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 -

Big Gary's Vacuum Systems Ltd.
(the " Employer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/465

DATE OF HEARING: September 14, 2000

DATE OF DECISION: September 22, 2000

DECISION

SUBMISSIONS

Mr. Gary Derrett on behalf of the Employer
Ms. Susan Derrett
Mr. Parrick Delowsky on behalf of himself

OVERVIEW

This case arises out of an appeal of a Determination, dated June 19, 2000. The Determination found that Mr. Delowsky had been terminated without just cause. The basis for the Determination is that Mr. Delowsky on a number of occasions made improper comments about the owners of the business, the Derretts and members of their family. The Determination generally accepted that Mr. Delowsky had made the comments attributed to him and that he had been warned in that regard a number of times between 1994 and 1998. In essence, the delegate found that the Employer had condoned the conduct and, therefore, could not rely on the warnings in the circumstances. The Determination found that Mr. Delowsky was entitled to 7 weeks compensation for length of services, based on his employment as a store manager with one of the Employer's stores from February 15, 1992 until June 2, 1999. Based on his salary, which was not in dispute, he was entitled to a total of $11,210.57.

FACTS AND ANALYSIS

The Employer appeals the Determination. Briefly put, the Employer says that Mr. Delowsky was terminated because he made the comments attributed to him but also because he, in the Employer's view, was dishonest. The Employer suspected him of stealing and that was the main reason for termination.

This, latter, ground was not dealt with in the Determination. The Employer concedes that he did not provide this information to the delegate. Mr. Derrett says that his (then) counsel advised him against relying on this information and that the delegate "never had access to this information and was forced to make his determination based on the evidence that was available to him." Mr. Derrett says that he subsequently formed the opinion that this advice was not correct and now seeks to resurrect dishonesty as cause for termination. In my view, the Employer is not entitled to resurrect this ground. It would be improper to allow a party to subsequently rely on information that was available to it at the time of the investigation as a ground for questioning the Determination. Had the information been provided to the delegate, he could have considered it in the course of his investigation and reached his conclusions based on it. The other party would have had an opportunity to respond to the allegations. At the end of the day, the delegate would have made his Determination and both parties would have had full opportunities to appeal it, should they disagree with its findings and conclusions. I agree with my colleagues in *Kaiser Stables*, BC EST #D058/97, and numerous other cases, that the Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the

merits of the Determination. As mentioned, the issue of stealing could have been addressed during the investigation. In my view, the Employer refused to participate fully in the investigation and I will not allow the Employer to raise the issues at this stage. I do not consider the Employer's disagreement with its legal advice to be sufficient ground. Moreover, it is inconsistent with the appellate nature of the Tribunal to allow a party to raise completely new matters not before the delegate when he made his Determination. In the result, and for these reasons, the appeal on this ground must fail.

In any event, and even if I am wrong in the above, in my view, there is no evidence upon which I could reasonably conclude that Mr. Delowsky had done what the Employer now accuses him of. When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c). The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BC EST #D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:

    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 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.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement

> of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

In this case, the burden is on the Employer, as the appellant, to persuade me that the Determination should be set aside. The Employer, as well, has the burden to prove just cause for the termination. As mentioned, I am not satisfied that the Employer has discharged either burden.

It is clear that there are bitter feelings on both sides. What the Employer has brought to the hearing amounts to mere speculation and suspicion. That, as I indicated at the hearing, is not sufficient to meet the burden on the Employer to prove just cause. In my view, the Employer must have clear and cogent evidence of the dishonest conduct and, in this case, the Employer did not have that. The evidence presented was little more than hearsay. One instance, relied upon by the Employer, was that Mr. Derrett says that an un-named customer told him in April 1999 that he had made a cash transaction with Mr. Delowsky some six months for the repair of a vacuum cleaner. Apparently, there was no receipt for the transaction. This customer did not testify. Mr. Derrett also says that an employee, who had been terminated by Mr. Delowsky, had made similar allegations, *i.e.*, that he—the employee—had been told by a customer of a similar transaction. Neither the employee not the customer testified with respect to this latter incident which only came to light some month after the termination. In my view, this evidence is unreliable. To put it in brief, the Employer had no direct evidence on which to support its case that Mr. Delowsky was stealing. The Employer's case is simply suspicions for which there appears to be little foundation. Mr. Delowsky denied the allegations. Moreover, if as the Employer says, it found out that Mr. Delowsky was stealing in April surely the Employer would have dealt with it expeditiously. If the evidence presented to the Employer's counsel was similar to that presented at the hearing, it does not surprise me that the advice was not to rely on it as cause for termination.

Turning to the issue of the comment made by Mr. Delowsky, in April 1999, which he did not deny, I am of the view that it does not provide just cause for termination. There can be little disagreement that the comment was in very poor taste and was very offensive in nature. However, he apologized for making the comment and explained that it happened in the heat of the moment. As well, he explained the context in which the comment was made. Mr. Delowsky had been negotiating the purchase of the store he was managing, the Richmond store, from the Employer. According to Mr. Delowsky there was an agreement that he would purchase the store for $300,000 as of January 1, 1999 and would pay $5,000 per month for 5 years. The transaction was to be sent to the "lawyers" and "accountants" but would be backdated to January 1. The Employer's yearend had to be completed. However, from Mr. Delowsky's point of view, there was little doubt that the "deal was done" and he was pushing to get it completed. This appears to have caused some friction between him and the Derretts. One day in April, Ms. Derrett came to the store and announced in front of a surprised Mr. Delowsky and other employees that the Richmond store would be "cut in half and down sized" and went looking for the landlord (in order to negotiate the lease). Ms. Derrett did not dispute this. She, however, was of the view that the store did not perform as well as it should have. Apparently the size of the store was doubled some time before but the earnings had not increased comparatively. Nevertheless, Mr. Delowsky, who was of the view that there was a deal that he buy the store, took that as a "slap in

the face." He testified that he was quite upset at the surprise announcement and the fact that it had been given in front of everybody. He explained that all the employees knew that he was going to purchase the store. Mr. Derrett did not dispute that there was some arrangement that Mr. Delowsky eventually was going to purchase the store—however, he explained that he did not believe that a final agreement had been reached. In any event, after Ms. Derrett left the store, Mr. Delowsky said to another employee something to the effect that the "f... cancer must have gone to her brain". Mr. Delowsky was understandably upset. Ms. Derrett, who had suffered from breast cancer, naturally felt very hurt by this comment. She testified that she felt betrayed by Mr. Delowsky's comment. At the hearing, she and Mr. Derrett spoke of the severe impact of the breast cancer on her and their family. Mr. Derrett, as well, as one might expect, was very upset. They were particularly upset because they felt they had treated Mr. Delowsky and his wife and children as part of their family. Mr. Delowsky subsequently apologized for the comment. In the circumstances, and particularly the context in which it was made, I am of the view that the comment does not, in itself, provides just cause for the termination. Moreover, for the reasons set out below, I am of the view that, even in the context of earlier warnings, dealt with in the Determination, the Employer cannot rely on this conduct as just cause for termination.

Nevertheless, in my view, this comment was not the reason for the termination. I am not sure exactly when the comment reached the Derretts—via the employee to whom the comment was made—but from the evidence at the hearing it was some time before the date of termination. In my view, it more likely that the Derretts decided to terminate Mr. Delowsky because they suspected he was stealing. Perhaps those suspicions were fuelled by the simmering disagreement over the sale of the Richmond store. On June 1, the day before the termination, Mr. Delowsky discovered that a surveillance camera had been placed over the till. Mr. Derrett explained that in his view only a "guilty" person would have looked for such equipment. I do not accept that explanation. Mr. Delowsky explained that he discovered the camera because there was gyprock on the till. When he looked up, he noticed the camera which was green and "stuck out". He felt quite hurt and offended from what he felt was a breach of trust and, after work that day, went to the Derrett's home in Langley. They were not home, but he reached them later by telephone and arranged for a meeting in the Langley store the following morning, June 2. At that meeting, the Derretts terminated his employment after first offering him the opportunity to resign. He did not accept and was terminated.

The comment, discussed above, appears not to have been considered—expressly, at least—in the Determination. In any event, I agree with the delegate that the earlier warnings regarding other comments made by Mr. Delowsky cannot be relied upon in the circumstances. According to the Determination, these warnings were given between 1994 and 1998. If I accept the delegate's findings, such as they are, that Mr. Delowsky made "rude" comments, I would be inclined to agree that the Employer condoned his conduct. In other words, if the Employer, as appears to have been the case, was aware of the conduct but took no action, the Employer condoned the conduct and cannot now rely on it as just cause for termination. In effect, the Employer is communicating to the employee that such conduct does not jeopardize his or her employment. Moreover, there was scant evidence at the hearing of what these earlier comments were or the context in which they were made. Apparently, Mr. Delowsky had made tasteless comments about the Derretts and their daughters between 1994 and 1998. The comments about Mr. Derrett

apparently related to his business acumen. The comments about Ms. Derrett also related to her breast cancer. The comments about the daughters were of an unfavourable social nature. It is an understatement that the comments were "rude". The comments were offensive. Mr. Derrett says that Mr. Delowsky was warned about these comments. There was nothing before me to substantiate the nature of these warnings. For example, was Mr. Delowsky warned that his employment was in jeopardy? (See *Kruger*, *above*). From the Determination, it appears that Mr. Delowsky was told that the Employer disapproved of the comments but that "his employment was not affected". There was no direct evidence before me at the hearing to the contrary. In any event, in the circumstances, I do not accept that the Employer regarded the comments as cause for termination. The real issues between the parties, in my opinion, was that Mr. Derrett suspected that Mr. Delowsky was stealing and the disagreement over the progress of the sale of the store.

In the result, the appeal is dismissed.

ORDER

I order that the Determinations dated June 19, 2000 be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal