Employment Standards TRIBUNAL

An appeal

- by -

Black Press Group Ltd. carrying on business as Ladysmith Press
("Black Press")

- 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:** R. Hoops Harrison

**FILE No.:** 2017A/68

**DATE OF DECISION:** October 17, 2017

# DECISION

## SUBMISSIONS

| | |
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| David Penner | counsel for Black Press Group Ltd. carrying on business as Ladysmith Press |
| Laura J. Kertz | on her own behalf |
| Kristine Booth | on behalf of the Director of Employment Standards |

## OVERVIEW

1. Black Press has filed an appeal of a Determination issued by Kristine Booth, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), dated March 31, 2017 (the "Determination") pursuant to section 112 of the *Employment Standards Act* (the "*ESA*").

## OVERVIEW AND BACKGROUND

2. Black Press operates a print media business which contains a machinery operation in Ladysmith, B.C., where Laura J. Kertz (the "Complainant") worked from late April 2008 until December 1, 2015. The Complainant's duties included acting as inserter, collator, cutter and packager.

3. Black Press terminated the Complainant on December 1, 2015, and in a termination letter of the same date, referenced "job performance, attendance, and behavior" concerns (the "Termination Letter"). The Termination Letter also refers to three prior letters of reprimand or warning dated September 30, October 19, and November 24, 2015 (the "Disciplinary Letters").

4. The Complainant made a complaint with the Employment Standards Branch, dated December 20, 2015, and the Delegate conducted a hearing on March 15, 2016 (the "Hearing").

5. The Delegate concluded that Black Press did not have just cause to terminate the Complainant and held that:

    a. the Complainant, Laura J. Kertz (the "Complainant"), was owed wages, annual vacation pay, compensation for length of service and accrued interest (under sections 18, 58, 63 and 88 of the *ESA*, respectively) in the amount of $7,500.76, and

    b. pursuant to section 98(1) of the *ESA*, Black Press was ordered to pay administrative penalties in the amount of $1,000.00.

6. In its appeal, Black Press says that the Director erred in law in making the Determination.

7. These reasons are based on the written submission of the parties, the Reasons for the Determination and the section 112(5) record that was before the Director (the "Record").

## FACTS AND ARGUMENT - HEARING

8. The arguments and evidence of both parties can be found between pages R2 and R17 of the Determination. Summarily,

    a. Black Press called six witnesses and the Complainant was the only witness on her own behalf; and

    b. the Record references 54 lots of documentary materials relied on by Black Press and 6 lots by the Complainant.

9. Black Press' evidence and position was (and is) that there were ongoing issues with the attendance, productivity and attitude of the Complainant since September, 2015. More specifically, Black Press, in its written submissions in support of the Appeal Form, dated May 8, 2017 ("Appeal Submissions"), summarizes the employment issues as being articulated into the Disciplinary Letters as follows:

    a. On September 30, 2015 (the "First Letter") - for refusing to train new employees, reporting to work when not scheduled, arguing with management, and sitting on her skid when the machine jammed.

    b. On October 19, 2015 (the "Final Warning") - for inappropriate behaviour and disrespectful conduct.

    c. On November 24, 2015 (the "Last Chance Letter") - for continued failure to attend shifts.

10. The Complainant gave evidence of her seven plus years of employment as largely without disruption or complaints until the material times of this complaint. She disputed the claimed employment issues. She provided further information regarding an ongoing injury that developed initially between September and October that hampered her performance. Still, she agreed that she was deserving of some discipline but disagreed with the basis for others and the methods utilized. Ultimately, the Complainant believed that the Disciplinary Letters were a premeditated manifestation of Black Press' desire to terminate her rather than truly resolve any employment issues.

11. At page R17 of the Determination, the Delegate begins to set out the statutory legal basis, as follows:

    a. Compensation for length of service is a statutory entitlement under section 63 of the *ESA*; and

    b. An employer can discharge the liability to pay compensation for length of service if they have just cause for dismissal.

12. As Black Press did not claim a single act that justified termination on its own (such as theft), and continuing on at page R18, the Delegate states that in order to establish just cause in this case, the burden is on the employer to establish that:

    a. reasonable standards of performance have been set and communicated to the employee,

    b. the employee was warned clearly that his/her employment was in jeopardy if such standards were not met,

    c. a reasonable period of time was given to the employee to meet such standards, and

    d. that the employee did not meet those standards.

13. Then, applying the legal standard, the Delegate addressed the written Disciplinary Letters in order, up to the Termination Letter.

*First Letter - September 30*

14. While the First Letter did address issues of performance, the Delegate found that the warning was general in nature and not specific to what duties she failed to perform and would need to correct. Furthermore, and as an example, the Complainant was not told that failing to follow reasonable direction from management would result in termination.

*Final Warning - October 19*

15. The Delegate found that the Final Warning letter contained more clarity on concerns with the Complainant's October 12 use of the machinery whereby she stopped working on a pocket, stopped the machine, spoke to the supervisor in a disrespectful tone and went to first aid. Later the Complainant was found not working and sitting on a skid. In the letter, Black Press warned the Complainant that one can only shut off a machine for a valid reason and can only call for first aid for an injury.

16. The Delegate questioned why these warnings were in fact necessary. The Delegate reviewed the evidence including a company Safe Job Procedure policy and the lack of evidence from Black Press that the policy was in place or the Complainant trained on it. Moreover, the Delegate noted that there was no evidence on what situation would constitute an emergency or what conditions would justify a valid reason to shut down a machine. As to the Complainant's injury that necessitated first aid, the Delegate found it disingenuous on the part of Black Press to issue a disciplinary letter on the point when they otherwise acknowledged the Complainant's injuries and modified her duties accordingly.

17. With all of the above inconsistencies, the Delegate also found that the letter concluded in an ambiguous warning statement that "non-adherence to company expectations, inappropriate behaviour or disrespectful conduct" would "almost certainly" result in termination.

*Last Chance Letter - November 24, 2017*

18. On November 23, 2015, the Complainant telephoned into Black Press advising that she could not get a ride into work and so could not make the shift.

19. On November 24, 2017, the Complainant attended work and received a letter advising that she had been suspended for missing work on the day previous. The letter referenced the prior two Disciplinary Letters and stated that "Continued failure to attend to your shifts as scheduled or non-attendance to Black Press policies will result in the termination of your employment." The Delegate found this warning insufficient given that none of the prior Disciplinary Letters warned the Complainant that she must attend all shifts absent a valid reason and stated at page R19:

> *This warning is vague and considering my above analysis regarding the requirement to specify what standard needs to be met, I find this portion of Black Press's warning insufficient.*

*The Termination Letter - December 1, 2015*

20. Following her suspension, the Complainant returned to work on November 30, still on modified duties and received an accommodation for the work that she did during her shift. Returning to work on the next day, December 1, she received the Termination Letter. The letter was issued by Kerri Troy, Production Administration Manager, and included:

a. advice that the Complainant's employment ended December 1;

b. summary mention of the prior Disciplinary Letters for "disrespectful behaviour, job performance concerns, not attending work as scheduled and not following company process"

c. specific mention of the October 19, 2015, letter concerning "disrespectful behavior" wherein "you were advised that this was now a final letter and that further non-adherence to company policies or processes would result in termination."

d. specific mention of the Complainant's failure to follow company policies or processes and that in a prior meeting wherein she was given a final warning that the Complainant displayed a "disrespectful attitude towards me by yelling at me about other workers, swearing saying 'F*ck that' regarding your suspension and threatening me with legal action…"

21. The Delegate noted discrepancies in the testimony of the witnesses regarding that prior November 24, 2015, meeting agreeing with Black Press that the interaction between the Complainant and Ms. Troy was tense. While the Delegate held that the Complainant did threaten legal action on that day, Black Press did not terminate the Complainant and instead carried out its planned suspension. In assessing Ms. Troy's evidence with respect to just cause, the Delegate noted that Ms. Troy's testimony was that she did not elect to terminate the Complainant because of foul language or threats. She decided to terminate her for the same behaviour that she was suspended for. And as the Complainant returned to work on November 30 without incident, the Delegate concluded that the events of November 24, 2015, "were not so bad that the relationship was damaged beyond repair."

22. Accordingly on page R20 of the Determination, the Delegate held that Black Press did not have just cause for termination as they:

a. failed to provide a clear warning, and

b. failed to demonstrate what standard the Complainant failed to meet between November 24, 2015, and December 1, 2015.

## ARGUMENT AND ANALYSIS - APPEAL

### *Grounds of Appeal*

23. In its submissions, Black Press states that the Delegate erred in finding that Black Press did not have just cause in terminating the Complainant. Accordingly it relies on section 112(1)(a) of the *ESA*, namely that the Director erred in law, and cites the decision of the B.C. 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.) ("*Gemex*") that the following instances constitute an "error of law":

a. Misapplying principles of general law;

b. Acting on a view of the facts that cannot be reasonably entertained; and

c. Arriving at conclusions that are clearly wrong.

24. Black Press divides its argument into four main issues on Appeal, reproduced (with same capitalization) as follows:

1. The Employer provided a Clear Warning that the Complainant's job was in Jeopardy,
2. The Employer's Clear Warning that the Complainant's Job was in Jeopardy was Warranted,
3. The Employer Showed that the Complainant did not meet its Reasonable Standards, and
4. The Delegate Made Findings of Fact that are Clearly Wrong.

25. I will address the last issue on Appeal first, then the remaining three in order, but before doing that it is important to clearly restate that the Tribunal appeal process does not afford me the authority to retry the Hearing – I am limited to determining whether or not the Director erred in law pursuant section 112(1)(a) of the *ESA*.

***Issue of Appeal #4 - The Delegate Made Findings of Fact that are Clearly Wrong***

26. Black Press cites one instance where it claims that the Delegate's reasons for the Determination do not agree with her own summary of the evidence. It cites a contradiction at pages R13 and R14 of the Determination concerning inserting flyers into pockets after September 23 and from a September 28 shift sheet.

27. As such, Black Press' position is that contradictory findings cannot be reasonably entertained and are therefore 'clearly wrong.' Black Press, in its argument, does not cite any further specific examples.

28. In the Delegate's written submissions on the appeal, the Delegate clarifies that the First Letter states, in part, that on September 21, the Complainant refused to train new employees. There is however no mention in the September 28 shift notes of such a refusal. Moreover, the shift notes for September 21 were not submitted in evidence and the only shift notes that claim such a refusal were from September 9. Essentially, the Delegate says that Black Press' arguments takes the issue out of context of the evidence overall.

29. As discussed previously, Black Press cites *Gemex* for the test for what is a reviewable error of law. A number of Employment Standards Tribunal decisions have considered *Gemex*, most notably in *Britco Structures Ltd.,* BC EST # D260/03 ("*Britco*").

30. The Tribunal in *Britco* provides a thorough summary of *Gemex*, the cases that considered *Gemex* and also those cases *Gemex* did not consider such as *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 ("Southam"). In clarifying the scope of what is and is not an error of law in this context and within its analysis of *Gemex*, the Tribunal in *Britco* stated at p. 15:

> *As noted, the Supreme Court of Canada has said in Southam, supra, that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (paragraph 35). Since the Employer does not allege that the Delegate erred in interpreting the law or in determining what legal principles are applicable, it cannot allege that the Delegate erred in applying the incorrect legal test to the facts. Nor can it allege that the Delegate erred in applying the correct legal test to the facts the Employer accepts. I can only conclude that it alleges that the Delegate erred in applying the correct legal test to facts that the Employer disputes. Therefore, the question, in reality, is whether or not the Delegate erred in respect to the facts that the Employer disputes. This is a question of fact over which the Tribunal has no jurisdiction. The application of the law, correctly found, to allegedly erroneous errors of fact does not convert the issue into an error of law. I am unable to extricate a question of law from the question the Employer seeks to have answered. [Emphasis added]*

31. I accept the Delegate's clarification, and further find that Black Press' submissions under this heading do not rise to the level of an error of law under s. 112 of the *ESA*.

***Issue on Appeal #1 - The Employer provided a Clear Warning that the Complainant's job was in Jeopardy***

32. Black Press cites the portion of the Determination dealing with the October 19, Final Warning letter (summarized herein at para. 15 to 17) and says that the Delegate erred in finding that the Final Warning was unclear with respect to the consequences of future misconduct. Black Press notes findings by the Delegate of warning and jeopardy in the Determination and submits that it is simply unsustainable on any reading of the Determination or review of the evidence to suggest that it failed in its duty to make clear to the Complainant that she faces termination if she continued to engage is her well-established pattern of misconduct.

33. As to legal analysis, Black Press says that the Delegate's application of the established jurisprudence on this point was clearly and demonstrably wrong and cites two decisions, *McKinley v. BC Tel*, 2001 SCC 38 ("*McKinley*") and *Baumgartner v. Jamieson*, 2004 BCSC 1540 in support of the proposition that the proper approach to analyzing dismissal for just cause is "contextual" and not mechanical.

34. Black Press goes on to say, at P10 – P11 of the Appeal Submissions, that the Delegate:

a. misapplied a principle of general law (inconsistent with the *ESA*) by requiring a rigid inflexible warning that precluded any discretion or contextual analysis, and

b. acted with a view of the facts that cannot be reasonably entertained.

