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: 1999/715

DATE OF HEARING: March 7 and 17, 2000

DATE OF DECISION: March 30, 2000

DECISION

APPEARANCES:

for the appellant	Ed Benoit Wendy Benoit Wayne Schafer 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 27, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that AOL had contravened Section 63 of the *Act* in respect of the termination of the employment of Michelle Miwa ("Miwa") with AOL.

The appeal filed by AOL challenges the conclusion of the Director that Miwa was entitled to length of service compensation. In the appeal, AOL contends that Miwa either quit, was offered and refused reasonable alternative employment or had given AOL just cause for her dismissal. There is a suggestion from the Determination and from a submission made by AOL during the investigation that Miwa was dismissed from her position for cause, but that was not position pursued in the appeal. The contention that AOL had just cause to dismiss Miwa first arose in the appeal and was based on information which AOL says they were unaware of until well after Miwa's employment with AOL was terminated.

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 24, 1999, the last date noted in the Determination for filing an appeal. A second appeal, from a Determination involving another former employee of AOL, had been filed a week earlier, 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 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 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 the Tribunal was assured that person would be at the appropriate 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". In the same correspondence, AOL asked that this appeal proceed first.

On March 3, 2000 a pre-hearing conference was held on both appeals. AOL again requested this appeal proceed first. Their argument for that procedure was that a number of summonses had been issued to representatives of government agencies and that:

> [t]his courtesy will provide all parties that are required to be there with a schedule of when they require to be in attendance and thus cause the least amount of interruption in their day.

As an aside, no effort was ever made by AOL to schedule their summonsed witnesses. It was, however, agreed that this appeal would proceed first, as AOL had requested. During the pre-hearing conference, AOL indicated that this appeal would probably be completed by 1 pm on March 7. It was, in fact, not completed on March 7 and an additional day was required.

At the pre-hearing conference, Mr. Benoit advised me he required several more summonses for representatives of other agencies he felt Miwa might have provided services to while she was employed by AOL. I pointed out to Mr. Benoit that the appeal alleged only that Miwa had engaged in conduct that justified summary dismissal in the period between April, 1998 and October, 1998 and that I was not prepared to allow him to utilize the appeal hearing process to conduct a fishing expedition that might or might not show Miwa was providing services to other agencies while employed by AOL. I asked if there were any specific allegations he was making outside of those made in the appeal and he replied that there were none. As a result, I put the parties on notice that in the context of the "just cause" allegations, the evidence would be confined to the period during which the alleged misconduct occurred, April to October, 1998.

I also made it clear that one of the issues I would decide was whether I should even consider this ground of appeal.

The hearing commenced on March 7, 2000. AOL called its first witness, Garry Norris. Mr. Norris had completed about 25 minutes of his testimony when I noticed that AOL was tape recording the proceedings. I ordered them to stop, indicating that it was not the practice or the policy of the Tribunal to allow its proceedings to be tape recorded. I also advised that a recent panel of the Tribunal had reached a similar conclusion.[1] Mr. Benoit, obviously annoyed by my decision and order asked me to produce some proof that I had authority to conduct the appeal. My file assignment form was not sufficient. He wished to see some proof of my appointment as an Employment Standards Tribunal Adjudicator. I advised him that my appointment was contained in an Order-in-Council, which, at least to that point in time, had never felt compelled to carry with me. I referred him to the appropriate time frame for the OIC and we continued with the hearing.

ISSUE

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

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[1] I was unable to provide the case reference at the time, but it is *Galter Holdings Ltd.*, BC EST #D074/00

THE FACTS AND EVIDENCE

1. The Facts

The following facts were not disputed, were not affected by any other evidence or were unchallenged:

Miwa commenced her employment with AOL on September 21, 1995 as the Kelowna Centre Manager at rate of $2500.00 a month.

On October 21, 1998, Miwa was called to an interview with Wayne Schafer, who had recently been hired as C.E.O. for AOL. She was given a letter, which stated:

> Re: Employment Status
>
> Please be advised that your services as Centre Manager for the Kelowna Centre of the Academy of Learning are no longer required.
>
> This decision entails a shift in job responsibilities to some other area within the company structure, which will make use of your particular skills. We have earlier discussed the disabilities program area development
>
> Inasmuch as this move will likely cause you some reflection about career goals, please take the balance of the week off to consider your options, and arrange a meeting in Monday 26 October 1998 to discuss the matter.
>
> Thank you for your consideration.

Miwa was told that she would be paid for the three days off.

On October 23, 1998, Miwa delivered a letter to the AOL administrative office, addressed to Mr. Schafer, the content of which stated:

> Please be advised that I consider your letter of October 21st, 1998, as my termination. I would therefore ask that you provide me with my record of employment and severance pay.

Miwa also instructed legal counsel, who wrote a letter to AOL dated October 26, 1998. On the same day, Mr. Schafer wrote to Miwa:

> It is clear from my letter to you dated 21 October 1998 that you were not terminated from employment. During our meeting of the same date you were advised that you were still on payroll, and would be paid for the 3 days leave 21 to 23 October 1998 inclusive.

> It is also clear that you were to report to work 26 October 1998, and arrange a meeting with me to discuss your new job assignment. Inasmuch as you have not reported for work, your salary will be deducted accordingly.
>
> Please contact this office and advise us of your intentions in this matter.

Mr. Schafer also responded to Miwa's lawyer. The actual date of the response is unclear, but it was probably November 2, 1998. The following two comments are contained in that response:

> . . . she would be paid, as no change had been made to her payroll status pending the reassignment.
>
> Please advise your client that she has deserted her employment, and that her separation will be processed forthwith.

In reply, dated November 4, 1998, Miwa's lawyer included the following request:

> . . . we ask that you provide full particulars of the position being offer [sic] or proposed to our client, including title, job description and rate of pay.

There was no response from AOL to this request.

Between April, 1998 and October 1998, while she was employed by AOL, Miwa contracted with the provincial Ministry of Social Development and Economic Security, Vocational Rehabilitation Services ("VRS") to provide services to three VRS clients.

During her employment with AOL Miwa had spent some time working with two special needs students and had participated with those students, with AOL technicians and with outside suppliers in modifying computer equipment and programs for those students. She expressed to a number of people at AOL an interest in working with and developing programs for special needs students.

2. The Evidence

I received evidence from three representatives of VRS, Bob Tomich, the Area Manager, Skills Development Division, Kelowna, Linda Owens and Garry Norris, both of whom were Vocational Rehabilitation Consultants with VRS during the period from April 1998 and October, 1998. All three had been summonsed by AOL as part of their effort to establish AOL had just cause to dismiss Miwa. The summons included a requirement to bring VRS records relating to any dealings it had with Miwa. The evidence showed that for the most part any dealings that VRS had with Miwa related to her position as Centre Manager for AOL. Mr. Benoit made certain to ask each of the witnesses whether they might have been able to find that Miwa had more dealings with VRS than what was found if they had received more time to search. Mr. Tomich and Mrs. Owens said that was possible.

Mr. Norris was not particularly helpful. He was, at the time he testified, on an extended medical leave from his position at VRS and had no control over or access to any of the files he administered during the period in question. His ability to recall details of his involvement with Miwa was affected by the passage of time and by some personal and medical issues that were present during that time.

Mr. Tomich brought several files with him. He noted that AOL had first requested information concerning services provided by Miwa to VRS in January, 2000. At that time, he had notified AOL that there were records in his office indicating Miwa had provided services to VRS clients from April/May 1998, but that any additional information was governed by freedom of information and protection of privacy legislation and the request was being forwarded to his Ministry's freedom of information section. The Ministry felt that the identities of the clients involved and the medical and financial details relating to their special needs should be protected. Mr. Tomich indicated there were records relating to three VRS clients and he would produce the information requested, but asked if the Tribunal was able to protect the confidentiality of that information. I believed we could and ordered that the material referred to by Mr. Tomich should be produced on condition that any information contained in that material would be kept confidential by all the persons present at the hearing and would be used only in connection with the proceeding. I thought I had made it clear that the information provided by Mr. Tomich was not to leave the hearing room.

Mr. Tomich produced three Authorization to Invoice ("ATI") forms and three invoices from Miwa relating to services provided in respect of three VRS clients during the period in question. On the second day of the hearing, I learned that Karl Koslowsky, acting on behalf of AOL had used the material to identify one of the clients, had contacted him and had questioned him about the services Miwa provided to him. Both the individual and the individual's father were very upset by the tactics used by Mr. Koslowsky and by the fact he had been given this information. Even if that was not a clear disregard for the order I had made concerning the material provided by Mr. Tomich, it was a very injudicious act and was reflective of just how far AOL was prepared to go to make their point. I would add at this point that as far as they were prepared to go, it is surprising how little they found.

Mrs. Owens provided evidence relating to her dealings with Miwa and produced copies of some e-mail communications that had passed between her and Miwa. The communications do not advance AOL's appeal in the least.

Wendy Benoit, Mr. Benoit, Mr. Koslowsky, Mr. Shafer, Cherry Niemi and Kristina Brummer were all called to give evidence for AOL.

Mrs. Benoit described generally the services provided by AOL, particularly as those related to special needs students. She confirmed that Miwa had expressed to her an interest in working with special needs students and there was some general discussion between them about developing a disability program. She expressed some opinions on matters raised by the appeal that were not helpful to me.

Mr. Benoit described his role at AOL. Otherwise he had little direct and cogent evidence to provide. He testified extensively about AOL establishing a "Disability Curriculum Development" position to which AOL intended to transfer Miwa. Most of his testimony was, however, lacking in detail and was predominantly framed in terms of understandings acquired from other sources, of statements of past or future intentions that were not expressed to any other person nor recorded, of interpretations of events and documents that were not otherwise supported by any objective evidence or material, of his perception of what other people had thought or said and of opinion. He frequently testified directly to matters he had no direct involvement with. He did confirm one matter that was relevant to the appeal. He confirmed that, even after October, 1998, AOL has never developed a disability curriculum nor established a "Disability Curriculum Development" position or any similar position. Mr. Benoit said there is an outside contractor, HMI Rehabilitation Services ("HMI"), that is performing some of the functions AOL contemplated for the "Disability Curriculum Development", but it was also clear from his, and other, evidence that HMI was under contract to AOL to perform those services for some time before October 21, 1998.

Mr. Koslowsky had absolutely nothing useful to add to the evidence.

Ms. Niemi was asked whether Miwa had expressed any particular interest. She replied: "no, not really, although she did spend more time working with disabled students". She said she was told, but didn't indicate when or by whom, that Miwa's position was going to be changed.

Ms. Brummer was employed as the Regional Manager for AOL until August 15, 1998, when she terminated her employment. She was Mr. Benoit's assistant. She confirmed that Miwa was working with special needs students and had expressed an interest in that area. She also confirmed that HMI was under contract to AOL to provide equipment, technical support, training and assessment in respect of special needs students at the time she left.

When Mr. Schafer was called to give evidence, he produced five pages of notes which he identified as being his notes of what he perceived to be the errors in the Determination. He had prepared them the previous evening. It was his intention to simply read those notes as his evidence. Mr. Benoit was quite perturbed when I denied Mr. Schafer that opportunity, advising him that I wasn't interested in his opinions, only in his evidence and that he should confine himself to what he knew, not what he believed to be wrong with the Determination.

Mr. Schafer gave evidence relating to the events on and around October 21, 1998. Much of what he had to say about that is incorporated in the facts set out above. While he also referred to a meeting he had with Miwa during which he expressed to her AOL's concern about her ability to effectively manage the Kelowna Centre, he said the events of October 21 were not disciplinary. He was asked why he did not respond to the November 4 letter from Miwa's lawyer requesting particulars of the position being offered to her and he replied that there would be no job or job description until he had met with Miwa and discussed the matter, which he intended to do on October 26. He acknowledged, for similar reasons, that there was no "disabilities curriculum", only an intent to develop a disabilities program and eventually a curriculum for that program. Notwithstanding my earlier direction, a considerable amount of his testimony was spent

addressing the conclusions made by the Director in the Determination and expressing a contrary opinion to them.

Miwa gave evidence. She provided a copy of her job description as the Centre Manager. In reference to the services she provided for VRS, she testified that none of the work related to anything that was done by AOL and it was performed entirely outside her working hours, although she did acknowledge she may have had some communication with VRS relating to those services during her normal working hours with AOL. She described, with some particularity, her involvement in the training of the two special needs students who were consistently referred to in the proceedings. She did not dispute the essential aspects of Mr. Schafer's evidence concerning the events of October 21, adding only that during the meeting she was asked to turn in her keys and after the meeting she was escorted by Mr. Schafer to her office to gather her personal things and then was escorted by him off the campus.

ANALYSIS

What should have been a relatively straight forward appeal on whether Miwa was entitled to length of service compensation at the time her employment with AOL was terminated has been unreasonably protracted by matters that were only raised in the appeal to the Tribunal.

At the outset of the appeal, Mr. Benoit argued that the entity named in the Determination, Wendy Benoit and Ed Benoit operating as Academy of Learning, is wrong and that it should be changed to Workplace Learning Systems Ltd., dba Academy of Learning.

During the period of time relevant to the complaint, Workplace Learning Systems Ltd. was not involved in Academy of Learning. Academy of Learning was operated during this time 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 that 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 made, either by himself or in consultation with Mrs. Benoit, 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.

- Termination of Employment

There is simply no doubt that, for the purposes of the *Act*, Miwa's employment with AOL was terminated on October 21, 1998. There is no other rational conclusion that can be drawn from the opening words of the letter given to her by Mr. Schafer on that date: ". . . your services as Centre Manager for the Kelowna Centre are no longer required". The *Act* contemplates that an

employee can be considered to have been dismissed when a condition of employment is substantially altered. The *Act* defines *"conditions of employment"* to mean:

> . . . all matters and circumstances that in any way affect the employment relationship of employer and employees;

It is not an unreasonable conclusion that removing an employee from a key management position with only a vague reference to "a shift in job responsibilities to some other area" represents a substantial alteration of a condition of employment. AOL has not shown the Determination to be wrong in its conclusion that Miwa was dismissed on October 21, 1998 and AOL had not shown there was just cause for her dismissal.

Reasonable Alternative Employment

Paragraph 65(1)(f) of the *Act* says:

65. (1) Sections 63 and 64 do not apply to an employee

> *(f) who has been offered and refused reasonable alternative employment by the employer.*

The Determination addressed the question of reasonable alternative employment as follows:

> In order to consider this provision of the Act negating compensation for length of service in lieu of written notice, I must consider whether the offer of alternative employment was "reasonable". To do so the terms and conditions of that offer would have to be made clear.
>
> In the case at hand the employer clearly terminated the position of Centre Manager without notice by stating, ". . . services as Centre Manager for the Kelowna Centre of the Academy of Learning are no longer required."
>
> The employer went on to state in this letter of termination, "This decision entails a shift in job responsibilities to some other area within the company structure, which will make use of your particular skills. We have earlier discussed the disabilities program area development."
>
> The terms and conditions of the alleged alternate employment was not made clear to the employee at the time of termination. Not being given any information about this vague proposal she could hardly consider whether it was a reasonable offer or not.

The Director concluded that no reasonable offer of alternative employment had been made and that Miwa was entitled to length of service compensation. Based on the evidence received, I would only add to the above comments that even in the period following Miwa's termination, and notwithstanding a specific request from her lawyer on November 4, 1998 to give particulars

of the position being offered, no information about the proposed position was ever provided by AOL. It is not sufficient to simply say that the particulars of the position would have been worked out.

AOL has not shown there is any error in the Determination on this point. There must be an offer of alternative employment, with sufficient particulars of that employment provided to the employee, to allow a reasoned consideration of whether it is a satisfactory substitute for the employment that has been lost. That did not happen in this case. I heard considerable evidence from AOL's witnesses that, in their opinion, the position contemplated for Miwa was reasonable alternative employment. Those views are, of course, purely subjective and they do not assist me at all. The question of whether the employment offered was, for the purposes of Section 63 or 64 of the *Act*, "reasonable alternative employment" requires an objective assessment by the Director from the available material, which must at least include clearly defined terms and conditions of the employment offered.

There is no merit to this ground of appeal.

3. Quit

AOL has not shown any error in the conclusion reached in the Determination on this point. Miwa was terminated on October 21, 1998 by the employer. No reasonable alternative employment was offered to her. There was no continuing obligation on the part of Miwa to report for work and her failure to do so cannot be characterized as a quit.

There is no merit to this ground of appeal

4. Just Cause

This leads me to the final ground of appeal. AOL says that after October 21 it became aware of information, which had they been aware of at the time of Miwa's termination, would have provided just cause to summarily dismiss her. AOL argues that they should be able to rely on this information to seek to discharge their statutory liability to pay Miwa length of service compensation. AOL relies on the common law principle expressed in *Lake Ontario Cement Company Limited v. John A. Groner*, [1961] S.C.R. 553, at pages 563 and 564:

> The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarised in Halsbury's Law of England, 2nd ed., vol. 22, p. 155, where it is said:
>
> It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

The question raised by this appeal is whether, for the purposes of the *Act*, AOL should be allowed to alter the basis upon which Miwa's employment was terminated and seek to establish just cause for dismissing Miwa after the fact of termination. For the purpose of considering this question, I make no distinction between facts AOL was aware of or not aware of at the time Miwa was terminated.

In my view, the position of AOL is not supported on an analysis of the purposes and objects of the *Act*. It would be an incorrect reading of Section 63 and quite inconsistent with the intent of the *Act* to allow AOL to allege just cause for dismissal when that was not the basis upon which the termination of employment occurred.

The Tribunal has noted on many occasions that *Act* should be interpreted in a manner that is consistent with its remedial nature and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects: see *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) And *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R.(4th) (B.C.C.A.). The *Act* sets minimum standards of employment. The following comment from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 guides the interpretive approach to the *Act*, including subsection 63(3):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (para. 21)

Section 63 is part of the legislative scheme to "*ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment*". Generally speaking, 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.*

As the Tribunal has noted in several decisions, 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.

The Determination correctly and succinctly notes one of the purposes for length of service compensation:

> Considering the intent of Part 8 of the *Employment Standards Act* (Termination if Employment), it becomes evident that the legislation is not designed to interfere in management's right to manage, staffing whom they wish to do the job the way they want it done. Rather, it is intended to provide the courtesy of notice, as we all have financial commitments and are dependent on our income to meet those commitments.

Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. Developments in the common law in this area have expanded the remedial authority of the Courts, but the basic objective remains unaltered. The focus in such a case is on the contractual relationship. As such, any factors, including those coming to light after the alleged breach, can have a bearing on the respective rights of the parties under the contract and, in the Courts' view, are properly considered.

The objective of Section 63 of the *Act* is different. It is intended to provide an employee with brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. This period can be provided by giving notice, by paying compensation equivalent to the required notice or by some combination of those two. As the Determination notes, it is in many respects an enforced courtesy.

Grammatically, paragraph 63(3)(c) of the *Act*, as well as in Section 63 generally, are cast in the present tense: *"terminates the employment, retires from employment, or is dismissed for just cause"*. That structure suggests the legislature intended the statutory liability for length of service compensation, or its deemed discharge, is to be determinable on termination. It would require a clearer statement of intention by the legislature than is indicated by the words used in paragraph 63(3)(c) before I would interpret the phrase *"or is dismissed for just cause"* to include the words "or had just cause for dismissal".

This view is reinforced by other provisions of the *Act*. Under the *Act*, the benefit and the corresponding liability crystallizes at the time of termination. Subsection 63(4) says, in part

> *63. (4) The amount the employer is liable to pay becomes payable on termination of employment . . .*

The *Act* also includes an employer's liability for length of service compensation in the definition of "wages" and, pursuant to Section 18(1), requires an employer to pay all wages owing to an employee within 48 hours after the employer has terminated the employment. These provisions reflect a basic goal of the *Act*, that wages be paid in a timely way and, as it specifically relates to termination of employment, that all wage obligations existing at the time of termination be paid immediately upon termination.

It is inconsistent with those provisions to suggest, in effect, that they are all conditional on whether the employer might find some reason, after the termination has occurred and the statutory obligations have crystallized, to avoid those obligations.

Section 2 sets out the purposes of the *Act*:

> *2. The purposes of this Act are to*
>
> *(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
>
> *(b) promote the fair treatment of employees and employers,*
>
> *(c) encourage open communication between employers and their employees,*
>
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
>
> *(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*
>
> *(f) contribute in assisting employees to meet work and family responsibilities.*

In Machtinger v. HOJ Industries Ltd., supra, the Court noted:

> . . . 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.

Length of service compensation is a minimum requirement of the *Act*. It would not be consistent with the above provision if the *Act* was interpreted in a way that, rather than encouraging employers to comply with the minimum requirements, was encouraging employers to begin looking for reasons that would allow them to avoid those requirements.

As well, one of the purposes of the *Act* is to *"provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act"*. As this proceeding clearly demonstrates, that purpose is not served by adopting the view proposed by AOL, which most certainly will have the effect of prolonging any final resolution of a complaint while often vague allegations of employee misconduct are investigated and adjudicated.

Finally, I cannot ignore the impact the position of AOL will have on the administrative scheme of the *Act*. Under Section 79 of the *Act*, the jurisdiction to receive and investigate a complaint alleging a contravention of the *Act* belongs to the Director. In respect of each complaint, the Director must investigate unless there is reason to stop or postpone the investigation. Following investigation, the Director may issue a Determination. The primary jurisdiction of the Tribunal is to consider appeals from a Determination. The Tribunal is not intended to be an investigative body. The administrative scheme is designed to achieve finality to complaints made to the Director in a way that is fair and efficient. The position of AOL impacts that scheme in two ways. First, it forces the Tribunal into an investigative role, requiring it, in a very real sense, to investigate the merits of the respective positions of the parties as a matter of first impression. Second, it raises the spectre of a multiplicity of investigations on the same complaint depending on long an employer is prepared to continue to allege employee misconduct.

For the above reasons, I do not accept that AOL should be allowed to seek to alter the basis upon which Miwa's termination occurred by attempting to establish just cause for dismissing Miwa after the fact of termination.

This conclusion renders all of the evidence relating to the services provided by Miwa to VRS clients unnecessary and irrelevant.

I only add that even if I had considered this argument, I would have concluded that AOL had not proven its allegations against Miwa. The allegations against Miwa were framed in the strongest of terms: "embezzlement of employer's funds, theft of employer's funds, fraud and misrepresentation of the employer's image, conflict of interest and direct competition of services provided by the Academy of Learning". Those are very serious allegations, including allegations of criminal conduct, and would require clear evidence of the alleged misconduct. Not only was there no clear evidence, there was no evidence at all that would have supported any of those allegations.

This ground of appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 27, 1999 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal