Employment Standards TRIBUNAL

An appeal

\- by -

Carters Jewellers 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: W. Grant Sheard

FILE No.: 2000/742

DATE OF DECISION: January 22, 2001

DECISION

SUBMISSIONS:

Barrie Carter	on behalf of the Employer
Karen RurykMartinsen	on behalf of the Employee
Karin Doucette	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by the Employer, Carters Jewellers Ltd., pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on October 13, 2000. In this appeal the employer claims that the Director's delegate was biased against the employer, that new evidence (a written statement from the store manager, Judith Miller) should be considered in this appeal, and that the employee was dismissed for just cause. The employee's position is that this was not a "justifiable firing" and that the determination was properly made. The Director's position is that delegate was not biased and that the determination was properly made.

ISSUES:

1. Was the Director's delegate biased in her investigation and making the determination?
2. What use can be made of the new evidence (the written statement of the store manager)?
3. Was the employee terminated for just cause?

ARGUMENT

The Employer's Position:

Mr. Carter stated the employer's position in two letters, one dated October 25, 2000 and the other dated December 11, 2000. In both, Mr. Carter submits that the delegate was biased in her investigation and making her determination and that the employee was dismissed for just cause.

In his letter of October 25, 2000, Mr. Carter says that the delegate "has taken the side of the employee from the very beginning, not taking into account any of the points raised by the

employer". In that same letter Mr. Carter requests that the written statement of the store manager, Judith Miller, be taken into consideration on the appeal and he attached a copy of the statement with his letter.

In his letter of December 1, 2000, Mr. Carter says that the employee clearly violated their policy by coming to work in such a disgusting condition (disheveled, hung-over, and sick) and by bypassing the store manager to have someone cover for her. Further, he says that the employee was appropriately warned the first time and that she was aware of the policies.

The Employee's Position:

The employee's response to the employer's written submissions is, by and large, a detailed response to the assertions made in the written statement of the store manager, Judith Miller. Concisely, however, her position is that this was not a "justifiable firing" and that the determination was properly made.

The Director's Position:

The Director's position is that there was not any bias on the part of the delegate and that the determination was properly made. The delegate denies any bias and submits that the evidence of the employer, limited as it may have been, was properly considered and a decision reached on an interpretation of the Act and related jurisprudence. The Director says that, during the investigation, the delegate was specifically directed by the employer not to speak to any of its other employees so the new evidence (the statement of the store manager) should not be considered on appeal.

THE FACTS

The appellant, Carters Jewellers Ltd. (the "Employer"), operates four retail stores in British Columbia. The respondent, Karen RurykMarinsen (the "Employee"), was employed as a sales person in one of the Employer's stores from November 15, 1999 until June 9, 2000 at the rate of $7.15 per hour.

As stated in the determination, during the investigation and in submissions made to the delegate, the Employer maintained that the Employee has "an alcohol problem", that she "reported for duty on two separate occasions reeking of alcohol…unfit to perform her duties". The Employer stated that the Employee "was given fair warning of [their] concerns with her performance and that [they] took the appropriate discipline procedures".

During the investigations the Employee denied she has a drinking problem. She admitted that the night before she was terminated on June 9, 2000 she had been out celebrating a birthday with a friend, but she was not scheduled to work until noon the next day. She said she had not consumed any alcohol in the 14 hours before she was scheduled to work, but that she ate a hot dog just before her shift began which she believes caused her to become ill at

around 3:15 p.m. She recalled another earlier incident on about May 27, 2000 when, after drinking on a Saturday night she was still feeling ill when she had to work the following Monday and felt compelled to leave work before the end of her shift.

The delegate found that the Employer had not provided any evidence to show that it had discharged its liability resulting from the Employee's length of service under section 63 of the Act. The relevant portions of that section are that (1) After 3 consecutive months of employment, an employer is liable to pay one week's wages as compensation for length of service unless (3) one week's written notice of termination is given or the employee is dismissed for just cause.

The delegate also stated in the determination that the Employer directed her not to speak to the manager or any other employees. The delegate noted that the Employer stated in his letter of August 16, 2000 that the Employee was given fair warning of their concerns, but he did not provide any evidence to support this assertion and the Employee denies it. The delegate also notes that the assertions made by Mr. Carter on behalf of the Employer in his submissions during the investigation were not things he had first hand knowledge of. He was not present in the store on either of the days of the impugned conduct of the Employee.

ANALYSIS

1. Bias

Allegations of bias have been dealt with in many decisions of this tribunal, but I find the comments in the decision of *Central Park Veterinary Hospital* BC EST #D532/98 *("Central Park")* particularly helpful. There it was noted that our Court of Appeal stated in *Adams v. Workers' Compensation Board,* B.C.C.A., (1998) 42 B.C.L.R. 228, at 231-232 as follows:

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

In leading into the allegation of bias in his letter of September 23, 2000, the Employer says in part, "the government whom you represent have and continue to devastate this province with their asinine economic policies" and he goes on to refer to "the ridiculous harassment policies your ministry appears to pursue". Clearly political and economic policies of the government of the day are not something the delegate is responsible for nor are they relevant at all and do not provide any basis, let alone a "sound basis", to challenge the impartiality of the delegate.

In *Central Park*, the following was said:

> The Employer did not present one piece of evidence to support the allegation of bias. Mere disagreement with the weight given to evidence presented or the extent to which an investigation was conducted does not lead to a conclusion of bias. A reasonable apprehension of bias would rest on conclusions that the delegate failed to accept evidence proffered by one party or deliberately misstated it in a determination.

The fact that the delegate may have advised the Employer of provisions in the Act, jurisprudence or evidence that may be contrary to his position does not establish bias. It is the Employer who forbid the delegate from more fully investigating by speaking to the manager or other employees.

The delegate stated in the determination that, when the Employer raised this issue of bias during the investigation, he was advised that if he wanted to pursue the allegation he would have to speak with the Regional Manager, however, he refused to take the name and phone number of that person and said he would not take the time to contact him. This conduct of the Employer appears to be consistent with his own letter of December 11, 2000 where he said "I did not take the complaint seriously because of (the delegate's) attitude and because it was beyond belief that a former employee could consider severance after such appalling behaviour".

There is no evidence whatsoever that the delegate failed to accept evidence proffered by the Employer or deliberately misstated it in the determination. It appears that the delegate properly weighted the evidence before her and conscientiously applied the Act and jurisprudence. I find that, in view of the total absence of evidence, this serious allegation of bias ought not to have been made.

2. Use of New Evidence

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.,* BC EST #D570/98 there is reference to the "Tri-West/Kaiser Stables Rule". This issue was decided in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97. In *Tri-West (supra),* the adjudicator there held evidence inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to co-operate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it…The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the

> case that should have and could have been given to the delegate in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors* (supra) held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria."

In the present case therefore, in addition to the failure to disclose the evidence at the investigative stage, the admissibility of this evidence also turns on other factors such as the importance of the evidence, the reason it was not disclosed and any prejudice to the parties from non-disclosure.

I find that, based on the Employer's own admission, the evidence of its manager, the statement of Judith Miller, was not disclosed because the employer forbid the delegate from contacting the manager. More than "sitting in the weeds", he deliberately concealed or prevented the discovery of this evidence. Further, the statement of the manager is not important in that it does not assist as the assertions made by the manager are largely denied by the Employee. There is no documentary or similarly compelling evidence to support the assertion that the Employee was given or made aware of policy, warned about her conduct, or the potential for dismissal. Although the Employee and the Director may not be prejudiced by the late production of this statement on appeal in that they may still respond to it, the delegate cannot test the reliability of the evidence by interviewing the witness and there is general prejudice in that the matter is not resolved at the earliest opportunity.

I find that the new material filed ought not to be allowed in deciding this appeal.

3. Was the Employee terminated for just cause?

The burden is on the appellant to show, on a balance of probabilities, that the determination under appeal ought to be varied or cancelled (see, for example, *Arbutus Environmental Services,* BC EST No. D002/96 and *Kearns,* BC EST No. D200/96).

The delegate noted in her determination that there have been many decisions by this Tribunal on what constitutes just cause and that the burden of proving such cause (again on a balance

of probabilities) rests on the Employer. In particular, the delegate referred to the decision of *Kenneth Kruger* BC EST #D003/97 in this regard. The delegate found, applying the principles of that decision, that no evidence was provided to establish that just cause existed or that fair warning was given that the Employee's employment was in jeopardy by a continuing failure to meet the standards and sufficient opportunity given to meet those standards.

I agree with the finding of the delegate inherent in the determination that the facts of this case did not amount to exceptional circumstances such that a single (or even as alleged in this case, double) act of misconduct amounted to just cause. Nor can I find anything in the evidence placed before the delegate or in the submissions made on appeal that the delegate made any error in applying the Act or its principles.

I find that the appellant has failed to meet the onus on it to show, on a balance of probabilities, that the determination under appeal was in error such that it ought to be varied or cancelled and, therefore, I dismiss the appeal.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated October 13, 2000 and filed under number 2000/742, be confirmed.

W. GRANT SHEARD

W. Grant Sheard
Adjudicator
Employment Standards Tribunal