by Ms. Maletta;
 - Hamilton did not provide any evidence as to what date or time the "fucking retard" comment reported by Mr. (sic) Kuhberg was allegedly made;
 - There was no evidence provided as to when the comment "fucking retard" was overheard;
 - There are a number of shortcomings that are apparent in the Employer's case.
29. Ms. Maletta contends that Hamilton's submissions merely repeat the arguments they made before the delegate. Ms. Maletta's submission contains comments that go to the facts outlined in the Determination rather than the grounds of appeal, and I assume also repeat the comments she made at the hearing before the delegate. As such, I do not intend to reproduce those in this decision.

ANALYSIS

30. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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, 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 the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.

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;
- (c) evidence has become available that was not available at the time the determination was being made.

32. 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.

33. Although Hamilton's grounds of appeal are that the Director failed to observe the principles of natural justice, there is nothing in either the submissions or in the record that supports this or any other ground of appeal.

Natural Justice

34. 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.

35. I am not persuaded that Hamilton was denied the opportunity to fully respond to the complaint. The parties attended a hearing with witnesses and were able to present their side of the case and to examine the witness of the other party. The hearing was conducted after a pre-hearing conference in which the parties exchanged information about the evidence they would provide, their witness list, and identified the issues they would have to address.

36. The basis of Hamilton's case arises out of a disagreement with the result, and primarily, as I understand it, the delegate's treatment of its evidence. Hamilton's appeal suggests that it disagrees with conclusions arrived at by the delegate. These disagreements only form a basis for appeal if they constitute errors of law. An error of law has been defined as:

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.

(*Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam*), [1998] B.C.J. No. 2275 (BCCA))

37. The Tribunal does not have jurisdiction over questions of fact unless the matter involves errors on findings of fact, which may amount to an error of law (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05. In *Re Funk*, BC EST # D195/04, the Tribunal held that an appellant would have to show that the fact finder made a "palpable and over-riding error" or that the finding of fact was "clearly wrong" to establish error of law.

38. The Tribunal accords a high degree of deference to delegates, who are finders of fact at first instance. In the absence of a palpable or obvious error of fact, the Tribunal will not set those factual findings aside. (see *Housen v. Nikolaisen* [2002] 2 S.C.R. 235)
39. Hamilton had the burden of demonstrating that it had just cause to terminate Ms. Maletta's employment. The delegate determined it had not discharged that burden. I am not persuaded that the delegate made any palpable or overriding error, made a factual finding that was "clearly wrong," or acted on a view of the facts that could not be reasonably entertained in arriving at that conclusion. The delegate found no clear evidence that it was Ms. Maletta who uttered the offending words, or that they were directed towards anyone in particular. The delegate noted that Hamilton did not call any witnesses to testify that Ms. Maletta's alleged comments were directed at them. Had it done so, the delegate's decision may well have been different.
40. Hamilton also requests "at the very least" a waiver of the administrative penalty. In *Actton Super-Save Gas Stations Ltd.*, BC EST # D067/04, the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize such considerations as providing exceptions to the mandatory administrative penalty scheme."
41. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by the *Employment Standards Regulation* (the "Regulation").
42. The appeal is denied.

ORDER

43. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal on the grounds that there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated July 26, 2013, is confirmed in the amount of \$1,218.07 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