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 -

Westhawk Enterprises Inc.
("Westhawk")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/940

DATE OF DECISION: **July 3, 1998**

DECISION

OVERVIEW

This is an appeal by Westhawk Enterprises Inc. ("Westhawk") pursuant to s.112 of the *Act*. The appeal is from a Determination issued by Ruth Atterton, a delegate of the Director of Employment Standards, on December 10, 1997. The Determination found Westhawk liable to pay compensation for length of service to Steven Marlow ("Marlow"), an employee whom the Director found had been terminated without cause or notice by Westhawk.

Westhawk filed an appeal on December 30, 1997. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

ISSUES TO BE DECIDED

This appeal requires me to decide whether Westhawk had just cause to terminate Marlow on March 10, 1996 and whether it is liable to pay compensation for length of service. A second issue raised by Westhawk is whether the delay in arriving at the Determination warrants setting the Determination aside.

FACTS

Marlow was employed by Westhawk as a customer service representative in a retail store from March 3, 1995 to March 10, 1996. It is not disputed that Marlow's employment was terminated by Westhawk on March 10, 1996 without notice, and the question is whether Westhawk had just cause for the dismissal. Westhawk alleges that Marlow wilfully and in anger broke a plexiglass display case, and that he admitted to doing so when approached by the employer. Westhawk further alleges that it had on unspecified previous occasions warned Marlow about his temper and poor attitude toward customers. Westhawk states that Marlow had also given notice that he would be leaving his employment, and alleges Marlow agreed to its suggestion that Marlow leave his employment immediately as a result of having broken the display case.

Mr. Marlow alleges that Westhawk dismissed him in retaliation for his giving notice that he would be leaving Westhwk's employ. He denies having broken the display case in anger, and says that another employee had broken the case. Marlow admits to having leaned on the case and having thereby caused another crack, but says that in any event all employees usually leaned on this case and he did nothing wrong by leaning on it after it had been broken. Marlow also denies having been warned previously by Westhawk about his temper or any other problem, pointing out instead that he received two pay raises during his employment. Marlow states that he did not "agree" to being terminated immediately by Westhawk, and alleges that his record of employment indicates dismissal as the reason for termination.

In view of Westhawk's written submission, I accept that the dismissal was not by mutual agreement, and that Marlow left his employment immediately as a result of having been terminated. I must decide whether the Determination under appeal is correct in concluding there was no cause for Marlow's dismissal.

Westhawk's submission also takes issue with the amount of time that elapsed between its first contact with the Director on this matter on March 15, 1996, when a delegate of the Director attended the workplace in person to commence the investigation, and the date of the Determination (December 10, 1997), which was more than 20 months after the investigation commenced. Westhawk states that in response to a request by Director's delegate, Mr. L.R. Bellman, it provided information and witnesses to support the allegation of just cause. Westhawk states that it contacted Mr. Bellman on several occasions in the ensuing month but received no response from him. Westhawk concluded the investigation had been abandoned or resolved in its favour until July 3, 1996, when a new delegate, Ms. C. Drevant, contacted Westhawk to again request information to support the claim of just cause. Westhawk responded in writing to Ms. Drevant, stating again the reasons for dismissal and referring to the information and witnesses provided to Mr. Bellman. Westhawk alleges that it then heard nothing further from the Director until August, 1997 when the third delegate, Ms. R. Atterton, again commenced an investigation and requested that Westhawk provide information regarding the alleged dismissal for cause.

ANALYSIS

Westhawk's complaint regarding the length of time it has taken the Director to arrive at a Determination is troubling, particularly in view of the lack of explanation by the Director for the delay. The Director did not file a submission in response to Westhawk's appeal, and in particular, the elapse of one year between Westhawk's letter to Ms. Drevant and the first contact by Ms. Atterton is completely unexplained. In another decision rendered recently, *Sirrs v. Director of Employment Standards* (BCEST #D103/98), I reached the conclusion that an unexplained year that had elapsed between an employee's request to abandon a complaint and his subsequent request to reopen the same complaint was too long a period of time in which to expect a complaint to be fairly resolved. In that case, the Director issued a Determination which refused to reopen the employee's complaint, and I confirmed that Determination. In the present appeal, I am faced with an even longer period of time that elapsed between the commencement of the Director's investigation and the time a Determination was issued, and again this delay is unexplained.

Section 74(3) of the *Act* requires complaints to be made within 6 months of termination of employment, and section 76 sets out the circumstances in which the Director may stop or postpone an investigation. The *Act* is silent as to any maximum period of time in which a complaint must be investigated, and as I decided in the *Sirrs* case, an approach to long unexplained delays in prosecuting a complaint should be based on common sense and administrative fairness.

One of the purposes of the *Act* set out in section 2 is: "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*." The policy behind the 6 month limitation period for filing complaints is also to ensure the fair and efficient resolution of disputes under the *Act*. Another stated purpose of the *Act* is "to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment" (s.2(a)). In approaching the issue of administrative and investigative delay, the quest for efficiency should not be allowed to outweigh the purpose of ensuring minimum standards for employees, except in the clearest of cases.

Long unexplained delays in prosecuting a complaint will usually thwart the *Act's* efficiency objective. There may nevertheless be instances when the elapse of more than a year between the commencement of an investigation and the issuance of a Determination is acceptable, and these may arise where an investigation is complicated, involves a number of different parties or witnesses, or where some other legitimate reason exists for the delay. In the present case, it appears that the Director moved swiftly to commence the investigation, as Mr. Bellman arrived at Westhawk's workplace a mere 5 days after Marlow was terminated. Westhawk responded promptly to Mr. Bellman's inquiries and referred him to witnesses who would support Westhawk's position. No resolution of the matter was reached by Mr. Bellman and nearly four months later another delegate appeared to start the investigation again from scratch. Westhawk responded promptly to Ms. Drevnat's inquiries, and then nothing happened again for more than a year. When Ms. Atterton initiated a contact with Westhawk in August, 1997 (appearing to start the investigation from scratch again for the third time), a further four months elapsed until a Determination was reached.

Significantly, the Determination notes that a witness contacted by Ms. Atterton was quite uncooperative, and Westhawk complains in its submission that it no longer knows where other witnesses are located. If I accept this unchallenged submission by Westhawk, the appellant in this case has clearly suffered some prejudice by the Director's delay in conducting its investigation and rendering its decision. The prejudice suffered by the appellant is compounded by the fact that even if they could be located, these witnesses would then be giving evidence about events that occurred nearly two years previously. An expression of the prejudice suffered by the appellant is found in a letter which the President of Westhawk sent to Ms. Atterton on December 1, 1997:

> Once again I am disappointed to hear that this case is lingering in your office.
>
> It has been approximately 19 months since I was initially approached by Mr. Bellman of your office, at that time I offered my assistance with this investigation. I was told that he would be conducting the investigation and would speak with the witnesses that I had provided to him. Your Fax dated November 28, 1997 states that now it has been left to me to further investigate and after nearly a two year delay provide you with a witness.

> I find your investigation techniques lacking for as far as I am aware no one has spoken to the witnesses I had provided to you almost tow years ago. I feel that it is unfair of your office to delay this long and expect me to locate and provide these witnesses at this time.

These sentiments fairly accurately reflect the concerns I have outlined above and in the *Sirrs* decision, and illustrate the importance of ensuring the efficiency purpose of the *Act* is upheld in deciding appeals from its provisions.

As for the equally important purpose of ensuring minimum standards for employees, I am assisted by two recent decisions of the British Columbia Court of Appeal in which administrative efficiency is weighed against other important values: *Ratzlaff v. British Coumbia (*1996), 17 B.C.L.R. (3d)336; and *Blencoe v. British Columbia Human Rights Commission (*May 11, 1998. Docket No. V03211, Victoria Registry). In *Ratzlaff*, the Court granted an order prohibiting further proceedings in a Medical Services Commission investigation into Dr. Ratzlaff's billings, when the Commission's delay of several years in conducting an investigation and hearing was found to have been "so egregious as to amount to an abuse of power." In the *Blencoe* case, which was handed down while I was deliberating on the present appeal, the Court ordered that proceedings by the Human Rights Commission to determine complaints of sexual harassment against Mr. Blencoe to by stayed, as a 30-month delay between the filing of complaints and the date of hearing violated s.7 of the *Canadian Charter of Rights and Freedoms.* In granting the stay, Chief Justice McEachern made the following statement:

> Courts of law have developed an extensive jurisprudence surrounding the determination of unreasonable delay in the context of criminal proceedings. Nothing that I say in this case should be taken to suggest that this jurisprudence must now be applied in the human rights context in all cases. In my view, the delay in this case is so excessive when weighed against the seriousness of the charge and the simplicity of the issues that it could never be viewed as reasonable under any test. An analysis of the precise scope of the test for unreasonableness should be left for a case which is not as clear as this one and which requires a more principled approach.

I note the Determination under appeal involves a sum of approximately $500.00. I find the delay of nearly two years in arriving at this Determination to be excessive and unreasonable when weighed against the seriousness of this matter and the simplicity of the issue before the Director. To use the language of section 2 of the *Act*, there has been no fair or efficient resolution of this dispute by the Director. The delay and particular circumstances in this case are sufficiently clear to outweigh the competing legislative purpose of ensuring minimum standards for employees. I note the Chief Justice in *Blencoe* deferred elaborating on a specific test for weighing competing values in cases of delay, until a "less clear cut" case arose. For these reasons, I make no finding as to whether or not Westhawk had just cause for Marlow's dismissal, because the fairness and reliability of

any such inquiry has been compromised by the Director's excessive delay in arriving at a Determination.

ORDER

After carefully considering the evidence and argument, I find that the Determination should be set aside and the appeal should be allowed. Pursuant to s.115 of the *Act*, I order that the Determination dated December 10, 1997 be cancelled.

Ian Lawson
Adjudicator
Employment Standards Tribunal

IL:cl