



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Vanessa Gyles

Applicant

-and-

**2212088 Ontario Inc. dba Edible Arrangements-Store #1107,
Ramandeep Shina, and Colleen Kehl**

Respondents

DECISION

Adjudicator: Eric Whist
Date: April 24, 2012
File Number: 2010-05635-I
Citation: 2012 HRTO 821
Indexed as: **Gyles v. 2212088 Ontario**

APPEARANCES

Vanessa Gyles, Applicant

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Ayoob Khan, Representative

2212088 Ontario Inc.
dba Edible Arrangements-Store #1107,
Ramandeep Shina, Respondents

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Harinder Gahir, Counsel

Colleen Kehl, Respondent

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Self-Represented

[1] This Application was filed on May 10, 2010 under section 34 of Part IV of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "Code"). The Application alleges discrimination in employment based on race, colour and place of origin.

[2] The Application alleges that Colleen Kehl made an offensive racial comment to the applicant, Ms. Gyles, during a telephone conversation on March 16, 2010. The Application alleges that Ms. Gyles raised her objection to this comment with her employer, Ramandeep Shina, but that Ms. Shina failed to respond appropriately and then terminated Ms. Gyles' employment two days later, on March 18, 2010.

[3] I heard evidence from five witnesses: Ms. Gyles, Ms. Kehl and Ms. Shina (the two personal respondents) and two other witnesses for the respondents, Harpreet Grewal and Cathy Austin.

DECISION

[4] The Application is dismissed. I do not find Ms. Gyles' testimony to be credible. I prefer the evidence of the personal respondents that provides a decidedly different account of events and which leads me to conclude that no racial comment was made by Ms. Kehl. I do not find that Ms. Shina failed in her duty as an employer to respond to Ms. Gyles' allegation of a racial incident and I do not find that the termination of Ms. Gyles' employment was tainted by discriminatory considerations or occurred in retaliation for Ms. Gyles having complained about the alleged racial comment.

BACKGROUND

[5] Ms. Gyles was hired as a salesperson by 2212088 Ontario Inc., dba Edible Arrangements-Store #1107 ("Store 1107") on January 7, 2010. Store 1107 is located in Brampton, Ontario. It is a franchise of Edible Arrangements and is owned by Ms. Shina. Edible Arrangements' franchise stores sell fresh fruit arrangements, usually cut

fruit made to look like floral bouquets. These stores operate, in many ways, like florists and a key part of their business is selling arrangements for special occasions.

[6] In 2010 Ms. Kehl was the owner of an Edible Arrangements franchise located in Windsor, Ontario.

[7] Ms. Kehl filed a Request for an Order During Proceedings requesting that she be removed as a respondent on the basis that she was not in an employment relationship with Ms. Gyles when she telephoned Store 1107 on March 16, 2010 and allegedly made a racially offensive remark to Ms. Gyles. In an Interim Decision dated January 14, 2012, 2011 HRTO 108 the Tribunal denied Ms. Kehl's request on the basis that the issue of whether Ms. Kehl and Ms. Gyles had a relationship "with respect to employment" could not be decided without an assessment of the facts and evidence along with an interpretation of the law in this area. I have not had to determine whether Ms. Kehl is in a relationship with respect to employment with Ms. Gyles given my decision to dismiss the Application.

SUMMARY OF KEY EVIDENCE

Events Surrounding the Telephone Calls on March 16, 2010.

[8] Ms. Gyles self identifies as a Black woman of Caribbean descent. She testified that while at work on March 16, 2010 she answered the telephone and was asked by the caller. "Can I speak to your owner?" She alleges this was followed by the caller giggling and then saying "Whenever I say that I feel I am talking to a slave or a slave owner". Ms. Gyles testified that she was taken aback by this comment as well as being shocked and upset.

[9] Ms. Gyles testified that she transferred the telephone call to Ms. Shina. She testified that she then asked Ms. Shina if she could talk to the caller after Ms. Shina had finished her conversation with the caller.

[10] The caller was Ms. Kehl. Ms. Kehl testified that she was calling in order to provide some advice to the new owner of Store 1107 about sales strategies given that Ms. Kehl was an experienced Edible Arrangements franchisee. Ms. Kehl testified that Edible Arrangements is a close knit organization and there is a sense of shared purpose within the organization and amongst franchises. Ms. Kehl testified that she did not know Ms. Shina when she called on March 16.

[11] Ms. Gyles testified that when she took the telephone from Ms. Shina and resumed her conversation with Ms. Kehl she told Ms. Kehl that she was Black, that she found Ms. Kehl's comment offensive and did not appreciate what Ms. Kehl had said. She testified that she then hung up the telephone.

[12] Ms. Gyles testified that Ms. Shina overheard this conversation and afterwards told Ms. Gyles that she could not believe that Ms. Gyles would hang up the telephone on a customer. Ms. Gyles testified that Ms. Shina's repeated concern was that Ms. Gyles had demonstrated poor customer relations and that Ms. Shina gave no regard to how Ms. Gyles may have felt after what Ms. Kehl had allegedly said to Ms. Gyles on the telephone.

[13] Ms. Gyles testified that what she wanted and expected was for Ms. Shina to be shocked by what had allegedly been said and to call and tell Ms. Kehl that her behaviour was unacceptable even if Ms. Kehl did not know that the person she had been speaking to on the telephone was Black.

[14] Ms. Kehl provided a decidedly different account of the telephone conversation. It was a detailed account that included the following. Ms. Kehl testified that she introduced herself by name and asked if Ms. Gyles was the store owner and when told no asked if the store owner was available. She testified that she did not know the store owner's name and asked Ms. Gyles if her owner was a he, she or a couple.

[15] Ms. Kehl testified that Ms. Gyles told her the store owner's name was Raman. She testified that she was put on hold and then Ms. Shina came on the line. Ms. Kehl

testified that Ms. Shina sounded stressed as she was explaining that she was training a new driver. She testified that she could hear someone in the background repeatedly asking to talk to Ms. Kehl.

[16] Ms. Kehl testified that Ms. Gyles came back on the line asking Ms. Kehl to repeat what she had said to Ms. Gyles during their earlier telephone conversation. Ms. Kehl testified that she then began to recount her earlier conversation with Ms. Gyles and when she stated that she had asked Ms. Gyles if her owner was a he, she or a couple she testified Ms. Gyles gasped and that this led Ms. Kehl to realize this was being seen as an offending comment. She testified that Ms. Gyles said how dare she say what she did, that Ms. Gyles was Black and that she was not a slave and that Ms. Shina was not her owner. Ms. Kehl testified that she apologized. She testified that Ms. Gyles abruptly ended the call. According to Ms. Kehl Ms. Gyles was yelling by the time she hung up the telephone.

[17] During cross-examination Ms. Gyles denied Ms. Kehl's account of events. She denied that Ms. Kehl had made a reference only to who her owner was, maintaining that Ms. Kehl had used the word "slave". She denied that Ms. Kehl offered an apology. She also denied that she yelled at Ms. Kehl.

[18] Ms. Shina testified that she overheard Ms. Gyles saying to Ms. Kehl "are you crazy" and noting that she was a Black person. She testified that Ms. Gyles was yelling when she hung up the phone. Ms. Shina testified that Ms. Gyles was well aware that Ms. Shina wanted to continue her conversation with Ms. Kehl. She testified that she had clearly said to Ms. Kehl not to go away that she would get back to her but that she was putting Ms. Gyles back on the line.

[19] Ms. Shina testified that she asked Ms. Gyles why she had hung up the phone and that Ms. Gyles told her that Ms. Kehl had called her a slave. She testified that she asked Ms. Gyles how Ms. Kehl had done this and that Ms. Gyles told her that Ms. Kehl had asked her who her owner was. Ms. Shina later testified that she asked Ms. Gyles

whether Ms. Kehl had specifically used the word "slave" and that Ms. Gyles had said no, that Ms. Gyles was interpreting Ms. Kehl's question about who her owner was.

[20] Ms. Shina testified that after the call she told Ms. Gyles that Ms. Kehl had not known Ms. Gyles was Black. Ms. Shina testified that she also asked Ms. Gyles why she had not told her what her concern with Ms. Kehl was and that Ms. Shina could have dealt with it. She testified that Ms. Gyles told her that she could not have wanted Ms. Shina to deal with this issue as Ms. Shina always thinks the customer is right.

[21] There was a second telephone call. Ms. Shina testified that she called Ms. Kehl back and that during this conversation they discussed what had just occurred between Ms. Gyles and Ms. Kehl. She testified that Ms. Kehl provided her account of events. She testified that after the call she told Ms. Gyles that Ms. Kehl had indicated to her that she had not used the word "slave" and that Ms. Kehl apologized to Ms. Gyles if there was a misunderstanding. Ms. Shina testified that she (Ms. Shina) also apologized for the misunderstanding and did so in an effort to calm Ms. Gyles down. She testified that Ms. Gyles told her that she was too nice and that she did not have balls.

[22] Ms. Shina testified that she and Ms. Gyles proceeded to discuss the incident over the next two hours with Ms. Shina taking the position that it was a misunderstanding. She testified that eventually Ms. Gyles told her to let it go, that it was an incident between Ms. Gyles and Ms. Kehl and that Ms. Shina could not change Ms. Gyles' view of what happened. Ms. Shina testified that by the time she left that evening she believed Ms. Gyles had calmed down and testified that Ms. Gyles had told her that she was fine.

[23] Ms. Gyles testified that when Ms. Shina got off the telephone with Ms. Kehl for the second time she did not say anything to Ms. Gyles and acted as if nothing had happened. She testified that after 20 minutes she asked Ms. Shina what had happened and was told that Ms. Shina had been in a telephone conversation with another franchise owner named Colleen. She told Ms. Shina that as another franchise owner Colleen ought to have known better than to make the comment she did. She testified

that Ms. Shina told her that Colleen had not known Ms. Gyles was Black and that she "didn't mean it" and repeatedly told Ms. Gyles that she could not believe that she had hung up on a customer.

Further Events on March 16 and March 17

[24] Ms. Gyles testified that she did not know Ms. Kehl's identity after the telephone calls, only that she her first name was Colleen. She testified that after Ms. Shina had left for the day on March 16 she called Edible Arrangements' corporate office to find out who Colleen was and with a view to making a complaint about Ms. Kehl. She testified that she was doing this because Ms. Shina had not dealt with the situation that she had not acted as an employer should have, in Ms. Gyles' view.

[25] During cross examination Ms. Gyles was questioned about the telephone records for Store 1107 from March 16, 2009 that were disclosed by Store 1107 and Ms. Shina. The telephone records indicate a number of telephone calls made at the time Ms. Gyles was on her own in the store. Ms. Gyles acknowledged telephoning Edible Arrangements' corporate offices but denied having called other Edible Arrangements franchise stores to find out who Colleen was.

[26] Ms. Kehl also testified that she contacted Edible Arrangements corporate office on March 16 to tell them what had happened. She testified that she also received a telephone call at her home on March 16 from a person who remained silent on the telephone. She testified that she suspected it was Ms. Gyles and proceeded to refer back to her earlier telephone call with Ms. Gyles, again offering an apology if there had been a misunderstanding. She testified that she heard a sigh on the other end of the line that convinced her it was Ms. Gyles.

[27] Ms. Gyles denied having called Ms. Kehl at home. The telephone records for Store 1107 for March 16 indicate that a telephone call was made from the store to La Salle, Ontario. Ms. Kehl testified that she lives in La Salle and identified the telephone number in question as her home telephone number.

[28] Ms. Shina testified that she was in contact with Edible Arrangements' corporate offices on March 17 at which time she was asked about what was happening. She testified that she was told that Ms. Gyles had contacted two other Edible Arrangements stores on March 16 about Ms. Kehl and had been rude in her dealings with these stores.

March 18, 2010

[29] Ms. Gyles' next scheduled work day was March 18. She testified that on March 18 Ms. Shina told her that she wanted to talk about the events of March 16, and proceeded to tell Ms. Gyles that she had been rude to one of Ms. Shina's colleagues (Ms. Kehl) and that she should not have hung up the telephone. She testified that Ms. Shina then told her that she was going to have to fire Ms. Gyles because of what she did. According to Ms. Gyles Ms. Shina also referred to Ms. Gyles having been rude on other occasions, in particular in dealing the accountant, Ms. Shina's brother-in-law.

[30] Ms. Shina's account of events on March 18 was different. She testified that Ms. Gyles initially would not talk. She testified that when they eventually began to talk at the end of the day Ms. Shina testified that she asked Ms. Gyles whether she had called other Edible Arrangements stores on March 16 and Ms. Gyles said no. This was at odds with the information Ms. Shina had been given by the Edible Arrangements corporate office on March 17. She testified that Ms. Gyles became combative and described Ms. Gyles as "yelling" and "going ballistic". She testified that Ms. Gyles told her that she was not a receptionist, that Ms. Shina was not a good manager and it was Ms. Gyles who was running the store.

[31] Ms. Shina testified that it was during this conversation that she decided to terminate Ms. Gyles' employment. She testified that she felt bullied by Ms. Gyles' constant challenges and that their conversations were not resolving anything. She testified that her decision was also informed by Ms. Gyles' overall performance including her failure to appear for work on Valentine's Day, her repeated lateness for work and the complaints she received about Ms. Gyles' poor customer service.

[32] She testified that Ms. Gyles stated that she had lawyer friends and that Ms. Shina was going to pay for this.

Ms. Gyles' Punctuality and Attendance

[33] Ms. Shina testified that Ms. Gyles' punctuality was a major concern and a factor that contributed to her decision to terminate her employment. She testified that Ms. Gyles was late 11 out of the 25 days she worked at Store 1107 and that she had repeatedly told Ms. Gyles that this behaviour was unacceptable. To support the claim that Ms. Gyles was repeatedly late Store 1107 and Ms. Shina disclosed a timesheet for Ms. Gyles that recorded the times of her arrival and departure from work. Ms. Gyles raised concerns about the authenticity of this document. Ms. Gyles testified that she was never reprimanded for being late.

[34] Harandeep Grewal was an employee of Store 1107 during the period Ms. Gyles was there. She testified that Ms. Gyles was often late when Ms. Gyles was on the morning shift and responsible for opening the store and as a consequence Ms. Grewal had to wait outside until Ms. Gyles arrived. She testified on some occasions she called Ms. Shina who had to come and open the store. She testified that Ms. Gyles was also late on occasion for the afternoon shift and as a consequence Ms. Grewal who had to wait past the end of her shift and as a result missed the class she was scheduled to attend. Ms. Grewal testified that she was unaware of whether Ms. Shina had spoken to Ms. Gyles about her lateness.

[35] Ms. Shina also testified that Ms. Gyles failed to appear on Valentine's Day which is an extremely busy day for the store given Valentine's Day is a special occasion for which people buy bouquets. Ms. Gyles testified that she did not appear because she was not scheduled to work that day. Ms. Shina testified that this was not true. Store 1107 and Ms. Shina disclosed a store schedule to support the claim that Ms. Gyles was indeed scheduled for this day. Ms. Shina testified that Ms. Gyles' failure to appear for work on Valentine's Day was a significant disruption for her.

Ms. Gyles' Performance

[36] Ms. Shina testified that she had concerns about Ms. Gyles' performance and that she was repeatedly talking to Ms. Gyles about her performance. She testified that Ms. Gyles had a temper and would get angry. She testified that she was lenient with Ms. Gyles because she was a new owner and Ms. Gyles repeatedly asked for further chances. Ms. Shina acknowledged under cross-examination that she never issued any written reprimands to Ms. Gyles but testified that this was because Ms. Gyles was still a new, probationary employee.

[37] Ms. Shina testified that she had been told that Ms. Gyles was rude and snappy with customers and was aware of an incident in which Ms. Gyles had a dispute with a customer after the customer's special order had not been prepared as requested.

[38] Ms. Austin testified that on March 8, 2010 she came to Store 1107 to buy an arrangement and was served by Ms. Gyles. She testified that Ms. Gyles told her there were no arrangements available even though Ms. Austin was willing to come back to the store later to give Ms. Gyles time to prepare an arrangement. She testified that Ms. Gyles was repeatedly rude. She testified that she was then told by Ms. Gyles that she had to call in her order. She testified that she called three hours later and dealt with Ms. Gyles who was again abrupt and rude. She testified that she asked to speak to the manager, Ms. Shina who she knew to be the manager from a business card she had picked up in the store. She testified that Ms. Gyles told her Ms. Shina was not the manager and hung up the telephone on Ms. Austin. Ms. Austin testified that she was scared because of how hostile Ms. Gyles had been throughout their dealings. She testified that when she did speak to Ms. Shina and shared the experiences she had had with Ms. Gyles Ms. Shina apologized and sent her a complimentary bouquet. Ms. Shina testified that she was also aware of the events involving Ms. Austin.

Edible Fruit Design Facebook Page

[39] Ms. Gyles was cross examined about a Facebook page for Edible Fruit Design that was disclosed by Ms. Shina and Store 1107. Edible Fruit Design is a business that sells edible fruit bouquets. Ms. Gyles testified that this was her business. She acknowledged these bouquets are almost identical to those sold by Edible Arrangements. She also acknowledged that she signed a non-competition agreement when she joined Store 1107 (a copy of this agreement was before me). When asked how she could be involved in Edible Fruit Designs given the non-competition agreement she signed, Ms. Gyles testified that she was not really a competitor given that a single person cannot really compete against a corporation like Edible Arrangements.

[40] Ms. Gyles testified that she started Edible Fruit Design after she left Store 1107. Ms. Gyles changed her testimony when she was shown that one of the Facebook pages for Edible Fruit Design that had been disclosed was dated March 8, 2010. She then acknowledged that she had begun this business while she was still working for Ms. Shina. She testified that she did not believe this was unethical.

FINDINGS AND ANALYSIS

[41] When the parties present contradictory evidence as to the facts, it is necessary to determine which version of events is, on the balance of probabilities, the most plausible in the circumstances. The Tribunal has adopted the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 for the assessment of credibility of witnesses. See *Habib v. University of Toronto*, 2010 HRTO 1917 and *Nelson v. Lakehead University*, 2008 HRTO 41. In the *Farry* case, the B.C. Court of Appeal stated at para. 11:

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a

practical and informed person would readily recognize as reasonable in that place and in those conditions.

[42] I find the testimony of the respondent's witnesses to be generally credible. In contrast, I find Ms. Gyles' testimony to be decidedly not credible. In my view there are a number of instances in which Ms. Gyles knowingly lied while giving her evidence and this willingness to present false evidence undermines her general credibility.

[43] I find Ms. Gyles lied about the fact that she started up a rival business to that run by her employer, Ms. Shina, at the time she was employed by Ms. Shina. She clearly tried to suggest that her Edible Fruit Design company was only started after she left Store 1107 on March 18, 2010 until presented with documentary evidence to the contrary. I am satisfied that the documentary evidence before me established that this business was open on March 8, 2010. I also find it noteworthy that Ms. Gyles did not see opening and running a business selling "edible fruit designs" while employed by Ms. Shina as an unethical business practice even though she had signed a non-competition agreement with her employer.

[44] I find that Ms. Gyles' claim that she was not scheduled to work on Valentine's Day to be a patent falsehood. I had documentary evidence before me in the form of a schedule to indicate that Ms. Gyles was scheduled to work this day. I also had Ms. Shina and Ms. Grewal's testimony that Ms. Gyles was scheduled for work on this day. Ms. Shina and Ms. Kehl also testified that Valentine's Day is an extremely important business day for Edible Arrangements franchises given the nature of their business and the practice is to schedule all available staff on Valentine's Day. Ms. Shina testified that when Ms. Gyles failed to appear for work on Valentine's Day she had to call family members on short notice to help.

[45] I find Ms. Gyles' claim that she did not call Ms. Kehl at her home on March 16, 2010 to not be credible. I had telephone records before me showing that on March 16 a telephone call was made from Store 1107 to Ms. Kehl's home in Lockwood, Ontario at a time the applicant was alone in the store. I am of the further view that Ms. Gyles called

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at least two Edible Arrangements franchises on March 16 as well, although this, too, was denied by Ms. Gyles. While I did not hear specific evidence about the other recorded telephone numbers on the March 16 telephone record, I am satisfied that they included at least two Edible Arrangement locations. I note Ms. Gyles testified that none of the calls she made that night were personal, that they were all related to her pursuit of her complaint. I note that the telephone record for March 16 indicates that at the time Ms. Gyles was on her own at the store there were calls to the Edible Arrangements corporate office in the United States and a further 8 calls to 5 locations throughout Ontario (e.g. Windsor, Warton and Kitchener-Waterloo). Both Ms. Kehl and Ms. Shina testified that they were told by the Edible Arrangement corporate office that they had received complaints from two franchises about telephone calls asking whether Ms. Kehl worked there and in which the caller was rude and abruptly hung up the telephone. I am satisfied this is sufficient evidence for me to find that on a balance of probabilities, Ms. Gyles made these calls.

[46] I heard conflicting evidence about Ms. Gyles' punctuality, her customer relations and whether Ms. Shina expressed concerns to Ms. Gyles about her performance. Ms. Gyles testified she was generally punctual, that she had not been rude to customers and that Ms. Shina never told her before March 18 that she had concerns with Ms. Gyles' performance. I do not find these claims credible. In each instance I prefer the respondents' testimony to the contrary.

[47] I had documentary evidence before me that showed Ms. Gyles' time sheet for the period she worked for Ms. Shina. I also had Store 1107's weekly staff schedule before me. These documents would appear to indicate that Ms. Gyles was late eleven times (often more than 20 minutes late) in the 25 days she worked.

[48] Ms. Gyles challenged the reliability of these documents suggesting that they may have been changed by the respondents. I do not find this likely and I accept the documents as authentic. I had the evidence of Ms. Shina and Ms. Kehl that the presented time sheet was in the standard form used by Edible Arrangements franchises and that time sheets are based on individual employees inputting their start and finish

times and cannot be altered without an identifying indication as to whom made the alteration. There were no indications that the arrival times recorded for Ms. Gyles had been altered. I also find it improbable that the respondents may have created a completely fabricated timesheet, as was suggested by Ms. Gyles' counsel.

[49] I also had the straightforward, clear and credible evidence of Ms. Grewal who testified that Ms. Gyles was often late both for the morning and the afternoon shifts. In my view the oral testimony of Ms. Shina, Ms. Kehl and Ms. Grewal corroborates the documentary evidence showing Ms. Gyles' schedule and hours worked. I do not find that being late 11 times in 25 days constitutes being generally punctual as maintained by Ms. Gyles.

[50] I find Ms. Austin's testimony about her experiences with Ms. Gyles to be credible. Ms. Austin's evidence was detailed, coherent and I note she is not a personal friend of Ms. Shina or a regular customer of Store 1107 but rather a person who agreed to testify out of a sense of civic duty. Her testimony was that Ms. Gyles was repeatedly rude to her. I note her further testimony that Ms. Gyles told her that Ms. Shina was not the store manager which is not true and the fact that Ms. Gyles abruptly hung up on her for no apparent reason.

[51] Ms. Shina also testified that she was aware of other instances of customer complaints about Ms. Gyles' customer service including the incident with the customer asking for a special order. I prefer these accounts about Ms. Gyles' conduct to Ms. Gyles' categorical denial that she was ever rude to customers.

[52] I also prefer Ms. Shina's testimony that she did speak to Ms. Gyles repeatedly about her performance to Ms. Gyles' claim that she was never reprimanded for her performance and that Ms. Shina never talked to her about her performance prior to March 18. I find it entirely implausible that Ms. Shina would not have raised issues of punctuality and customer relations as maintained by Ms. Gyles given the frequency of the lateness (and not opening the store on time), the complaints about Ms. Gyles' rude customer service and the failure to appear at work on Valentine's Day.

[53] This leads me to my assessment of the events of March 16. I find that based on the totality of the evidence presented, on a balance of probabilities, it is improbable that Ms. Kehl actually said: "Can I speak to your owner?" followed by "Whenever I say that I feel I am talking to a slave or a slave owner" as maintained by Ms. Gyles. I prefer Ms. Kehl's version which was that after she asked to speak to the store owner she asked Ms. Gyles if her owner was a he, she or a couple and it is this statement that Ms. Gyles' found to be offensive.

[54] This finding is based, in part, on my determination that Ms. Gyles is not a credible witness. I recognize that Ms. Gyles' general credibility does not necessarily mean that her account of events as to what took place during the telephone call with Ms. Kehl is not true. However, her routine willingness to not tell the truth about her experiences while working at Store 1107 is indeed a factor in my assessment as to what happened on March 16.

[55] Importantly, I also find Ms. Kehl to be a credible witness. She was clear, consistent and detailed in her testimony. She was exact in her recollections of what happened during her telephone calls with Ms. Gyles. These recollections did not change during the course of her testimony including under cross-examination. She was also genuinely emotional about how she felt about being accused of making a racially offensive comment and adamant about not making a statement in which she referred to slaves or slave owners. Her overall testimony was full of persuasive detail and indeed credible.

[56] I find it relevant that Ms. Kehl used language carefully and precisely which further contributes to my finding that she did not say, "Can I speak to your owner?" followed by "Whenever I say that I feel I am talking to a slave or a slave owner".

[57] This alleged phrasing actually makes little sense. One might imagine a person potentially saying "Can I speak to your owner?" followed by "Whenever I say that I feel I am talking to a slave". The further reference to also talking to "a slave owner" does not make sense if one has just asked a person to speak to his or her owner. I do not find it

probable that Ms. Kehl would say she felt she was talking to a slave owner after asking Ms. Gyles about who her owner was given her clear and precise use of language.

[58] I also have considered Ms. Shina's testimony about what occurred on March 16. While she was obviously not privy to the telephone conversation itself she was present at the time and spoke to both Ms. Gyles and Ms. Kehl. She testified that Ms. Kehl had told her that she had not used the word slave. She also testified that she specifically asked Ms. Gyles whether Ms. Kehl had used the word slave and that Ms. Gyles had told her no, that Ms. Gyles told her that this is how she interpreted Ms. Kehl's reference to wanting to speak to Ms. Gyles' owner.

[59] I generally find Ms. Shina to be a credible witness. Her testimony was clear and forthright. In my view, it was evident that she was a conscientious person trying to run a small business in March 2010 with limited experience, at least in managing people. I am of the view, based on the evidence before me, that she patiently and repeatedly tried to work with Ms. Gyles, to coach her about her performance issues. That said, I do not rely on Ms. Shina's testimony in making my findings as to what was said during the telephone conversation on March 16. I am concerned that her evidence about her alleged exchange with Ms. Gyles about whether the word slave was used is an embellishment of what may have been said between Ms. Shina and Ms. Gyles. In my view it is significant evidence in that it clearly would suggest that Ms. Gyles admitted to Ms. Shina that the allegations in her Application as to what Ms. Kehl said to her were not true. However, I note that Ms. Shina makes no reference in her Response to the Application to Ms. Gyles having told her that the word "slave" was not used by Ms. Kehl. This affects the credibility of this evidence.

[60] However, I do not need to rely on Ms. Shina's evidence to make my determination about what was said during the telephone call between Ms. Gyles and Ms. Kehl. I find Ms. Kehl's testimony to be credible, I find Ms. Gyles' testimony not to be credible. I am satisfied that, on a balance of probabilities, Ms. Kehl did not say "Whenever I say that I feel I am talking to a slave or a slave owner" but rather asked

Ms. Gyles if her owner was a he, she or a couple and that this is what led to Ms. Gyles' response.

[61] I note this is not a case in which there can be a finding that Ms. Gyles may have misunderstood what was said by Ms. Kehl. She was insistent that that Ms. Kehl had explicitly made a reference to slave and slave owner, that she did not simply make a reference to Ms. Gyles having an owner and that she never offered an apology. I do not find, based on my assessment of the evidence before me, that this account is truthful.

[62] I am of the further view that Ms. Kehl's asking Ms. Gyles whether her owner was a he, she or a couple cannot reasonably be considered to be a racially offensive comment in the context that it was made. In my view, Ms. Kehl was clearly making enquiries about who owned Store 1107 and that Ms. Gyles, as an employee of that store, knew this to be the case. Perhaps Ms. Kehl should have asked about Ms. Gyles' employer or who **the** owner or the franchisee of Store 1107 was but to enquire about Ms. Gyles' owner in the context in which it was asked does not constitute, in my view, a racially offensive comment even if Ms. Gyles was offended.

[63] I also find it significant that Ms. Kehl did try to respond to Ms. Gyles concern that the comment was offensive to her. It was Ms. Kehl's testimony that she apologized if there was any misunderstanding about her comment during both her conversations with Ms. Gyles. It was Ms. Kehl and Ms. Shina's testimony that during their telephone conversation Ms. Kehl apologized again about any misunderstanding. Ms. Kehl testified that she also apologized when the applicant called her on March 16 at home. In other words Ms. Kehl did not disregard Ms. Gyles' concern about what was said but tried to respond to it by assuring Ms. Gyles that there was no inappropriate intent behind the comment. I do not see how, under these circumstances, Ms. Kehl's comment could be reasonably construed as being racially offensive.

[64] Ms. Gyles' counsel argued that the nature of Ms. Kehl's response including her multiple apologies and her calling Edible Arrangements corporate office on March 16 to inform them of the incident are indications that Ms. Kehl knew she had said something

particularly offensive, that she had, in fact, explicitly referred to slave and slave owners during her initial telephone conversation with Ms. Gyles. I do not agree. I am satisfied, based on the evidence before me, that Ms. Kehl's willingness to apologize was not because she felt guilty for a racially offensive comment but because she was keen to respond to Ms. Gyles' serious allegations and to repair a relationship with another Edible Arrangements franchise.

Did Ms. Shina appropriately respond to Ms. Gyles' allegations that Ms. Kehl's had made a racially offensive comment?

[65] The Tribunal has held that an employer has a duty to investigate complaints of discrimination or harassment; that the duty to investigate is the means by which an employer ensures that it is achieving the *Code* mandated responsibility of operating a discrimination free environment (see. *Laskowski v Marineland of Canada Inc* 2005 HRTO 30 para 53). A failure to take reasonable steps to address allegations of discrimination may result in an employer being held liable for violating the *Code*. The Tribunal has further held that such a duty extends to incidents of discrimination or harassment involving a respondent's customers (see *Laskowski* para 57).

[66] The issue to be determined is whether Ms. Shina took reasonable steps in responding to Ms. Gyles' allegation that she had been subject to a racially offensive remark. I am of the view that she did. I am satisfied, based on Ms. Shina and Ms. Kehl's testimony, that when Ms. Shina called Ms. Kehl after Ms. Gyles had hung up the telephone and asked Ms. Kehl what had happened Ms. Shina had, in effect, conducted an investigation. I accept that during her conversation with Ms. Kehl, Ms. Shina obtained Ms. Kehl's version of events and Ms. Kehl's offer of an apology for any misunderstanding that may have arisen from her comments.

[67] Ms. Shina then communicated her understanding of Ms. Kehl's explanation and Ms. Kehl's apology to Ms. Gyles. I am of the view that she did this immediately after her telephone call with Ms. Kehl, as Ms. Shina testified she did. I prefer this account to Ms. Gyles testimony that after her telephone call with Ms. Kehl, Ms. Shina said nothing for

20 minutes and it was left to Ms. Gyles to broach the issue of what happened during this telephone call. I find Ms. Gyles' account improbable and that it is much more likely, given the nature of Ms. Kehl and Ms. Shina's call, that Ms. Shina would have shared the outcome of that call and Ms. Kehl's apology immediately, not in the least in order to calm Ms. Gyles.

[68] Ms. Gyles argued that as her employer, Ms. Shina should have told Ms. Kehl that her behaviour was unacceptable, that she should have, in effect, stood up for the applicant.

[69] It is clear in this case that Ms. Shina did not tell Ms. Kehl that her behaviour was unacceptable. The outcome of her conversation with Ms. Kehl was to communicate Ms. Kehl's version of events to Ms. Gyles as well as Ms. Kehl's apology and belief that there had been a misunderstanding. In my view this is a reasonable outcome to her "investigation", particularly given my findings of fact that no racially offensive comment was made by Ms. Kehl. Ms. Shina's duty to investigate does not require that she support the applicant's view of what happened and I am satisfied that in making a prompt telephone call to Ms. Kehl and her subsequent sharing of some of the contents of this call, including the offered apology, that Ms. Shina acted reasonably and met her duty to investigate. The fact that Ms. Gyles disagreed about what the suitable outcome should be does not mean that the process Ms. Shina followed was unreasonable.

[70] Ms. Gyles also testified that Ms. Shina did not take her initial complaint about Ms. Kehl seriously and that Ms. Shina's predominant concern was that Ms. Gyles had provided poor customer service by hanging up on Ms. Kehl. I cannot tell from the evidence before me the degree to which this contention is accurate. However, I am satisfied that Ms. Shina did respond to the applicant's complaint almost immediately when she called Ms. Kehl and spoke to her about what happened. She communicated her findings to Ms. Gyles. I am satisfied this was reasonable and Ms. Shina met her duty under the Code to respond to an alleged racial incident.

Was Ms. Shina's Decision to Terminate Ms. Gyles' Employment Discriminatory?

[71] Ms. Gyles does not allege that her employment was terminated by Ms. Shina because of her race, colour or place of origin. Rather, she alleges that her employment was terminated as a result of the events of March 16, that it was her complaint that she was subjected to a racially offensive comment by Ms. Kehl and her efforts in relation to this complaint that led to the decision to fire her. This is, in effect, an allegation of reprisal, that Ms. Gyles was discriminated against for attempting to enforce her rights under the *Code*. However, I do not find this to be the case.

[72] To begin, I am of the view that Ms. Gyles' overall performance while working for Store 1107 was a factor in Ms. Shina's decision to terminate her employment. The evidence before me was that Ms. Gyles was persistently late, failed to appear for work on an important occasion and was rude to customers all within the first 25 days of employment. I am satisfied that this clearly problematic behaviour was factored into Ms. Shina's decision to terminate Ms. Gyles' employment, as Ms. Shina maintained.

[73] Ms. Gyles was fired on March 18. Ms. Shina testified that on March 18 she questioned Ms. Gyles about whether she had spoken to other Edible Arrangement stores on March 16 and was told by Ms. Gyles that she had not. This was at odds with the information that Ms. Shina had been given by Edible Arrangements corporate office on March 17. She testified that as she continued to discuss whether there were still issues for the applicant arising out of the March 16 incident Ms. Gyles became increasingly combative and insubordinate. She testified that Ms. Gyles yelled at her. She described Ms. Gyles as going ballistic. She testified Ms. Gyles made explicit criticisms of her work suggesting that she knew how to run the store more effectively. Ms. Shina testified that she felt bullied by Ms. Gyles on March 18, and was of the further view that their conversations with Ms. Gyles were not going anywhere, they were not resolving issues.

[74] Ms. Gyles denied that she was insubordinate in her meeting with Ms. Shina on March 18. She testified that Ms. Shina told her she was being fired for what she did, a reference, in Ms. Gyles' view, to her actions on March 16.

[75] In my view, based on the evidence provided, there was indeed a confrontation between Ms. Shina and Ms. Gyles on March 18 and that it was Ms. Gyles' behaviour on this date that ultimately led to Ms. Shina's decision to terminate Ms. Gyles' employment. I prefer Ms. Shina's detailed and persuasive account as to what happened on this date to that of Ms. Gyles. That said, there remains the issue of whether the events of March 16 were, in some measure, a factor in Ms. Shina's decision to fire Ms. Gyles.

[76] I am satisfied that Ms. Gyles was pursuing her rights under the *Code* when she complained to Ms. Shina on March 16 that she had been the subject of a racially offensive comment. In my view, if Ms. Shina considered the fact that Ms. Gyles made such a complaint to be a reason for firing the applicant, I would be satisfied that this firing was tainted by discriminatory concerns and would constitute a violation of the *Code*.

[77] However, I do not find that Ms. Shina had an issue with Ms. Gyles having made her complaint. In my view Ms. Shina patiently and reasonably tried to manage the applicant's complaint both by contacting Ms. Kehl and in subsequently discussing the issues with Ms. Gyles. I find it significant that, according to Ms. Shina, Ms. Gyles had calmed down by the end of the day on March 16 and Ms. Gyles had indicated that there was no further role for Ms. Shina to play. I see no persuasive evidence to suggest that Ms. Shina's decision to terminate Ms. Gyles' employment was based on their interactions on March 16.

[78] I am also of the view that the fact Ms. Gyles subsequently called Edible Arrangements corporate offices on March 16 was not, in itself, a concern to Ms. Shina. I heard evidence that when Ms. Gyles told Ms. Shina on March 18 that she had spent hours tracking down an appropriate telephone number at Edible Arrangement's corporate office that Ms. Shina had told her that she could have provided the number to Ms. Gyles. I had no sense that Ms. Shina felt that her conduct in dealing with Ms. Gyles and Ms. Kehl on March 16 was inappropriate or that she felt vulnerable if Ms. Gyles contacted the corporate head office.

[79] However, I do think Ms. Shina was concerned about the complaint she received from Edible Arrangements corporate offices on March 17 that the applicant had called other Edible Arrangement franchises and had been rude. I find it significant that this was the issue that was discussed at the outset of Ms. Gyles and Ms. Shina's conversation on March 18. Ms. Shina testified that Ms. Gyles denied that she had made these telephone calls. Ms. Gyles also testified that she did not make these calls.

[80] I find it likely that Ms. Shina did consider Ms. Gyles telephone calls to other stores when deciding to terminate her employment. She was told by Edible Arrangements corporate office on March 17 that there were complaints about Ms. Gyles behaviour and she questioned Ms. Gyles about this behaviour on March 18. However, I do not see Ms. Shina's consideration of this behaviour to be a form of reprisal for the applicant making her complaint and attempting to enforce her rights. In my view, it was reasonable for Ms. Shina to be concerned about how Ms. Gyles conducted herself and whether she was, in fact, lying to Ms. Shina about her actions and /or rude in her dealings with others. The fact that Ms. Gyles may have been, in a broad sense, pursuing her rights under the Code by contacting other stores to identify Ms. Kehl does not mean she can act irresponsibly in pursuing these rights or, in fact, lie about her actions.

[81] The fact that Ms. Shina may have given weight to Ms. Gyles contacting other stores on March 16 when deciding to terminate her employment is not a violation of Ms. Gyles rights under the *Code*.

[82] For all of these reasons the Application is dismissed.

Dated at Toronto, this 24th day of April, 2012.

“Signed by”

Eric Whist
Vice-chair