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.: 2001/643

DATE OF HEARING: November 7, 2001

DATE OF DECISION: November 20, 2001

DECISION

APPEARANCES:

Gordon Huang for Alkon Trading Ltd.

Valene Khan, 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. Valene Khan (the "Employee") was entitled to the sum of $1,573.34 . 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. The Employer did establish an error in the Determination relating to the assessment of compensation for length of service. In my view, the Employee was clearly warned that her job was in jeopardy because of use of the phone for personal matters. The Employees phone use as shown on the video tape, was conduct that was clearly incompatible with a continuing employment relationship, and was a willful disregard for the Employer's policy concerning phone use during working hours. I determined that the Employer had cause to terminate Ms. Kahn, and therefore Ms. Kahn was not entitled to 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.

ISSUES:

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

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

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

PRELIMINARY ISSUE:

At this hearing the Employer sought to tender a video tape, which was alleged by the Employer to show misconduct of the Employee on October 10, 1999, October 12, 1999, May 23, 2000 and May 24, 2000. The Employee objected to the admissibility of the tape as the Employee claimed the tape was "dubbed, no dates or times of alleged speaking, that the tape was not accurate evidence of the entire work date". This objection was not raised by the Appellant in writing prior to the hearing. As I was unaware of any objection to the admissibility of the tape, I reviewed the tape prior to the hearing, as I reviewed all other materials submitted by the Employer, the Employee and the Delegate, prior to the hearing. I note that the Delegate did not object to the admissibility of the tape, indicating that it was admissible, and a question of what weight should be put on the tape. All other parties had also viewed the tape prior to hearing.

The tape was a compilation copy of video tape, which was obtained from a fixed video surveillance camera present in the Employer's store to deter shoplifters. The tape was viewed by the Employer, and the Employer says that it terminated Ms. Khan on the basis of the videotape evidence, particularly the evidence on May 23 and 24, 2000.

Ms. Khan was aware that the cameras were there to deter shoplifters, and were operated by the Employer. After termination of the Employee, the Employer offered to the Employee an opportunity to view the tapes. The Employee declined the offer. The tapes show 121 minutes of the Employee talking on the phone on 4 separate shifts. The tapes do not show the entire work shift for each of the four days, and only show the telephone conversations. I am satisfied that the Employer, did not alter the portions of tapes showing Ms. Khan talking on the phone, other than editing out the portions of the tape to delete portions of the work day where Ms. Khan did not talk on the phone. At the hearing, I ruled that the tapes were admissible on the issue of Employee misconduct going to whether the Employer had just cause to terminate Ms. Khan. I also noted that Ms. Khan could ask questions of Mr. Huang, and give evidence concerning the video tape evidence, which I would also consider before making any findings of fact concerning the "weight" of evidence on the tape. The video tape was filed as Exhibit 2.

Given the nature of the appeal hearing, one expects the inquiry to be conducted efficiently, and fairly, focusing on the errors the appellant alleges were made by the Delegate. While it was helpful to review the tape prior to the hearing, playing a video tape of over two hours at a hearing, would have been a waste of hearing resources. I note that I gave the parties an opportunity to adduce evidence relating to the tape, and make submissions regarding the weight to be given to the tape at the hearing.

ARGUMENTS OF THE PARTIES:

Employer's Argument:

The Employer argued that it had cause to terminate Ms. Khan because she continued excessive use of the phone for personal reasons, after warning that she would be terminated for this conduct. 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:

Ms. Khan admits that her conduct on the phone was inappropriate, but she states that she was not warned that her job was in jeopardy. Ms. Khan argues that she was terminated after she raised with the Employer, whether she was paid properly for statutory holidays. She says that after raising the issue with the Employer, the Employer placed a help wanted sign in the front window of the store and terminated her. 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), Kim Zhao (wife of owner), on behalf of Alkon Trading Ltd. operating as Kitchen Plus ("Alkon" or "Employer"). I also heard testimony from Valene Khan (the "Employee") and her mother, Mitzi Hendry (a former bookkeeper for Alkon). 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. Valene Khan worked in the location at the Westgate Mall location as a retail clerk between January of 1999 and May 25, 2000. The Westgate Mall appears to be a "strip mall location", that is that the store is accessible to the outside.

Ms. Khan was terminated by the Employer on May 26, 2001. Ms. Khan was aware that she was going to be terminated from a telephone call with Ms. Bonnie Michael, who was terminated by the Employer on May 25, 2001. She says that she was not told the reasons for her termination on May 26, 2000, but she was told a couple of days later that she was being terminated for excessive personal phone calls, and for reading magazines. I do not accept the theory advanced by Ms. Khan that the Employer placed signs in the workplace advertising for a new employee, because Ms. Khan raised an issue related to statutory holiday pay. She was terminated by the Employer because of her conduct in personal use of the phone, which the Employer appears to have viewed as conduct incompatible with a retail operation, where the focus is on serving the Employer's customers.

The Employer indicated that after hiring Ms. Khan it had repeated difficulties contacting the store because the telephone was always busy. The store had one phone line. Other Employees at other stores had difficulties contacting this store with inventory issues. The Employer indicated that if one store ran out of inventory, the Employees were expected to phone the other two stores to determine if the other stores had the item requested by the customer. The Employer raised the phone issue with Ms. Khan and she told the Employer that there was a problem with the phone. The Employer replaced the phones three or four times. Ms. Khan denies that the phone was replaced by the Employer, however, I prefer the Employer's evidence. There is no basis for me to conclude that Mr. Huang deceived me on this point. He gave his evidence in a very straightforward, and candid manner, without exaggeration.

On or about October 10, and 12, the Employer received complaints from other store owners at the Westgate Mall. As a result of this information, and noting that there was a problem contacting the store because the line was busy, Mr. Huang viewed the video tapes in the store. On viewing the tape related to October 10, 1999, Mr. Huang testified that the first conversation depicted a quarrel that Ms. Khan was having with her boyfriend. The length of the tape was 15 minutes. Mr. Huang found the tape to be objectionable as the Employee could conduct no business on behalf of the Employer while quarreling in a loud, emotional, and angry way with her boyfriend. There was evidence of profanity on the tape. There appears to be evidence of one or two customers walking in and out, and being ignored by the Employee or leaving the store quickly. In viewing the tape, it was obvious to me that any customer in the store would have felt uncomfortable with the tone, subject matter, and language used by Ms. Khan in quarreling with her boyfriend.

The tape on October 12, 1999 showed 23 minutes of the Employee arguing in a loud, emotional way with her mother. The tape contained some profanity, and the Employee's conduct was louder and more objectionable than on October 10, 2000.

I have no hesitation in concluding that Ms. Khan's conduct on October 10, and 12, 2000, was completely incompatible with the operation of a retail store. I have no doubt that anyone hearing such language, conversation, and tone of voice would feel uncomfortable and would have left the store. Whether this would translate into a loss of business is difficult to say, and impossible to quantify.

After reviewing the tape, Kim Zhao, testified that she and Mr. Huang were " really upset" by what they saw and heard on the tape. Ms. Zhao went to the store and said to Ms. Khan "if you do this again any time, you will be fired, next time". I conclude from what Ms. Zhao said, that Ms. Khan was put on notice that inappropriate, personal telephone calls would result in dismissal. Ms. Khan in her oral evidence denies that she was warned by Ms. Zhao, and says that Ms. Zhao asked if "she was ok". I do not accept Ms. Khan's evidence, it is not probable, in all the circumstances of this case, particularly the circumstances depicted on the video tape of October 10 and 12, 1999.

As a result of this incident the Employer issued a written memo on December 30, 1999, which was distributed to all Employees, and signed by all Employees, including Ms. Khan. The salient portion of that memo reads as follows:

> (3) Please limit the personal phone calls and visit during the working hours and only store staff stay in the cash register area.

The tape on May 23, 2000 depicts Ms. Khan in telephone conversation for 10 minutes for matters unrelated to the business, including phoning in to a newspaper to determine if they were still accepting letters to the editor on a matter of interest to Ms. Khan.

The tape on May 24, 2000 depicts Ms. Khan in telephone conversations for a total 73 minutes, a large part of which was spent "organizing" a barbecue at her home for company employees. This was an event which was not sanctioned in advance by the Employer. During a number of the phone calls she indicated to suppliers that she was organizing a company picnic. It is apparent from a viewing of the tape that she did not use the specific name of the company, or pledge the credit of the company.

I cannot conclude from the video tape evidence alone that there was a continuous problem of personal misuse of the telephone by Ms. Khan, as the video depicted the Employee's conduct on 4 separate days. There is, however, evidence from Mr. Huang regarding difficulties with busy signals at the store, and phone replacement, which is some evidence of a continuing problem. I am, however, satisfied that there was misuse of the phone by Ms. Khan on 4 separate dates. The most objectionable phone conduct took place on October of 1999, about 7 months before the termination. There was evidence of misuse of the phone on two dates after the Employer gave an oral warning to Ms. Khan that her job was in jeopardy for personal use of the phone, and after the distribution of a written policy "limiting use of the phone for personal reasons".

I note that at p 3 of the Determination the Delegate characterizes the Employee's evidence as follows:

> She didn't have that many personal calls at work. The complainant reported that an employee called Erna forwarded her cell phone to the store and took personal calls all day whereas the complainant's personal calls would last a maximum of 5 minutes.

Most of the time Ms. Khan worked at the Westgate location, she worked on her own. There is no evidence that she confined personal calls to her meal, or rest breaks. From a review of the video tape, it is clear that Ms. Khan minimized to the Delegate her use of the telephone. The length of the calls on all dates appear to have exceeded that amount of phone use she reported to the Delegate. I note further, that there is no evidence in this case that Mr. Huang was aware of another employee forwarding cell calls to the store, or if in fact the employee worked at the Westgate location. On the basis of the material before me, which did not include production of Erna for oral evidence, I cannot be satisfied of the fact that another employee used the phone inappropriately, or that employees other than Ms. Khan used the phone inappropriately. It cannot be seriously argued that the Employer "condoned" the actions of the other Employee or selectively and unfairly enforced the phone policy.

The Employer had a meeting with Ms. Khan and her mother, Mitzi Hendry following the termination. Mr. Huang invited Ms. Khan and her mother to view the video tapes, so that they could determine that his decision was reasonable. Both Ms. Khan and Ms. Hendry declined to view the video tapes. Ms. Hendry testified that her daughter had "her permission" to organize a company barbecue. This evidence is unhelpful and irrelevant to whether the Employer had cause. I might have come to a different conclusion regarding the personal nature of the phone calls on May 24, 2000, had the Employee obtained advance permission from the Employer to organize a company picnic on company time. What Ms. Khan did was organize a party at her mother's home, without the Employer's permission. It cannot be said that this was a company event sanctioned by the Employer.

Ms. Hendry also testified that Mr. Huang said that he was letting Ms. Khan go for immaturity or immature conduct in the workplace. If Mr. Huang did characterize Ms. Khan's behaviour as immature, I would agree with that characterization. This is apparent from all the telephone calls which were recorded on the video tape. This statement is not inconsistent with a termination for improper use of the company telephone during working hours. I note that an Employer is not obliged to tell an Employee of the reasons for termination at the time of the termination. The Employer must be in a position to establish just cause, if the Employee questions the termination. I note in the Record of Employment, the Employer noted the reasons for termination as a termination for just cause.

After termination, Ms. Khan filed for Employment Insurance. On June 26, 2000 she was denied benefits due to a finding that she lost her employment due to her misconduct. She appealed this to the Board of Referees who upheld the termination on the issue of misconduct. After a telephone hearing the Board of Referees indicated as follows:

> The Board after carefully reviewing the evidence and submissions finds that the claimant lost her employment due to her own misconduct pursuant to Section 29 of the Act. The Board finds that the Commission has relied on mainly hearsay evidence to satisfy the onus of proving misconduct, namely the employer's hearsay evidence of what transpired on the videotape. The commission has made no attempt to view or submit to the Board the videotape or to corroborate what the

> employer stated occurred on the tape. Nevertheless, the claimant has made certain admissions in the course of her testimony and evidence which supports the employer's evidence. For instance, the claimant stated in her testimony that she doesn't deny that she talked on the telephone or read the magazines, but tried to justify it by arguing that the calls were "store to store", even if the **content** of the call may have been personal. Also, in exhibit 4, the claimant stated that she would talk on the telephone and read the magazine because "all the employees did it". However, the claimant was clearly warned about this conduct once and had received the written directive (Exhibit 6), but continued the conduct which admitted to, but has tried to justify it. The employer had provided a standard of behaviour expected of the claimant on the verbal warning and in Exhibit 6, but the claimant continued the conduct, which the Board finds was a wilful or wanton disregard of the employer's interest.

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. Khan, that Mr. Huang discussed this with Ms. Khan at the time of her hiring and she agreed that she would accept vacation pay with every cheque. I did not find Ms. Khan 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. Khan 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 in May 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 $1,446.06, not including interest. The Delegate invited further comment and information from the Employer.

Mr. Huang thought that Ms. Khan'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. The Delegate did not watch or view the video tapes prior to issuing the Determination. The Delegate found that the burden of proving cause for dismissal rested with the Employer. The Delegate found that there was not sufficient proof that the complainant was told that she could lose her job if the behaviour continued. The Delegate found that there was a dispute on the evidence as to whether Ms. Khan was warned that she could lose her job if her behaviour did not improve. The Delegate determined that while the Board of Referees for Employment Insurance determined that there was misconduct such that Ms. Khan was disentitled to Employment Insurance, but that the Employer had not proven cause for dismissal.

After an investigation, the Delegate issued a Determination that Ms. Khan was entitled to the sum of $1,573.34 which consisted of the following:

Vacation pay, January to March 31, 1999	$110.88
Wages Owing, April 1/99 to May 28/00	$783.76
Compensation for Length of Service	$551.42
Total Wages Owing	$1,446.06
Plus Interest to August 17, 2001	$127.28
Total Amount owing	$1,573.34

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. Khan because she used the telephone excessively in breach of the Employer's directions.

The Employer argued that I should decide this case the same way as was decided in the Employment Insurance appeal. I note that while the conclusions of the Board of Referees in the

Employment Insurance proceedings were interesting reading, these conclusions are not binding on me. I determined this appeal on the basis of the evidence in this case. Given that the parties before me, were unrepresented by counsel, and did not argue issue estoppel, I decline to give a decision elaborating on the concept of issue estoppel. It is clear, however, that the issue of "disqualification for misconduct" before the Board of Referees, while similar, is not identical to the issue of "cause" in an Employment Standards determination related to compensation for length of service. There are procedural dissimilarities, and the identity parties are not the same as in the process under this *Act*.

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.

This case turns primarily on findings of fact. It is unfortunate that the Delegate did not view the videotape prior to her Determination. It is apparent from a review of that tape, and the Delegate's summary of the Employee's version of the facts, that the Employee minimized the amount of time that she spent on the telephone, when dealing with the Delegate. On the day immediately proceeding the termination Ms. Khan spent over an hour on the telephone in calls that were personal. She was not transacting business on behalf of the Employer, and was unavailable to take telephone calls if they had come in.

Having had the benefit of hearing the witnesses under oath, I prefer the evidence of Mr. Huang and Ms. Zhao over the evidence of Ms. Khan on the issue of whether a warning was given following the October 10 and 12, telephone calls. I find that Ms. Khan was warned that her job was in jeopardy. I find that there was repetition of the conduct after a verbal warning that her job was in jeopardy, and after the Employer communicated a written policy about phone use. It appears that while the conduct on the telephone in May was not loud or objectionable, there was "unrestrained use" of the phone by Ms. Khan for personal reasons.

On the balance of the evidence before me, I conclude that the Employer had just cause to terminate Ms. Khan. She is therefore not entitled to compensation for length of service, pursuant to s. 63 of the *Act*.

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.

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 after the termination on May 26, 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. It is completely appropriate for a Delegate to attempt to settle a complaint, without issuing a Determination. 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 is an effective use of resources, and complies with the statutory purpose to ensure that disputes under the *Act* are settled 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.

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. The Employer has, however, demonstrated a serious error by the Delegate in this matter, in that the Delegate did not view the video tape of the Employee's telephone conduct. This was the basis of the Employer's case, and there was objective evidence available to the Delegate, from which the Delegate should have drawn conclusions about the nature of the misconduct.

In essence, the Delegate appears to have found that the Employer had not established that it warned the Employee. The viewing of the tape may also have been of some assistance in resolving the issue of credibility of the parties on the issue of warning. The leading authority on credibility suggests that one should consider the evidence or testimony, within the factual matrix, and reach a conclusion on whether the testimony given is consistent with the preponderance of possibilities: *Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.)*. The video tape contained facts concerning the complainant's conduct which formed the basis of the Employer's decision to terminate.

I note that the Delegate did not have any direct contact with Ms. Khan, but spoke to her over the telephone. It may have been helpful to the Delegate if she had direct in person contact with Ms. Khan. I had the advantage of hearing both parties give evidence under oath or affirmation. Any person viewing the video tape of October 10 and 12, 1999 would conclude that the Employee's conduct was worthy of immediate, clear, and extreme censure. No Employer can have that type of conduct going on in a public location, within a retail store, and expect that it will attract or retain customers. It is most probable that the Employers did censure the Employee's conduct by warning her, immediately after becoming aware of the conduct, that repetition of that conduct would result in immediate termination. It is highly improbable that the Employer just said to the Employee "don't do it again", as suggested by Ms. Khan. There was no reason to reject the Employer's version of the warning.

The formalization of the policy in writing is some evidence of the Employer's continuing concern with misuse of the phone for personal, rather than business reasons.

I am satisfied that the Employer has shown, with regard to the compensation for length of service issue, that the Delegate erred in failing to "go far enough in this investigation". The Delegate was mislead by the Employee about the warning and the length of the telephone calls.

The conclusion of the Delegate that a warning, that Ms. Khan's continued employment was in jeopardy was not given, was incorrect. I note that from my review of the videotape evidence, I agree with the Board of Referees in the Employment Insurance appeal, which characterized Ms. Khan's conduct, as a "willful and wanton disregard of the employer's interest".

Having said that the Delegate's conclusions were incorrect, in my view, there is no evidence of any improper conduct by the Delegate. It is the Delegate's job to investigate and make a Determination, which will result in the "weighing of evidence". This may mean that the Delegate prefers the evidence of one party over the other party. In the circumstances of this case, it is my finding that the Delegate erred with regard to a critical finding of fact, namely that the Employee was in fact warned that further use of the phone for personal reasons, would result in termination. This is a separate issue from Delegate misconduct.

For all the above reasons, I confirm the vacation and other pay calculations of the Delegate, cancel the Determination related to compensation for length of service, and refer this matter back to the Delegate for a re-calculation of the amount of the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated August 17, 2001 related to compensation for length of service is canceled. I otherwise confirm the Determination related to vacation pay, and other pay, and refer this matter to the Delegate for a re-calculation of the entitlement of Valene Kahn, including an entitlement to interest pursuant to s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal