EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Kevin Jager
("Jager")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1999/170

DATE OF DECISION: June 25, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Kevin Jager ("Jager") of a Determination which was issued on March 2, 1999 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director denied a claim by Jager for length of service compensation, concluding Jager had discharged his employer, Kinross Gold Corporation ("Kinross"), from their statutory obligation to pay length of service compensation because he terminated the employment. The Director also declined to exercise her discretion under Section 66 of the *Act* to deem Jager's employment to have been terminated.

ISSUES TO BE DECIDED

The issues are whether Jager has shown the Director erred in concluding he was not entitled to length of service compensation because he had terminated the employment and whether he has shown that the Director improperly exercised her discretion under Section 66 of the *Act*.

FACTS

Kinross owned and operated the QR Mine which was located approximately 70 km. east of Quesnel. Access to the mine was by an industrial road. The mine employed both mill personnel and underground miners. Jager was employed as a Labourer/first aid attendant. He initially worked in the Bucking Room in the Assay Lab. On or about November 17, 1997, he was reassigned to work as a crusher operator. Jager believed this work assignment jeopardized his ability to safely and adequately carry out his responsibilities as a first aid attendant and contravened several provisions of the health and safety regulations applicable to the mine. Consequently, he refused the assignment and conveyed that refusal to his supervisor. His frustration with what he perceived to be a negligent attitude to safety displayed by Kinross and a personal concern that his own credentials could be affected by that attitude led him to quit his employment on or about November 20, 1997. He did not confer with either the Workers' Compensation Board or the Mines Safety Branch about his opinion or his concern before he terminated his employment. After his termination, he contacted the Workers' Compensation Board and the Mines Safety Branch. The Mines Inspector considered a complaint filed by him and concluded, among other things, that Kinross was not in violation of the applicable health and safety regulations and that he could have performed his first aid duties while assigned to the crusher operations with risking his credentials.

Jager does not deny he quit his employment. He says, however, that the Director should conclude that he was forced to quit and, applying Section 66, conclude, for the purposes of Section 63 of the *Act*, that his employment was terminated.

ANALYSIS

Section 66 of the *Act* states:

> *66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.*

Also, "conditions of employment" is defined in Section 1 of the *Act:*

> ***"conditions of employment"*** *means all matters and circumstances that in any way affect the employment relationship of employers and employees;*

Conditions of employment can include wages, payment of wages, benefits, job classification, job responsibilities, hours of work and where the work is to be performed.

Section 66 vests a discretion in the Director. The Tribunal has expressed its view on a number of occasions about the circumstances under which it would interfere with the exercise of discretion by the Director. In *Jody L. Goudreau*, BC EST #D066/98, the Tribunal said, at page 4:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
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> > . . . a general description of things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> > *Associated Provincial Picture Houses v. Wednesbury Corp.*,
> > [1948] 1 K.B. 223 at 229

This view was adopted by another panel of the Tribunal in *Takarabe and others*, BC EST #D160/98, who also added:

> In *Boulis v. Minister of Manpower and Immigration* [(1972) 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant factors.
> (page 15)

In the context of this appeal, the Tribunal would only interfere with the decision of the Director if I conclude the Director was unreasonable or failed to exercise her discretion within "well established legal principles". There is no issue of abuse of power or jurisdictional error raised by the appeal. The reasons contained in the Determination for declining to apply Section 66 are stated as follows:

> . . . the complainant claims he was unable to render first aid in an adequate manner to satisfy WCB requirements. However, he did not appear to take sufficient steps, while he was employed, to rectify what he felt was an inappropriate situation or violation/s. Specifically, he could have gone through the occupational health and safety committee or the ERC to voice his concerns. He could have invited WCB to do a site inspection while he remained employed. There is no evidence WCB advised him to quit his job.
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> The employer's contention that the operation was not large enough to have people do only first aid or to keep the warehouse open for sufficient times to require another warehouse person, seem valid. It is accepted that the complainant was hired as a labourer who had a first aid ticket.

Under Section 66, the Director should consider, first, whether there was an alteration in any matter or circumstance affecting the employment relationship. If there is no such alteration, that is an end of the matter. If the Director concludes there is an alteration, the next step is to consider whether the alteration is "substantial". If the alteration is not "substantial", there is no basis for exercising the discretion given the Director in Section 66. If the alteration is "substantial", the Director may exercise the discretion and conclude the employment is terminated. The Director may also decide not to exercise her discretion and the Tribunal will not interfere with that decision unless it falls into one of those circumstances under which the Tribunal will interfere.

While the Director did not specifically consider whether there was an alteration or whether that alteration was substantial, the Director did consider whether the circumstances justified exercising discretion in favour of the complainant. The Director decided that the facts did not justify concluding Jager's employment had been terminated because he had failed to take steps to rectify what he perceived to be an unsatisfactory situation before terminating his employment.

Jager argues forcefully that Kinross was in violation of WCB Regulations. The issue under Section 66, however, is not whether Kinross violated WCB safety regulations generally, but whether *"a condition of employment is substantially altered"*. In the context of this case, the focus of the consideration could only have been his re-assignment to the crusher operations. However, as noted by both the company and the Director, the Mines Inspector, who has regulating authority over mine safety and over the interpretation and application of the WCB Regulations to the mine, has expressed the opinion that Jager could have continued to act as a first aid attendant, without jeopardizing his first aid ticket, while performing his assignment in the crusher operations. Jager may have a legitimate complaint about how the Mines Inspector administers the WCB Regulations, but I accept the following point, made by the Director in reply to the appeal:

> From what the Mines Branch has said, it would not have been necessary for him to quit his employment to preserve the integrity of his position as a first aide attendant. Had he done his research first, he would have known he was not in danger of losing his first aide ticket, by continuing at the job he last occupied.
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> We believe it is reasonable to accept the interpretation of the authorized regulatory body over that of the individual, and especially in regard to an individual who lacked significant experience in the industry.

Jager has not shown any basis upon which the Tribunal would review the Director's exercise of discretion in this case.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 2, 1999 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal