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 -

McKenzie Developments Ltd.
("McKenzie")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/239

DATE OF HEARING: August 16, 1999

DATE OF DECISION: September 27, 1999

DECISION

APPEARANCES

Rick Kolter	on behalf of McKenzie Developments Ltd.
Kerri Ruttan	on behalf of McKenzie Developments Ltd.
John Busby	on behalf of McKenzie Developments Ltd.
Aimee Durand	on her own behalf
Jarrod Dubois	on behalf of Aimee Durand
Robert Joyce	on behalf of the Director

OVERVIEW

This is an appeal by McKenzie Developments Ltd. ("McKenzie") under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated March 30, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). McKenzie alleges that the delegate of the Director erred in the Determination by concluding that Aimee Durand ("Durand") was owed regular wages and compensation for length of service in the total amount of **$751.81** (includes interest). McKenzie further alleges that the delegate of the Director was biased towards Durand and did not conduct the investigation in an impartial and proper manner.

PRELIMINARY ISSUE

The delegate of the Director submits that a number of written statements provided by McKenzie with the appeal were not supplied during the investigation and therefore, in accordance with past Tribunal decisions, should not be considered by the panel. The delegate further submits that the position taken by McKenzie during the investigation, that is , there was no "staff drink policy" in place, has now been reversed with McKenzie arguing that there was a policy and the former employee knew of the policy and the consequences for violating the policy.

The panel decided to reserve judgment with respect to the preliminary issues raised by the delegate of the Director until the merits of the issues were dealt with.

ISSUES

The issues to be decided in this appeal are:

1. Did the delegate of the Director investigate this matter in a proper and impartial manner?

2. Does McKenzie owe regular wages to Durand ?

3. Does McKenzie owe compensation for length of service to Durand ?

FACTS

Durand worked in the restaurant of the Alexander McKenzie Inn (the "Inn") for the lease operator of the restaurant until the operation of the restaurant was taken over by the Inn on August 20, 1998. Shortly after the Inn took over the operation of the restaurant, Durand was offered a position in the Lounge.

Durand was observed by the manager of the Lounge on November 16, 1998 to provide drinks to her boyfriend and friend for the "staff prices" and not regular customer prices.

Durand was confronted by the Lounge manager as well as the senior duty manager and then told to leave the premises and report to the General Manager the next morning. The General Manger terminated Durand's employment the next morning.

Rick Kolter ("Kolter"), Kerri Ruttan ("Ruttan") and John Busby ("Busby") gave evidence on behalf of McKenzie. I have summarized the relevant evidence as follows:

McKenzie submits that the delegate of the Director only interviewed witnesses who would be favourable to Durand during the investigation and refused to speak to those persons suggested by McKenzie. McKenzie further submits that the delegate of the Director did not accept information provided which would be contrary to the information provided by Durand.

McKenzie concedes that regular wages in the amount of $445.32 are owing to Durand.

McKenzie submits that Durand knew that the "staff drinks policy" was for staff members only and not for friends or relatives of staff members. McKenzie further submits that when Durand was confronted on the evening of November 16, 1998, she admitted that she knew what she had done was wrong and that she would in all likelihood be fired. McKenzie finally submits that there was just cause for the termination of Durand and therefore no compensation for length of service is owed.

Durand and Jarrod Dubois ("Dubois") gave evidence on behalf of Durand. I have summarized the relevant evidence as follows:

Durand submits that she told the delegate of the Director that under the "staff drinks policy" she was able to purchase drinks for her husband and friend. Durand further submits that she told the delegate of the Director that she was never advised that if she served drinks to non staff persons at staff prices, she would be fired.

Durand further submits that other employees purchased drinks for her husband as well as their own friends and relatives. Durand finally submits that when she spoke to the settlement officer from the Tribunal, all she wanted was her regular pay and an apology.

Under cross examination by the delegate of the Director, Durand stated that:

- she was advised of the "staff drinks policy" when the Inn took over the restaurant;
- she knew that the policy was for staff members only;
- she knew that a breach of the policy would result in termination of employment;
- employees were told that if anyone ever caught stealing from the hotel, they would be fired;
- she never stole anything except when she took those 3 drinks.

In response to a question from the panel, Durand conceded that she had never told the delegate of the Director the information provided under his cross examination.

Dubois submits that many employees bought drinks for non-staff persons at the staff prices. Dubois further submits that other employees bought him drinks at staff prices when they knew he was not a staff member. Dubois finally submits that he observed managers purchasing drinks for their friends and relatives at the staff prices.

The delegate of the Director gave evidence with respect to the issues raised and stated that:

- Durand's complaint was received November 20, 1998, a letter forwarded to McKenzie on November 25, 1998, a demand for records issued December 2, 1998 and records received on December 16, 1998;
- Kolter on behalf of McKenzie alleged that Durand never worked for the Inn in the restaurant and was first hired August 26, 1998 for the lounge;
- Kolter's position was that Durand had been caught stealing and was terminated;
- Durand submitted a wage slip for the period of time that Kolter contended she did not work in the restaurant;
- a subsequent visit to the Inn on January 15, 1999 produced copies of time sheets which indicated that Durand did in fact work during the time period Kolter contended she did not;
- on January 26, 1999 he met with Kolter who advised at that time that no "staff drink policy existed. Kolter also advised that there had been a staff drink policy from time to time;

- by letter dated March 8, 1999 he advised Kolter that information received indicated that there was indeed a staff drink policy in effect at that time and invited Kolter to submit further information;
- there was no response to the invitation to Kolter to supply any additional information;
- the written statements from other employees was not provided until after the Determination had been issued, and in any event, those statements are contradictory and do not address the issues in dispute;
- the letters provided to him from Kolter, Busby and Ruttan contain inconsistencies with the letters later provided for the purposes of the appeal;
- he attempted to interview Ruttan who did not want to speak to him as she was busy at the time;
- he only interviewed 1 person whose name was provided by Durand, the balance of the persons interviewed were as a result of his investigation;
- he provided ample opportunity for McKenzie to provide information and to respond to information provided by Durand.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, McKenzie.

With regard to the issue of impartial investigation or bias, the Court of Appeal stated in *Adams v. Worker's Compensation Board,* B.C.C.A., (1989) 42 B.C.L.R. 228, at 231-232

> 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 a general denial. It ought not 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.

During the hearing and the examination of the documents provided, McKenzie did not present any substantive evidence to support the allegation of bias. Mere disagreement with the weight given to evidence presented or the extent to which an investigation was conducted does not lead to a conclusion of bias. A reasonable apprehension of bias would rest on conclusions that the delegate failed to accept evidence proffered by one party or deliberately misstated it in a determination.

The evidence is that the delegate of the Director sent a number of letters to McKenzie requesting that they provide any additional information prior to the Determination being made. For their own reasons, McKenzie chose not to do so.

For all of the above reasons, I conclude that there is no evidence to support the allegation of bias or improper conduct made by McKenzie. I further conclude that the delegate of the Director provided McKenzie numerous opportunities to provide additional information prior to issuing the Determination.

With respect to the issue of regular wages owing, McKenzie has already conceded that those wages are owing to Durand.

I must then consider the final issue, that is, does McKenzie owe compensation for length of service to Durand.

The obligation of an employer to pay compensation for length of service to an employee is set forth in Section 63 of the *Act* which provides:

> *Section 63, Liability resulting from length of service*
>
> *(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*
>
> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
> *(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *(a) is given written notice of termination as follows:*
> *(i) one week's notice after 3 consecutive months of employment;*
> *(ii) 2 weeks' notice after 12 consecutive months of employment;*
> *(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
> *(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
> *(c) terminates the employment, retires from employment, or is dismissed for just cause.*

> *(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by*
>
> *(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,*
> *(b) dividing the total by 8, and*
> *(c) multiplying the result by the number of weeks' wages the employer is liable to pay.*
>
> *(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.*

The circumstances in which the employer's obligation to pay compensation for length of service is deemed to have been discharged is set forth in Section 63(3) *supra*, that is, by the employee quitting, retiring of being dismissed for just cause.

McKenzie alleges that Durand was dismissed because she violated the staff drink policy and in effect, stole from the hotel. McKenzie further alleges that incident does constitute just cause for termination and therefore no compensation for length of service is owed.

The evidence provided to the panel at the hearing was that Durand was aware of the "staff drink policy" and further that Durand knew that if this policy was breached, she would be terminated. Durand stated that "she never stole anything except when I took those 3 drinks" and further stated "I guess I just made a mistake that night". The evidence further was that Durand did not advise the delegate of the Director with respect to her understanding of the "staff drink policy", in fact, it would appear that Durand withheld this information from the delegate of the Director for her own reasons.

It is clear, in my view, that Durand knew about the "staff drink policy" and knew that violation of that policy would result in termination. Durand, nevertheless, served her husband and friend drinks at staff prices contrary to the policy.

For all of the above reasons and on the balance of probabilities, I conclude that Durand was dismissed for just cause and is therefore not entitled to compensation for length of service.

Having found that Durand was dismissed for just cause based on the evidence provided to the panel and without any reliance on the disputed documents and information, I need not decide with respect to the preliminary issue raised by the delegate of the Director.

It is unfortunate that Durand was not completely forthright with the delegate of the Director as, had that been the case, I am sure this issue would not have proceeded to this point.

The appeal by McKenzie is allowed in part with respect to the issue of compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 30, 1999 be varied to be in the amount of **$445.32** together with whatever interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal