Employment Standards TRIBUNAL

An appeal

- by -

Hamilton & Spill Ltd.
(the "Employer")

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/837

DATE OF HEARING: April 22, 2002

DATE OF DECISION: May 9, 2002

DECISION

APPEARANCES:

Terence W.T. Yu, Barrister & Solicitor — for Hamilton & Spill Ltd.

Salim Rehemtulla — on his own behalf

OVERVIEW

Hamilton & Spill Ltd. (the "Employer") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 5th, 2001 (the "Determination") pursuant to which the Employer was ordered to pay its former employee, Salim Rehemtulla ("Rehemtulla"), the sum of $4,232.71 on account of 5 weeks' wages as compensation for length of service payable under section 63 of the *Act*.

The Employer's appeal was heard at the Tribunal's offices in Vancouver on April 22nd, 2002. Mr. Makhan Brar and Ms. Diane Singh testified in person on behalf of the Employer. Mr. Francis Leung testified for the Employer via teleconference. Mr. Rehemtulla testified on his own behalf. The Director was not represented at the appeal hearing. In addition to the witnesses' testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

ISSUES ON APPEAL

The Employer does not take issue with the Delegate's calculations, however, it says that Mr. Rehemtulla is not entitled to any compensation for length of service since it had just cause to terminate his employment [see section 63(3)(c) of the *Act*]. Further, the Employer says that the Delegate was biased and did not conduct a proper investigation prior to issuing the Determination.

FINDINGS AND ANALYSIS

Section 77 and Bias

I am not satisfied that either of the latter two grounds of appeal--which the Employer's legal counsel did not strenuously press at the appeal hearing--has any merit. The material before me shows that the Delegate gave the Employer a reasonable opportunity (see section 77) to present its position to the Delegate and that the Employer availed itself of that opportunity. I do not accept counsel's submission that a Delegate has a duty to interview every single person who an Employer says might have relevant evidence. It is the Employer's obligation to present its case to the Delegate and it is the Delegate's duty, in turn, to consider all of the evidence presented. In my view, that latter duty was fully satisfied in this case.

As for the matter of bias, counsel says that certain of the Delegate's statements contained in a submission filed with the Tribunal suggest that the Delegate must have been biased. However, there is nothing in the material before me that would suggest the Delegate was predisposed against the Employer. While some of the language used by the Delegate in his submission could be fairly characterized as a spirited defence of the correctness of the Determination, I do not conceive that such statements show that the Delegate was biased against the Employer.

Just cause for termination

Most of the material facts are not in dispute. The Employer operates a wholesale furniture business. On Thursday, March 22nd, 2001 Mr. Rehemtulla, formerly the supervisor of the Employer's "Customer Care" department, purchased four side/coffee tables from "new" stock. As an employee, Rehemtulla would have been entitled to a 10% staff discount. Mr. Rehemtulla prepared a handwritten bill of lading (this document did not show any prices and was not an invoice) and gave that to the warehouse supervisor who, in turn, retrieved the goods (which were still in their original shipping containers) from the warehouse. The warehouse supervisor helped Rehemtulla load the goods into Rehemtulla's vehicle. Mr. Rehemtulla took the goods home but did not unpack them until the weekend when he discovered that the goods had varying degrees of damage (2 items were heavily damaged; the other 2 items had comparatively minor damage).

On the following Monday, Rehemtulla handed a clerk in his department a handwritten "sales order" form and asked her to prepare a formal invoice (which was prepared) showing $50 per item or $200 in total; Rehemtulla characterized the $200 as a "global" price for all four items although each item was separately priced at $50. Mr. Rehemtulla did not have, nor did he seek, any specific authorization to set that particular discounted price for the items. It might also be noted that Rehemtulla did not return the damaged items to the warehouse on Monday so that an independent party could verify the extent of the damage to the items and assess whether the proposed discount was appropriate in the circumstances. Further, Rehemtulla did not return the goods so that they could be replaced with undamaged goods. The normal wholesale price of the items totalled $655; after taking into account the 10% staff discount, the price set by Rehemtulla represented a 66% discount of the "staff price" and a 69.5% discount of the normal wholesale price.

On Tuesday, the company's audit clerk questioned Rehemtulla about the price of the items and Rehemtulla told her that the goods in question were damaged. At about 6 P.M. that same day, Rehemtulla was called into a meeting and was questioned about the matter and then, after being called a liar and a cheat, was terminated; he was immediately escorted from the building. The regular wholesale price of the goods was subsequently (and unlawfully--see section 21 of the *Act*) deducted from Rehemtulla's final paycheque. Some time later, Rehemtulla returned two damaged table tops and was given new tops by way of replacement.

Mr. Brar, the Employer's human resources supervisor, testified about the events leading up to Mr. Rehemtulla's termination. Mr. Brar stated that the company's policy with respect to damaged goods, especially for goods sold in the local market, was to ship replacement items rather than negotiating a price discount with the customer. He also testified that all staff purchasers were to be processed by the customer service department (not Mr. Rehemtulla's customer care department) and that any issue regarding damaged goods was to be addressed solely by the quality control department.

Mr. Brar also testified about a number of other circumstances of which he had no personal knowledge and thus that evidence, being hearsay, is of limited probative value. While hearsay evidence is admissible before the Tribunal (see Rule 19, Appeal Rules of Procedure), an employer seeking to reverse a delegate's conclusion that there was no just cause for dismissal cannot expect to succeed if it relies on hearsay evidence with respect to critical factual matters.

Ms. Singh, who works in the customer service department, confirmed Mr. Brar's testimony that all aspects of employee purchases, including preparation of the bill of lading (which is the warehouse's authority to release the goods) and invoicing, are administered by the customer service department. Ms. Singh was in the warehouse on Thursday and saw Rehemtulla's handwritten bill of lading; she thought it was odd and subsequently questioned the matter with other company officials.

Mr. Leung, the Employer's controller, did not have any personal knowledge about the events in question save the termination interview at which he was present. At the meeting, Rehemtulla was asked about the goods and replied that they were return items from Costco (a retail customer) and were damaged. Mr. Rehemtulla offered to bring in the goods so that the damage could be verified. Mr. Leung said that, in general, damaged goods were replaced but that discounts might be negotiated if the customer was outside the local market. Mr. Leung did not personally inspect the damaged goods that Rehemtulla returned but, based on the damage report prepared by the quality control department (recall that two table tops were subsequently returned for replacement), "I wouldn't want the goods even for $50". Finally, he testified that employees generally were given 15 days to pay for their purchases.

Mr. Rehemtulla took issue with only a few of the above points. First, he said that invoicing was not the exclusive province of the customer service department. He said that his own department had prepared invoices in the past when he made a personal purchase. Second, he testified that he negotiated price discounts with customers even though they were located in the local market. Third, he does not recall ever saying to anyone that the goods he purchased had been returned from Costco.

ANALYSIS

The Employer's position appears to have shifted over time. Initially, as set out in Mr. Brar's September 10th, 2001 letter to the Delegate, the Employer's position was that:

> "...Salim Rehemtulla misused his authority and knowledge of our systems and procedures and was caught purchasing good stock at damaged stock prices. As a result Salim was terminated from his employment with Hamilton & Spill Ltd. due to his misconduct and for cause...
>
> During his termination interview...[the] CEO informed Salim that he had two options, 1) *for the company to press charges against him for theft*, or 2) pay full price for the merchandise." (my italics)

There is no evidence before me--nor does the Employer even suggest--that the goods purchased by Rehemtulla were free from damage. The italicized portion of the above quotation comes very close to being an outright fabrication. Indeed, the Employer's own "Physical Inspection Report" indicates that at least two of the items were very significantly damaged (one table top was rated by the quality control department as being 40% damaged; the other table top was "scrapped"). Mr. Leung's evidence, it might be recalled, was that he would not have paid even $50 for each of those two tables in light of the reported

damage. The original allegation against Rehemtulla suggests something akin to theft or fraud; he manipulated the company's policies in order to obtain new goods at a substantially discounted price.

Before me, the Employer took a somewhat different tack: Rehemtulla breached company policy and was in a conflict of interest. Further, this "revelation of character" shows that Rehemtulla was a dishonest employee who could no longer be trusted.

The problem that I have with the Employer's present position is that it, too, is based on a faulty evidentiary premise. The Employer says that all employee purchases were administered by the customer service department; Mr. Rehemtulla says that was not so, at least in his case. Presumably, the Employer could have produced records with respect to Rehemtulla's previous purchases (there were several) that would have supported its position but I have no such records before me. Further, if Mr. Rehemtulla was so obviously in breach of company policy regarding employee purchases, why did the warehouse supervisor release the goods to him on Thursday without question? I also note that this employee did not testify before me.

The Employer says that it never negotiated price discounts with local customers who complained about damaged goods; Mr. Rehemtulla says otherwise and that he personally negotiated such discounts. The Employer could have produced records to corroborate its position but it did not do so. It should be remembered that the burden of proving just cause lies on the Employer.

I must pause at this point to note that I am troubled by certain aspects of Mr. Rehemtulla's behaviour. He ought to have had someone at the company verify the damage to the goods prior to setting a discounted price; he ought not to have unilaterally fixed the discount price; he should not have asked a member of his own department to prepare an invoice.

On the other hand, if Mr. Rehemtulla was attempting to defraud the company, one has to wonder why he went about things in such a transparent manner. He did not, in my view, act surreptitiously; indeed, he appears to have been quite open and forthright when questioned about the matter. In this latter regard, he asked another company employee to prepare the invoice; that invoice was transmitted, in short order, to the customer service department; he did not obtain the goods on his own but rather gave a bill of lading to the warehouse supervisor; when questioned by other staff, he immediately explained why the price was so low and, I note, at no time did anyone on behalf of the Employer ask Rehemtulla to return the damaged goods so that they could be replaced (rather than being discounted). I find this latter point rather telling especially in light of the Employer's strenuous assertion that replacement was the only option ever offered to a local customer who purchased damaged goods.

Even if Rehemtulla did not follow the letter of company policy (and this is not clear), and even if he placed himself in a position of conflict by unilaterally fixing a discount price (and I am inclined to the view that he did), I am not satisfied that this single incident--in an otherwise unblemished 5 plus years' employment--amounts to such a serious failing as to justify summary termination for cause (I say this particularly in light of the Supreme Court of Canada's recent decision in *McKinley v. BC Tel,* [2001] 2 S.C.R. 161).

The Employer, who did not conduct much of an investigation, leapt to the conclusion that it had a thief in its midst (recall the Employer's first--and false--position that Rehemtulla "was caught purchasing good stock at damaged prices" and might be charged with theft) and reacted, swiftly, to that apparent state of affairs. However, this is not a case of theft; it is not even a case of dishonest behaviour. This case, as I

see it, is at most properly characterized as a case of poor judgment by an otherwise faithful and long-serving employee.

Given the evidence before me, I am not satisfied that the Employer had just cause for dismissal.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $4,232.71 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal