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 -

Kootenay Elevator Services (1994) Ltd.
(" Kootenay Elevator ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Fernanda Martins

FILE No.: 1999/553 & 1999/554

DATE OF HEARING: November 29, 1999

DATE OF DECISION: April 10, 2000

DECISION

APPEARANCES:

Michael T. Kew	for the Appellant
Richard N. Andriashek	on his own behalf
Ann Andriashek	on his own behalf
Ed Wall	for the Director

OVERVIEW

I have two appeals before me both brought by Kootenay Elevator Services (1994) Ltd., (Kootenay Elevator), pursuant to section 112 of the Employment Standards Act (the "Act") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 20, 1999 under file number 67-092, (the "Determination"). The Director found that the employer owed Richard Andriashek wages, annual vacation pay, overtime and interest in the amount of $9,227.04. The Director also found that the employer owed Ann Andriashek wages, annual vacation pay, overtime, and compensation for length of service and interest in the amount of $3,045.18.

The two appeals were heard concurrently on November 29, 1999 in Nelson, BC, at which time evidence was given under oath by Walter Heimann, Richard Andriashek, and Ann Andriashek. The Director's delegate questioned the parties and presented a final summary of the Director's position.

Kootenay Elevator operates an elevator repair business. Walter Heimann is the owner and operator of that business. Kootenay Elevator employed Richard Andriashek as an elevator mechanic from August 9, 1992 to October 14, 1998. The Director found that Mr. Andriashek terminated his own employment by not returning to work when asked to do so by the employer.

Ann Andriashek was employed as an assistant to Mr. Andriashek from 1995 until October 14, 1998. The Director found that her employment was terminated without just cause.

The Director relied on the payroll records as provided by the employer. During the investigation the employer stated that overtime was never paid because there was an understanding that Mr. Andriashek was free to choose the hours of work.

The employer submitted spreadsheets to the Director purporting to summarize non work-related purchases made by the complainants using the company credit card. On the last page of this document, there is a handwritten note stating:

> Att. Mr. Ed Wall: This is for your information to show how they wasted money and how they conducted them selfes (sic) during working hrs and driving. This is

> only taken over 20 days; over 2 years there will be a large sum of money documented for a damage suit if they continue their claim. All is documented by Master Card. W H

In its reasons for appeal, Kootenay Elevator submitted that the Director's delegate erred in finding the facts in this matter as follows:

> (i) In finding there was no clear policy on the use of the company credit card or alternatively, if he was correct in finding there was no clear policy on the use of the company credit card, in failing to go on to consider whether the use of the credit card for personal expenses was reasonable in all of the circumstances.
>
> (ii) In calculating the wages and in particular, in calculating travel time at full pay rates.
>
> (iii) In finding that the employer did not have just cause for terminating Ann Andriashek's employment without written notice.
>
> The Appellant seeks an Order:
>
> (a) overturning the finding that Ann Andriashek was not dismissed for justifiable cause.
>
> (b) recalculating the amount due for wages or submitting that to the Director's delegate for recalculation based on:
>
> > (i) a different rate for travel time for the employees;
> >
> > (ii) further evidence regarding travel time when Ann Andriashek was a passenger with a co-worker;
> >
> > (iii) deducting overpayment of expenses.

ISSUES TO BE DECIDED

This appeal requires me to decide whether the Director erred :

1. In not considering the personal expenses incurred by the employees, or in the alternative, in not considering the unreasonable expenses incurred by the employees.

2. In the calculation of wages owed by calculating travel time at a full rate of pay.

3. In finding that the employer did not have just cause for terminating Ann Andriashek's employment without written notice.

CALCULATION OF WAGES

Facts and Arguments:

In its reasons for appeal, Kootenay Elevator submitted that the Director's delegate made the following errors in fact or in law or both:

> Because of the nature of the work full supervision of the employee was impossible and the employee had clear instructions to manage the work in such a fashion and schedule his hours in such a fashion that no over-time was worked.
>
> The Appellant disputes the calculation of travel time at full rates. Richard Andriashek was entitled to only minimum wages for time spent travelling and no further amount was agreed to. His expenses were to be $32.00/day for meals, $20.00 for part days, $50.00 for hotel accommodation. It was anticipated he would be staying with his spouse Ann Andriashek and her travel allowance would supplement Richard Andriashek's. Ann Andriashek was a helper travelling for companionship. It was agreed she would not be paid for travel time. Her expenses were to be $32.00 /day for meals, $20.00 for part days, $5.00 for hotel as she would be staying with her spouse, Richard Andriashek.

Kootenay Elevator also submitted that the following facts were in dispute:

> It is further submitted that calculating the wages due the Director's delegate failed to differentiate between hours that Ann Andriashek spent travelling and as a passenger travelling to and from job site (particularly as the complainant was employed on a casual basis and was travelling with her common law spouse) and regular work hours. The Appellant recalculated the amount due for 1998 as an overpayment to the employee for the period of $1,867.56. The Director also failed to differentiate between the hours which Richard Andriashek spent travelling and regular work hours. The employer recalculated the amount due for 1998 as an overpayment to the employee for the period of $708.38.

On September 23, 1999, the Tribunal received written submissions from the Director in response to the appeal, which included:

> It is patently clear from the employer's records presented to the Director's delegate during the investigation that the employer never distinguished between time spent travelling and time spent working. The records presented at the time of the investigation clearly show a long line of zeros in the column headed "trav. pay". Furthermore, the columns headed "weekly trav.t" and "over time" are blank. This indicates that employer had no policy regarding travel time or overtime. The records also showed that the employer paid all hours at the specified hourly rate. The employer may not, now that a complaint has come before the Employment Standards Tribunal, change the terms upon which wages were paid.

In his written submissions to the Tribunal by way of letter dated October 4, 1999, Mr. Andriashek stated that:

> Travel time has always been paid at full rate. At a job where some days all you did was travel, you would have to be a fool to work for 60% of a wage that was already dismally low for the trade. Further, you'll find there is no record of a reduced travel rate being paid to me on any of my previous print outs.
>
> I have never received any instructions 'to manage the work in such a fashion that no over-time was worked'. On the contrary company policy has always been 'get the job finished and running before leaving the site, otherwise it would not be efficient with the expenses'.
>
> Again, travel time has always been paid at full rates as reflected on previous pay print outs.

In her written submissions to the Tribunal by way of letter dated October 4, 1999, Mrs. Andriashek stated that:

> Travel time was always at full rate as supported by past wage print outs.

In those submissions she replied to the Appellant's assertion that she agreed not to be paid travel time and that she was travelling for companionship, by stating that she was a mechanic's helper not a "companion".

The Appellant's counsel then submitted in a letter to the Tribunal dated October 20, 1999:

> The employer accepts the statement of the Delegate of the Director of Employment Standards that there was not a clear distinction between travel time and regular time while the employee was working for the employer. However, this must be viewed in the context of the entire arrangement as stated in the original submissions; namely, that the employee was free to set his own hours (in conjunction with his wife, Ann Andriashek) provided those hours did not amount to over-time.
>
> The fact that the employees are now claiming over-time changes the entire employment relationship and had that been part of the original agreement between the parties it is clear that the employer would not have been willing to pay travel time to this employee at all or to either of them at any greater than the minimal standards. Contrary to the position set out by the Delegate of the Director of Employment Standards, it is that decision which changes the terms upon which wages were paid. Given that change, the entire relationship must be reviewed.
>
> With reference to Richard N. Andriashek's statement, there was nothing inconsistent with the instructions to manage the work in such a fashion and schedule hours in such a fashion that no over-time was worked and the

> requirement that he get the job finished and running before leaving the site. The second statement arose from a situation where the employee left a job site in Northern B.C. in completely unsafe conditions and had to incur an additional approximately 1,600 kilometres of travel to rectify the situation.

The Director made written submissions dated October 28, 1999 with regard to travel time stating:

> The employer indicates through its counsel that the travel time issue must be analyzed in the context of the entire employment arrangement. The Tribunal may or may not agree, however, the entire employment arrangement cannot be considered without first and foremost considering the minimun standards set out in the Act, in particular Section 4.

Mr. Andriashek testified that the focus was to get the job done. If there was a breakdown the preference was to get the machine running. He did not agree that Mr. Heimann wanted him to keep his hours down to eight hours per day. He was supposed to get the job out of the way.

Analysis:

The onus is on the Appellant to demonstrate error or a basis for the Tribunal to vary the Director's Determination of the amount of wages owed to these employees.

Section 35 of the Act states:

> An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work
>
> (a) over 8 hours a day or 40 hours a week, or
>
> (b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

Section 40 of the Act states:

> (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38
>
> (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
>
> (b) double the employee's regular wage for any time over 11 hours.
>
> (2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38
>
> (a) 1 1/2 times the employee's regular wage for the time over 40 hours, and

(b) double the employee's regular wage for any time over 48 hours.

(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

(4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,

(a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and

(b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.

At the hearing, counsel for the Appellant argued that section 37 of the Act demonstrates that the Act permits flexibility in scheduling and that the parties in this case simply did not go through the formalities. I agree with the Tribunal's findings in Kinross Gold Corp. [1999] B.C.E.S.T.D. No. 261 BCEST #D245/99 in reply to similar arguments. Those findings apply in the matter at hand :

> "Nor do I accept the proposition that seems to run through the arguments of Kinross in this appeal, which is that the requirements of Section 37 of the Act, and the Regulations that relate to that section, should be viewed as mere technical or procedural matters which can either be ignored or inferred ex post facto. Such a conclusion would be inconsistent with the purposes and objects of the Act identified in Section 2,
>
> . . .Without denigrating the importance of the other purposes stated in Section 2, the overwhelming policy consideration in this matter is that employees are entitled to receive at least basic standards of compensation and conditions of employment from their employer. That is a statement of policy that the legislation says must direct the application and interpretation of the Act.
>
> . . .an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.
>
> Section 37 provides an opportunity for an employer to avoid the basic overtime standards and requirements outlined in Section 40 of the Act, provided the employer complies with the rules and requirements of Section 37 and the related Regulations. Provisions that detract from the minimum standards of the Act are strictly construed and, in these circumstances, require strict compliance with the legislative requirements.

The Director's delegate found that there was no time bank agreed to between the parties. He reasoned that even if there had been an agreement, it would not be considered legitimate unless all the regulations in the Act had been followed and it was clear that this had not happened. I see no error in the Director's findings in this regard.

There is no authority which compels me to accept Kootenay Elevator's argument that the employee's travel time should have been calculated by the Director using the minimum wage under the Act because the employer would not have been willing to pay travel time at all or any greater than minimal standards if he had known that he would have to pay overtime. Mr. Andriashek testified that he would not have worked for minimum wage. Enforcement of the Act does not change the terms of an employment agreement beyond those affected by the Act or entitle the employer to have the terms reviewed so that the end result is same as not having the Act enforced.

"Travel time" is not defined in the Act or its Regulations. There is no dispute that Mr. Andriashek should be compensated for the time he spent travelling while under the direction and control of his employer nor that it formed part of the working day. Time spent travelling for the employer is not distinguished from being "work" under the Act and since it is work, the employee is entitled to his regular wage as was originally agreed on by the parties.

Work is defined in the Act as follows:

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

Mrs. Andriashek testified that she was never told that she would not be paid travel time. She had submitted her hours through Mr. Andriashek and had always been paid for that time. I find that the fact that the employees were married has no relevance under the Act. I find that as an employee Mrs. Andriashek was entitled to her regular wage while she was performing work for her employer. I find that it was intended from the outset of her employment that she would be paid for travel time and that she submitted that time for payment legitimately. It would have been very obvious to the employer that the hours submitted for payment included travel time for a second person. I do not find it credible that there was an agreement that she would not get paid travel time. It is only after having the overtime provisions of the Act enforced against the employer that he is advancing this argument. Nor do I find that travelling as a passenger with a co-worker is a reason under the Act to not be paid for that time.

I find that the Appellant has not demonstrated a basis for the Tribunal to vary the Director's finding on this issue.

EXPENSES

Facts and Arguments:

Kootenay Elevator argued that there was an overpayment of expenses. After the complaint was made to the Director and then more extensively after the Determination was issued, the Appellant spent a great deal of time analyzing all the expense reports from these employees and extrapolated what he felt had been claimed by them inappropriately.

At the hearing Mr. Heimann testified that when he analyzed the expenses after the complaints were filed he found a personal trip to Calgary had been charged to the company. He also found a number of entries relating to liquor. He had told Mr. Andriashek that he did not want any liquor charges. He stated that he would have closed his eyes to beer as an expense but not during work time when there was driving and safety was a factor. He also noted that there was an additional meal charged while Mr. Andriashek was working in Vernon. He testified that the Andriasheks charged groceries on the credit card. He could not recall that the Andriasheks had offered specifically to pay for items not appropriately charged. He stated that in 1998 he changed the expense system to a flat rate. He had trusted Mr. Andriashek and had asked him repeatedly not to charge any non-company expenses.

Mr. Andriashek testified that he understood that he could charge for any out of town expenses which included toilet paper and soap, that is, any "creature comforts". He further testified that when Mr. Heimann raised objections to him about "tampax" being charged, Mr. Andriashek offered to pay him back. It was his understanding that a drink with a meal was acceptable.

Mrs. Andriashek testified that Mr. Andriashek was in charge of expenses.

The Appellant seeks an order deducting the overpayment of expenses from the calculation of wages.

Analysis:

Section 1 of the Act says, in part:

> "wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production of efficiency,
>
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

(d) money required to be paid in accordance with a determination or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

(f) gratuities

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses, and

(i) penalties;

Sub-paragraph (h) above specifically excludes "allowances or expenses" from the definition of wages. Therefore, I have no jurisdiction to deal with this aspect of Kootenay Elevator's appeal in so far as it relates to the recovery of those expenses. (Sidhu [1997] B.C.E.S.T.D. No. 539 BCEST #D533/97).

DIRECTOR'S FINDINGS ON CREDIT CARD USE

Facts and Arguments:

In the determination, the Director found:

> There was no clear policy on the use of the company credit card. Both parties appear to have a different understanding of who could use the credit card and what it could be used for. This vague understanding could not be the basis of discipline.

In its appeal as filed, Kootenay Elevator submitted that the following facts were in dispute:

> That the Director's delegate erred in stating there was no clear policy on the use of the company credit card. The employer adduced clear evidence that the company credit card was not to be used for personal purchases but was only to be used for appropriate and necessary travelling expenses and accommodation. Further, these travelling expenses and accommodation expenses had to fit within the employer's policy regarding moderation of the expenses.
>
> In any event, the Director's delegate erred in not finding that the use of the credit card for numerous personal expenses was clearly unreasonable and certainly could form the basis of appropriate discipline.

The Director submitted by way of letter to the Tribunal dated September 20, 1999 regarding the employee, Richard Andriashek and under separate cover dated September 21, 1999 regarding the employee, Ann Andriashek:

> If the employer wishes to rely on a policy regarding the use of the credit card, it must be able to prove that the policy was set and clearly communicated to the employee. No such proof was brought forward during the investigation for the consideration of the Director's delegate. Furthermore, that the policy was unclear is evidenced by the fact that the complainant and the employer demonstrated different understandings of it, as presented in the determination question. The employer must also be able to demonstrate that the consequences of not obeying the policy were be [sic] clearly and unequivocally stated to the employee. No such evidence was brought forward during the investigation for the consideration of the Director's delegate.
>
> The employer cannot retroactively enforce an unclear policy, especially when there is no evidence the employer ever attempted to enforce during the course of the employment.

On October 4, 1999, Richard Andriashek in written submissions to the Tribunal stated:

> [T]he company credit card was to be used for all vehicle, motel/hotel/rental, meals and all other expenses incurred while travelling and doing business as a representative of Kootenay Elevator Services. It was always clear policy that all expenses were covered and a drink with a meal was acceptable. I have never been questioned on this in 7 years of working for Kootenay Elevator and find this policy change after the fact pure nonsense.
>
> Note: The going rate within the trade for out of town expenses is $100/day for a mechanic and $100/day for a helper.
>
> …As for the fantasy figures on expenses, I have never seen these figures until after my employment was terminated with Kootenay Elevator Services.
>
> [A]gain, I have seen no proof of any personal expenses. All receipts were turned in and no questions ever arose as to the use of the card until, of course, after my termination from Kootenay Elevator Services. And as Kooteny [sic] Elevator has stated that I wasn't fired or laid off, what "appropriate discipline" did they have in mind?

Also on October 4, 1999, Ann Andriashek submitted in writing to the Tribunal:

> I, as a helper, was not in charge of the company credit card.

In response to the Appellant's assertion that she was travelling for companionship with her spouse and that she agreed not to be paid travel time and her expenses were to be $32.00 per day

for meals, $20.00 for part days, $5.00 for hotel as she would be staying with her spouse, Richard Andriashek, Ann Andriashek stated:

> [T]here was never any such agreement and I was a mechanics helper not a "companion". Expense figures are pure fantasy, as I have never seen them until after I was laid off.

In reply, the Appellant submitted by way of letters to the Tribunal dated October 20, 1999:

> Use of the credit card was governed by both stated company policy and by necessary implication. It was to be used for authorized company expenses and whether this was ever expressly stated, it is submitted that it is a reasonable term that would be necessarily implied. While the exact nature of those expenses may be the matter of some dispute, there was clear evidence adduced in this case that the expenses for which the credit card was used went well beyond what any reasonable person could legitimately consider as company expenses.
>
> Furthermore, the evidence that was presented included evidence that the employee, Richard N. Andriashek, used the credit card without authorization from the company and further used it for personal purchases. He also allowed Ann Andriashek to use the card without the employer's authorization.
>
> Furthermore, the evidence that was presented included evidence that the employee, Ann Andriashek, used the credit card without authorization from the company and further used it for personal purchases. It is submitted that such unauthorized use in and of itself is grounds for termination of her employment.
>
> It is the employer's position that the need to control expenses was clearly communicated to workers and in particular a flat rate of expenses was required to ensure that continued abuse of the credit car [sic] for non-appropriate expenses was curtailed. At no time did the employer agree that the credit card could be used for the purchase of alcohol.

On October 4, 1999, the Tribunal received a letter from counsel for the Appellant dated September 29, 1999 which enclosed a re- calculation of Richard and Ann Andriashek's payroll and expenses from October 13, 1996 to October 13, 1998. Kootenay Elevator provided notes explaining the re-calculations which included:

> A company credit card was issued prior to Ann's hiring and to Rick only with the strict request and agreed by Rick that it would only be used for legitimate company expenses like vehicle and hotel costs, meals and - food only when Rick or later both were staying in kitchenette units and cooked for them selves and that the expenses were to be held down to acceptable levels but not for private use at all. It worked when only Rick was working for KES but when Ann came on the abuse of the card set in gradually. Ann started to sign the card, then they started to stray in the most expensive hotels in the towns, the meal and food costs went

> unproportionally higher and the card was more and more used for private items and other personal items to the point that they started to stock up on delicatessen items before the end of trips before they went home. They also started to use our service van for extensive unauthorized private trips, even into Alberta. Only twice was a private trip authorized, once from Radium to Calgary and once from Mackenzie to Fort St. John with the strict request that they pay for the fuel. They filled up before they left and right away when they came back and naturally on the KES credit card! Rick was severely warned to stop this or he would be put on fixed expenses. Since the abuse did not stop Rick and Ann were put on January 1, 1998 on fixed expenses with the strict request that the credit card was only to be used for vehicle operating costs and purchases for items required for the work. To no avail!
>
> …Since Rick and Ann have now been awarded overtime the whole picture of their employment included [sic] their expenses, a major part of our operation, had to be re-calculated and an indepth analysis of their credit card slips with the times and locations shown has revealed that they have also used our van on other occasions for private trips for which they charged KES the fuel and on at least one case even their time!
>
> …Note: Since Rick and Ann Andriashek have charged all their legitimate or illegitimate bills combined on the same credit card it is not possible to separate their charges; therefore, in the year 1998 when their expenses were calculated on flat rates most of the back charges were done as advances on Rick Andirashek's payroll with the exception of one backcharge of $2,886.43 on Ann Andriashek's payroll.

On October 28, 1999 the Director submitted to the Tribunal by way of letter:

> In addition to the information already submitted in this matter, the Director's delegate draws the Tribunal's attention to the long delay between alleged misuses of the credit card and any action whatsoever in that regard. If the employer wishes the Tribunal to believe that personal purchases on the company credit card were firing offences, then immediate termination should have been the result. However, it is only after the complainant enforced her minimum entitlements under the Employment Standards Act that the employer wishes to retroactively apply sanctions.

At the hearing, Mr. Heimann testified that he compensated the employees for travel expenses by issuing a credit card to be used strictly for company expenses such as vehicle, food, small expenses such as light bulbs, bolts, that is job related items and absolutely no liquor. He testified that when Mrs. Andriashek came on board in 1995, no other credit card was issued and Mr. Andriashek was to handle the card for legitimate expenses only such as hotel and food and whatever was required for the job. Further, Mr. Andriashek was the only one to sign but she started to sign as well. He testified that he had let these employees know these requirements

when Mrs. Andriashek started working by laying the ground rules on how expenses would operate. He testified that he was not aware until later that liquor was being charged. He testified that he advised Mr. Andriashek that he could buy a bottle of liquor and then submit the receipt and he would pay for it as he was aware that it was stressful out on the road. He testified that there were a lot of instances where he wanted to make it convenient for Mr. Andriashek. He testified that in February or March of 1998, he became aware that Mrs. Andriashek was signing for the credit card. He testified that he told Mr. Andriashek that he did not want hygienic products or liquor charged or he would have to implement a flat rate system. He testified that after analyzing the expenses following the complaint to the Director, he noted that gas had been charged for a private trip

In cross-examination, Mr. Heimann did not agree that toilet paper and any expenses that went along with being away from home could be charge on the card. Mr. Heimann stated that an occasional beer was an acceptable expense. He stated that he expected that Mr. Andriashek had offered to pay him back when he raised the matter of "tampax" being charged, but he could not recall. Mr. Heimann was also unable to produce a receipt with Mrs. Andriashek's signature for the tampax purchase. Mr. Heimann agreed that it was Mr. Andriashek who was in charge of expenses and not Mrs. Andriashek. Mr. Heimann agreed that he had never indicated to anyone that there would be termination for personal expenses only that he would change to a flat rate system. Mr. Heimann stated that he had not given Ann Andriashek any specific warning regarding the use of the credit card. He stated that it was Mr. Andriashek's responsibility and he had been asked and warned. When asked why he had not fired Mr. Andriashek if he was the one responsible, Mr. Heimann responded that he needed a mechanic. Mr. Heimann stated that he had implemented a flat rate of $82.00 per day including hotels and meals but Mrs. Andriashek's expenses were different as she was sharing the hotel room. The "tampax" expense was incurred on April 27, 1998. Mr. Heimann agreed that if the Andriasheks had not filed a complaint he would have closed his eyes to the charging of the personal trip and to the occasional beer. He stated that after he switched over to the flat rate system for expenses he would deduct the credit card expenses from the flat rate. He was not sure how often he would do this but said possibly on monthly basis.

At the hearing, Mr. Andriashek testified that he had been given a company credit card by Mr. Heimann for all out of town expenses. He stated that Mr. Heimann left it to him to be responsible. He testified that there had never been a flat rate system put in place since if there had been one, expenses would not have gone through Mr. Heimann. He testified that the standard expense rate in the trade was $100.00 per day and that it did not matter whether one was married or not. He testified that he did keep expenses down and if he had a beer with lunch, it was never made an issue of. He testified that he had absolute control over his helper if it was his job site. Further, he was often working thousands of miles away and it would not have worked to obtain authorization for expenses. He testified that he believed that the credit card was for all out of town expenses such as toilet paper, soap, and if toilet paper was included he assumed that feminine napkins were also included.

In cross-examination Mr. Andriashek stated that he had allowed Mrs. Andriashek to sign for the credit card as a matter of convenience. He agreed that he had discussions with Mr. Heimann on

June 30, 1998, regarding Mrs. Andriashek signing and that this was the first time that the matter had been raised to him. He stated that Kootenay Elevator never took any action with regard to types of expenses until there was a charge for feminine napkins. He stated that he was told that he would be put on a flat rate system but it had never been implemented. He stated that when he first started working there had been a cash advance system but it was cumbersome so the credit card was implemented. He stated that he had been told to "take it easy" on expenses generally but not on specific expenses.

Ann Andriashek testified that she was not in charge of expenses and was paid straight wages. Further, expenses were never taken off her wages before and did not understand the source of the "overpayment" being claimed by Kootenay Elevator. She also testified that the only time that she signed for the credit card was when she was told that she could by Mr. Andriashek and only for company expenses.

Analysis

After reviewing the arguments, submissions and evidence on the point of the Director's findings with regard to the use of the company credit card, I find that the Director made no error. Evidence from parties was conflicting and I find that the Director was correct in finding that the policy for use of the card was unclear. I find that the employer had condoned the purchase of various items of a personal nature up until it was noted that a charge for a feminine hygiene product had been made on April 27, 1998. The employer admitted that he was willing to overlook far more extravagant charges including personal trips and alcohol if the parties had not filed this complaint. I find that the employer can not seek to enforce a policy, which if actually in place, was not enforced during the employees' course of employment beyond the threat to go to flat rate system.

I do not accept Mr. Heiman's evidence that such a system was ever actually imposed since the employees continued to rely on the credit card for charging expenses with the same frequency as in previous years, right up until the last day worked as itemized in great detail by the employer in its submissions to the Tribunal. I accept the evidence of these employees that the system was never implemented. No accounting for deductions of charges against the "flat rate" was produced that the employees had ever been presented with during their employment. Copies of cheques given to the Director during the investigation were made out for wages except for one dated June 8, 1998 in the amount of $138.99 for petty cash and one dated July 28, 1998 in the amount of $16.50 for a cash expense. If such a system was in place at the beginning of 1998 as a corrective measure, it makes no sense that the employer continued to allow the employees use of the credit card in the same manner as for previous years.

I find that the Director did not err by not going on to conclude that the employees' use of the credit card was unreasonable and could form the basis of appropriate discipline. I find that even if he had gone on to characterize the use of the credit card as unreasonable, that no form of discipline other than the warning to Mr. Andriashek to go to a flat rate was ever undertaken. It was Mrs. Andriashek that was terminated and not Mr. Andriashek.

Kootenay Elevator's submission that Mrs. Andriashek's unauthorized use of the credit card in and of itself is grounds for termination of her employment is unreasonable in light of the employer overlooking Mr. Andriashek's alleged transgressions which were more numerous and more serious in nature. Further, I find that although the employer had requested that Mr. Andriashek not allow Mrs. Andriashek to use the credit card, Mr. Andriashek did continue to allow her to use the credit card for the sake of convenience. The employer agreed that Mr. Andriashek was solely responsible for Mrs. Andriashek as his helper and that the credit card was in his control and his responsibility as was the submission of receipts for expenses charged. The employer also admitted that he had not dealt directly with Mrs. Andriashek regarding the use of the card. Therefore, I find no wrong doing in Mrs. Andriashek's use of the credit card. I find that it was Mr. Andriashek's conduct in this regard that could be characterized as insubordinate and not Mrs. Andriashek's.

At the hearing, counsel for Kootenay Elevator argued that the matter of expenses goes to the credibility of the employees and the circumstances leading to the dismissal of Ann Andriashek. I do not accept this argument. I find that the employer had the same opportunity to review receipts at the time that they were being submitted by Mr. Andriashek as he did after the complaint was made to the Director. I find that during the course of these employees' employment, their employer permitted these charges to be made without issue, apart from the "tampax" purchase which was addressed by warning Mr. Andriashek, not Mrs. Andriashek. I find that the employer had been reviewing receipts and was aware of the purchases if he noticed that one particular purchase. In my view, whether their conduct might be seen as unreasonable from an objective perspective, has no bearing if it was condoned by the employer. I find that the employer's tacit approval promoted these employees' understanding that the purchases were acceptable. There was no allegation that these employees concealed the nature of their purchases in any way. The employer can not re-characterize conduct after the fact because a complaint was made to the Director.

DISMISSAL FOR CAUSE

Facts and argument:

Kootenay Elevator submitted that the Director's delegate made the following errors in fact or in law or both:

> Ann Andriashek ignored the clear directions of the management that she was not to attend for less than a four-hour minimum daily time period during the period of November 24, 1996 until July 27, 1997.
>
> The Appellant disputes the finding that the termination of the Respondent's employment was not justified on the basis that her verbal abuse of the President of the company in the presence of customers and others was sufficient grounds for dismissal and further that the Director's delegate erred in failing to find that this incident was the culmination of a continuous pattern of insubordination including:

- inappropriate use of credit card provided for company expenses;
- for cutting telephone communication off between the employer and herself and her fellow employer and common law spouse, Richard N. Andriashek;
- for submitting false hours;
- for disobeying company directives regarding calling ahead regarding jobs;
- improper use of the company vehicle.

The Appellant submitted that facts in dispute were:

> The Director's delegate failed to take into account the significant acts of insubordination by the complainant. In Candy v. C.H.E. Pharmacy Inc. (1997) B.C.J. No. 684 the British Columbia Court of Appeal found that insubordination and dishonesty amount to just cause for immediate dismissal:
>
> Insubordination, like dishonesty, is grounds for termination of a contract of employment without notice for both are inconsistent with the continuation of the employer/employee relationship.

Mr. Heimann testified that:

> He was not certain when Ann Andriashek was hired as a part time helper but he thought that it was in 1995.He laid the ground rules on how things would operate with her. Some jobs did not require help and it was too expensive to have her on every job. Her position was never changed from part time status. Richard Andriashek was supposed to supervise her hours.
>
> Eventually, the way in which he could communicate with Mr. Andriashek changed. He needed to be able to communicate with Mr. Andriashek to get him out to a job site as soon as possible. On one occasion he had difficulty in contacting Mr. Andriashek on a job at Radium Hot Springs. The cell phone had been turned off. Since he was unable to contact them to advise that they should go home because the job was not proceeding, they ended up staying at a hotel and incurring expenses of more than $300.00. On another occasion when he called Mr. Andriashek, Mrs. Andriashek answered and stated that it was not a good time to call. It became increasingly difficult to communicate with Mr. Andriashek. Mrs. Andriashek had answered for him with regard to not staying in the apartment in Rossland.
>
> The job in Rossland was not going very well. Mr. Heimann's customer "was on his case badly". There were delays. Power was unavailable sometimes. He had offered the Andriasheks the use of an apartment in Rossland with expenses so that they could make good use of their time and not have to drive 90 kilometres from

> and to Nelson. The Andriasheks chose to travel home. Mr. Andriashek reported that he was working eight hours a day. The customers were angry so Mr. Heimann went to Rossland to check on matters. He was at the work site at 8:00 in the morning but the Andriasheks did not turn up until 9:15 and finished at 4:30 p.m. but still charged eight hours. The next day the Andriasheks showed up at 8:10 a.m. and stayed until 4:30 p.m.. They could not continue working because there was a break in the power. When the Andriasheks declined to stay in Rossland, Mr. Heimann told them clearly that they would not be permitted to use the company vehicle nor would they get paid travel time. He told them that he wanted them to work eight hours. Mr. Andriashek agreed but then did not keep his agreement regarding the hours worked. Mr. Heimann returned on the day after Thanksgiving and made copies of the job diaries, which he found at the work site. The copies were left in the diary and Mrs. Andriashek made a "ruckus" over him having copied the diary. The next day, October 14, 1998, the Andriasheks "booked off sick". Mr. Heimann was scrambling. He had his wife assist him and called someone else in to work. The next day the Andriashek's arrived just after 8:00 a.m.. Someone else was working in Mr. Andriashek's place and Mr. Andriashek asked where that left him and Mrs. Andriashek. Mr. Heimann responded that it was up to him. He did not have a problem with them taking sick days. Mr. Andriashek stated that it was up to Mr. Heimann and then Mrs. Andriashek started to argue loud enough for everyone to hear. Mr. Heimann fired her as this conduct was intolerable to him. Mrs. Andriashek asked why she was being fired and he told her that she had been interfering with his business. He ordered her off the work site. His recollection was vague regarding what transpired in that exchange. He could not recall if the arguing took place before or after he laid off the Andriasheks. The Andriasheks removed their tools from the company van and left the work site with the keys to the van.

In cross-examination Mr. Heimann testified that:

> He fired Mrs. Andriashek because she cut communication, abused the credit card, and abused him in front of others. The only time he had confronted Mrs. Andriashek was regarding his copying of the work diary when he told her that she might not have a job.
>
> He had not asked the Andriasheks to keep a job diary but he needed the diary as evidence for his customers. He felt that he had the right to copy the diary because it was on the job. He felt that he was "confronted" when Mrs. Andriashek asked him why he had copied the diary.
>
> He could not recall in the heat of the argument whether Mrs. Andriashek had sworn at him before he told her that she was laid off.
>
> He had never said anything to Mrs. Andriashek verbally or in writing regarding insubordination.

He had advised Mr. Andriashek that he did not want Mrs. Andriashek on jobs, which involved three hours of driving and only two hours of work. Mr. Andriashek had left her at home occasionally but only after he talked seriously to Mr. Andriashek.

He admitted that he had not given Mrs. Andriashek a specific warning regarding the use of the credit card but he had warned Mr. Andriashek as the card was his responsibility.

Prior to October 13, 1998 he had attended the Rossland job site a couple of times. He found out early in the morning of October 14, 1998 that the Andriasheks would not be in to work because of illness. The elevator installation was taking place in a condominium building where other trades were also working. The site foreman was upset.

The Andriasheks had contacted him on October 14, 1998, when they were feeling sick but he could not recall if it was by cell phone or a message on the answering machine.

The Andriasheks usually phoned in the hours that they worked. He had not required any documentation of hours being worked. He stumbled onto their diary in the machine room at the Rossland work site.

On October 15, 1998 the exchange between him and the Andriasheks happened within ten minutes. He felt that he was not being confrontational with Mrs. Andriashek when he told her that she had charged tampax on his credit card. He felt he was just stating a fact.

Richard Andriashek testified that:

While at the Radium job, he and his wife travelled to Sirdar to meet Mr. Heimann to pick up some parts. That evening they travelled to Cranbrook since they were doing some work there. At 11:30 that night Mr. Heimann called "ranting" about them being in Radium. The next morning Mr. Heimann called and told them not to go to Radium. He felt that there had been mismanagement on Mr. Heimann's part in picking up the parts.

The Rossland job took several weeks. He and his wife were called off that job to do other work. When he first arrived at the Rossland job, things were a mess. The measurements were wrong. He arrived at a hostile job site. They were supposed to have started two months earlier. He did his best to handle the job but every time he got going he would be called to go work somewhere else. When he was at the work site things went well. The day he that showed up after nine o'clock in the morning he had made service calls on the way out. However, there was never a set time to arrive at work with Mr. Heimann. He did not have to "punch a clock".

He left the company van secured on Mr. Heimann's property. He believed Mr. Heimann to have his own set of keys.

In Cross-examination, Mr. Andriashek testified that:

While at the Radium job, he had accidentally shut the cell phone off probably when he removed it from the vehicle to have dinner and then noticed it was off when he was back at the hotel.

He denied that he had been told to put in an eight-hour day at the Rossland job.

While working on the Rossland job, he continued to make several service calls throughout the Kootenays.

A diary was kept so that they could keep track of what transpired at a job. He agreed that the employer would have an interest in that but suggested that the employer should have provided a maintenance form.

He took exception to Mr. Heimann not getting permission before copying the diary. He denied that Mrs. Andriashek's words were heated or angry when she spoke to Mr. Heimann about the diary. She was only asking why he had copied it and she never raised her voice.

On October 14, 1998, he left a message that he was ill for Mr. Heimann. He admitted that he was upset because he was being blamed for Mr. Heimann's "blunders". Mrs. Andriashek did not go in to work that day because there was no job for her without him.

When he went to work on October 15, 1998 at around 8:00 a.m., someone else was doing his job. He asked Mr. Heimann what had been done and what did this mean for him and Mrs. Andriashek. Mr. Heimann responded that it was up to Mr. Andriashek who in turn replied that they were there to work and it would be up to Mr. Heimann. Mr. Heimann then said that he was not putting up with "this bullshit" any more. Mrs. Andriashek then asked him what he meant and he responded that they were always late. She then stated that they put in eight hours and asked if he was calling her a liar. At this point he said that they were laid off and that they no longer worked for him. Mr. Heimann then took an aggressive stand towards Mr. Andriashek shaking his finger and stated that furthermore, she had bought tampax on his credit card. She then said "fuck you" and Mr. Heimann became more aggressive. He again shouted, that they were laid off and to get off the property.

No one had ever been called in to take over his work before. If someone was called in it was as a labourer.

> He agreed that during slow times it was not unusual to be laid off. He denied that he understood Mr. Heimann was laying them off for this reason when he told them they were laid off in the first instance on October 15, 1998.
>
> He disagreed that Mr. Heimann had fired Mrs. Andriashek after she had uttered the obscenity. He stated Mr. Heimann had already fired her. He said that at the time the only person he noticed that was around was the fellow replacing him in "the pit".
>
> Ann was under his supervision and Mr. Heimann had never told him that he found it difficult to communicate with her nor did he ever tell him that this was interferring with Mr.Heimann's abiliy to communicate with Mr. Andriashek. Mr. Heimann had not mentioned any dissatisfaction with Mrs. Andriashek's respect for him. There had been no discussion regarding dissatisfaction of Mr. Andriashek's supervision of Mrs. Andriashek.

Ann Andriashek testified that:

> She never swore at Mr. Heimann until after he laid her off. She had never received anything oral or in writing complaining about her actions.
>
> She was not in charge of expenses. She signed credit card receipts only when was she was told that she could by Mr. Andriashek and that was strictly for expenses.
>
> She never cut off any phone calls between Mr. Heimann and Mr. Andriashek and she did not interfere with Mr. Andriashek running his jobs.

In cross-examination by Mr. Kew, she agreed that she understood that her job was mainly casual and she would work when needed. She stated that the issue of not working overtime was not discussed with her. She stated that she kept a job diary for her own benefit and not at the request of the employer. She stated that she recalled answering the cell phone in the car when in the parking lot at a Safeway and that she told Mr. Heimann that it was not a convenient time to call as Mr. Andriashek was inside the store and she then passed on the message. She also stated that she had not played any role when the phone was shut off at Radium.

In cross-examination regarding the job diary, she stated that she knew that Mr. Heimann had copied her job diary because she had found the photocopies in the diary. She agreed that it was useful information for her employer but she did not appreciate him looking at her personal records. She stated that she told Mr. Heimann that she did not appreciate his actions and not having asked her, but she did not raise her voice to him. During that exchange, she understood that Mr. Heimann was voicing his opinion on how the job was progressing but felt that since she was just the helper, he should be talking to Mr. Andriashek. She did not understand that he was addressing her work specifically. She recalled that he had mentioned something about her interfering and that there might not be work for her, but she did not understand it to related to any dissatisfaction of her work.

In cross-examination, Mrs. Andriashek stated that on October 14, 1998 Mr. Andriashek, ended up sick and could not reach Mr. Heimann. She left it at that because she was Mr. Andriashek's helper. They did not get a call from Mr. Heimann and she made no inquiries regarding being needed because she worked with Mr. Andriashek.

When asked if she recognized that not showing up for work was a serious blow to Mr. Heimann she responded by asking whether sick days were not allowed and that she assumed that she could not work without Mr. Andriashek.

When asked about her perspective of what happened at the work site on October 15 she stated that Mr. Heimann was there with some other man working. She arrived with Mr. Andriashek and was not aware whether he had told Mr. Heimann that they would be going in to work. Mr. Andriashek asked Mr. Heimann what was going to happen and she did not get involved until Mr. Heimann told them that they were laid off and then she asked for the reason. (She agreed that they had been laid off the year before and that Mr. Heimann had told her on October 13, 1998, that there might not be work for her.) Mr. Heimann responded by saying that she was interfering with business and that she had charged tampax on the company credit card. He also said that they were late and she responded that they worked eight hours. Then she told him to "fuck off". He then ordered her off the work site. She understood the first time he said she was laid off that her job was at an end. She only noticed the person in the pit when this was going on and stated that Mr. Heimann was yelling. She admitted that she was upset that he would bring up the charged tampax as the reason for the lay off.

She did not feel that nature of conversation on October 13, 1998, was a warning. It did not come across that way to her. The only issue was the time book and she felt that she had made her point. Nothing was stated to let her know that her job was in jeopardy because of what she had said. She never heard about the phone call being a problem. She had never helped Mr. Heimann before.

Objection raised by Appellant counsel:

Mr. Kew raised an objection that the Director's delegate was being permitted to cross-examine the respondent and that by doing so the "system was pulling itself up by its bootstraps". I permitted the Director's delegate to continue questioning as I perceived that he was staying within his role as prescribed in BWI Business World Incorporated (BC EST #D050/96).

Analysis:

The onus is on the Appellant, Kootenay Elevator, to demonstrate error or a basis for the Tribunal to vary the Director's Determination that Ann Andriashek was dismissed without just cause.

The burden of proving cause for summary dismissal is on the employer.

The question before me is twofold: whether Mrs. Andriashek was dismissed for a single act of misconduct or insubordination or for a series of instances of misconduct; and whether the employer had just cause to dismiss her as a result

The Tribunal in Kruger BCEST #D003/97 set out the following principles as a guide for determining whether an employee has been dismissed for just cause:

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

2. Most employment offences 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 in fact 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 had 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.

Madame Justice Southin of the B.C. Court of Appeal in Candy v. C.H.E. Pharmacy Inc. (1997) B.C.J. NO. 684, held that the trial judge had erred in law in concluding that the breach of contract by the employee in that instance was not of so fundamental a nature as seriously to affect its performance. She went on to state at page 4:

Insubordination, like dishonesty, is grounds for termination of a contract of employment without notice, for both are inconsistent with the continuation of the employer/employee relationship.

The learned trial judge did not refer to the judgment of this Court in Stein v. British Columbia (Housing Management Commission) (1992), 65 B.C.L.R. (2d) 181, in which, speaking for the Court, I said, at 183, that the issue was:

Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

I then quoted these passages from Laws v. London Chronicle (Indicator Newspapers) Ltd., [1959] 1 W.L.R. 698, [1959] 2 All E.R. 285 at 287-88 (C.A.):

To my mind, the proper conclusion to be drawn from the passages which I have cited and the cases to which we were referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a complete disregard of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

* * *

I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think, that one finds in the passages which I have read that the disobedience must at least have the quality that it is "wilful". It does (in other words) connote a deliberate flouting of the essential contractual conditions.

Later I said:

I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law or dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an

> essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
>
> Here the learned trial judge found the plaintiff to have been "insubordinate". The only meaning to ascribe to that word is a failure to obey the lawful orders of his employer. Upon the authority of Stein v. British Columbia (Housing Management Commission), supra, such a failure was a disregard of an essential condition of the contract of service.

Section 63 of the Act sets out the requirement of employers to compensate employees for length of service and when this requirement is discharged. The relevant portions of Section 63 state:

63 (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:

(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...

(c) terminates the employment, retires from employment, or is dismissed for just cause.

The main difficulty with this point of appeal is that Kootenay Elevator claims that it was justified in dismissing Mrs. Andriashek because her conduct was insubordination and therefore, inconsistent with the continuation of the employer/employee relationship, although it was willing and able to continue employing this employee's supervisor who was largely culpable for the conduct alleged against her. Throughout Kootenay Elevator's submissions and supporting testimony, it is obvious that it was Mr. Andriashek who was responsible for expenses, credit card use, submission of receipts, the number of hours worked in a day, when to show up for work, reporting hours worked, determining whether to take his assistant on a job or not, in general all aspects of the job. It is also obvious that on the occasions that any kind of directive, disciplinary or corrective action was taken by this employer prior to the last day worked by these employees, it was against Mr. Andriashek.

Some of the employer's allegations of misconduct by Mrs. Andriashek are largely based on conjecture with no proof. The employer alleges that Mrs. Andriashek was interferring with his ability to communicate with Mr. Andriashek and cited two instances to support this assertion. The first instance involved the cell phone being turned off for a time during the Radium job. I find that this was entirely Mr. Andriashek's doing and there was nothing advanced by the employer other than suspicion to prove otherwise. I find that the second instance was one where Mrs. Andriashek behaved reasonably by telling Mr. Heimann that Mr. Andriashek was unavailable at the time. There was also no evidence advanced by the employer to support the

assertion that Mrs. Andriashek was ignoring directions to not attend for less than a four hour minimum daily time period. There was no evidence that the employer had given her those instructions. In its submissions to the Tribunal dated September 29, 1999 in the form of explanatory notes accompanying a detailed re-calculation of wages that the employer felt should have been owing, the employer states with regard to restrictions on time worked by Mrs. Andriashek : "This was whenever possible ignored by Rick suspected due to the pressure of Ann on him!" Again, a matter which was Mr. Andriashek's responsibility and one on which he had been directed.

I have already explored the issue of credit card use by Mrs. Andriashek in great detail and will not review it other than to repeat that it was Mr. Andriashek's conduct which was insubordinate vis a vis Candy v. C.H.E. Pharmacy Inc., supra, and not Mrs. Andriashek's since it has he who failed "to obey the lawful orders of his employer".

Another instance advanced by the Appellant as an example of Mrs.Andriashek's pattern of insubordination is that she disobeyed company directives regarding calling ahead regarding jobs. The Appellant argued that she should have contacted the employer on October 14, 1998 when Mr. Andriashek called in sick, to inquire whether she would be needed. No evidence was presented by the employer supporting the assertion that she had ever been given such a directive. I find that it was a legitimate conclusion for her to draw that if the person she assisted was not going in to work that she need not go in. The Appellant argued that Mrs. Andriashek's choice to remain at home that day without checking with the employer "was calculated to inflame" the situation. Again, this is based solely on conjecture. There was also no evidence given by the employer that he made any effort to call her to come in because he needed her help although he did manage to find someone to replace Mr. Andriashek. The employer was unhappy that the employees did not turn up for work given the pressure he was facing and the reason for them not coming in was in question. I believe it is fair to say that Mr. Andriashek was more upset than sick that day, and that was his reason for not going in to work.

Improper use of the company vehicle is cited as another instance in a pattern of insubordination displayed by Mrs. Andriashek. It appears that this is in reference to private trips taken in the company vehicle by Mr. and Mrs. Andriashek and possibly to the vehicle being left locked at the Rossland worksite. No evidence was presented that she had been responsible for either of these acts.

Kootenay Elevator went to great lengths to assure Mr. Andriashek that he had not been dismissed. A copy of a letter dated November 7, 1998 addressed to Mr. Andriashek from Mr. Heimann included "As mentioned before, you have not been fired or laid off and it is your decision what you want to do!" This letter set out a number of conditions for his continued employment which addressed his past misconduct with regard to use of the credit card and vehicle. The letter ended with:

> It is with much regret that I have to impose the above conditions but your actions in the last year have made it impossible to run my business efficiently any longer!

> If you are willing to return to work in acceptance of the above conditions you are welcome to do so or I will consider your leaving the job without proper notice as an improper way of quitting your employment and treat it accordingly!

In the same letter, the employer says "Ann is fired by Kootenay Elevator Services LTD. permanently and will not be re-hired under any conditions by Kootenay Elevator Services LTD. again!"

Appellant counsel cited Cantelon v. Industrial Wood and Allied Workers of Canada, Local 1-71 Ellen Frisch, Laura Wilimovsky, Darrell Wong and International Forest Products Limited, B.C.S.C. [1999] where the Honourable Mr. Justice Collver stated at paragraph 62:

> I agree with her contention that where, as was the case here, the conduct was so serious and Mr. Cantelon's response to management concerns so negative that the employment relationship could not be maintained or restored, termination was the appropriate measure.

The Appellant can not have it both ways: on the one hand argue that Mrs. Andriashek's conduct which clearly was far less egregious than that of Mr. Andriashek, was so serious that the employment relationship could not be maintained or restored, and then on the other going to great efforts to continue employing Mr. Andriashek.

The Appellant disputes the Director's finding that the termination of the Ann Andriashek's employment was not justified on the basis of her verbal abuse of the President of the company in the presence of customers and others was sufficient grounds for dismissal. Evidence was conflicting on at what point Mrs. Andriashek actually swore at Mr. Heimann. However, I am compelled to accept the evidence of Mr. and Mrs. Andriashek over Mr. Heimann's as he could not recall whether he had already told her that she was laid off before she swore at him. I accept that the Andriasheks both understood that she had been dismissed the first time they were told that they were being laid off. When Mrs. Andriashek asked for the reason, she was told that they had been interfering with his business and he would not put up with this "bullshit" anymore and then took a step towards her shaking his finger and shouted that she had bought "tampax" on his MasterCard. At this point Mrs. Andriashek said, "fuck you, Walter".

The Appellant also attempted to tie the discussion between himself and Mrs. Andriashek on October 13, 1998 regarding the copying of the work diary to her conduct on the day that she was dismissed. The testimony indicated that there was unclear communication by the employer of disapproval for any of Mrs. Andriashek's specific conduct on the former occasion. There was some allusion by Mr. Heimann that there might not be work for Mrs. Andriashek but she did not understand it to be related to any specific conduct on her part as he was also expressing his dissatisfaction on how the job was going generally, which was not her responsibility. Mr. Heimann did not testify that he had made any clear warning to her regarding her conduct.

I find that Kootenay Elevator has failed to show that it was justified in dismissing Mrs. Andriashek without notice. The employer has failed to show that her conduct prior to dismissal was insubordinate. Mrs. Andriashek was entitled to ask for reasons for the layoff. It was clear

from the reasons given to her that her employment had been terminated and her reaction was not without provocation.

For the purposes of the Act termination of employment includes layoff.

I find that prior to her dismissal, the employer had not adequately notified Mrs. Andriashek that her employment was in jeopardy by a continuing failure to meet standards which had also not been clearly identified as required in the test prescribed in Kruger, supra.

The employer is entitled to terminate the employment of an employee for reasons other than insubordination, or a failure to meet standards but he is then liable to compensate the employee under the Act.

After careful consideration of the lengthy testimony and submissions, I find that the Director's conclusion that Mrs. Andriashek was terminated without just cause is correct and the appeal should be dismissed.

ORDER

Pursuant to s. 115 of the Act, I order that the Determinations of the Director, dated August 20, 1999 are confirmed as issued under file 1999/553 in the amount of $3,045.18, and as issued under file 1999/554 in the amount of $9,227.04, together with whatever further interest that may

Fernanda M. R. Martins
Adjudicator
Employment Standards Tribunal