Employment Standards TRIBUNAL

An appeal

- by -

Kanaka Industries Ltd.
("Kanaka")

- 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: David B. Stevenson

FILE No.: 2000/772

DATE OF DECISION: February 12, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kanaka Industries Ltd. ("Kanaka") of a Determination that was issued on October 23, 2000 by a delegate of the Director of Employment Standards (the "delegate"). The Determination concluded that Kanaka had contravened Part 8, Section 63 of the *Act* in respect of the employment of Wendy G. Marsel ("Marsel") and ordered Kanaka to cease contravening and to comply with the *Act* and to pay an amount of $343.69.

ISSUE

The primary issue raised in the appeal is whether Kanaka has shown the Determination was wrong. The secondary issue is whether the Tribunal should consider material and information provided with the appeal that was not given to the delegate during the investigation.

FACTS

Kanaka operates an automobile service station in 100 Mile House, British Columbia. Marsel was employed as a service attendant. Her employment was terminated on May 2, 2000. The letter notifying Marsel of her termination was succinct, stating:

> As of today, May 2, 2000 your services are no longer required as you have violated two of Shell's company policies.

Kanaka was notified by the delegate on July 13, 2000, in a telephone discussion and in a letter sent by facsimile, that Marsel had lodged a complaint alleging her employment had been terminated without "just cause". The letter invited Kanaka to respond within seven days to the allegation of termination without "just cause" if that allegation was disputed. No response was received. On July 24, 2000, the delegate issued a Demand For Employer Records. The Demand included the following:

> 3. all disciplinary letters on file and copies of policies alleged to have been violated.

Kanaka provided some material. The Determination notes that the material included "a number of issues not raised in the May 2, 2000 letter of termination". In response to this point in their appeal Kanaka states:

> In his letter of July 24, 2000 . . . [the delegate for the Director] makes it quite clear to send everything that is pertinent to the case and even specifies that fines could be imposed.

I take it from that statement that Kanaka understood their response to the demand should have included all pertinent and relevant material.

Apparently, the material provided by Kanaka did not identify what policies had been violated nor did it contain any evidence that Marsel had been advised what standard was not being met or that she had been told a continuing failure to meet that standard would result in her termination. On September 12, 2000, the delegate sent a letter requesting Kanaka to provide confirmation of the specific policies that were alleged to have been violated, that Marsel was advised she was not meeting the standard and that Marsel was told a continuing failure to meet the standard would result in her termination. No response to this letter was received. In the appeal, Kanaka claims that it was never received.

On October 5, 2000, the delegate sent another letter to Kanaka, referring to, and attaching, the September 12, 2000 letter, which it identified as "requesting certain information with respect to the complaint filed by Wendy Marsel", and asking Kanaka to provide the requested information as soon as possible. It also indicated that if no response was received within ten days of the date of the letter, the matter would proceed on the basis of the information provided to date. Kanaka claims that letter was not received until after the Determination was issued.

The Determination was issued on October 23, 2000. On October 24, 2000, Kanaka left a message with the Director, which was returned on October 30, 2000. This appeal was received by the Tribunal on November 14, 2000. Included with the appeal were four letters from employees and former employees of Kanaka, the earliest dated October 25, 2000 and the latest dated November 5, 2000, addressing conclusions of fact made in the Determination on the question of just cause. Kanaka also submitted excerpts from what was referred to as the "Red Book Attendant Training Guide" and submitted Marsel had violated company policies respecting attire and safe work practices. None of this information or material was provided to the delegate during the investigation.

ARGUMENT AND ANALYSIS

The Tribunal has addressed the question of just cause on many occasions. In all cases the burden of proving the conduct of the employee justifies termination is on the employer. Based on the material that was provided to the delegate during the investigation, I have no difficulty agreeing with the conclusion that Kanaka failed to show just cause for terminating Marsel. The appeal suggests the investigation was inadequate and the delegate was

negligent. I disagree. The delegate did what was required under Section 77 of the *Act*, which states:

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

The letter of July 13, 2000 notified Kanaka that Marsel had filed a complaint for length of service compensation, alleging she was terminated without just cause. The same letter invited Kanaka to file a written response if the allegation was disputed. The Director was not required to provide Kanaka with any statements made by Marsel. I fail to see, in any event, how the absence of such statements prevented Kanaka from attempting to convince the delegate there was just cause for terminating Marsel.

The material on file and the submissions on this appeal indicate there was little, if any, effort made by Kanaka to participate in the investigation. The material provided by Kanaka during the investigation was generally non-responsive to the allegation of termination without just cause. The fax letter of July 13 was ignored and the response to the Demand of July 24, 2000 appears to have been non-specific on the reason for the decision to dismiss.

The more troubling point is whether any consideration should be given to the material filed with the appeal - material that was not submitted during the investigation. None of the statements submitted with the appeal were created until after Kanaka received the Determination. In *Tri-West Tractor Ltd.*, BC EST #D268/96, a case very similar on its facts to the present one, the Tribunal made the following point:

> This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. 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 during the investigative process.

The above comment is, in my view, applicable to the circumstances here.

The appeal also says that Kanaka did not receive "equitable and unbiased treatment" from the delegate. No evidence was provided to support this allegation. I reject it and in doing so

note and adopt the words of the Court of Appeal's in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at p. 231:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide the rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. 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 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.

For all the above reasons, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated October 23, 2000, in the amount of $343.69, be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal