

**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 -

Western Natural Gas Products Ltd.  
("Western")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Lorne D. Collingwood
<b>FILE NOS.:</b>	1998/801
<b>DATE OF HEARING:</b>	March 4, 1999
<b>DATE OF DECISION:</b>	March 18, 1999

**DECISION**

**APPEARANCES**

Hoss Budde	Owner of Western
Johanne Budde	Witness
Shirley Johnson	Witness
Scott Keith	On his own behalf

**OVERVIEW**

Western Natural Gas Products Ltd. ("Western") appeals, pursuant to section 112 of the *Employment Standards Act* (the "Act"), a Determination by a delegate of the Director of Employment Standards dated November 26, 1998. The Determination is that Western did not have just cause when it dismissed Scott Keith and that it must accordingly pay Keith compensation for length of service.

**ISSUES TO BE DECIDED**

I must decide whether Western did or did not have just cause when it terminated Keith. And underlying that matter is an allegation of theft.

Western fired Keith for theft when a customer came forward with a packing slip that had the same number as the packing slip of another sale. Western found that Keith handled each of the sales and it fired Keith on discovering that it had neither any record of the sale to the customer, nor the cash proceeds of that sale.

The delegate accepted that cash was missing but decided, on the balance of probabilities, that someone just made a mistake and the cash was misplaced. In explaining her decision, the delegate said that she could not say for certain if packing slips did have the same number as one of her copies was hard to read. The delegate also notes that Western chose not to lay charges with police and that it appeared that there was a lack of control over cash receipts.

On appeal, Western claims that the delegate is wrong on the facts and, because of that, erred in deciding that it did not have just cause to dismiss Keith. It says that there are two packing slips for two different sales with exactly the same number and that both of the sales are by Keith. Western says that the missing cash, missing records, and the packing slips show that Keith made a sale, pocketed the cash, and acted to cover that up. In the latter regard, Western claims that Keith overwrote the packing slip for the cash sale with details of his other sale.

Keith denies that he took money as alleged. He does not now remember either of the two sales. But he says that he was required to modify packing slips on a routine basis as customers would decide to change their purchase orders. He says that Western's computer system has produced errors in the past and that computer error, or an inadvertent mistake, likely explains why two packing slips have the same number. Beyond that, he says that various people had access to the box in which Western kept its petty cash but suggests that the missing cash and Western's missing records were probably just misplaced. He says cash and records have gone missing in the past.

## FACTS

Two different packing slips do have exactly the same number. At the time of the investigation, Western had only a copy of a customer's packing slip, what its customer, McFee Plumbing & Heating ("McFee"), had sent by fax. Like many a fax, it is not particularly clear. But I am shown the customer's original copy. There is no question that McFee was issued a packing slip with the number 216756 and that another of Western's packing slips, one for a sale to a company called Western Supplies – Kamloops ("WS"), has that very same number.

WS is in no way related to Western the appellant.

On May 5, 1998, McFee bought a quantity of ½ inch flex hose from Western. The customer's copy of the packing slip for that sale shows that McFee paid cash. And it shows that the sale was by Keith. He has written his initials on the packing slip.

On May 6, 1998, WS faxed Western a purchase order for a quantity of an item that is listed as R043-182 ¾ 5#7". WS telephoned later that day and asked if a quantity of ¾ inch flex hose could be added to its order. Shirley Johnson, Western's secretary, handled the call and she checked to see if the order had gone out. She found that Keith was handling the sale. Keith indicated that he would add the flex hose to the order. And he did. A Purolator waybill shows that the order was sent out on the 6th. And the packing slip for the sale shows that a quantity of R043-182 ¾ 5#7" and some ¾ flex hose was sold to WS and that Keith was the salesman. His initials are on that document as well. All is in order with that packing slip but the date. The packing slip is dated May 5, 1998.

A day or so after the sale to WS, McFee telephoned Western. McFee needed to know the exact amount that was paid for hose on the 5th. (The customer's copy of a Western packing slip does not show such information. It is blacked out.) Johnson got the call. She undertook a search for the information using Western's computer and the packing slip number that McFee gave her but found that packing slip 216756 was for the sale to WS. She had never seen such a thing before. Indeed, until that point, no one at Western had ever seen two packing slips with the same number.

Johnson and Johanne Budde undertook an extensive search of packing slip records and for the cash that McFee would have paid for hose, what they calculated to be \$23.11 including

taxes. They did not find the cash, nor were they able to account for it. Nothing was amiss with the petty cash. And the search for packing slips was equally unproductive. There was no record of the McFee sale in the computer and they were unable to find Western's hard copy of the packing slip, what is generated for Western's own use and records at the same time as the customer's copy of a packing slip is produced.

When a customer pays cash for a purchase, the cash is to be given to Johnson. It is her job to keep a record of the petty cash. The cash is kept in a box. People other than Johnson had access to the box and cash and hard copies of packing slips have gone missing in the past. I am told that has only happened twice, however, and that in both cases the cash was found. On one occasion, cash and a packing slip were found under Johnson's desk pad. In the second instance, Johnson was unable to balance the petty cash. She remembered that Keith had the day before made a cash sale and, on speaking to Keith, she found the missing cash. Keith had made change using the petty cash and he still had the customer's cash and the record of the sale in his pocket.

Western's computer records are organized by packing slip number. A computer program generates the packing slip numbers. It is designed so that it will not issue a number twice. And Western's experience is entirely consistent with that. The only problem with the computer system of which I am told is a quite unrelated problem with totals that has long since been corrected.

Through use of the computer, the packing slip for the sale to McFee could have been overwritten with details of the sale to WS, such that it was actually transformed into the slip for WS. And if that were done, the computer would then not show a record of the McFee sale. But it is not the sort of thing that one could achieve just by hitting the wrong key or by inadvertently typing in a wrong code. That is because, not only are company names and codes dissimilar, but shipping and billing addresses, information on contact persons, and the descriptions of the items purchased are different. All of that would have to be changed. All that the two packing slips have in common is their packing slip numbers and their order dates.

Once a packing slip is drawn up, saved and printed, there are two parts of it that cannot be changed. The first is the number of the slip. The second is the order date. That means if a person were, on the 6th of a month, to overwrite a packing slip that had the 5th as its order date, the result would still be a packing slip that said that the 5th was the date of the order.

**ANALYSIS**

Section 63 of the Act sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. The liability for compensation for length of service may be discharged. Section 63 (3) of the Act provides for that.

63 (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.(my emphasis)

An act of theft or dishonesty is a fundamental breach of the employment relationship. A single act can, by its very nature, cause irreparable damage to the relationship. Where the facts plainly and clearly show a wilful act of dishonesty, the employer may dismiss the employee for reason of just cause [Kenneth Kruger, (1996), BC EST No. D379/96, also *Candy v. CHE Pharmacy Inc.* (1997), 31 B.C.L.R. (3d) 12 (C.A.)].

The facts of this case are not as the delegate found them. There are two packing slips with the same number, one of which is for a cash sale. And it is not only that the cash from that sale is missing, but records are missing, and the packing slip for the sale to WS is dated the 5th, not the 6th. Beyond that I have found that there is no evidence of any computer error which would explain the many irregularities with the packing slips.

I can see but one logical explanation for the packing slips and the fact that the computer was found to have no record of the sale to McFee. It is that Keith overwrote the packing slip for the sale to McFee with details of his sale to WS. It is he that handled both the sale to McFee and that to WS. His initials are on both of the packing slips. And it explains both why Johnson and Budde could not find a packing slip for the sale to McFee in Western's computer, and why the packing slip for WS is dated the 5th and not the 6th.

I am satisfied, moreover, that Keith acted to deprive Western of the cash from that sale and that he did so through fraudulent means and with deliberate intent. I am unable to believe,

as it is so very unlikely, that Keith generated the packing slip for the sale to WS through a series of inadvertent errors or that computer error may somehow be to blame. The packing slips show a deliberate attempt to conceal the cash sale to McFee. And it is highly improbable, that cash goes missing, both the computer record and Western's hard copy of the packing slip for the sale go missing, and that packing slip irregularities would all occur in respect to the same sale unless it was by design. There is plain, clear evidence of dishonesty in this case and, as such, I find that Western did have just cause when it dismissed Keith and that its liability to pay compensation for length of service is discharged.

**ORDER**

I order, pursuant to section 115 of the Act, that the Determination dated November 26, 1998 be cancelled.

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**