

An appeal

- by -

636104 B.C. Ltd. operating as Nerve Center Café
(“Nerve”)

- 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: Robert Groves

FILE No.: 2005A/163

DATE OF DECISION: November 15, 2005

DECISION

OVERVIEW

1. This is an appeal by 636104 B.C. Ltd. operating as Nerve Center Café (“Nerve”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on April 22, 2005 in favour of one Kaylee Stepura (“Stepura”).
2. Having made a finding in the Determination that Nerve had contravened section 63 of the *Act* in its dealings with Stepura, the Delegate ordered Nerve to pay \$605.75 in respect of compensation for length of service and accrued interest, and an administrative penalty of \$500.00, for a total of \$1,105.75.
3. This matter initially came before me on the question of whether the time within which Nerve should have filed its Appeal Form under the *Act* should be extended. In BCEST #D134/05, dated September 8, 2005, I decided that the time period should be extended to June 29, 2005, which was the date on which Nerve’s Appeal Form was stamped as received by the Tribunal.
4. The Delegate having delivered the record of his proceedings prior to my determining the timeliness issue, the Tribunal wrote to the parties on September 12, 2005 inviting submissions on the merits. The Delegate delivered a letter submission in reply (the “Delegate’s Submission”), dated October 3, 2005. On October 4, 2005, the Tribunal forwarded copies of the Delegate’s Submission to Nerve and Stepura, and requested that any further submissions be delivered by October 19, 2005. No further submissions were received.
5. The appeal has now been referred to me for determination on the merits. Pursuant to the authority provided under Section 36 of the *Administrative Tribunals Act*, the Tribunal has decided that this application shall be decided on the basis of the written submissions of the parties.

ISSUES

6. Has Nerve shown that the Determination should be cancelled, or varied, or that it should be referred back to the Director of Employment Standards, because, as Nerve has stated on its Appeal Form, evidence has become available that was not available at the time the Determination was being made?

FACTS

7. Nerve operated an internet café in Surrey, British Columbia, at which Stepura was employed in customer service from May 16, 2002, until she was discharged on August 3, 2004, allegedly for just cause.
8. Stepura subsequently filed a complaint under Section 74 of the *Act* alleging that Nerve had contravened the *Act* by failing to pay statutory holiday pay and compensation for length of service.
9. The Delegate commenced an investigation, and at a meeting with Stepura and a representative of Nerve on March 18, 2005, all parties agreed that statutory holiday pay had, in fact, been paid to Stepura in accordance with the *Act*. The Delegate then focused his attention on Nerve’s allegation that Stepura was not entitled to compensation for length of service because she had been dismissed for just cause.

10. In an email the Delegate forwarded to Nerve dated March 24, 2005, the Delegate confirmed to Nerve that the onus rested on it to prove that Stepura had been discharged for just cause, failing which Stepura was entitled to compensation for length of service. The Delegate also explained to Nerve that a finding of just cause might follow Nerve's presenting evidence of serious wilful misconduct, serious breach of company rules or practices, or serious undermining of Nerve's corporate culture on the part of Stepura. He also asked Nerve to produce its relevant rules and policies and to tender evidence as to the manner in which they had been violated by Stepura, including the names and phone numbers of witnesses who might be able to confirm the facts supporting Nerve's position. The Determination states that Nerve failed to comply with any of these requests, notwithstanding that the Delegate's March 24, 2005 email gave Nerve until April 1, 2005 to reply.
11. Instead, Nerve forwarded an email to the Delegate dated March 30, 2005, in which it asserted that Stepura had made disparaging comments about Nerve on an internet chat room at a time when she knew, or ought to have known, that such conduct would provide grounds for immediate dismissal. This was so, Nerve contended, because another employee had been discharged for similar reasons in 2002, at which time Nerve said it had given notice to its other employees "verbally and in writing" that "this kind of behaviour" would not be tolerated, and would give grounds for discharge. Nerve did not, however, deliver to the Delegate any copies of the written warning it said it provided to its employees at that time, or the statements of any employees corroborating that such a policy was in effect, or had been communicated. Rather, it stated that it would be pleased "to obtain and submit statements from our other former employees regarding their knowledge of this policy."
12. No such evidence having been received thereafter, the Delegate issued his Determination on April 22, 2005 stating that Nerve had failed to provide sufficient evidence to demonstrate the existence of just cause. In reaching this conclusion, the Delegate regarded it as significant, firstly, that Nerve did not appear to have imposed any form of progressive discipline on Stepura, and secondly, that there was no conclusive evidence she had ever been warned that her continued employment was in jeopardy if the misconduct that Nerve felt inappropriate were to be repeated in future. The inference to be drawn from this emphasis in the Delegate's analysis is that he did not feel that Stepura's misconduct, if any, was of such a fundamental nature as to warrant dismissal without the requirement of a warning.
13. On appeal, Nerve argues that it offered to provide to the Delegate proof that its policy on employees' making insulting statements about Nerve in public was clearly communicated to and understood by all members of staff including, presumably, Stepura, but that Nerve did not receive a response to its offer from the Delegate. Nerve's Appeal Form attaches a witness list containing the names of four persons, from whom I infer Nerve expects that evidence of the existence of the corporate policy could be obtained, if they were asked.

ANALYSIS

14. Nerve's Appeal Form states that the statutory ground of appeal on which it relies is that evidence has become available that was not available at the time the Determination was being made. The evidence in question is the testimony of other individuals to the effect that Nerve's policy relating to negative public statements about the company by employees would not be tolerated, and would form the basis for immediate termination.
15. In my view, such a basis for the appeal cannot be sustained. The reason why I say this is that there is nothing apparent in the record submitted by the Delegate, or on Nerve's Appeal Form, that suggests the

evidence it asserts is “new” was, in fact, unavailable to it when the Determination was being made. Rather, what seems to have happened is that Nerve informed the Delegate it would obtain and submit statements from other employees regarding their knowledge of the company’s policy, but that Nerve simply did not place the evidence before the Delegate prior to the Determination being issued. Indeed, the evidence has still not been tendered, even on this appeal. What we have instead is Nerve’s statement that it can provide the evidence through the witnesses whose names are listed, if it is requested.

16. The approach the Tribunal takes concerning the introduction of new evidence on appeal is strict. In general, appellants will not be permitted to rely on evidence that was available and could have been presented to the Delegate. Further, appellants will be required to demonstrate that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the investigation and prior to the Determination being made (see *Senor Rana’s Cantina Ltd.* BCEST #D017/05).
17. Here, it is Nerve that said it would produce the evidence from other employees to the effect that the policy relating to negative public communications was well known. That promise was made prior to the April 1, 2005 deadline set by the Delegate, but Nerve did not follow up, and no such evidence was submitted to the Delegate in the weeks leading up to the April 22, 2005 Determination, nor, indeed, at any time on this appeal.
18. For Nerve to argue, as it has, that it offered to produce the evidence, but the Delegate did not respond, is disingenuous. The Delegate informed Nerve that the onus was on it to prove just cause, and that any evidence in support of Nerve’s argument on the point should be submitted by April 1, 2005. Nerve’s March 30, 2005 email nowhere requests that the Delegate provide a response. Nor is Nerve’s statement in the email that it would obtain and submit statements from former employees regarding their knowledge of Nerve’s policy couched as an offer, which the Delegate could act on or not, as he chose. Finally, there is nothing in the email which suggests that the evidence would be difficult to obtain, or that it could not, therefore, be supplied in a timely way, as requested.
19. I have concluded, therefore, that Nerve has failed to show that the evidence could not, with the exercise of due diligence, have been presented to the Delegate during the investigation of the complaint and prior to the Determination being made.

ORDER

20. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert Groves
Member
Employment Standards Tribunal