

An appeal

- by -

Canalog Proplate Divs. of Motor Transport Consultants Inc. and/or Motor
Transport Consultants Inc. Divs. of Canalog Proplate
("Canalog")

- 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: Ian Lawson

FILE No.: 2003A/285

DATE OF DECISION: February 17, 2004

DECISION

SUBMISSIONS

Richard Saunders	on behalf of the Director
Shelly Troupe and Suzzanne Jalsoviczky	on behalf of Canalog
Nancy Tomyn	on her own behalf

OVERVIEW

This is an appeal by Canalog under s. 112 of the *Employment Standards Act* (“Act”). The appeal is from a Determination issued by Richard Saunders as a delegate of the Director of Employment Standards on October 1, 2003, under ER#081-702. The Determination required Canalog to pay compensation for length of service to Nancy Tomyn (“Tomyn”), together with an administrative penalty, in the total amount of \$1,544.55. Canalog filed an appeal on November 7, 2003. The appeal is now decided without an oral hearing, on the basis of written submissions.

FACTS

Canalog provides consultation services to trucking companies regarding licensing, permits, and cost recovery systems. Tomyn was employed by Canalog as a data entry clerk from June 18, 2001 until her dismissal on December 16, 2002. In the course of his investigation, the delegate found Tomyn had been awarded “very good” in 9 out of 9 categories at a performance review conducted a little more than two months before her dismissal. At a second performance review conducted just one week before the dismissal, Tomyn was awarded 6 “very good” ratings and 3 “good” ratings out of the same 9 categories. When Canalog was requested by the delegate to complete a “Just Cause Questionnaire” form relating to Tomyn, the delegate reported as follows:

The form records that while Troupe [Tomyn’s supervisor] was on 2 weeks holidays Tomyn left work early on several occasions, was absent and consumed alcoholic beverages with friends while at work. Also, Tomyn gave out personal and confidential information to unauthorized individuals, did not complete work, and there were various complaints from clients regarding her conduct and quality of work.

Canalog records that Tomyn was made aware of the standards of the business on November 1, 2002 and that she was not meeting those standards. She was also advised on November 1, 2002 that she would be terminated if her standards did not improve.

Canalog supported these allegations with a number of documents that were faxed to the delegate. The delegate communicated with Canalog at its Surrey and Calgary offices, and in due course a mediation session was conducted, with Canalog’s representative appearing by telephone from Calgary. The mediation was not successful in resolving the dismissal issue, and although the record before me does not so indicate, I presume the mediation was conducted by a person other than the delegate and the delegate had no knowledge of what was said at the mediation.

The delegate decided to conduct his investigation by way of a Complaint Hearing, which was scheduled for June 5, 2003. The hearing was then re-scheduled several times to accommodate Canalog's Calgary representatives who wished to attend the hearing, and to accommodate absences on the part of the delegate and Tomy. A second delegate of the Director participated in re-scheduling the hearing, while delegate Richard Saunders was absent. On July 9, 2003, the second delegate communicated with Mr. Jalsoviczky of Canalog's Calgary office, who advised he was available either August 13 or 14, 2003 to appear at the hearing but he would call the delegate the next day to confirm which date was best. When Mr. Jalsoviczky did not call back, the second delegate waited until July 16 to issue a Notice of Complaint Hearing returnable on August 14, 2003. The Notice was delivered by registered mail to the Calgary office, and receipt was acknowledged. On August 12, 2003, however, Ms. Troupe of Canalog's Surrey office contacted the delegate to ask about the hearing date, and advised Canalog did not receive a notice. The delegate then faxed the Notice of Complaint Hearing to Canalog's Surrey and Calgary offices. Ms. Troupe called the delegate on August 13 to say Canalog would not be attending the hearing, as they were not properly notified.

At this point, the second delegate contacted Mr. Jalsoviczky by telephone, but was only able to communicate with him by voice-mail. Mr. Jalsoviczky advised the hearing needed to be re-scheduled, and that the Notice of Complaint Hearing must have been directed to the company's personnel manager, who had just returned from a three-week vacation. The second delegate then left a message for Mr. Jalsoviczky, advising the hearing would go ahead as scheduled but that he could attend by teleconference if he wished. On August 14, 2003, the delegate received a fax from Mr. Jalsoviczky, at 8:45 AM, stating "Unfortunately neither Ms. Shelly Troupe, Surrey Branch Manager, or myself, will be attending the hearing scheduled for today's date, August 14, 2003 at 9:00 AM." The delegate then conducted the Complaint Hearing as scheduled.

In the Determination, the delegate undertook a careful analysis of the duty of procedural fairness, referring to the decision of the Supreme Court of Canada in *Kane v. Board of the University of British Columbia* (1980), 110 D.L.R. (3rd) 311. The delegate then stated the following:

In the case at hand, both the general principles of natural justice and the specific provisions of the Act govern the Director in her decision-making. Procedural fairness requires that a person affected by an administrative decision knows the case against him or her and is given an opportunity to reply to it. Section 77 of the Act speaks to this principle in stating:

Opportunity to respond

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In complying with this principle, the right to notice is paramount. There is a requirement to give adequate notice to the parties whose interest may be substantially affected by the decision. This concept is intrinsically tied to the concept that the parties have the right to be present at the hearing. However, the right to be present is not absolute. In cases where the adjudicator is satisfied that a party has been properly served the notice and the party does not attend the hearing may proceed in the absence of the party. In proceeding with a hearing in the absence of one or the other party, the Director is also guided by the purposes of the Act which are articulated in Section 2 which states [the delegate then quotes the entire section, with emphasis on subparagraph (d), "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act"].

In this case, I am satisfied that reasonable attempts were made to notify the employer of the complaint, of the dispute resolution process and the requirements of the legislation.... [the delegate then quotes section 122 of the Act, regarding service].

Accordingly, as I am satisfied that the Notice of Complaint Hearing and Demand for Records was sent by registered mail to the employer's last known and confirmed mailing address, I have concluded that these documents were deemed to have been served. I am satisfied that based on this finding and the finding that numerous offers were made to conduct the hearing through a teleconference that the employer was treated fairly and the principles of natural justice were applied. I make this finding, keeping in mind that one of the principles of the Act is to provide fair and efficient procedures for resolving disputes under the Act [emphasis in original].

The delegate then proceeded to analyze the evidence and he correctly applied the relevant tests to determine whether Canalog has established just cause for Tomyn's dismissal. The delegate found no evidence that Tomyn failed to meet Canalog's expected performance standards, or that Canalog had adequately identified these standards and instructed Tomyn in how to meet them. The delegate gave appropriate weight to the two favourable performance evaluations which Canalog conducted respecting Tomyn in the weeks leading up to her dismissal, and he concluded there had been no just cause for the dismissal.

ISSUE

Is Tomyn entitled to compensation for length of service?

ANALYSIS

In its Appeal Form, Canalog indicates its grounds of appeal are that the Director failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made. In support of these grounds, Canalog filed a letter dated November 1, 2003, which alleges facts relating to Tomyn's contract of employment and the various allegations of misconduct against Tomyn, and to which is attached a number of documents. Canalog requested and received from the Tribunal Administrator an extension of time to file a submission in reply to Tomyn's submission, to December 29, 2003. On January 5, 2004, Canalog filed a brief fax which repeated the allegations of misconduct against Tomyn and stated Canalog "incurred costs in excess of \$10,000 to correct all of the errors made by Ms. Tomyn" and that "an internal audit was conducted by Senior Management, which revealed that due to ongoing and continuous personal interruptions, lack of focus and attention to the job duties, and overall performance, Ms. Tomyn was beyond rectifying her errors."

Canalog therefore makes no submission relating to breach of natural justice, and does not identify any evidence that was not available to it at the time the Determination was made. For those reasons alone, I find there is no merit to its appeal.

Regarding the natural justice issue, the delegate was certainly alive to the importance of ensuring Canalog has an opportunity to be heard regarding Tomyn's complaint. I agree with the delegate that the right to be heard is not absolute, and in the circumstances of this case, the delegate's efforts to accommodate Canalog were more than reasonable. I find the Notice of Complaint Hearing was issued properly and Canalog was correctly deemed to have been served.

Regarding the new evidence issue, I find Canalog presents no new evidence that was unavailable when the Determination was being made. Canalog's submissions merely re-state allegations of fact that were known when the delegate commenced his investigation.

In the result, I find Canalog's appeal ought to be dismissed and the delegate's findings ought to be confirmed.

ORDER

I find the Determination made by Richard Saunders on October 1, 2003 to be correct and the appeal therefrom is dismissed. Pursuant to section 115 of the Act, I order that Determination ER#081-702 be confirmed, together with interest pursuant to section 88.

Ian Lawson
Adjudicator
Employment Standards Tribunal