Employment Standards TRIBUNAL

An appeal

- by -

Alkon Trading Ltd. operating as Kitchen Plus
("Alkon" or "Employer")

- 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: Paul E. Love

FILE No.: 2001/642

DATE OF HEARING: November 7, 2001

DATE OF DECISION: November 20, 2001

DECISION

APPEARANCES:

Gordon Huang for Alkon Trading Ltd.

Bonnie Michael, in person

Diane MacLean, for the Director of Employment Standards

OVERVIEW

This is an appeal by an employer, Alkon Trading Ltd. operating as Kitchen Plus ("Alkon" or "Employer "), from a Determination dated August 17, 2001 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate determined that Ms. Michael was entitled to the sum of $1,681.55 . The principle issues in this case are whether the Delegate erred in including compensation for length of service as part of the Determination, whether the Delegate erred in holding that the Employee had not agreed to accept vacation pay on her scheduled pay days and that the inclusion of vacation pay as part of the hourly rate of the Employee violated the *Act*, and whether the Delegate erred in the manner in which the Delegate conducted the investigation. While the Employer had substantial difficulties with Ms. Michael's attendance and job performance, the Employer kept a running list of complaints, rather than warning the Employee that her performance or attendance was deficient, and that continuation of the problem would result in termination. The Employer did not establish any error in the Determination relating to the assessment of compensation for length of service. I accept that the Employer had the consent of the Employee to pay vacation pay on the Employee's scheduled pay days, however, the Employer paid the Employee an all inclusive hourly rate which included vacation pay. This is contrary to s. 58 of the *Act*. There was no evidence in this case of bias, or misconduct by the Delegate in the manner in which this case was investigated, which could lead an Adjudicator to set aside the Determination. I therefore confirmed the Determination, with the exception that the Determination needed to be corrected to reflect a termination date of May 25, 2000 not May 28, 2000. This would effect the wages, vacation pay and interest calculations.

ISSUE:

Did the Delegate err in finding that the Employer did not have just or reasonable cause to terminate Ms. Michael?

Did the Delegate err in finding that Ms. Michael was entitled to vacation pay?

Did the Delegate err in the manner in which she conducted the investigation?

ARGUMENTS OF THE PARTIES:

Employer's Argument:

The Employer argued that it had cause to terminate Ms. Michael because of absenteeism, and inadequate job performance. The Employer argued that it had paid vacation pay with every cheque as agreed by the parties. The Employer argued that the manner in which the investigation was conducted resulted in errors by the Delegate, particularly that the Delegate accepted the evidence of the Employee over evidence provided by the Employer, and failed to interview witnesses named by the Employer.

Employee's Argument:

The Employee said that she thought that there were no problems with her job performance, as she had not received any warning that her job was in jeopardy. Ms. Michael said that she was terminated by the Employer as a result of making a written complaint to the Employment Standards Branch concerning statutory holiday pay. The Employee claimed that she was not paid vacation pay along with her cheque, and that the Employer coerced her to sign a document agreeing that she had received vacation pay.

Delegate's Argument:

The Delegate argued that there was no evidence that the Employer had warned the Employee that her job was in jeopardy as a result of misconduct, and therefore the Employer had not established any just cause for termination. The Delegate argued that the Employer did not obtain any agreement from the Employee to pay vacation pay, along with each paycheque, and that there was no proof of any agreement. The Delegate further argued that including vacation pay as part of the hourly pay, as a unit pay rate, violated the *Act*.

FACTS

I decided this case after an oral hearing. In the hearing I heard testimony from Gordon Huang (owner), Deborah Williamson (employee), Heather Wright (manager), on behalf of Alkon Trading Ltd. operating as Kitchen Plus ("Alkon" or "Employer"). I also heard testimony from Bonnie Michael (the "Employee"). I also considered the Exhibits filed at the hearing including the submissions filed by the parties with the Tribunal. The Employer operates retail kitchen stores at three locations in the Lower Mainland area. Bonnie Michael worked in the location at the Brentwood Mall location as a retail clerk between January of 1999 and May 25, 2000.

There was a dispute in this case concerning the date of termination. The Employer says that it terminated Ms. Michael on the 25th of May, but permitted her to work out her shift. The Employee says that she filed an Employment Standards complaint on May 26th, but was terminated on May 28th. I accept the Employer's evidence on this point. The Employer's

evidence was confirmed by Ms. Wright, particularly that the Employer had significant concerns with the performance of Ms. Michael, which peaked during the week of May 25, 2000. Ms. Wright confirmed that Mr. Huang contacted her by telephone on May 25, 2000 after the termination. The Employer filed a termination letter which was dated May 25, 2000. Ms. Williamson, another employee, saw the letter on May 25, 2000 and endorsed her signature on the letter.

On the date of the termination, Ms. Michael phoned to the Brentwood location, before she came in for her shift, in order to organize a staff meeting. Ms. Michael was attempting to organize a meeting of the staff at the three stores. Ms. Wright, in giving her evidence said that this was unusual, and she did not intend to participate, and she told Ms. Michael that she could not get a babysitter. Ms. Michael also spoke to Ms. Deborah Williamson, an employee. Ms. Michael's husband came onto the phone, and spoke with Ms. Williamson. Ms. Michael's husband was not an employee of Alkon. Ms. Williamson found it "unusual and intimidating" that Ms. Michael's husband phoned the store and spoke with her in connection with the proposed meeting. Both Ms. Wright and Ms. Williamson indicated that it was not Ms. Michael's responsibility to organize staff meetings, it was Mr. Huang's responsibility. Ms. Williamson indicated that this was not the way she usually resolved problems with the Employer. If she had a problem she would speak to Gordon Huang, and he was fair, and would do something about the problem.

I am satisfied that in the week prior to the termination of Ms. Michael the Employer has proven the following events concerning Ms. Michael:

> May 18, 2000 - absent
>
> May 24, 2000 - gave the customer $30.00 as a credit, without consent or any authorization by the company
>
> May 25, 2000 - phoning of the store by Ms. Michael and her husband in an attempt to set up a staff meeting of the Employees without the consent or authorization of the Employer

Ms. Wright was a manager at the Brentwood Mall location. Ms. Wright's evidence was that she kept a running handwritten list of problems with Ms. Michael's job performance. This was filed, along with a typewritten transcription, in the Employer's submission to the Tribunal. I note that in this Decision I will not set out the 5 pages of problems noted by the Employer with Ms. Michael's job performance. I have not fully set out the problems that the Employer had with Ms. Michael, but have summarized the main problems. I note that many of the problems listed by Ms. Wright were not dated by Ms. Wright. Ms. Wright indicated that Ms. Michael had problems with inventory control, the giving of discounts without consent, ringing in personal purchases herself contrary to policy, tardy work ethic, excessive absenteeism, and an inability to maintain a separation between her personal and work life. She indicated that Ms. Michael had many phone calls which did not have anything to do with work, and often resulted in emotional displays by Ms. Michael. Ms. Wright did speak to her about the telephone calls which she indicated were

extremely disruptive to the business. Ms. Wright counseled Ms. Michael's not to use the phone for personal reasons, but she did not warn her that her job was in jeopardy if this conduct continued. Ms. Wright's testimony was that given the continuing problems that the Employer had with Ms. Michael, it was inevitable that she would be terminated. Ms. Wright said that " it was intolerable, she had to be let go, it was difficult to know if she would show up, and what incidents would happen on her shift". Ms. Wright was advised on the evening of May 25, 2001 by Mr. Huang that he had terminated Ms. Michael that day.

It is apparent from the evidence of Ms. Wright that while she believed that the Ms. Michael had to be terminated, she did not show Ms. Michael the list of problems, and did not warn Ms. Michael that her job was in jeopardy. I note that Ms. Wright found it "difficult to deal with her [Ms. Michael] because of the emotional level and couldn't deal with her on a professional basis".

Vacation Pay:

I note that the Delegate was not satisfied on the information she had that the Employee had consented to payment of the vacation pay on the scheduled pay days of this Employee. I have no hesitation in preferring the evidence of Mr. Huang over Ms. Michael, that Mr. Huang discussed this with Ms. Michael at the time of her hiring and she agreed that she would accept vacation pay with every cheque. I did not find Ms. Michael to be a credible witness. Her testimony at points was exaggerated, and not in accordance with the preponderance of probabilities: *Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.)*. I accept the Employer's evidence that she was told her wage rate included vacation pay at the time of hiring. The Employer sought to document the oral agreement by stamping on each cheque that the cheque included vacation pay. The Employer also had Ms. Michael and other employees sign a letter, on or about April 10, 2000 indicating that they had been paid for vacation pay. Again, I accept the evidence of the Employer that there was no coercion. The Employee freely and voluntarily signed the letter. I do not accept the testimony of Ms. Michael, when she alleges that the Employer was "angry" and "stood over her" while she signed the letter.

During 2000, the Employer changed its practices and issued a pay stub which set out the amount of vacation pay and the amount of regular wages for each pay period.

The Investigation

This investigation commenced in May 2000, and the Determination was issued on August 17, 2001. The complaint appears to have been filed on May 26, 2000. The Employer received a letter from the Delegate dated June 14, 2000, which set out the Employee's allegations, and asking for a written response and records. The letter also provided some information related to the concept of just cause for dismissal. There was some contact between the Employer and the Delegate in 2000. The Employer then received a letter from the Delegate dated June 29, 2001 which summarized the results of the investigation. The letter also contained an apology for the delay in the investigation due to a considerable backlog, and the need to deal with several

insolvencies on a priority basis. The letter summarized the findings, and noted that at this point in the investigation it appeared that the complainant was owed $2,909.80 not including interest. The Delegate invited further comment and information from the Employer.

Mr. Huang thought that Ms. Michael's complaint had been abandoned or withdrawn. After receiving the June 29 2001 letter, the Employer then provided two letters to the Delegated dated July 28, 2001 and July 31, 2001. The Delegate met with the Employer and Bonnie Michael. The Delegate did not interview Heather Wright or Deborah Williamson, two witnesses suggested by the Employer. It was the Delegate's view that the evidence was not relevant, given that the Employer had not demonstrated that Ms. Wright and Ms. Williamson could give any helpful evidence on the issue of warnings given by the Employer to Ms. Michael.

After an investigation, the Delegate issued a Determination that Ms. Michael was entitled to the sum of $1,681.55 which consisted of the following:

Vacation pay, January to March 31, 1999	$134.56
Wages Owing, April 1/99 to May 28/00	$937.50
Compensation for Length of Service	$474.24
Total Wages Owing	$1,546.30
Plus Interest to August 17, 2001	$135.25
Total Amount owing	$1,681.55

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

Compensation for Length of Service:

A major issue in this case is whether the Employer has shown that it had cause to terminate Ms. Michael because of absenteeism, and other performance related concerns.

At the time of the filing of her complaint, Ms. Michael alleged that she was terminated because she filed an employment standards complaint concerning statutory holiday pay. After hearing the evidence of Gordon Huang and Heather Wright on behalf of Alkon, and the evidence of Ms. Michael, I am satisfied that the employer terminated Ms. Michael because it believed that it had just cause to do so. The Employer did so after a cluster of absences, and other problems, and the immediate event precipitating the dismissal was the telephone call by Ms. Michael and her husband setting up a staff meeting. For the reasons set out below, however, I find that the Employer has not established cause for dismissal. The Employer had serious concerns with the

performance of Ms. Michael, her record of absenteeism, her lack of professionalism, and her failure to follow policies.

The difficulty for the Employer, however, is that there is no proof that it warned Ms. Michael about her work related conduct. Ms. Michael's evidence essentially was that she thought that she was doing a good job. I do not accept her evidence. It is clear that both Mr. Huang and Ms. Wright, brought to the attention of Ms. Michael problems related to her non-professional attitude, her tardy attendance, mistakes that she made, and failure to follow the Employer's policy concerning discounts, and personal sales. There was evidence that the Employer counseled the Employee with regard to the above matters. There was no evidence that the Employer told the Employee that her job was in jeopardy if she did not improve her conduct. There were admissions both from Mr. Huang and Ms. Wright in their oral testimony, that the Employee had not been told her job was in jeopardy. Had there been evidence that Ms. Michael's conduct persisted after such a warning, I would have upheld this termination on the basis of cause. It is clear that Ms. Michael was an unsatisfactory employee, who was difficult to manage.

Unlike the Delegate, it is my view that the Employer did not condone the Employee's behavior. In this case, the Employer is unable to establish that it warned the Employee that her job was in jeopardy because of the Employee's misconduct.

I note that many Employers seem to have difficulty in the day to day management of problem employees. In small work places, where the supervisor works alongside the Employee, it may be difficult to manage an employee who brings her personal problems to the workplace, and who apparently fails to take direction which includes "counseling"or "helpful hints". In dealing with the problem employee, the employer cannot just catalogue the complaints, to be dredged up and relied upon after a culminating incident. Sometimes one must be blunt with an Employee who inadequately performs, by specifying the inadequate performance, and telling the Employee that continued inadequate performance will result in discharge. Some Employees, such as Ms. Michael, fail to hear or understand direction which is not blunt. The choice of how to manage problem employees remains with the Employer, and an Employer who does not follow a progressive discipline policy, can still terminate the Employee with notice prescribed by the *Ac*t.

The law in this area, requires that the Employer set the standard, clearly communicate to the Employee that her job was in jeopardy if she failed to meet the standard, provide an opportunity to the Employee to meet the standard, and terminate when it is clear that the Employee is unable or unwilling to meet the standard despite being given an opportunity (including direction and training) to do so. It is not a particularly high standard for an Employer to meet, but this standard was not followed by Alkon. I must confirm the Determination on this point as the Delegate did not err in the Determination. I note that the Employer now uses a written warning approach to dealing with employee misconduct.

4 % Vacation pay:

It is open to the Employer to pay vacation pay, along with the cheque for each pay period, provided the Employee agrees to this. Section 58(3) of the *Act* provides as follows:

> 58(3) Vacation pay must be paid to an employee
> (a) at least 7 days before the beginning of the employee's annual vacation, or
> (b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement

The Delegate relied on *Markin, BCEST #D 98/73*, for the proposition that vacation pay could not be included in the hourly rate of an employee and paid on each pay cheque. I note that *Markin* was a situation where the Employer could not establish that the Employee agreed to receive vacation pay on each paycheque. There was evidence in that case that the Employee did not agree to receive it on a scheduled pay date. There was also evidence in that case that Markin's rate of pay did not increase when he was entitled to an increase in pay as a result of a change in the vacation pay entitlement from 4 % to 6 %. If the vacation pay was included in the wage, as alleged by the Employer in *Markin*, the Employee suffered a wage reduction in the year that the vacation pay entitlement increased from 4 % to 6%. I note that s. 58(3) is one of the standards were there is some flexibility for the Employer and the Employee to reach an agreement relating to the timing of the payment of vacation pay. Such an agreement is not contrary to s. 4 of the *Act*.

The Employer did not separate on the vacation pay from the regular wage entitlement on the pay stub. The Tribunal has on a number of occasions indicated that vacation pay cannot be included in the hourly wage rate. This is because the inclusion of vacation pay within a "unit rate scheme" has the potential to reduce the Employee's income, as the vacation pay rate changes after 5 consecutive years of employment (from 4 % to 6 %). The inclusion of vacation pay in the commission structure for a commissioned sales employee, has been characterized as an absurdity because total wages ought to increase, rather than decline with seniority: *Atlas Travel Service Ltd. and Director of Employment Standards, unreported Vancouver Registry no. 1931266 (B.C.S.C.).* There are a number of Tribunal authorities in addition to *Markin* which indicate that a "unit rate" where vacation pay is included in the wage, is contrary to the *Act*.

I have found that the Employee did agree with the Employer to receive vacation pay on the scheduled pay days. The problem for the Employer is that an hourly rate which consists of regular wages and vacation pay, does not comply with the *Act*. While an Employer can pay the vacation pay, if agreed by the Employee, on the scheduled pay days, a pay rate which is blended, consisting of a regular wage and vacation pay, does not comply with the *Act*. The Delegate did not err in the manner in which she dealt with vacation pay in the Determination.

Given my findings, concerning the date of termination being May 25, 2000 rather than May 28, 2000, the total amount of the Determination may require an adjustment in terms of wages, vacation pay and interest. I therefore refer the calculation issue to the Delegate.

Complaints about the Procedures followed by the Delegate:

I note that some of the Employer's arguments relate to the investigation by the Delegate. The Employer alleges:

(a) re-opening of the case;

(b) that the Employer accepted the Employee's evidence in preference to the Employer's evidence;

(c) that the Delegate attempting to settle the case for a larger amount than found to be due in the Determination, prior to the investigation;

(d) that the Delegate used incorrect employer numbers to describe the Employer;

(e) bias.

Unfortunately this investigation was not resolved as quickly as one would like to see. The initial complaint was filed May 25, 2000 and the Determination was issued August 17, 2001. The delay in the issuance of the Determination lead the Employer to believe that the matter had been abandoned. The Employer in this case, believed that the matter was concluded, and has objected to the "re-opening" of the file. This file was never closed by the Employment Standards Branch. The length of time taken to investigate a complaint and issue a Determination may rest in part on the case load of the Delegate, which relates to the resources the Ministry of Labour has allocated to the Branch. I see no prejudice to the Employer from any delay in this matter. It is, however, unfortunate, that complaints cannot be resolved quicker, as one of the purposes of the *Act* set out in s. 2 of the *Act* is to provide fair and efficient procedures to resolve disputes over the interpretation and application of the Act. In addressing this issue, I do not intend to criticize the conduct of the Delegate, who has to work within the parameters of government resourcing to the Branch.

The Employer says that rather than investigate the Employer's side of the case, the Delegate accepted information provided by the Employee and proceeded to discuss settlement. In my view the present legislative scheme is an inquiry system, where the Delegate, after inquiry issues a Determination. This Determination can be appealed to the Tribunal, and at a Tribunal hearing the focus is on errors that the Delegate made that would affect the outcome of the Determination. A Delegate may make mistakes, such as an employer number, which have no reasonable bearing on any conclusion in a case. This is a purely administrative issue, and if there is a discrepancy in the file number, it is open to the Delegate to correct this, in the records of the Employment Standards Branch at the time of file closure. Such an "error" will not result in the Tribunal exercising its discretion to vary, set aside or cancel the Determination, as it does not go to the substance of the Determination.

The Delegate wears a number of hats during the course of her dealings with the parties up until the issuance of a Determination. The Delegate acts as an investigator to investigate complaints made under the *Act*. The Delegate functions as a settlement officer to attempt to settle complaints

without issuing a Determination. The Delegate also may issue a Determination, which is then subject to appeal to the Tribunal. In order to efficiently, and fairly handle complaints made, the Delegate may "roll" between the various roles. The Tribunal has generally been reluctant in the past to require the Delegate to investigate all witnesses suggested by a party, as in the first instance the Director has to determine the appropriate level of administrative resources to allocate to an investigation. In certain situations it may well be appropriate to obtain the complainant's side of the story, and determine with the Employer whether there is any basis for settlement. This may well be an effective use of scarce resources, contributing to the statutory purpose set out in section 2 of the *Act*, to resolve disputes in a fair and expeditious manner.

A Delegate may go too far during settlement discussions, and apply unfair or unreasonable pressure on a party or make threats to attempt to coerce a settlement. There is no evidence of that occurring in this case, however. It is possible that a Delegate may act in a manner prior to the issuance of a Determination which can affect the Determination, eg. by failing to give each party the opportunity to participate in the investigation, as required by s. 77 of the *Act* or by exhibiting bias. I am not satisfied that there was any action by this Delegate during the course of the investigation which raises any concerns of administrative fairness, or bias which would warrant me to cancel the Determination. If the Employer can demonstrate that the Delegate erred in failing to "go far enough in an investigation", the Tribunal can set aside the Determination, on the basis of correctness.

In my view there is no evidence in this case of any improper conduct by the Delegate. It is the Delegate's job to make a Determination, which will result in the "weighing of evidence", which may mean that the Delegate prefers the evidence of one party over the other party. The Delegate initially asked the Employer if this matter could be settled, for an amount larger than the amount Determined. The fact that the Determination was issued for an amount less than settlement amount the Delegate explored prior to the full investigation, is some evidence that the Delegate heard what the Employer had to say.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated August 8, 2001 is confirmed, except that the issue of wages, vacation pay and interest are referred to the Delegate, to adjust the Determination to reflect a finding that Ms. Michael was terminated on May 25, 2000.

Paul E. Love
Adjudicator
Employment Standards Tribunal