Employment Standards TRIBUNAL

An appeal

- by -

Marusa Marketing Inc.
("Marusa")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2006A/108

DATE OF DECISION: November 8, 2006

DECISION

SUBMISSIONS

Brian S. Williams	on behalf of Marusa Marketing Inc.
Natasha Carlson	on her own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Marusa Marketing, Inc. ("Marusa") under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued August 3, 2006.

2. Ms. Natasha Carlson ("Carlson"), a former employee of Marusa, filed a complaint against Marusa under section 74 of the Act alleging that Marusa contravened the Act by failing to pay her two bonuses, namely, a "centre" bonus and a "retention" bonus as well as compensation for length of service (the "Complaint").

3. The delegate of the Director (the "Delegate"), after conducting a hearing into the Complaint, determined that Marusa contravened sections 17, 58 and 63 of the *Act* in failing to pay Carlson the retention bonus as well as compensation for length of service, but not the centre bonus. Accordingly, the Delegate concluded that Carlson was entitled to wages in the amount of $1,000 for the retention bonus and 2 weeks wages in the amount of $1,038.46 for compensation for length of service plus 4 per cent annual vacation pay on both these amounts. The Delegate also awarded interest of $78.47 on the total amount awarded pursuant to section 88 of the *Act*. In addition, pursuant to section 29(1) of the Employment Standards Regulations, the Delegate imposed administrative penalties of $500 each on Marusa for the two contraventions of the *Act*.

4. Marusa, in its appeal, contends that the Delegate failed to observe the principles of natural justice and seeks cancellation of the Determination including the administrative penalties.

5. Marusa did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties, the section 112(5) "record" and the Reasons for the Determination.

ISSUE

6. The issue to be determined in this appeal is whether the Delegate failed to observe the principles of natural justice in making the Determination?

THE FACTS

7. The Delegate held a hearing into the Complaint on April 27, 2006 (the "Hearing"). Both parties were in attendance at the hearing. In the case of Marusa, Mr. Brian Williams ("Williams"), the Director Human Resources of Marusa, attended at the hearing by telephone, as did two other employees of Marusa,

namely, the payroll clerk, Melissa Hechtel, and the Branch Manager of the Kelowna Centre, Michael Kim ("Kim"). Both parties made oral submissions and presented oral and written evidence at the hearing. The relevant facts presented at the Hearing and contained in the record and the Reasons for the Determination are as follows:

8. Marusa is in the business of operating call centres internationally and operates one in Kelowna, British Columbia (the "Kelowna Centre").

9. One of Marusa's largest customers at the Kelowna Centre is Sprint, a telecommunications company.

10. The Kelowna Centre receives in-bound calls from Sprint customers who have problems with or enquiries about Sprint's services.

11. Marusa hired Carlson as an agent for its Kelowna Centre on November 1, 2004.

12. Subsequently, Carlson was promoted to the position of a Team Supervisor and thereafter, to the position of a Supervisor in the Intensive Care Unit ("ICU") at the Kelowna Centre.

13. In the position of an ICU Supervisor, Carlson was responsible for or supervised up to 10 employees of Marusa at any given time.

14. The employees in the ICU would comprise of employees with performance issues and, in the normal course, they would spend approximately a week receiving assistance from Carlson before returning to their regular unit at the Kelowna Centre.

15. Accordingly, Carlson did not have the same set of employees week after week to supervise.

16. On November 14, 2005 Marusa terminated Carlson's employment for cause.

17. The sole reason for the termination of Carlson's employment concerned an incident on November 7, 2005 when an agent, not in the ICU, received a call from a customer and signalled for help from a supervisor and Carlson responded, as other supervisors were busy.

18. Carlson took over the call from the agent (the "First Call") and assessed the customer's request for a credit and determined that no credit was due to the customer and accordingly advised the customer.

19. Thereafter, Carlson spoke with the agent about the customer call and discovered that the agent was very upset about the call, as the customer has asked him personal questions and flirted with and sexually harassed him.

20. Carlson felt that it was inappropriate for the customer to have behaved in the manner she had with the agent. As a result, Carlson telephoned the customer (the "Second Call") and left a message on the customer's voicemail stating that it was inappropriate for her to have sexually harassed the agent and requested the customer to behave professionally when calling in the future.

21. The next day Carlson reported the incident to the Assistant Manager at the Kelowna Centre, Mr. Dennis Bonner ("Bonner").

22. According to Carlson, Bonner's only advice to her at the time was that she should have used the star 67 function on the telephone when making the Second Call so as to block the Kelowna Centre's direct telephone number.

23. However, at the end of Carlson's shift that evening, Bonner approached her with the Learning Lab Supervisor, Ms. Jennifer Burr ("Burr"), and questioned her whether she was rude to the customer.

24. While Carlson was upset with Bonner's questioning, she says that Bonner assured her that everything was alright.

25. On November 8, 2005, Carlson saw her doctor and obtained a medical note indicating that she was, for medical reasons, unfit to return to work for two to three months.

26. Carlson indicates that the medical leave was due to the stress she was experiencing as a result of her father's cancer and the pressure of her job including Marusa's failure to pay her the bonus she was entitled to, but not the customer call in question.

27. Carlson did not present the medical note to Marusa immediately but presented it at the termination meeting of November 14, 2005.

28. On November 9, 2005, the Kelowna Centre Branch Manager, Mr. Michael Kim ("Kim"), telephoned Carlson to suspend her. At that time, Kim states that Carlson admitted to him that she should not have called the customer back.

29. On November 12, 2005, Marusa completed the investigation into the matter and Kim contacted Carlson and invited her to a meeting on November 14, 2005 (the "Termination Meeting").

30. At the Termination Meeting Kim did not ask Carlson why she made the Second Call because according to Kim no answer Carlson could give would have been acceptable.

31. According to Kim, the only time an employee may telephone a customer is when the customer requests it.

32. While Marusa took no issue with Carlson's behaviour in the First Call, Marusa considered Carlson's decision to make the Second Call inappropriate and her behaviour in the Second Call unprofessional, abusive, threatening and rude.

33. Marusa, in further justification of its decision to terminate Carlson's employment for cause, relied on its Standard of Conduct and Work Practices policy (the "Policy"), which delineates the Rules of Conduct applicable to its employees.

34. In particular, the Policy states:

> "If an employee is not considerate of others and does not observe reasonable rules of conduct, disciplinary action will be taken. Listed below are offences that we consider to be serious enough to result in disciplinary action, *up to and including discharge*, for a single offence. Depending on the severity and pervasiveness of the disciplinary problem, a written reprimand, probation or discharge may be necessary. This is not meant to be a complete list of such offences and may be supplemented at any time."

35. The Policy delineates 28 different types of misconduct, including the following:

> "9. Use of foul, abusive or threatening language to fellow employees, customer, clients or visitors;
>
> …
>
> 21. Rudeness to clients or contacts including wilfully annoyingly hanging up on a customer."

36. The Policy is provided to all employees when hired and Carlson admits having knowledge of and understanding the Policy.

37. According to Williams, given Marusa's business, rudeness and inappropriate behaviour towards customers is not tolerated.

38. Williams also stated that Marusa's contract with Sprint includes quality assurance provisions, which allow for Sprint to monitor calls to the Kelowna Centre. Marusa's Clearfield, Utah Centre's negative rating by Sprint led to Marusa losing its contract with Sprint and 250 employees lost their jobs.

39. Carlson disputes Marusa's allegation that her decision to call the customer was inappropriate or that she acted anything but professionally in leaving the message knowing full well that Marusa or Sprint could record her message.

40. At the Hearing, the only evidence Marusa relied upon in support of its position that Carlson's message to the customer in the Second Call was inappropriate, abusive, threatening and rude, was a statement signed by Burr, Marusa's Learning Lab Supervisor, wherein the latter states that she heard Carlson state to the customer "I am not applying that credit. It is not due. Thank you and Good Bye". The Delegate determined that this quote in Burr's statement likely related to the First Call which Marusa is not taking issue with. Burr's statement did not mention that she overheard or knew what was specifically said in the Second Call, which was the basis for the termination of Carlson's employment. It was Carlson, according to Burr's statement, who told Burr about the Second Call.

41. With respect to the words attributed to Carlson in Burr's statement, Carlson pointed out that Burr was on a call helping another agent at the time when Carlson was dealing with the customer and Burr also noted in her statement that she was helping another agent at the time.

42. Marusa did not call Burr to testify at the hearing of the Complaint and therefore Burr's evidence could not be cross-examined.

43. The agent who Carlson assisted in the First Call was also not called by Marusa to testify or give any form of evidence.

44. Carlson was a relatively long-serving employee with no previous disciplinary record and had been promoted to the position of a Supervisor in ICU prior to the incident in question leading to the termination of her employment.

45. Marusa's Policy neither prohibited employees from calling customers nor warned them that their employment would be unequivocally terminated without notice for contravening any rules set out in the Policy. Instead, the Policy states that an infraction of the standards of conduct by an employee will lead to discipline ranging from a warning to dismissal.

46. The Delegate, in assessing the evidence, determined that there is no dispute that Carlson called the customer back because the customer behaved inappropriately and harassed another agent; however, Carlson did so in a manner reflective of her belief that she was permitted to take this type of action.

47. The Delegate further determined that although Carlson may have later agreed that her behaviour was inappropriate after being confronted by Marusa's management on the issue, Marusa did not provide any evidence at the Hearing that Carlson admitted to knowingly and purposefully committing an offence warranting immediate dismissal.

48. While the Delegate agrees that Carlson's behaviour (in the Second Call) was inappropriate and amounted to misconduct which may have warranted some form of discipline, Marusa had not met the burden to establish that it had just cause for terminating Carlson for her behaviour.

49. On the subject of retention bonus, Carlson claimed that she was owed a retention bonus, which rewarded supervisors for retaining employees that reported to them.

50. The retention bonus program commenced in September 2005 and the first bonus period was from September 18 to October 15, 2005.

51. Supervisors, including ICU Supervisors, could receive a maximum of $1000 in retention bonus; however, for each employee in the Supervisor's unit or department whose employment ceased or terminated during the bonus period, $250 would be deducted from the Supervisor's bonus.

52. The retention bonus for the first period was paid on November 18, 2005, in excess of one month after the end of the first bonus period.

53. Marusa claims that ICU Supervisors were mistakenly included in the retention bonus program when it was initially launched but that was never Marusa's intention since ICU Supervisors do not have a permanent group of employees reporting to them.

54. While ICU Supervisors were excluded from participating in the retention bonus program after the first bonus, Carlson stated that she was not informed of this until after the program ended for ICU supervisors.

55. According to Marusa, Carlson was not entitled to a retention bonus payment because she was not employed on the date the bonus was paid, November 18, 2005, which Marusa claimed to be its policy regarding all bonus payments. However, in the case of retention bonus, there was no agreement between the parties as to when the employees would have to remain employed with Marusa in order to receive the retention bonus already earned.

56. Marusa admitted to negotiating with another ICU supervisor, a Ms. Joanne Blackman ("Blackman"), $500 for the retention bonus (one-half the maximum amount for the bonus) as an "act of good faith". This amount was arrived at on the basis ICU teams having approximately half the number of employees as other teams and not because of any number of employees lost from ICU during the relevant bonus period, according to Marusa.

57. Carlson, however, presented that ICU supervisors were subject to deduction under the retention bonus program if an employee under their supervision was lost during the bonus period. In the case of Blackman, Carlson believed that she lost two employees and that is why she received $500.

58. Blackman was not available for cross-examination, as either party did not call her. However, Blackman's written statement was presented in evidence, which while not explaining the basis for the amount of her retention bonus articulated her belief that Carlson was entitled to the full amount of the retention bonus and the delay in payment on the part of Marusa was an ongoing frustrating issue for the employees.

59. Marusa never established or communicated to its employees the specific date when the retention bonus would be payable. Both Carlson and Blackman (in her statement) stated that Marusa had told them that the retention bonus would be paid at the end of October 2005. Marusa did not dispute this evidence.

60. Marusa admitted that Carlson did not lose any employees during the bonus period and therefore no deductions were made from her bonus. However, had Carlson been employed at the time the bonus monies were disbursed, she would have received the same amount (i.e. $500) as what Blackman agreed to.

61. Carlson argued that Marusa was known for repeatedly delaying bonus payments to employees and had Marusa paid the retention bonus in a timely manner after it was earned, she would have received the bonus in its entirety before the termination of her employment.

62. Marusa paid wages to its employees on a bi-weekly basis. Pay periods started on Sunday and ended on Saturday. Two pay periods corresponded to the bonus retention period in question.

63. Marusa did not pay Carlson the retention bonus earned by Carlson within 8 days (or for that matter at any time) after the end of the pay period in which the bonus was earned.

64. The Delegate accordingly determined that Marusa was in breach of section 17 of the *Act* and concluded that Carlson was owed the maximum retention bonus.

65. As Marusa was successful in defending that part of the Complaint relating to the centre bonus and since Carlson does not appeal or counter-appeal on this issue, I have neither delineated the facts relating to the centre bonus nor dealt with the matter in this appeal.

ARGUMENT

Marusa's Submissions

66. Marusa's appeal is based on its allegation that the Director failed to observe the principles of natural justice in making the Determination. However, Marusa does not make any submissions on this ground of appeal. Marusa, instead, reiterates its submissions at the Hearing and, in particular, reiterates that it is a company policy that bonuses are paid on the second paycheck of the month following the month the bonus is earned. Marusa attaches to its appeal the bonus payment policy which states:

> "All bonuses are based on continued employment and require you to be actively employed on the date the bonus is paid."
>
> …
>
> All bonuses are based on continued employment and require you to be actively employed on the dated the bonus is paid."

67. Marusa concedes that no specific date was set for the retention bonus to be paid.

68. Marusa then delineates in its submissions the following three reasons for its request for the cancellation of the Determination pertaining to the retention bonus and the consequent administrative penalty:

- The Company believed that we were in compliance with the ESA by having an established date that bonuses were to be paid – that being the second paycheck of the month following the month in which the bonus was earned.

- We have been in business in Kelowna for almost 2 years. Although the issue of bonus payout has been raised in the past by the Employment Standards Branch in Kelowna, our practice of requiring the employee to be actively employed at the time of the bonus payout (which has been the second paycheck of the month following when the bonus was earned) has never been cited as violating the ESA.

- Due to the information learned through this case, the Company has actively sought to comply to Section 17 of the ESA by creating and implementing a direct communication piece outlining clear expectations for all employees (see attachment #2).

69. The attachment #2 is entitled "Bonus Payout Policy". It is a new document created after the Determination and it provides, *inter alia*, that:

> - All bonuses will be paid no later than the 25th of the third (3rd) month following the month in which the bonus was earned. Example: A bonus earned in January would be paid no later than April 25.

70. At the bottom of this document there is space for execution by the employee.

71. With respect to the issue of the termination of Carlson's employment, Marusa again reiterates its position at the Hearing. In particular, Marusa reiterates how serious it regards Carlson's breach in telephoning the customer and reiterates in support of its position the instance where an employee in Marusa's other location (Clearfield, Utah) called back a customer, which led to Marusa's client, Sprint, cancelling its contract, which led to a loss of 250 jobs.

Carlson's Submissions

72. Carlson submitted written statements from two former employees of Marusa. Both letters set out complaints against Marusa and Marusa's delays or mistakes in making payments to employees.

Director's Submissions

73. The Director submits that Marusa has not provided any specific argument or evidence to substantiate its position that the Director has failed to observe the principles of natural justice in making the Determination. The Director goes on to state that both Marusa and Carlson were provided with notice of the hearing and attended at the hearing and were afforded "an opportunity to present their case and know the case against them". The Director submits that Marusa is now re-arguing the case on appeal and this is inappropriate, as an appeal is not for the rehearing of the original complaint.

ANALYSIS

74. In the Appeal Form, Marusa has only checked a single ground of appeal, namely, that the Director failed to observe the principles of natural justice in making the Determination, but Marusa does not make any submissions in support of this ground of appeal. This fact combined with the fact that legal counsel does not represent Marusa compels me to carefully review Marusa's appeal submissions in the context of all of the possible grounds of appeal set out in Section 112 of the *Act* so that I may attempt to discern the true basis for Marusa's challenge to the Determination. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03):

> "Although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of errors amount to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off .

75. However, I hasten to add that in reviewing Marusa's submissions in light of all of the possible grounds of appeal in section 112 of the *Act*, I must be very cautious because neither Carlson nor the Director were afforded notice of or an opportunity to make arguments relating to the grounds of appeal not identified in Marusa's Appeal Form.

Error of Law

76. Having reviewed the record and the submissions, I did not find any misinterpretation or misapplication of the *Act* or any applicable principles of general law on the part of the Delegate. The Delegate's determinations on the issues of the retention bonus as well as the termination of Carlson's employment were both rationally supported in the law and the evidence.

New Evidence

77. The submissions made by Marusa in its appeal, with one exception, which I will deal with later in my decision, do not contain any new evidence. In my view, Marusa is unequivocally re-arguing the case before the Tribunal on the facts that are identical to those before the Delegate. As noted by the Tribunal in *Millennium Technology Inc*. (BC EST #D033/03) and *Global English College Ltd*. (BC EST #D280/03), an appeal is not an opportunity to reargue a case.

78. The one exception to my conclusion that there is no new evidence in Marusa's appeal is its inclusion of a new document entitled "Bonus Payout Policy" in its appeal submissions. This document identifies Marusa's policy for bonus payments. It specifically sets out the requirement of active employment on the part of the employee at the date the bonus is paid as well the specific time frame when bonus would be paid after it is earned. Marusa introduces the document in its submissions as follows:

> - Due to the information learned through this case, the Company has actively sought to comply with Section 17 of the ESA by creating and implementing a direct communication piece outlining clear bonus expectations for all employees (see attachment #2)"

79. Marusa presents the document in support of its contention that the Determination should be cancelled with respect to the award of the retention bonus. However, this document constitutes fresh evidence, which was not before the Delegate at the hearing because it did not exist at the time, but was created subsequently in response to the Determination. In my view, this document fails the test applied by the Tribunal in *Re: Merilous Technologies Inc.* (BC EST #D171/03) for admitting fresh evidence on appeal. In particular, the document is not relevant to a material issue arising in the complaint. The document, as indicated, was created after the Determination presumably to address the issue of the specific time or time frame for payment of bonus in future cases. It is not relevant to and does not apply to Carlson's claim for retention bonus as it did not exist at or around the time that Carlson earned the retention bonus. Therefore, I am disallowing the document in evidence in the appeal and concluding that there is no basis for appeal on the ground of new evidence.

Natural Justice

80. As indicated by the Tribunal in *Re: Healey* (BC EST #D207/04), those alleging denial of a fair hearing must provide some evidence in support of that allegation. Marusa has merely checked the box in the Appeal Form related to this ground of appeal without more. As indicated by the Tribunal in *Re: 683233 B.C. Ltd. (cob Pacific Kia, Cal National Leasing Ltd.)* (BC EST #D041/06):

> "It is not for the Tribunal to divine what matters of fact and law an appellant might have in mind when a particular ground of appeal is identified. Rather, an appellant must take care to set them out in sufficient detail so as to make clear the substantive basis for the selection of that particular ground of appeal. It is only when the context is explained in this manner that it becomes possible for the Tribunal to consider, and decide, a ground of appeal properly."

81. I have reviewed the record and the Reasons for the Determination and I can find no basis whatsoever for Marusa to found its appeal on the ground of a violation of its natural justice rights. To the contrary, the Delegate properly observed the principles of natural justice and afforded Marusa an opportunity to learn the case against it and the right to be heard. Further, Marusa attended at the Hearing and presented both written and oral evidence through its witnesses. Accordingly, Marusa's allegation that the Director failed to observe the principles of natural justice must fail.

ORDER

82. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $3,198.47 together with whatever additional interest that may have accrued, pursuant to Section 88 of the *Act* since the date of issuance. I further confirm the Determination relating to the two administrative penalties of $500 each against Marusa for contravening the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal