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 -

Wendy Benoit and Ed Benoit operating as
Academy of Learning
(" AOL ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No: 1999/691

DATE OF HEARING: March 8, 2000

DATE OF DECISION: March 30, 2000

DECISION

APPEARANCES:

for the appellant	Ed Benoit Wendy Benoit Karl Koslowsky
for the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Wendy Benoit and Ed Benoit operating as Academy of Learning ("AOL") of a Determination which was issued on October 20, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that AOL had contravened Parts 3, 5 and 8, Sections 18(1), 45 and 63 of the *Act* in respect of the employment of Kelvin Stirbys ("Stirbys") with AOL.

The appeal filed by AOL challenges the conclusions of the Director that AOL had not paid Stirbys all the wages he was owed for June and July, 1998; that AOL had not paid Stirbys statutory holiday pay for July 1, 1998; and that Stirbys was entitled to length of service compensation.

Before considering the merits of the appeal, some background relating to the administration of this appeal is appropriate.

BACKGROUND

This appeal was filed with the Tribunal on November 17, 1999, the last date noted in the Determination for filing an appeal. A second appeal, from a Determination involving another former employee of AOL was filed a week later, also on the last date noted in the determination for filing an appeal. The two appeals were dealt with together for administrative purposes. The Tribunal decided that an oral hearing on both appeals was appropriate. A Notice of Hearing on the appeals was sent by the Tribunal to the parties involved on February 8, 2000. On February 18, 2000, AOL communicated with the Tribunal, indicating the Notice of Hearing was not received by the author of the letter, Mr. Ed Benoit, Chief Operations Officer of AOL, until February 16, 2000. The letter advised the Tribunal that Mr. Benoit would be unavailable on the date fixed by the Tribunal for the hearing, March 3, 2000, and requested the hearing be rescheduled to another date. The communication noted that Mr. Benoit would be out of the province until March 6, 2000. On February 21, 2000, Ms. Bev Stevens, an administrative assistant for the Tribunal phoned Mr. Benoit. She notified him that, based on the information provided, the hearing had been rescheduled for March 7, 2000 and she wished to confirm his availability on that date. Mr. Benoit asked for a two month delay in holding the hearing,

indicating the notice he had received left him insufficient time, he felt, to prepare a proper presentation. Ms. Stevens told him that a two month delay was not possible as the Tribunal's process was an accelerated one and that AOL had since November to assemble and submit any documents relating to their appeal. Mr. Karl Koslowsky, Mr. Benoit's Administration Assistant, joined the conversation. Ms. Stevens was subsequently assured by Mr. Koslowsky on two occasions during that telephone discussion that Mr. Benoit was available on March 7, 2000. A new Notice of Hearing was sent out to the parties for that date.

On February 23, 2000, the Tribunal received a facsimile from AOL, over the signature of Mr. Benoit. The final substantive paragraph of that facsimile read:

> Ms. Stevens indicated that March 7 2000 might be an alternate date, should everyone be available. I will be in Kelowna, B.C. that date and can rearrange my schedule to meet a commitment on that date, but in actuality, I would prefer at minimum at least a two month advance notice so that proper arrangements of events and meetings can be scheduled or rescheduled. Perhaps these two months would be enough time to allow the aforementioned information from VRS to arrive and thus allow us to prepare properly.

To the uninformed reader, that paragraph might suggest that the new hearing date was forced on AOL without their input or agreement. That would be incorrect. In fact, the Tribunal had advised Mr. Benoit that the hearing had been rescheduled to March 7, 2000 and was assured by Mr. Koslowsky that Mr. Benoit was available for the hearing on that date. No other date was discussed and, more specifically, March 7 was never discussed as an alternate date. Ms. Stevens asked Mr. Koslowsky to confirm, at least twice, that Mr. Benoit was available on March 7 to avoid any later suggestion, such as was attempted in the above paragraph, that she had misunderstood him.

On February 29, 2000, the Tribunal received a request for several summonses in respect of the two appeals. Additional requests were made on March 1, 2000 and March 2, 2000. All requests were processed immediately. One of the requests, to provide a summons for Sharla Munson, was denied because Stirbys assured the Tribunal she would be at the hearing.

On March 2, 2000, AOL complained to the Tribunal that it was anticipated that the summonses would not be in their hands until March 3, 2000 which left two days to serve them on the named individuals, a time constraint they found "very unrealistic, unprofessional, and unconscionable". AOL also asked that the other appeal, involving Michelle Miwa (see Decision No. BC EST #D140/00), proceed first.

On March 3, 2000 a pre-hearing conference was held on both appeals. AOL again requested the appeal on Michelle Miwa proceed first and that was agreed. AOL had also requested that this appeal be commenced at 1800 hours (6 pm) on March 7, "or after completion of Ms. Miwa's case". During the pre-hearing conference, AOL indicated that Ms. Miwa's case would probably be completed by 1 pm on March 7 and, based on that indication, this appeal was scheduled to commence at that time. Stirbys and his witnesses appeared at 1 pm as directed. The other appeal, however, was not completed in time and was not, in fact, completed by the end of the day

on March 7. This matter was adjourned to commence on March 8, 2000. The hearing commenced at 9:30 am on March 8 and was concluded just after 9:30 pm on that day.

ISSUE

The issue to be decided in this case is whether AOL has demonstrated that the Determination is wrong, in fact or in law.

THE DETERMINATION

The complaint filed by Stirbys with the Director involved claims for unpaid wages, unpaid annual vacation pay, unpaid overtime, unpaid statutory holidays, unpaid commission sales and length of service compensation. The claims relating to unpaid annual vacation pay, unpaid overtime and unpaid commission sales were denied. In respect of the claim for unpaid wages, the analysis in the Determination stated:

> It would appear that the employer has arbitrarily and retroactively altered the complainant's monthly salary in June 1998 form $1666.66 to $692.39. Effectively, this reduction in his monthly salary represents an adjustment of $974.27.
>
> Wages for July 1998 are also payable.
>
> Aside from the employer's assertion that certain hours were not worked that is disputed by the complainant there is not sufficient evidence to retroactively reduce his rate of pay.

In respect of the length of service compensation, the Determination found the position of AOL, that Stirbys had abandoned, or quit, his employment, was not supported on the evidence. It should be noted that the position of AOL, stated in their submission to the investigating officer on December 16, 1998 was as follows:

> There is no termination pay due as Kelvin quit showing up for work and did not make prior arrangements by communicate [sic] same to payroll in advance. . . . The facts are that Kelvin abandoned his employment and made not [sic] attempt to report it in hopes that no one would notice and in hopes he would be paid for the missed time.

There was no reference in the position taken by AOL during the investigation that Stirbys was terminated for cause.

This same submission also contained the following:

> If Kelvin was working extra hours, he sure wasn't reporting them to me. The hours he was to work were entirely up to him. I am fully aware that he worked

varying hours as he would receive or make calls in the evenings and on weekends at times. However, those hours were more than counter balanced by his sleeping in until 11:00 or 12:00 noon on many mornings. These types of calls were the exception not the rule. I checked many a phone bill to see how frequent they were and there were few long days. Anyway, Kelvin was in a management position with complete control over his hours of work.

THE FACTS AND EVIDENCE

1. The Facts

The following facts either were not disputed, were not affected by any of the evidence or were unchallenged:

1. Stirbys was employed by AOL as a Technical Support Person commencing December 15, 1997 at a monthly salary of $1666.66. Stirbys' employment was subsidized through Kelowna Community Development Society under a vocational placement program funded by Human Resource and Development Canada ("HRDC").

2. Prior to this job, he had worked for AOL as a "Part Time Facilitator" from May 25, 1996 to December 14, 1997.

3. In the technical support job, Stirbys was paid by way of an advance of $625.00 (except for December, 1997 when he received an advance of $205.00 and January, 1998, when he received an advance of $425.00). The advances were paid on or around the 25th of each month of his period of employment, except July, 1998, as he was no longer employed by that date in July. His monthly salary was paid on about the 10th of the month following the month in which it was earned. The advance was adjusted at that time and applicable statutory deductions would be made.

4. In December, 1997, AOL also advanced, or more appropriately loaned, Stirbys $1000.00, on the understanding and agreement that it would be repaid at a rate of $100.00 a month until it was fully repaid.

5. Stirbys worked at and from his house in Westbank. There is some dispute about the reasons for that, but it is not necessary to this decision that I resolve that dispute. AOL paid Stirbys' phone bill.

6. For three periods of time, from May 1 to May 10, from May 25 to June 8 and from June 29 to July 3, Stirbys was visited by a friend from Bella Coola, Allan Kaytor.

7. Commencing May 10, 1998, Al Balmer, who was being trained by AOL to operate an AOL location in Princeton, stayed with Stirbys at his house. He left Stirbys' residence on June 14, 1998. AOL paid Stirbys to allow Mr. Balmer to board at his house.

8. Stirbys was paid his full salary for May, 1998. On May 25 he was paid an advance on his May salary of $625.00. On June 10, 1998 he was paid the adjusted balance of his May salary, an amount of $896.67, following deductions.

9. Stirbys was paid an advance on his June salary on June 25 in the amount of $625.00. That payment was the last amount of money actually paid to Stirbys by AOL.

10. On Friday, July 3, 1998, Stirbys went to Bella Coola. He did not notify AOL that he was going. He was supposed to be at work on Monday, July 6. He telephoned Mike Benoit, Mr. Benoit's son and another Technical Support Person for AOL, and told him he had lost his ride and would be unable to return to Kelowna until July 8.

11. On July 8, a person or persons acting on behalf of AOL entered Stirbys' home, using a key they had secured from Mr. Balmer, and removed the contents of the workshop.

12. On July 10, 1998, Wendy Benoit, signing as "Owner, Academy of Learning", prepared a termination letter and had it delivered to Stirbys. The substantive part of the letter read:

> It is with regret that I have no option but to terminate your employment with the Academy of Learning effective 1 July 98. Your actions continue to be far from professional. Leaving without pre-arranging time is an unacceptable practice made worse by not advising me of your actions. Any further pay cannot be issued until a full accounting of your hours for the last two months has been completed.

13. On or about July 10, 1998, AOL prepared a payroll summary for Stirbys covering a pay period identified as June 1, 1998 to July 1, 1998. On the summary the gross wages for that period were adjusted to $692.39. Vacation pay in an amount of $361.05 was added to that amount, showing total gross wages for the period as $1053.44. The statement showed two deductions: an amount of $28.44 as UI contribution and an amount of $1025.00, shown as advance. That amount was comprised of the $625.00 June advance on salary and the $400.00 remaining on the $1000.00 advance/loan made to Stirbys in December, 1997. The balance was $0.00.

2. The Evidence

In its appeal, AOL has challenged every aspect of the Determination. AOL says that the entity against which the Determination was issued, Wendy Benoit and Ed Benoit operating as Academy of Learning, was incorrectly identified; that Stirbys was paid all wages owed; that Stirbys was paid his statutory holiday pay for July 1, 1998; and that Stirbys was not entitled to length of service compensation because he quit his employment. AOL also adds a new argument to its appeal that was not raised at any time during the investigation. AOL says that even if Stirbys did not quit, AOL had cause to terminate him and, on that basis as well, he is not entitled to length of service compensation.

The hearing on this appeal took more than twelve hours to complete. AOL, represented by Mr. Benoit, called four witnesses, Sharla Munson, Wendy Benoit, Mike Benoit, who gave his

evidence by telephone, and Ed Benoit. Stirbys called one witness Allan Kaytor. All but approximately one hour of that time, a period of time that included Stirbys' cross-examination of AOL's witnesses, was consumed by AOL, represented by Mr. Benoit.

AOL first called Sharla Munson. Ms. Munson is Stirbys' ex-wife. She attended the hearing voluntarily. In correspondence received by the Tribunal on February 29, 2000, AOL stated that Ms. Munson was required to attend to give evidence concerning AOL's argument that Stirbys was not at work in his home shop on days for which he was paid. AOL wanted her phone records for April, May, June and July of 1998, stating:

> The phone records of Ms. Munson during this time period, may prove that Mr. Stirbys was not at work during his regularly scheduled work hours. These records may further confirm that Mr. Stirbys was falsifying his whereabouts and not reporting any variations to his work schedule as per his Terms of Employment agreement. Further, these records may prove that Mr. Stirbys was conducting company business her home [sic] rather then [sic] from his place of business.

In correspondence received by the Tribunal on March 2, AOL added the following:

> As we have indicated, Ms. Munson has knowledge as to the whereabouts of Mr. Stirbys on a number of dates and times contrary to Mr. Stirbys submissions.
>
> We believe she can further testify that Mr. Stirbys was not at work during his regularly scheduled hours has [sic] he professes to have been. I believe her testimony is vital to our position and may prove that Mr. Stirbys was not at work on days that he has claimed to have been at work. I further believe her testimony may prove that Mr. Stirbys was collecting wages that were unearned under false and fraudulent means.

Ms. Munson and Stirbys have been separated since 1992 and there is one child of the marriage. Ms. Munson was asked by Mr. Benoit whether there were any occasions since she and Mr. Stirbys were separated that Stirbys stayed over at her house during the week. She said yes. Ms. Munson was asked by Mr. Benoit whether there were any occasions during the first part of 1998, up to July, when Stirbys stayed over at her house during the work week. She acknowledged there were a few occasions in 1998 when Stirbys stayed overnight at her residence, but was unable to say whether any occurred during his work week. She was asked whether Stirbys visited her residence during the work week in the same period. She said yes, it was likely that he did, but had no record of specific days and recalls that none of those visits were very long - often it was just to stop by to deliver something she had requested or to pick up something from her house. She was asked if he stayed at her residence when he was having "problems" or was sick. She was not aware of any "problems" and that he had not stayed at her residence during any period of illness. She was asked if he stayed at her residence during the period his car was broken down. She didn't think he had. She was asked how long it took to get from Stirbys' house to hers. She said approximately 25 minutes.

That was all the evidence elicited from her by Mr. Benoit. Stirbys had one question for her. Her testimony took approximately 25 minutes in total.

Mrs. Benoit gave evidence. To say it was her evidence is being charitable in the extreme. Apart from those areas where she gave evidence relating to the operations of AOL and to her own duties and responsibilities with AOL, she had very little direct knowledge or recollection of the events relating to this appeal.

On several occasions I had to ask Mr. Benoit to refrain from answering the very question he had put to Mrs. Benoit and which she had indicated she did not know the answer to or was unclear about. On other occasions, in critical areas, Mr. Benoit was asked by me, most often with little effect, to refrain from suggesting the answers to Mrs. Benoit in the questions he asked her. When my instruction was followed, Mrs. Benoit demonstrated little direct knowledge of the matter or event about which she was being asked and even less recollection. There was a question about a meeting in which she had participated that was suggested by Mr. Benoit to have taken place in August, 1998. In reply, she said she recalled a meeting, but made no notes and couldn't really recall the date or anything else about it. Mr. Benoit then proceeded to tell her what it was about and was quite upset when I stopped him, indicating it was not his evidence I wished to hear at that point, but that of Mrs. Benoit.

The cornerstone of the evidence Mr. Benoit sought to provide through Mrs. Benoit was an assertion that Stirbys had not only been paid for the full month of June, but had been overpaid for that month and had been paid money in July to which he was not entitled because he had worked no days in that month. Mr. Benoit had Mrs. Benoit produce and identify a "payroll detail by employee" for Stirbys from the end of December, 1997 to the end of July, 1998. The last seven entries on this document are relevant to what evolved during the testimony of Mrs. Benoit. I will reproduce these entries:

> ACADEMY OF LEARNING
> Payroll Detail by Employee
>
> STIRBYS, Kelvin

Date	PP	Gross	EI	CPP	Tax	SalaryHr
06-25-98	12	0.00	-	-	-	-
06-30-98	12	1873.15	50.58	50.61	-	-
06-30-98	12	1873.15-	50.58-	50.61-	-	-
06-30-98	12	1926.33	48.63	-	-	-
06-30-98	12	1666.67	45.00	-	-	184.00
07-31-98	12	1666.67-	45.00-	-	-	184.00-
07-31-98	12	1053.44	28.44	-	-	78.15

The document's summary showed Stirbys' gross earnings for 1998 as $12663.93. That figure was supported with T4 summaries for Stirbys for 1998. Mrs. Benoit then agreed with Mr. Benoit's suggestion that the payroll summary, which I have described in paragraph 13 of the

facts, actually referred to what Stirbys had been paid for July and had wrongly shown the pay period as June 1, 1998 to July 1, 1998. Mr. Benoit then asked that document be altered to show the pay period as July 1, 1998 to July 31, 1998. I refused to do that.

Testimony that was already confusing was about to get worse as Mr. Benoit had Mrs. Benoit attempt to explain the series of entries set out above in an effort to convince me that Stirbys had been overpaid during June and July, 1998. Even Mrs. Benoit appeared to be confused about what she was supposed to be telling me. Several times she was asked to confirm a calculation or a provide an explanation for certain amounts or figures and was unable to do so. She was referred to the amount of $692.39 on the June payroll summary and asked how this figure was reached. She was unable to tell me, saying only she believed it to be an adjustment for hours missed. Later she said that amount might have included some of July. At another time she said there was "major confusion" in early July about what to pay Stirbys. In fact, that confusion was resolved by not paying him anything. The explanation for the amount of $1926.33 was particularly unsatisfactory as there was absolutely nothing in anything that had arisen on the file to the date of the hearing suggesting Stirbys had been paid that amount in June, 1998 and Mrs. Benoit was equally confused about how that figure was arrived at.

Finally, I asked whether the payroll records would identify what that amount represented. Mrs. Benoit said they probably would and I asked that they be produced in order to resolve the confusion. To put it mildly, the payroll records were a revelation. In respect of the $1926.33 amount, the record showed the amount to be comprised of a "bonus" of $1852.24 and vacation pay on that amount of $74.09. Once deductions were made, there was a net amount of $1877.70. Mrs. Benoit was asked by Mr. Benoit if the amount shown as "bonus" would also have included some of Stirbys' June salary. She was, for one of the few times in her evidence, unequivocal, replying "no, that if there was any salary included it would be shown separately from the bonus".

She could not explain what the bonus was for. She believed that Mr. Benoit had paid for some clothing and shoes for Stirbys in October or November of 1997 and had paid for car repairs in 1998 and this "bonus" was produced to record those payments. What AOL had done became more clear in Mr. Benoit's evidence, and I will save my final comments on this area of the appeal until I have reviewed his evidence.

The second key aspect of Mrs. Benoit's evidence related to AOL's position that it was not required to pay Stirbys his full salary for May, June and July, 1998 because he was absent for a substantial amount of time during those months. Mr. Benoit attempted to have her testify about how much time Stirbys was absent. The sum total of the relevant evidence given by her on that point was to refer to some discussions with Mr. Balmer, who, she said, had complained about Stirbys not being available to help him with his training, and that she had fielded some complaints from staff and some other people that Stirbys was hard to contact. Even at that, she was uncertain about whether those "complaints" occurred before or after Stirbys "went away, and didn't come back", which referred to July 3, the last day Stirbys worked for AOL.

Mrs. Benoit identified two pages of hand-written notes, which she said were extracted from what was described as a ring binder maintained by a former office employee, Krista Roux, in which

Ms. Roux had placed her daily record of activities. It should be noted that Mr. Benoit later testified that sometime in mid-May he had instructed Ms. Roux to call Stirbys each day and to record the time and whether she made contact with him. As well, she was charged with the responsibility of assembling all of the information relating to Stirbys' alleged attendance problems. Notwithstanding this evidence, the only reference in the notes to any call to Stirbys is at 11:49 on July 13, three days after the termination letter was written, saying: "Kelvin - not answering". Supposedly, Ms. Roux was keeping the "complete" record of her calls on scraps of paper which according to Mr. Benoit, unfortunately disappeared when Ms. Roux left the employ of AOL in August, 1998. The only other reference in the notes to Stirbys was on July 17, where, it appears, Ms. Roux was making a note of the contents of an e-mail message sent by Mr. Balmer on July 14, 1998.

Mike Benoit gave his evidence by phone. He commenced work as a Technical Support Person on June 18, 1998, the day after he finished his school exams. The purpose of his testimony was to confirm AOL's assertions that Mike had gone to Stirbys' house on several occasions, before and after June 18, and Stirbys was not there.

In fact, Mike Benoit testified that he had no recollection of going to his house before June 18 and while he did have some recollection of going there and not being able to get in, the only specific recollection he had of that related to some time after Stirbys phoned him from Bella Coola on July 6 and before AOL's equipment was removed from his house on July 8.

He acknowledged that Stirbys had called on July 6 and had said he had been unable to get a ride and that he was working on it. He said he did tell his father about the call, but couldn't remember whether it was the evening of the same day or the next day.

Mr. Benoit gave evidence. He attempted to clarify the June "bonus". He said that certain "advances" had been made by him to Stirbys in a period from October, 1997 to January, 1998, for clothes, shoes and car repairs. These "advances" were, he contended, intended to be repaid and Stirbys had agreed that Mr. Benoit could recover them from his wages "at any time". I do not believe his testimony on this point.

That agreement was never committed to writing and no reference to or record of such an agreement was provided at any time during the evidence of AOL. At the time some of these alleged "advances" were made, Stirbys was not employed except in a part-time or casual capacity. As the facts note, he was at the time a "Part Time Facilitator". No payroll records were presented to show that the amounts of those "advances" were recorded as such. The car repairs apparently occurred in 1998, yet there is no reference to them in any payroll document presented for 1998. Also, in his evidence, Mr. Benoit presented a document, which he identified as a memo to file from Kristina Brummer concerning Kelvin Stirbys. Ms. Brummer was Mr. Benoit's assistant at the time. She is no longer employed by AOL. The memo is dated 14-July-1998 and states:

> *9:40 am* Kelvin called me to discuss his final pay. He said that Ed wanted some information on what he had spent on Ed's MEC card and Visa card. Currently he has; $508.38 on Clothes, $157.91 on shoes, and he is checking into

> how much on the car. Please have Ed call him if there are any problems with his final cheque.
>
> *9:53 am* Kelvin called back. He said he had spoke with Howie's garage and had found out the following; on September 9, 1997 he spent 629.50 on his clutch, May 18, 1998 control arm & fan belt, $388.29 and a tow for $37.45.

That memo suggests Mr. Benoit had not even kept a record of the amount of these "advances" - quite unusual if there was, at the time these so-called "advances" were made, an agreement to repay them at some future time. I also note that the information being provided by Stirbys was not requested until after his termination.

During his employment, Stirbys never submitted a time card. This is, perhaps, understandable in light of Mr. Benoit's December 16, 1998 submission to the Director stating that, "Kelvin was in a management position and in complete control of his hours of work". His record of time was recorded each month on a Targeted Wage Subsidy Time Sheet by Cherry Niemi, AOL's bookkeeper, as 8 hours a day, five days a week. Those hours were then used to claim wage subsidy payment from HRDC for Stirbys. Mr Benoit altered two of those time sheets, the time sheet for May, 1998 and the time sheet for June, 1998. He claimed in his evidence that he altered the May time sheet sometime between the 1st and the 5th of June and that he altered the June time sheet sometime between the 1st and the 10th of July. I disbelieve him.

There is no evidence that any adjustment was made to Stirbys' hours of work for either May or June before the July 10 termination letter was prepared. Also, there are several reasons for concluding the alterations were not done at the time Mr. Benoit said they were. First, the May hours were adjusted downward from 168 to 114 by Mr. Benoit. He says he gave that adjustment to Ms. Niemi, who did the payroll, yet Stirbys' May salary, which was prepared and paid on June 10, contains no adjustments. Second, the payment claim to HRDC for Stirbys' wage subsidy, which was dated June 5, 1998, was typical of other month's claims which were based on the usual hours recorded by Ms. Niemi for him each month, indicating that no change had been made to the time sheet by June 5. Third, the reference to 114 hours could only have been based on the information contained in the e-mail received from Mr. Balmer on July 14. They clearly reflect the comments made by Mr. Balmer in that e-mail about the days that Stribys was sick or working "about half time".

Finally, Mr. Benoit said that the adjustment he made to the May time sheet was in part based on an analysis done by Ms. Roux of Stirbys' telephone records for that month. In fact, AOL could not possibly have received those telephone records before June 5th. Stirbys' May telephone bill was not paid until June 25. While the telephone records, as summarized by AOL, indicate Stirbys worked 86 hours in May, other evidence suggests those phone records were not summarized until after July 10, 1998.

Mr. Benoit also introduced a Personnel Notification (PN) form which he testified was prepared by him on June 1, 1998 and dated that same day. I also conclude that document was not prepared until after July 10, 1998. Mr. Benoit states on the PN, under point 13:

> Should have worked 168 *in May* only worked 90 ? ? maybe less. Did not send in PNs.

The italicized portion indicates words that were originally not in the comment, but were inserted later. Quite clearly, the above statement was based on AOL's summary of the telephone records, which is, on the evidence presented, the only basis for suggesting Stirbys had worked no more than 90 hours in May. I have concluded that summary did not exist before July 10. There was no evidence that any other information was known to Mr. Benoit on or about June 1 that would have allowed the conclusion stated in the PN and that document was, on a balance of probabilities, also prepared after July 10, 1998.

In his evidence Mr. Benoit said that he was in Fort McMurray, Alberta for most of the period from mid-May to early June. Mr. Benoit also testified that he was getting complaints from staff that they could not reach Stirbys. None of the "staff" were called to testify, but Mr. Benoit proffered two letters, one over the signature of Brenda Smith and another over the signature of Randall Nikkel. I place no weight whatsoever on either letter. The letter from Brenda Smith is dated November 16, 1999. It contains the following:

> As per my conversation with Karl Koslowsky on November 16, 1999:
>
> Information was requested on any communications that I had with Kelvin Stirbys, the Technical Support person, for the time period in question.

It is obvious from the letter that Ms. Smith is being requested to provided information well after the fact. Mr. Koslowsky was, by all appearances, soliciting evidence to support the allegations AOL would make in their appeal. There is no indication this information was sought by or provided to AOL before November 16, 1999.

In the letter, Ms Smith refers to two calls on May 10, 1998, one at 9:45 am and the other at 10:20 am, which were not returned. It is difficult to comprehend the purpose of that information. If the purpose was to show Stirbys was possibly not at work on May 10, I accept that was probably the case, as May 10, 1998 was a Sunday - Mother's day actually - and AOL has never suggested that Stirbys should have been at work on a Sunday. The only other date referred to in the letter is June 30, 1998, but other documents provided by AOL suggest that Stirbys was at work that day.

The letter from Mr. Nikkel is undated, but apparently was provided by him at about the same time as the other letter. He is, on the face of the letter, recalling matters that occurred in April, May and June, 1998. There is no indication that he kept any record of the events about which he speaks and every indication that he didn't. The letter contains the following statement:

> When I was working in Penticton in April and May 98, Ed had asked me to drive by Kelvin's home office on my way home several times to see if he was there. I drove by his house where he was working several times between 1pm and 4pm and he was never there. I drove by his place once and saw Mike Benoit (Tec. Assistant) they're [sic] waiting for Kelvin.

Quite apart from the vagueness of the information in the letter, on the basis of other evidence, that I accept, it is inaccurate. Mike Benoit was not a Tec. Assistant until June 18, 1998. Mr. Nikkel could not have seen him in at Stirbys' house in May as he was still in school until June 18.

Mr. Benoit introduced a summary of the information he used to make the alterations to Stirbys' May and June time sheets. Most of the information was based on telephone records for May and June and the period covered by the summary was May 1 to June 29, a total of 43 working days. Of these working days, the "starting" time for all but eleven were based on the time of the first long distance call made on that particular day that could be identified as work related. For those days where the "starting" time was not based on the telephone records, a common start time of 1:00 pm was noted. When asked how that was determined, Mr. Benoit said it was based on the time Ms. Roux was first able to contact Stirbys on that day. It is quite extraordinary, I think, that Ms. Roux was consistently able to contact Stirbys at exactly 1:00 pm on each of those days. The "end" time was similarly based on the telephone records. If there was no long distance call shown on the telephone records after 3:00 pm, then that time was recorded by Mr. Benoit as the "end" time. When asked how this time was chosen, he replied that this was the time that Mike got out of school and had gone past Stirbys' house, but he was not there.

I have no reason to accept this summary as an accurate measure of the hours worked by Stirbys and I do not. In his evidence, Mr. Benoit went through all the telephone records. The summary, in some cases, did not accord with those records. For example, the summary states, for June 5 and 12: "did not work". The telephone records showed that on June 5 Stirbys had made his first work related long distance call at 9:54 am and his last call at 4:40 pm, which lasted for 80 minutes (until 6:00 pm). On June 12 the telephone records show a work related long distance call at 11:34 am and another at 3:53 pm. When asked why he identified these days as "not worked", Mr. Benoit replied it was because Mr. Balmer had stated Stirbys had not worked those days. This is one of the reasons why I do not give any weight to Mr. Balmer's e-mail communication. Mr. Balmer also noted that Stirbys was sick for the period May 17 to May 25, yet the telephone records show work related long distance calls on all of the working days in that period - May 17, 23 and 24 were week-end days and May 18 was a statutory holiday. This discrepancy provides another reason for giving no weight to Mr. Balmer's e-mail communication.

Mr. Benoit testified that in addition to himself, there was Mike Benoit, Krista Roux, Randal Nikkel, Al Balmer, and David Ellsworth monitoring the activities of Stirbys through May and June, 1998. As I have noted above, in light of all those persons involved and all that activity, it is positively incredible that there would be no physical evidence existing before July 10, 1998 showing that such monitoring was taking place and what its results were. As well, a friend of Stirbys from Bella Coola visited him on 3 occasions between May 1 and July 3. With all this activity going on, it is equally amazing no one mentioned his presence at Stirbys' house. Finally, it is inconsistent to state on the one hand that Stirbys had "complete control over his hours", while on the other to claim that he should have been at his workshop over the same hours as the regular business hours for the school.

I return now to Mr. Benoit's evidence regarding the "bonus", which was shown as paid in June and recorded as part of Stirbys' gross wages. There is simply no doubt that Mr. Benoit, presenting the case on behalf of AOL, assisted by Mrs. Benoit, attempted to represent the $1926.33 amount shown on the payroll detail (see page 9, above) as Stirbys' June salary. That was untrue and, I believe, both Mr. Benoit and Mrs. Benoit knew it was untrue. Mr. Benoit finally confirmed that the "bonus" was an amount that AOL thought Stirbys owed them for purchases and payments made either by Mr. Benoit personally or by AOL for Stirbys. Mr. Benoit knew, from the moment he first asked Mrs. Benoit to confirm that Stirbys had been overpaid for June and July, 1998 that the amount he was using to show the overpayment was this so-called "bonus". There was, in fact no "bonus" at all and the information used to create this "bonus" was not available to Mr. Benoit until after July 14, 1998. The payroll detail, which was represented as having been paid in June, 1998, was a fabrication. The whole scheme was nothing more than a clumsy and ill-conceived effort to claw back some gratuitous payments made on behalf of Stirbys by concocting evidence designed to mislead the Tribunal.

The only witness appearing on behalf of Stirbys was Mr. Kaytor. He outlined three periods of time between May 1 and July 3, 1998 that he had visited Stirbys. He testified that during the first two visits, he observed that Stirbys was organized and conscientious in his work, regularly starting his work day at approximately 8:30 am and completing at approximately 5:00 pm unless something held him over for a time past 5:00 pm. I accept the suggestion from Mr. Benoit, as did Mr. Kaytor, that he did not make such observations on each day he was staying at Stirbys' house, but in my view that does not detract from his evidence that Stirbys appeared to have a fixed and organized routine. Mr. Kaytor volunteered that for the first week of his first visit, he had assisted Stirbys in doing some renovation work to his workspace. Mr. Kaytor also volunteered that on his last visit during the period noted, from June 29 to July 3, Stirbys appeared to have "given up". He had lost the pattern Mr. Kaytor had observed during the other visits; he was no longer punctual, as he had been before, and seemed to lack the same enthusiasm for his work. It was because of these observations that Mr. Kaytor suggested to Stirbys he return to Bella Coola with him for a few days.

Mr. Kaytor was with Stirbys when he called Mike Benoit on July 6. He relayed his recollection of the Stirbys' side of the telephone conversation and said Stirbys told Mike Benoit that he couldn't get back until Wednesday, asked Mike Benoit if there was anything he needed from his house and asked him to tell Mr. Benoit. I accept Mr. Kaytor's evidence. There is no good reason not to. My acceptance of his evidence provides the third reason for not giving any weight to Mr. Balmer's e-mail communication. Mr. Kaytor's evidence speaks to the some of the same time frame covered by Mr. Kaytor's e-mail communication. It also speaks more clearly, was direct, not hearsay, and was given *viva voce*.

ANALYSIS

This case is, without doubt, one of the most vexatious and abusive appeals I have had the misfortune to preside over. If I had the jurisdiction to award costs against AOL and Mr. Benoit personally, I would do so without reservation.

Employers like AOL represent the strongest possible argument for minimum employment standards legislation such as the *Act*. They have thrown every possible roadblock in the way of an efficient resolution of this dispute without any real basis for doing so. They have fabricated evidence and intentionally attempted to mislead the Tribunal in the presentation of their appeal.

Turning to the issues raised by the appeal, I will first address the argument that the entity named in the Determination, Wendy Benoit and Ed Benoit operating as Academy of Learning, is wrong and should be changed to Workplace Learning Systems Ltd., dba Academy of Learning.

The complaint filed by Stirbys related to his period of employment, which ended on July 10, 1998. At that time, Workplace Learning Systems Ltd. was not involved in Academy of Learning. Academy of Learning was operated during Stirbys' period of employment by Wendy Benoit and Ed Benoit. The objective of the Director when issuing a Determination is to issue it against the employer. The term "employer" is defined in the *Act* and in this case AOL is clearly the employer for the purposes of the *Act*. If the employer is a proprietorship, as it was in this case during the period relevant to the complaint, the Determination is normally issued against the person or persons who are the controlling minds of the proprietorship.

It was clear from all the evidence, which was confirmed by all the circumstances surrounding this appeal, that Mr. Benoit had, and continues to have, a substantial and predominant role in the entire business of AOL. He controlled the day to day operations of all locations and, either by himself or in consultation with Mrs. Benoit, made all key decisions relating to the business. Mr. Benoit was, and continues to be, one of the "controlling minds" of AOL. It has not been shown that the Determination is wrong in respect of who is named and this argument is dismissed.

The second ground of appeal, that the Director erred in concluding Stirbys had not been paid all wages owing for June and July, 1998, is also dismissed. One thing that should be made absolutely clear is that the arguments about whether Stirbys was entitled to his full salary for May have no relevance to this appeal. The fact is that Stirbys was paid no more than his full salary for May. Subsection 21(1) of the *Act* operates to prohibits AOL from deducting any amounts from subsequent wage payments, in this case his June salary, to recover any part of the salary already paid to Stirbys for May. That provision reads:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

There is nothing in the *Act*, or in any other Act, that would permit AOL to unilaterally recover wages it later decided were not owing. As well, it is not open to me, even if I felt there was some justification for it (and in this case there is none), to allow what the *Act* specifically prohibits.

In respect of the June and July wages, AOL's appeal simply challenges findings of fact made by the Director. The Determination reached the following conclusion:

> Aside from the employer's assertion that certain hours were not worked that is disputed by the complainant there is not sufficient evidence to retroactively reduce his rate of pay.

Nothing presented by AOL in this appeal has affected the above conclusion in the least and, based on what has been presented, I completely agree with it. Although there was evidence from Mr. Kaytor that Stirbys was not working full days during his last visit, from June 29 to July 3, Mr. Kaytor also gave evidence that during his other visits, Stirbys was putting in extra hours, in the evening and on weekends. In *Heinz Benecken*, BC EST #D101/99, the Tribunal made the following comment:

> The burden is on Benecken in this case. Meeting that burden requires him to do more than simply establish factual discrepancies that may affect one area of the Determination. I accept there is some evidence suggesting Benecken worked more than 8 hours a day during the low season, at least while the renovations were taking place. Equally, I accept there is some evidence showing he worked less than 12 hours a day, 7 days a week during the peak season. The real question is not whether I accept those facts, but whether either of those facts establishes conclusively that the determination is wrong and must be cancelled or varied. . . .
>
> In the final analysis, I cannot say the Determination has been shown to be manifestly unfair or that there was no rational basis for its conclusion.
>
> (pages 5 - 6)

Similarly, in this case the total effect of the evidence, on balance, is not sufficient to justify changing the conclusion of the Director that AOL was not entitled to unilaterally reduce Stirbys' rate of pay for June and July, 1998.

Based on the above conclusion, the question of whether Stirbys received statutory holiday pay for July 1 is moot. Even if it were not, AOL did not establish that Stirbys had received any statutory holiday pay for July 1, 1998.

The final issue is Stirbys' entitlement to length of service compensation. There are three questions that have been raised by AOL: first, was the Director wrong to conclude that Stirbys quit; second, even if Stirbys did not quit, did AOL have just cause to terminate him; and third, can the issue of just cause be raised at all.

Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. For the purposes of this appeal, the relevant parts of that statutory provision are subsection 63(1) and paragraph 63(3)(c) of the *Act*, which state:

> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.*

. . .

(3) The liability is deemed to be discharged if the employee

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

Length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause.

In this case, AOL initially took the position that the conduct of Stirbys amounted to a quit and they were discharged from the statutory liability to pay length of service compensation to him.

In respect of that position, the Director noted in the Determination that the act of quitting is a right that is personal to the employee. There must be clear and unequivocal evidence that this right has been voluntarily exercised by the employee. There is an objective and a subjective element involved in the act of quitting: objectively, the employee must carry out an act that is inconsistent with further employment; subjectively, the facts must point to an intention on the part of the employee to terminate the employment.

While the Determination does not specifically comment on it, it was arguable that the objective element of a quit was satisfied in this case by Stirbys failing to show up for work on July 6. However, there is no evidence that could possibly lead to a conclusion that he intended to quit his job. All the evidence points to a contrary conclusion. He phoned Mike Benoit to let him know his return to Kelowna had been delayed, he asked Mike to tell Mr. Benoit, he told Mike that he would be back on Wednesday, he made efforts to do that and he was back into Kelowna on Wednesday. That is not the conduct of an individual who intends to quit his job. AOL has failed to show the conclusion in the Determination is wrong and the argument to the contrary is rejected.

Turning to the second question, I note that while the termination letter, dated July 10, 1998, is equivocal on whether it is relying on just cause or a quit in notifying Stirbys of his termination, it is clear from the subsequent submission by Mr. Benoit to the investigating officer that AOL was taking the position that he had quit, or abandoned, his job. The interpretive and policy issue

raised by this question is whether AOL, having failed to satisfy the Director that Stirbys quit his employment, may now assume the position that, in any event, they had just cause to dismiss him.

I conclude that AOL cannot now take the position that it had just cause to terminate Stirbys. The reasons for that conclusion have been outlined in *Wendy Benoit and Ed Benoit operating as Academy of Learning*, BC EST #D138/00. As a result, this ground of appeal is dismissed.

Even if I had considered whether Stirbys was dismissed for just cause, AOL did not prove there was any misconduct justifying summary dismissal. AOL alleged Stirbys' conduct was dishonest and constituted a fraud and a theft against them. That allegation arose from the assertion that Stirbys was not at work for the entire week of May 11 to 15 and that he had accepted his full salary for that period when he was not entitled to it. The allegation of dishonesty was never proved.

The document that Mr. Benoit points to as an admission by Stirbys that he was not at work, contains no such acknowledgment by Stirbys. He says only that he would like to report five sick days in May and would not like them deducted because he had "put in many, many extra hours". The telephone records introduced by AOL show that Stirbys was at work that week, at least for parts of those days. It is unnecessary for me to even consider whether Stirbys could have been away from work for parts of those days and dismissed for that because Mr. Benoit acknowledged he was "aware that he [Stirbys] worked varying hours as he would receive or make calls in the evenings and on weekends at times." That comment gives Stirbys some justification for accepting his full salary, even if he was absent from work due to illness. The notion of dishonesty in the context of "stealing time" requires proof that an employee has intentionally taken pay which that employee knows he or she has no entitlement to. This case, at its best for AOL, is far from that.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 20, 1999 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal