Employment Standards TRIBUNAL

An appeal

- by -

Kamloops Pine Products (1997) Ltd.
("KPPL")

- 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: Carol L. Roberts

FILE No.: 2003A/239

DATE OF DECISION: November 3, 2003

DECISION

SUBMISSIONS

Robert Fraser and James W. Caughill	on behalf of Kamloops Pine Products (1997) Ltd.
Frank Ehman	on behalf of himself
Berhane Semere	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Kamloops Pine Products (1997) Ltd. ("KPPL"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued July 29, 2003.

Frank Ehman filed a complaint with the Director alleging that KPPL had contravened the Act. Following a telephone conference hearing on July 23, 2002, the delegate concluded that Mr. Ehman was entitled to compensation for length of service and interest in the total amount of $799.44. The delegate dismissed Mr. Ehman's complaint as it related to commissions. The delegate also imposed an administrative penalty of $500.00 for contravention of the Act.

KPPL contends that new evidence has become available that was not available at the time the Determination was made, and seeks to have the Determination changed, varied or sent back to the Director. KPPL states "Hearing was conducted by conference call. Documentation not available by phone to support ongoing problems."

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

This decision is based on written submissions by Robert Fraser on behalf of KPPL, Berhane Semere on behalf of the Director of Employment Standards, and by Mr. Ehman.

ISSUES TO BE DECIDED

At issue is whether KPPL has established that evidence has become available that was not available at the time of the hearing.

FACTS

Mr. Ehman filed his complaint on January 31, 2002, alleging that KPPL failed to pay him commissions earned, and terminated his employment without notice, just cause or wages in lieu of notice.

On or about June 20, 2003, the parties were advised that a hearing into the allegations would be held on July 18, 2003 by teleconference. Enclosed with the notice of hearing was a fact sheet outlining the

hearing process. Most notably for the purposes of this decision, the fact sheet stated that "all documents to be used at the hearing must be provided in advance". The delegate also issued a Demand for Employer Records on June 20, 2003, requiring KPPL to provide any and all documents relating to Mr. Ehman's termination and "all documents that the employer relies on to establish just cause to terminate". By way of a fax dated July 17, 2003, the delegate reminded KPPL to provide any evidence he intended to rely on at the hearing prior to the hearing date. The delegate did not receive any documents relating to the termination of Mr. Ehman's employment prior to the hearing or at any time.

Evidence presented by the delegate shows that KPPL sought, and was granted, two adjournments. The hearing was postponed first to July 21, and then to July 23, at Mr. Fraser's request. Neither request was for the reason that Mr. Fraser needed additional time to obtain further evidence.

No documentary evidence was presented at the hearing to support KPPL's verbal evidence that it had just cause to terminate Mr. Ehman's employment.

The delegate found that KPPL had failed to discharge the burden of establishing that Mr. Ehman's employment was terminated either by mutual consent, or, alternatively, for cause.

ARGUMENT

Enclosed with KPPL's appeal submissions were a March 26, 2002 "memo from Donna to Jim" relating to certain questions asked of Mr. Ehman, an "unsigned letter from Donna" which is dated June 6, 2002 relating to "what Donna perceived was happening", a "memo from Donna to Jim dated June 13, 2002 indicating e-mail problems", "correspondence from Frank to Bob Lesage" dated June 11, 2002 relating to unanswered messages, a July 8, 2002 unanswered letter, a July 15, 2002 memo regarding a meeting purportedly to discuss a number of Mr. Ehman's unauthorized actions, and "correspondence dated after July 16, 2002 indicates problems with Donna continuing". KPPL submitted that these documents would have supported its position that Mr. Ehman was dismissed for cause.

The delegate noted that Mr. Fraser did not submit any evidence prior to the hearing, despite repeated requests and demands to do so, and, further, that at no time did Mr. Fraser mention that he was having difficulty locating documents or indicate that certain documents he wished to rely on were unavailable. The delegate submits that KPPL was given ample opportunity to make submissions before the hearing, and that, having failed to do so, it ought not be given the opportunity to challenge the decision based on evidence he failed to provide at the hearing.

Mr. Ehman notes that much of the "new evidence" is unsigned, and, for the most part, dated well before the issue of his termination arose. He seeks to have the Determination upheld.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that a Determination is incorrect rests with an Appellant. (*Natalie Garbuzova* BC EST #D684/01) On the evidence presented, I find that burden has not been met.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

KPPL has not met three of these four conditions. All of the documents referred to by the appellant are dated before August 2002, one year before the date of the hearing. All of this material could have been provided to the Director in advance of the hearing, had the appellant exercised due diligence.

The documents appear to relate to some interpersonal difficulties between Mr. Ehman and the secretary (Donna) which KPPL referred to at the hearing as well as other management issues. While I accept that these documents may have had some relevance to the issue of Mr. Ehman's termination, I am not persuaded that they would have led the delegate to a different conclusion on the issue of whether KPPL had just cause to terminate his employment.

The concept of just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

To substantiate just cause for this first category, an employer must meet a four part test:

1. A reasonable standard of performance was established and communicated to the employee;
2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

(see: *Silverline,* BCEST #D207/96 and *Kruger* BC EST #D003/97*)*

The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

None of the documents suggest that KPPL met the four part test to substantiate just cause. Furthermore, the documents were all dated approximately six months before Mr. Ehman's employment ended. There is no evidence these issues were raised with Mr. Ehman, that a reasonable standard was communicated to him and that he was warned that failure to meet that standard would result in the termination of his employment, or that Mr. Ehman failed to meet that standard.

The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated July 29, 2003 be confirmed in the amount of $1,299.44, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal