

An appeal

- by -

Revelstoke Women's Shelter Society
(“RWSS”)

- 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.: 2015A/116

DATE OF DECISION: November 5, 2015

DECISION

SUBMISSIONS

Nelli Richardson

on behalf of Revelstoke Women's Shelter Society

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Revelstoke Women's Shelter Society ("RWSS") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on July 22, 2015. In that Determination, the Director found that RWSS had contravened sections 63 and 58 of the *Act* in failing to pay Carol D. Perkins ("Ms. Perkins") \$5,669.53, representing compensation for length of service, vacation pay and interest. The Director also imposed an administrative penalty in the amount of \$500 for the contravention, for a total amount owing of \$6,169.53.
2. RWSS appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination.
3. This decision is based on the appeal 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

4. The delegate conducted a hearing on February 18, 2015. At issue was whether or not RWSS had just cause to terminate Ms. Perkins' employment. RWSS was represented by Nelli Richardson ("Ms. Richardson"), Executive Director, Lynn Loeppky ("Ms. Loeppky"), another RWSS employee, and Ron Lind, one of RWSS's directors.
5. The delegate found, briefly, as follows.
6. Ms. Perkins was employed as a front line and transition house worker for RWSS from October 11, 2005, until June 26, 2014. For many years, Ms. Perkins performed her duties well and was considered to be a valuable employee. The relationship between the parties began to deteriorate in May 2013 after Ms. Richardson issued a staffing directive about the assignment of shifts. Ms. Perkins disagreed with this directive and communicated her disagreement both to Ms. Richardson in terms Ms. Richardson found disrespectful, and to the Board executive committee directly. The Board supported Ms. Richardson's decision.
7. Ms. Richardson met with Ms. Perkins on June 3, 2013, to discuss her conduct and performance. According to Ms. Richardson, Ms. Perkins was confrontational during the discussion. Ms. Richardson informed Ms. Perkins that if there were no further complaints for a year, the documented concerns would be removed from her personnel file. According to Ms. Perkins, she was "blindsided" by the allegations and believed that she had been unfairly singled out for a reprimand as other staff members had acted in the same manner and were not reprimanded.
8. Ms. Richardson and Ms. Perkins met again on June 25, 2013, to discuss additional performance issues. According to Ms. Richardson, Ms. Perkins denied responsibility for the errors, blaming them on others, and accused Ms. Richardson of singling her out.

9. Ms. Richardson and Ms. Loeppky met with Ms. Perkins on November 13, 2013, to discuss concerns they had with Ms. Perkins' health and to complete a formal evaluation of her performance. Ms. Perkins took a short time off work to deal with some medical issues and no formal evaluation was completed.
10. Ms. Richardson and Ms. Perkins met again in January 2014. While Ms. Perkins indicated that her health was improving, Ms. Richardson informed her that her health issues did not excuse her past misconduct and that RWSS would not tolerate further disrespectful communications or actions. Ms. Perkins apologized for her conduct and her formal performance evaluation was scheduled for the spring.
11. Ms. Richardson met with Ms. Perkins on May 20, 2014, for a performance appraisal at which time Ms. Richardson outlined a number of ongoing concerns. Ms. Perkins was not pleased with the evaluation and the meeting ended unproductively. Ms. Richardson's subsequent written performance evaluation of Ms. Perkins was not a positive one and Ms. Perkins was asked to meet with Ms. Richardson and Ms. Loeppky to develop a plan to resolve the concerns.
12. On June 19, 2014, Ms. Perkins again met with Ms. Richardson and Ms. Loeppky to discuss her performance and conduct. Ms. Perkins was given a copy of her employee file from November 2013 and her recent performance evaluation. Although Ms. Perkins was offered an opportunity to discuss the documents, she elected not to do so. Ms. Richardson advised Ms. Perkins that her conduct and performance needed to improve or her employment would be terminated. Ms. Loeppky testified that this was the only time in which she witnessed Ms. Perkins being warned that her conduct would have to improve or her employment would be terminated.
13. Later that day, Ms. Richardson received a telephone call from a client who reported that she did not feel safe to come to the shelter because of an incident she had with a front line worker. Although the client declined to identify the worker, Ms. Richardson believed it was Ms. Perkins and arranged a Board meeting to discuss Ms. Perkins' conduct and the latest complaint. The Executive Committee decided to terminate Ms. Perkins' employment immediately.
14. Ms. Perkins' letter of termination outlined a number of reasons for the termination, including her dishonesty, her "complete disregard" for protocols, policies and direction, the fact that she made schedule changes without the approval of a supervisor after being told not to do so, and making a client feel so unsafe she refused to attend the shelter.
15. RWSS argued that it had just cause to terminate Ms. Perkins' employment based on Ms. Perkins' willful misconduct, dishonesty, insubordination, inappropriate interaction with clients and her unsatisfactory performance, all of which Ms. Perkins had been warned about.
16. Ms. Perkins argued that she had been singled out for reprimands and that the allegations of her disrespectful behaviour were exaggerated or untrue. She agreed that Ms. Richardson had warned her about her conduct but denied that she was told that her unsatisfactory behaviour would result in the termination of her employment. Ms. Perkins also contended that no one had discussed the client's complaint about her prior to her termination.
17. Ms. Perkins contended that RWSS had failed to establish just cause, arguing that the identified performance issues were minor reprimands and did not warrant discipline or termination of her employment without compensation for length of service.

18. The delegate noted that the Employer had the burden of substantiating just cause and set out a four part test the Employer had to meet to establish just cause:
- a) The employer had to set reasonable standards of performance and communicate those to the employee;
 - b) The employee had to be clearly warned that his or her continued employment was in jeopardy if such standards were not met;
 - c) The employer had to give the employee reasonable time to meet such standards; and
 - d) The employee continued to fail to meet those standards.
19. The delegate concluded that RWSS had established that Ms. Perkins' job performance and conduct was unsatisfactory throughout the final year of her employment. He concluded that there were several meetings at which RWSS provided Ms. Perkins with examples of her misconduct and, at the same time, reasonable standards were set and communicated by Ms. Richardson. However, the delegate found there was conflicting evidence about whether Ms. Perkins was warned that her continued employment was in jeopardy if those reasonable standards were not met. He noted that although RWSS contended that it had issued such warnings in May and November 2013 and May and June 2014, Ms. Perkins denied receiving those:
- From May 2013 to May 2014, I am not convinced that Ms. Perkins was warned, clearly and unequivocally, by the Society, that her employment would be terminated if certain standards were not met. Ms. Richardson was very diligent in keeping a record of Ms. Perkins' unsatisfactory conduct and performance. This record provided details about discussions and formal meetings related to managing Ms. Perkins. After carefully reviewing the comprehensive record supplied by the Society, I could not find an occasion where Ms. Richardson warned Ms. Perkins that failure to meet the Society's performance and conduct standards would result in termination of employment. The inconsistency between the testimony of Ms. Richardson and her own record casts uncertainty on whether Ms. Perkins received such warning. There is no other evidence to support Ms. Richardson's testimony as Ms. Loepky testified that she did not witness any warnings prior to June 2014. From May 2013 to May 2014, I find that the Society failed to establish that it warned Ms. Perkins, clearly and unequivocally, that failure to meet workplace standards would result in dismissal.
20. The delegate also determined that the incidents of Ms. Perkins' dishonesty, discovered after the decision was made to terminate her employment, did not constitute grounds for immediate termination. Those incidents included Ms. Perkins' dishonesty regarding suffering a workplace injury without reporting it and corresponding with the Executive Board Committee about workplace issues.
21. The delegate concluded that RWSS had not established that Ms. Perkins had injured herself at the workplace. Ms. Perkins testified that she was not injured at work and RWSS had no direct evidence to establish that it had. The delegate determined there was insufficient evidence to support RWSS's assertion that Ms. Perkins was dishonest and found no grounds for immediate termination on this basis.
22. Finally, the delegate found that while Ms. Perkins may have not been entirely forthright with Ms. Richardson about communicating with the Executive Board Committee, this incident did not constitute a serious breach of trust that was inconsistent with the employment relationship. The delegate noted RWSS's employee complaint procedure provided that complaints about the Executive Director were to be taken directly to the Board, which is what Ms. Perkins did. In light of the fact that Ms. Perkins was in compliance with RWSS policies, the delegate found this incident was insufficient to support grounds for dismissal with cause.

23. Finally, the delegate concluded that the client complaint of June 2014 also did not represent grounds for immediate termination. The delegate determined that the complaint contained “a subjective assessment of Ms. Perkins’ style of communication and lacks detail and supporting evidence to prove that Ms. Perkins ... deliberately acted in a manner that was prejudicial to the Society’s interests such that her behavior would justify immediate dismissal without notice or pay.”

Argument

24. RWSS contends that the delegate failed to observe the principles of natural justice in making the determination. RWSS argues that the delegate disregarded RWSS’ mandate, code of ethics and oaths of confidentiality.
25. RWSS says that although Ms. Perkins was originally going to appear at the hearing by telephone, she in fact appeared in person with her boyfriend who was then privy to confidential RWSS information. Further, it says that Ms. Perkins and her boyfriend were permitted to talk, while Ms. Richardson was not permitted to speak to Ms. Loeppky. For example, the delegate allowed Ms. Perkins’ boyfriend into the hearing. RWSS says the Society’s representatives felt uncomfortable by his presence because they were disclosing confidential information.
26. RWSS argues that the delegate considered Ms. Perkins’ actions as “minor infractions” while RWSS regarded them as major infractions and contends that Ms. Perkins was well aware that her actions could lead to dismissal as she was present when other staff were terminated for similar violations.
27. RWSS contends that the delegate erred in concluding that the only time Ms. Perkins was told her employment was in jeopardy was at a meeting on June 19, 2015, arguing that Ms. Perkins was warned about the consequences of her conduct at meetings in May and November 2013 and May 2014. RWSS says that because the word “terminated” was not used is not just “a matter of semantics”.
28. RWSS also says that the delegate accepted Ms. Perkins’ position with little evidence to support her claim and repeated the position it advanced at the hearing, providing its reasons for terminating Ms. Perkins’ employment.
29. Finally, RWSS says that it did “everything in [its] power by way of verbal and written warnings, additional training, mentoring and extensive supervision” and that, despite its efforts, Ms. Perkins’ conduct did not change.
30. RWSS makes two other points in its appeal; the first is the fact that interest was assessed on the amount ordered owing, which it argues was a direct result of the delegate’s delay in issuing the Determination (over 5 months from the date of the hearing) and the fact that the Determination was sent to each of the RWSS Directors, one of which was removed, presumably prior to the Determination being issued, which it claims was a “direct violation of our right to privacy and confidentiality.”

ANALYSIS

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 burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that RWSS has not met that burden and dismiss the appeal.

33. In *J.C. Creations Ltd.* (BC EST # RD317/03), the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an “overly legalistic and technical approach” to the appeal document: “The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.” (page 12)

34. Although RWSS’s appeal is on the basis of natural justice, the thrust of some of its arguments is that the Determination is wrong. I will address each of those arguments.

Failure to observe the principles of natural justice

35. 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”.

36. RWSS contends that Ms. Perkins was allowed to appear in person (when she had earlier said she would be attending by phone), and to communicate with her boyfriend through the hearing while Ms. Richardson and Ms. Loeppky were not permitted to speak to each other. Both Ms. Richardson and Ms. Loeppky were witnesses for RWSS and each gave evidence. It is entirely proper for the delegate to prohibit witnesses from discussing their evidence with each other until they have both testified (see *Collectrite Services Kelowna Ltd.*, BC EST # D240/00, and *Baum Publications Ltd.*, BC EST # D090/05). Given that Ms. Perkins’ boyfriend was not a witness, I find no unfairness or denial of natural justice in the delegate allowing Ms. Perkins’ boyfriend to communicate with her.

37. RWSS also takes issue with the fact that Ms. Perkins’ boyfriend was permitted to attend the hearing and was therefore privy to RWSS’s confidential information. RWSS does not argue that it did not have the opportunity to present the evidence as it determined necessary to meet its burden. I find no denial of natural justice in this respect. While RWSS does not argue that this issue was raised with the delegate, both parties are entitled to have their cases heard and it is within the discretion of the delegate to decide who is permitted to attend the hearing.

38. RWSS also contends that the delegate failed to “hear” its position, but cites only his finding in favor of Ms. Perkins in support of that contention. There is no evidence the delegate failed to consider all of the evidence.

39. I find no basis for this ground of appeal.

Error of law

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 [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.

41. The burden of establishing just cause rests with an employer (see *Kenneth Kruger*, BC EST # D003/97). Therefore, RWSS had the onus of establishing that it had grounds to terminate Ms. Perkins' employment for cause. Placing the burden of establishing cause on RWSS is neither unfair nor an error of law.

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

Most employment offenses 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 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 questions 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 principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that his or her work performance is acceptable to the employer.

44. The delegate considered the evidence presented by the parties in light of the law set out above. While it is apparent that RWSS disagrees with the ultimate conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable, or that the Director misapplied the law of the *Act* relating to just cause.

45. The delegate found that RWSS had established that Ms. Perkins' performance was unacceptable and that she was clearly warned that her performance was unacceptable. However, he concluded that RWSS had not

established that Ms. Perkins had been clearly and unequivocally warned about the consequences of continued unacceptable performance. I find nothing in the record to suggest that his conclusion was incorrect.

46. Although RWSS maintained a personnel file documenting the conversations Ms. Richardson had with Ms. Perkins, those notes suggest that Ms. Richardson repeatedly expressed “concerns” about Ms. Perkins’ conduct and told her that her conduct was not going to be tolerated. However, there is nothing to suggest that Ms. Perkins was ever told that her employment was in jeopardy.
47. RWSS says that even if the word “termination” was not used, Ms. Perkins was aware of the consequences as a result of her work experience and the failure to use the word “termination” was merely a matter of “semantics”. Ms. Perkin’s evidence was that she was never told that her employment would be terminated. As noted in paragraph 43 above, there are important reasons for requiring clear and unequivocal warnings. It is not for Ms. Perkins to infer her employment was in jeopardy based on the discussions.
48. I also find no error in the delegate’s conclusion on the alleged incidents of misconduct that RWSS relied upon to establish just cause to dismiss without warning. The delegate determined that RWSS had not met its burden of establishing dishonesty. While I note that RWSS contends that it did not want to place its clients in a position where they had to “face their abuser”, it nevertheless had to meet an evidentiary burden to establish that Ms. Perkins was dishonest, an evidentiary burden the delegate concluded had not been met.
49. I find that the delegate’s conclusions were rationally supported based on the evidence before him.
50. While I agree with RWSS’s concerns about the delay between the hearing of the complaint and the issuance of the Determination, I am not convinced, on the evidence before me, that the delay caused RWSS any prejudice (see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307). Delay, without evidence of any prejudice in an administrative context does not amount to an abuse of process.
51. Finally, I wish to comment about RWSS’s concern that the Determination was sent to all of the Directors of the RWSS, suggesting that doing so was a breach of confidentiality. The delegate states that as of October 15, 2014, certain people were listed as directors.
52. I find no basis for Ms. Richardson’s contention that those individuals who are legally entrusted under the *Society Act* to carry out the Society’s business, including the right to employ persons, have no right to know the results of a hearing regarding an individual’s employment.
53. The appeal is dismissed.

ORDER

54. Pursuant to section 115(1) of the *Act*, I Order that the Determination, dated July 22, 2015, be confirmed in the amount of \$6,169.53 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