35. The Delegate submits the warnings suffered from both specific and general ambiguity:

a. Specific Ambiguity - the world "almost" means 'very nearly' and when used in 'almost certainly will be terminated' creates a literal ambiguity, and

b. General Ambiguity - the warnings analyzed at R18 - R20 of the Determination were either found to be vague or their consequences ambiguous in the sense that the core idea in progressive discipline is that an employee should be given an opportunity to correct their behaviors and understand the consequences if they do not. The Delegate cites an example that an employer cannot warn an employee to a) not to be late again and then subsequently b) terminate them for failing to abide by the company dress code.

*Analysis*

36. "Just cause" is not defined in the *ESA* and, accordingly, the Tribunal has held that common law notions, including those such as "progressive discipline" (see *Clark Reefer Lines Ltd.*, BC EST # D114/15) should, where relevant, be considered when assessing if an employer has just cause for dismissal.

37. A convenient summation of Tribunal decisions on the subject of, and a reiteration of the common law test for, just cause in a case such as this one was summarized by the Tribunal in *J-W Research Ltd.*, BC EST # D090/14 ("*JWR*"), at pp. 5 and 6:

a. The burden of proving that the conduct of the employee justifies dismissal is on the employer;

b. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are minor instances of minor misconduct, it must show:

i. A reasonable standard of performance was established and communicated to the employee;

ii. A reasonable period of time was given to the employee to meet such standard and had demonstrated that they were unwilling to do so;

iii. The employee was adequately notified that their continued employment was in jeopardy by a continuing failure to meet the standard; and

iv. The employee continued to be unwilling to meet the standard.

38. I find that the Delegate correctly summarized the overall legal test at page R18 of the Determination. That is not disputed by Black Press.

39. On this aspect of the test, which could be coined in many ways such as 'clear warning' or 'notice of jeopardy', I do agree with Black Press that a literal interpretation of 'almost' in the Final Warning is not helpful. To reduce the situation to semantics fails to employ any contextual approach and does a disservice to the parties.

40. That being said, the notice of jeopardy aspect of the *JWR* test for progressive discipline is not simply: 'you will be fired.' It is: 'you will be fired if you fail to meet X standard.' To that end, the Delegate's general ambiguity point is substantiated. It is because of the disciplinary consequences of repeating the impugned conduct that it is a warning and not simply an admonition (see *Brazeau v. International Brotherhood*, 2004 BCCA 645 at para. 21 per Lambert J.) The Delegate weighed the evidence and applied the correct test and found that the Final Warning and the standards it addressed together were ambiguous. The Delegate made no error of law in doing so.

***Issue on Appeal #2 - The Employer's Clear Warning that the Complainant's Job was in Jeopardy was Warranted***

41. In its argument, Black Press says that the Delegate failed to consider relevant evidence including instances of contradiction and lack of credibility on the part of the Complainant's position and testimony. It was, in fact, this type of evasion in the Complainant's testimony that was indicative of her obstinacy in her employment - which ultimately led to the Final Waring, Last Chance Letter and termination.

42. On the issues of fact concerning credibility and weighing evidence, again pursuant to *Britco*, and *Gemex,* the issue before me is whether Black Press has established an error of law under s. 112 of the *ESA*.

43. I find that the Delegate did consider, evaluate and weigh the evidence. The Determination, reached after a *viva voce* hearing, shows a firm appreciation of the facts.

44. While the Delegate did not weigh the evidence in the manner advocated by Black Press, the Delegate did not err in law, either by making a finding that was unsupported by evidence, or otherwise.

***Issue on Appeal #3 - The Employer Showed that the Complainant did not meet its Reasonable Standards***

45. Under this heading, Black Press takes issue with the Delegate's use of the word "subjective" at page R20 of the Determination, in describing Ms. Troy's testimony.

46. This statement must be viewed in its relevant context. The Determination states Ms. Troy "explained she terminated Ms. Kertz because she did not show her any respect and she did not think things would improve".

The Determination continues: "These are Ms. Troy's subjective assessments as opposed to Ms. Kertz's words, actions or inactions." Viewed in context, I find no error in this statement.

47. Otherwise, Black Press' argument under this heading is essentially a restatement of its position on the merits of the issue before the Delegate and its view of the evidence in that regard. It does not establish a basis for Black Press' contention that the Delegate made any error in law.

## ORDER

48. Pursuant to section 115 of the *ESA*, I order the Determination be confirmed together with any interest that has accrued under section 88 of the *ESA*.

**R. Hoops Harrison**
**Member**
**Employment Standards Tribunal**