

An appeal

- by -

Haida Glass Ltd.
("Haida")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/613

DATE OF HEARING: March 11, 2003

DATE OF DECISION: April 29, 2003

DECISION

APPEARANCES:

Kari D. Boyle: On behalf of Haida Glass Ltd.
Terry Haerber: On his own behalf

OVERVIEW

This is an appeal by Haida Glass Ltd. ("Haida"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 18, 2002.

Terry Haerber filed a complaint alleging that Haida owed him overtime and statutory holiday pay on overtime rates from June 8, 1999 to November 28, 2000, and that it had terminated his employment without notice or compensation for length of service. The Director's delegate determined that Mr. Haerber was not a manager, and that his employment had been terminated without cause or notice.

The Director's delegate concluded that Haida contravened sections 40, 44, 45, 46 and 47 of the *Act* in failing to pay Mr. Haerber overtime and statutory holiday pay, and in failing to pay him compensation for length of service. The delegate ordered that Haida pay Mr. Haerber \$9,298.69 in respect of the overtime, vacation pay and compensation.

ISSUES TO BE DECIDED

The issues on appeal are whether the Director's delegate erred

1. in denying Haida full opportunity to respond to Mr. Haerber's allegations;
2. in concluding that Mr. Haerber was not a manager; and
3. in concluding that Mr. Haerber's employment was not terminated for cause.

I have concluded that Haida was denied full opportunity to respond to Mr. Haerber's allegations.

Throughout the term of his employment, Haida issued Mr. Haerber yearly diaries in which he documented, among other things, job related activities. Haida argued that the diaries were the property of the company, and that Mr. Haerber was obliged to return them at the conclusion of his employment. Haida also argued that it had the right to review the diaries to determine whether Mr. Haerber had made any notes that might support its position. The delegate contended that she had no authority to request that Mr. Haerber produce or return the documents to Haida.

Sections 84 and 85 outline the Director's powers of investigation and inspection. Those powers include the power and authority of a commissioner to compel production of documents and papers under s. 15 of

the *Inquiry Act*, and the power to require a person to produce records for inspection relevant to an investigation.

Mr. Haeber testified at the hearing that the delegate did not ask him for, or review, his diaries during the course of her investigation. The delegate submitted that it was not necessary to review the diaries because the hours of work were not in question. Given the issues raised by Haida, I find that the delegate erred in not reviewing the diaries for the purposes of determining whether Mr. Haeber in fact made any entries that would support Haida's position on appeal, specifically, that of just cause and condonation.

The delegate also failed to provide Haida with two letters Mr. Haeber sent to the delegate on March 29, 2003. Those letters contained assertions that Haida had a right to respond to, and would have responded to had they been disclosed.

As I conclude that the delegate denied Haida the opportunity to respond to the allegations, I heard new evidence at the appeal hearing, including, but not limited to, Haida's response to Mr. Haeber's denial of any supervisory responsibilities.

Mr. Haeber produced his diaries at the hearing, and Tribunal staff reviewed the diaries with Mr. Haeber to allow him to black out any portions that may have contained purely private information. Copies of the altered diary entries were provided to Haida for its response, and Mr. Haeber was given one week to reply to Haida's submissions.

FACTS

I heard evidence from Mr. Haeber, and from Rick Heuber and Wayne Veale, the co-owners of Haida. I also heard the evidence of Diane Huber, Haida's general manager, Ray Oliver and Peter Kinvig, current and former Haida employees, and Lisa Misola, Haida's controller since 1998. I have set out only that evidence relevant to the issues I must decide. For ease of reference, I have set out the evidence respecting the two issues under appeal separately.

Background

Mr. Haeber is an experienced glazier ("installer") who began working for Old Haida Glass, a company specializing in the supply and installation of commercial and residential glass, in September 1995. In June 1997, the company's assets were purchased by Rick Huber and Wayne Veale, who, along with Mr. Haeber, had been former Haida employees. The company continued under the name Haida Glass Ltd.

Mr. Haeber's employment was terminated on June 7, 2001.

Mr. Haeber's job duties

After Mr. Huber and Mr. Veale purchased Haida, Mr. and Mrs. Huber, Mr. Veale and Mr. Haeber met to divide up areas of responsibility in the company. Mr. Huber was to be responsible for measuring, installing and some estimating, Mr. Haeber was to be responsible for supervising crews, scheduling and customer liaison, and Mrs. Huber assumed responsibility for supervising office staff.

Mr. Huber described Mr. Haeber's role in the company as "pivotal". Mrs. Huber testified that, because Mr. Haeber had a significant amount of experience and knowledge in certain areas, he was given keys to the premises and a large degree of autonomy.

Mr. Haeber was also given the sole use of a company vehicle, expenses for which were paid by Haida. According to Mrs. Huber, Mr. Haeber's job was the most significant one in the company since he had the most responsibilities. She stated that Mr. Haeber never reported to anyone, no one supervised his work, and only submitted his own time cards because they formed part of the invoicing process. She stated that, because Mr. Haeber was considered part of the management team, he was trusted to perform his work responsibly.

Mr. Haeber's position title was working foreman. In that capacity, in addition to his own work, he scheduled between 1 and 6 teams of two person installation crews according to customer job demands, and ensured that jobs were completed according to schedule. Mrs. Huber testified that, because Mr. Haeber was responsible for ensuring jobs were completed on schedule, he had the authority to determine whether overtime was necessary. She also testified that Mr. Haeber authorized days off. Mr. Haeber contended that he was responsible for scheduling crews in accordance with the scope of the work and the employees' ability. He denied that he had any authority to authorize overtime, and did not recall anyone requesting a leave of absence. He submitted that he spent only one to two hours each day directly supervising work crews. He denied that he was a supervisor, since he was not at a job site at all times.

Each installer recorded their time on a time card, and allocated it to a particular job for billing purposes. Their cards were given to Mr. Haeber, who signed off the time cards as foreman. His signature, according to Mrs. Huber, was evidence of approval of the time each employee spent on the job, as well as confirmation that the hours were matched to the proper job. Haida prepared invoices based on the time cards provided to them by Mr. Haeber and other notes Mr. Haeber made, including material prices. According to Mr. Haeber, his initials on time cards signified only that he had checked to ensure the job code was correct, the hours added up and the date was correct. He denied that his initials constituted approval of hours already worked.

He also said that he relied on the verbal reports from installers that work had been completed. Mr. Haeber could not recall if he ever telephoned a customer to determine whether work had been done if a time card indicated it had not been.

Mr. Kinvig worked for Haida off and on from the 1970's up to 2002 as an estimator/installer. He was a Haida employee at the time the company came under new management. Mr. Kinvig testified that, until he left Haida, Mr. Haeber was his supervisor. He described Mr. Haeber's duties as a liaison between clients and the office, scheduling jobs and workers, and following up on jobs. Mr. Kinvig's evidence was that he gave Mr. Haeber his completed time cards, reported to him if he was sick or if he needed assistance. If any discipline was necessary, Mr. Kinvig said that it was issued by Mr. Haeber. Although Mr. Kinvig acknowledged that Mr. Haeber did not often visit sites to inspect work he performed, he testified that it was Mr. Haeber's responsibility to ensure jobs were completed in a timely way.

Mr. Oliver worked for Haida for approximately 15 months within the last 5 years as an installer. He testified that Mr. Haeber supervised his work, and was responsible for disciplining him if he failed to report to work. Mr. Oliver's evidence was that Mr. Haeber scheduled his time off, approved his overtime, and trained him on the use of a Bosun's chair.

Mrs. Huber's evidence was that, although she and her husband completed all the necessary paperwork required to hire and fire installers, they acted only on Mr. Haeber's recommendations since he was the person with the most knowledge of what skills were required and how each employee performed on the job. Mrs. Huber testified that, on one occasion, Mr. Haeber fired an employee without any knowledge or agreement from either her or her husband. In cross-examination, Mrs. Huber testified that Mr. Haeber sat in on a few hiring interviews, but was not sure which ones they were.

Mr. Haeber denied that he had power to hire or fire, and was involved in an employee performance review on only one occasion, and then only to provide his observations of their capabilities. Mr. Haeber contended that he never personally participated in reviews, but gave verbal feedback to Mr. Huber. Although Mr. Haeber noted the employees' performance review dates in his diaries, he contended that he did so only as a "scheduling aid", and did not attend them on a regular basis.

Mr. Oliver testified that, in July 1999 he attended a performance appraisal meeting at which Mr. and Mrs. Huber and Mr. Haeber were all present.

Mrs. Huber submitted 5 employee appraisals conducted in July, 1999, which identified Mr. Haeber and Mr. Huber as supervisors, and which both signed as supervisors.

Just Cause

Mrs. Huber and Ms. Misola testified that, in 1999/2000, Haida received almost daily calls complaining both about Mr. Haeber's failure to return telephone calls and the fact that scheduled work was not being done. Haida provided copies of a large number of these messages to the delegate dated between 1999 and May, 2001. The content of the messages were similar, and contained comments such as: "very upset no one has contacted him"; "has left many messages and has not heard from anyone"; "very upset, has left six messages"; and "quite upset, has left many messages."

Because Ms. Misola often covered the telephones when the receptionist was on her lunch break, she observed Mr. Haeber collecting his messages. Mrs. Huber also testified that she saw Mr. Haeber empty his message slot and review the messages.

In August 2000, Mr. and Mrs. Huber cut short their vacation to return to the office to address what they considered to be a situation that threatened the ongoing viability of the business. They testified that an employee had threatened to quit over his frustration at Mr. Haeber's failure to return phone calls. Mrs. Huber testified that they could not afford to lose a key employee during the summer months, since it was Haida's busiest time of year and installers were difficult to replace. Consequently, Mr. Huber assumed responsibility for estimating and scheduling work crews for non commercial jobs, and Mrs. Huber instituted new working procedures and relationships.

Mr. Huber testified that although he asked Mr. Haeber to hand over the paperwork on the jobs already underway, Mr. Haeber did not do so.

Both Mrs. Huber and Ms. Misola testified that there was an immediate improvement in job completion and customer satisfaction after Mr. Huber assumed scheduling responsibilities. However, Mrs. Huber said that it was some time before Haida sorted out Mr. Haeber's mess. In the fall of 2000, Mrs. Huber discovered a significant amount of paperwork related to completed or nearly completed work sitting on

Mr. Haeber's desk. Mr. Haeber agreed that he had "misplaced" the paperwork, and acknowledged that was a serious oversight on his part.

After discovering the paperwork, Mrs. Huber specifically asked Mr. Haeber if she could invoice the Rob Michaels Construction ("RMC") job, and he told her that she could. More will be said about the RMC job later in this decision.

Mr. Huber testified that, of the outstanding work, the material for two of the jobs was in the shop, and had been for some time, and that it was "no big deal" to complete. For one of the jobs, the customer was very unhappy with the service he had received from Mr. Haeber, and took his business elsewhere. In early November, 2000, Haida received a letter from a customer complaining that Mr. Haeber had not returned phone calls and had not done work scheduled one year earlier.

According to Mr. Haeber, the customer complaints were not directed at him personally, but frustration that work could not be completed. According to Mr. Haeber, the delay in the completion of jobs was a result of the availability of personnel, weather conditions, and unavailability of material necessary to do the work.

Ms. Huber testified that Ms. Misola and another young female employee in the office reported that they had received telephone calls at home in the evening from Mr. Haeber, who appeared to be intoxicated. Mrs. Huber testified that the employee told her that she felt "mildly uncomfortable" by the phone call but indicated she did not want Mrs. Huber to discuss the incident with Mr. Haeber. Although Mrs. Huber respected the employee's wishes, she removed all other female employee's home telephone numbers from office documents. Mrs. Huber testified that she then received a telephone call from a female customer who told her that Mr. Haeber had telephoned her a number of times in the evening, and that she felt he was "hitting on her". The customer advised Mrs. Huber that she was a professional psychologist, and was of the view that Mr. Haeber had a substance abuse problem.

Ms. Misola testified that Mr. Haeber telephoned her in the evening on about 5 or 10 occasions. Her evidence was that he expressed disappointment with the way Mr. and Mrs. Huber and Mr. Veale operated the company, and that he felt betrayed by the previous owners. She testified that Mr. Haeber seemed particularly angry at Mrs. Huber and disapproved of her approach to advertising, among other things. In Ms. Misola's view, Mr. Haeber thought that, because she worked closely with Mrs. Huber, she could influence her decisions in these areas. Ms. Misola said that she never reported these calls to Mrs. Huber at first because they were very negative towards her, but when she discovered that Mr. Haeber had been calling another employee, she felt obliged to report that she had similar experiences.

Mrs. Huber testified that, after she heard her employees' experiences with Mr. Haeber, she felt she had let her employees down and, she told her husband that Haida should terminate Mr. Haeber's employment. While Mr. Huber and Mr. Veale agreed the issues were serious, because of their friendship with Mr. Haeber, the quality of his work, and his length of service with Haida, they were of the view that a warning letter was appropriate.

On November 28, 2000, Haida wrote a five page letter to Mr. Haeber regarding his job performance. The letter set out Mr. Haeber's duties and expected skills, and Mr. and Mrs. Huber and Mr. Veale's collective opinion that Mr. Haeber had not performed those duties satisfactorily. The letter set out those areas in which Mr. Haeber's performance was of concern, including his failure to respond to customer complaints about jobs not completed, his failure to ensure timely completion of work orders, his record keeping, his

harassment of employees and customers, and his lack of professionalism. The letter went into some detail about Haida's concerns on each issue, indicated his job was in jeopardy, and set out immediate expectations for Mr. Haeber's performance. It also clearly indicated that Mr. Haeber's "'I don't care' attitude" would not be allowed to continue. The letter concluded by indicating that Haida would work with Mr. Haeber to help him "in this transition period. However, we expect that same commitment from you as well. We leave it up to you to decide." No specific date was set for a review of Mr. Haeber's performance, nor were there any other timelines set for the "transition period".

According to both Mr. and Mrs. Huber, the letter was to convey to Mr. Haeber that although Haida thought he was a good installer and valued his experience, it was unhappy with his performance, and this was his "last chance". Mrs. Huber testified that the letter did not set out a timetable for Mr. Haeber to improve his performance because the relationship had been one of trust, and Haida wanted to give him an opportunity to resolve the issues.

When Mr. Huber delivered the letter to Mr. Haeber, he said that he should read it, and return a signed copy to him at his convenience. He said that Mr. Haeber did not ask any questions or seek clarification on any point, and, while he signed and returned it, he wrote that his signature "did not constitute agreement or acceptance of the contents whether substantiated or not. Nor substantiating documents were provided". Mr. Haeber advised the delegate that it was impossible for him to defend himself against the allegations. At the hearing Mr. Haeber contended that his general denial was meant to "put the ball back into [Haida's] court".

The delegate concluded that Haida had "acted within the principles of corrective discipline" by providing Mr. Haeber with the letter. The delegate noted that Mr. Haeber disagreed with the letter's contents, but made no findings as to whether the incidents set out in the letter were substantiated.

Having heard the evidence of the parties, I am satisfied they were. The telephone messages support Haida's contention that customers were complaining that Mr. Haeber failed to return phone calls. They also indicate a pattern of frustration by customers about a lack of completion of scheduled jobs. Mr. Haeber did not dispute that he made telephone calls to female employees and customers. Mr. Haeber only expressed concern that Ms. Misola had not kept the contents of the call confidential, as he asked her to. He also acknowledged that the paperwork found on his desk was a "serious oversight".

Mrs. Huber testified that, after the November letter, she watched Mr. Haeber "like a hawk". She said that while there were no further reports of Mr. Haeber telephoning employees or customers at home in the evening, his job performance never improved. In her view, it got worse. Mr. and Mrs. Huber testified that Mr. Haeber scheduled jobs he was expressly asked not to, failed to appear at scheduled jobs, did not turn in time cards in a timely fashion, and continued to fail to return telephone calls. The evidence shows that complaints about Mr. Haeber's failure to return phone calls continued to be made as late as May, 2001.

Mrs. Huber testified that, from November 2000 onward, she brought each customer complaint to Mr. Haeber and spoke to him about it. She said that, if she didn't get a satisfactory response, she would refer the matter to her husband. Mrs. Huber also set up a tracing system so that Mr. Haeber's work would be monitored.

According to Mr. Huber, there was no chance that Mr. Haeber was led to believe that his performance was satisfactory. Mrs. Huber also testified that she never said anything that would lead Mr. Haeber to believe that his performance was acceptable. She testified that she never said anything to him that would

lead him to believe that there was no problem, that he was not given a raise, and never complimented him on anything but his work as an installer.

Mr. Haeber contended that he was never advised of any further problems until he was told that his employment was terminated.

According to Mrs. Huber, Mr. Haeber's dishonesty over the Rob Mitchell Construction ("RMC") job was the "last straw" leading to his termination. There is no dispute that this job, which involved the installation of windows in a condominium unit, was entirely Mr. Haeber's responsibility. He did the initial quote, ordered the material, scheduled the installers and dealt directly with RMC.

After discovering paperwork about the RMC job on Mr. Haeber's desk in the fall of 2000, Mrs. Huber received Mr. Haeber's assurance that the job was complete and issued invoices to RMC on October 1, 2000 and November 1, 2000. When the invoices remained unpaid the following May, Mrs. Huber followed up with Mr. Haeber and told him that she was going to institute legal proceedings, and needed his assurance that the job was done. Relying on his assurance, Haida instituted a small claims action against RMC to collect on its invoice.

RMC filed a counterclaim for damages, alleging that work had not been completed, and the work that had been completed was not done in a workmanlike manner. Mrs. Huber testified that at first, she thought it was a "ploy" by RMC to avoid paying its account because she believed Mr. Haeber's word that the job was complete. Mr. Haeber's diary notes confirm that he was aware of RMC's counterclaim.

On May 31, 2001, Mr. Incantalupo, the President of RMC, left a message for Mr. Haeber to call him. Mr. Haeber contended that he attempted to call Mr. Incantalupo several times without success. His diary contained notations to that effect.

Ms. Misola testified that, on June 6, she received a call from Mr. Incantalupo complaining that Mr. Haeber had not returned his phone call of May 31, and that the job had not been completed. Ms. Misola called Mr. Haeber, and asked him to call Mr. Incantalupo, and told him that he was sitting by the phone waiting for his call.

Later that day, Ms. Misola asked Mrs. Huber to intervene and ask Mr. Haeber to call Mr. Incantalupo. Mrs. Huber testified that she did so, and again asked whether the job was complete, because she had filed the claim and "needed him to back her up". Mrs. Huber testified that Mr. Haeber confirmed the job was complete, and that he had left several messages for Mr. Incantalupo.

Later that day, Mrs. Huber called Mr. Incantalupo. He told her that he had been sitting by his telephone all day and that he had not received a call from Mr. Haeber. Mrs. Huber then called Mr. Haeber again and asked him if he had called Mr. Incantalupo. He told her that he had tried several times, and had left messages. Again Mrs. Huber asked him whether the RMC job had been completed, and his reply was that it was "to the best of his knowledge".

At that point, Mrs. Huber felt Mr. Haeber was not truthful with her, so she and Ms. Misola pulled all the RMC job time cards. They showed that Mr. Oliver was the last person on the job site, and that his notations indicated that the job was not complete. She said that, on the evening of June 6, her husband called Mr. Oliver. He confirmed that the job was not finished, and that Mr. Haeber was aware of that, and that Mr. Haeber had the telephone numbers of occupants of the two suites that were incomplete. Ms.

Misola confirmed Mrs. Huber's evidence in this respect. She testified that the last time any work had been done on site, according to the cards on file, was October 1999.

Mr. Oliver, who was the main installer on the RMC job, testified that, although he was on the site most of the time by himself, Mr. Haeber was his supervisor. Mr. Oliver said that the work took a long time to complete because some of it had to be scheduled with tenants who already occupied their units. He said that windows needed to be caulked in 2 units, and that he reported to Mr. Haeber that another worker would need to complete the job. Mr. Oliver testified that his time cards for his work contained notations as to the state of completion of a job. Mr. Oliver was the last person at the RMC job. His time card indicated that the RMC job was not complete.

Mr. Haeber denied that he was requested to contact Mr. Incantalupo after May 31, and specifically denied that he was asked to contact RMC on June 6. There is no reference to RMC in his diaries after May 31. In cross examination, Mr. Haeber testified that he could not remember whether Mr. Incantalupo ever told him that the job had been done. He acknowledged that he did get a page to call him, and did call, but was unsure of who he reached.

At the hearing, Haida submitted copies of Mr. Haeber's cellular telephone bills for April, May and June of 2001. None of those bills showed any outgoing phone calls to RMC. (EXHIBIT #1)

Mr. Haeber testified that he was "dumbfounded" by the telephone records, and was certain that the job had been completed, but was not sure by whom. He acknowledged that he did not check any of the time cards to find out. He later suggested that the reason the cell phone records did not show any calls on May 31 were because the calls were made to RMC's cell phone and that there would be no record of calls if there was no answer.

Mr. Incantalupo sent a letter to Haida outlining Mr. Haeber's involvement in the project, which was provided to the delegate. It indicates that all RMC's dealings were with Mr. Haeber, that he made several attempts to contact Mr. Haeber but his calls were not returned, that in the end workers were only showing up for 2 hours a day, and that, ultimately, the work contracted for was never completed.

On June 7, 2001, Mr. Huber advised Mr. Haeber that his employment was terminated.

On June 20, Ms. Misola received a phone call from Mr. Haeber. She testified that he told her that, if he did not receive his full claim for wages and statutory holiday pay, he would pursue a fraud claim against both her and Haida, and report her to her professional body. The threat arose over an eyeglasses claim made under an extended health benefit plan, the details of which are not pertinent here. Ms. Misola testified that she was shocked and shaken up by Mr. Haeber's threat, and wasn't sure how she should deal with it.

Since filing the complaint with the Employment Standards Branch, Mr. Haeber has also threatened to pursue a civil action against Haida for "liable, slander, defamation, misappropriation or fraud."

After Mr. Haeber's employment was terminated, the principals of one of its suppliers, Western Glass and Mirrors, advised Haida that, on a few occasions when Mr. Haeber picked up materials at the shop, they smelled alcohol on his breath. They also stated that, at the time, Mr. Haeber's vehicle was loaded with glass products.

Mr. Kinvig testified that, although did not ever see Mr. Haeber drinking on the job, from time to time, he would smell alcohol on his breath and see beer bottles in his workplace.

Mr. Veale also testified that, although he never saw Mr. Haeber drunk on the job, on one occasion he smelled alcohol on his breath. When Mr. Veale questioned him about this, Mr. Haeber told him that he had one beer with a customer. One Saturday, Mr. Veale testified that he saw Mr. Haeber at a bar. Because Mr. Haeber had driven the company vehicle there, and was impaired, Mr. Veale drove him home and told him not to pick up the truck until the following day.

Mr. Haeber denied that he drank on the job.

ARGUMENT

Haida submitted that the delegate erred in concluding that Mr. Haeber was not a manager before November 28, 2000. It contended that Mr. Haeber was not entitled to overtime, and had been paid in full for all hours worked. It argues that the delegate erred in preferring Mr. Haeber's unsubstantiated denials over Haida's documented evidence even when they were directly contradictory or just plain wrong. It contended that Mr. Haeber had and exercised significant powers of independent action, autonomy and discretion.

Haida also argued that it had just cause to terminate Mr. Haeber's employment, and that, at no time, did it condone Mr. Haeber's conduct after it sent him a letter warning him that his job was in jeopardy.

Mr. Haeber argues that the Determination ought to be upheld. He contended that he was not a manager, and did not exercise the responsibilities attributed to him.

The delegate submitted that Haida produced no evidence to indicate that Mr. Haeber was aware that his job was in jeopardy after his "job performance dated November 28, 2000, a documents which had clearly indicated he was not in agreement with". The delegate further contended that "the overwhelming amount of information provided by Haida made it impossible to investigate each and every incident", but that she did investigate the RMC incident. The delegate submitted that the RMC incident had been included in the November letter.

ANALYSIS

Credibility

As noted above, the delegate had much of the evidence before her that I had, albeit in affidavit form. However, for unexplained reasons, she preferred the evidence of Mr. Haeber, which consisted essentially of general denials, over the affidavit evidence of Mr. and Mrs. Huber, as well as the documentary evidence provided by Haida.

The leading decision on determining the credibility of witnesses is *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.):

The real truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (at p. 356-7)

I have also considered the motives of the parties, their relationship to each other, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence.

As noted above, I heard oral evidence under oath from Haida's owners, Mr. Kinvig, Mr. Oliver and Ms. Misola, as well as Mr. Haeber. Mr. and Mrs. Huber and Mr. Veale repeated their affidavit evidence at the hearing. Their evidence was subject to cross examination. I found Mrs. Huber and Ms. Misola, in particular, to be credible witnesses. Their evidence was forthright and consistent. It is clear that Mr. Huber and Mr. Veale had long standing personal relationships with Mr. Haeber and it appeared they had some difficulty giving evidence that may have portrayed him negatively. Nevertheless, I also found their evidence to be credible. I also found the evidence of Mr. Oliver and Mr. Kinvig, neither of whom continues to work for Haida to be credible. They had nothing to gain in appearing to give evidence on Haida's behalf, and I find they gave their evidence in a straight forward manner.

I found Mr. Haeber to be a less than credible witness. Mr. Haeber's evidence consisted, in essence, of general denials of responsibility, an inability to recall details, and denials that any of the allegations had any factual basis. His explanation about why his cell phone records did not show calls to Mr. Incantalupo were incredible. He has repeatedly claimed he intends to pursue further legal action against Haida, and has threatened to report Ms. Misola to her professional association.

However, despite his general denials, Mr. Haeber did not dispute much of the critical evidence. For example, as noted above, he did not dispute that he had evening telephone conversations with Ms. Misola, at least one other female employee or a female customer that were unwanted and caused them some distress. He acknowledged that Mrs. Huber found important paperwork on his desk that had a negative impact on the business. He did not dispute that Haida received a large number of telephone messages complaining about his failure to return calls.

Therefore, where the evidence is conflicting, I prefer the evidence of the Hubers, Mr. Veale and Ms. Misola over that of Mr. Haeber.

Was Mr. Haeber a manager?

Section 34(1)(f) of the Regulations provides that part 4 of the Act (that part relating to overtime wages) does not apply to a manager.

Having reviewed the submissions of the parties, I find that the delegate erred in concluding that Mr. Haeber was not a manager for the period June 8, 1999 until November 28, 2000.

Manager is defined in section 1 of the Regulations as

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

How parties define their relationship is only marginally relevant to determining whether or not an employee is a manager. The true test is the actual authority exercised by the employee, not the authority that might be set out in a position description.

There is no dispute that Mr. Haeber was not employed in an executive capacity. He had no involvement in budgeting or setting goals or directions for Haida, nor did he have any ability to make final decisions about the operation of the business, apparently to his displeasure.

Therefore, the issue is whether his primary employment duties consisted of supervising and directing other employees.

In *429485 B.C. Ltd (c.o.b. Amelia Street Bistro)(Re)*, the Tribunal said that a conclusion as to whether a person falls within the provisions of s. 1(a) :

...depends on a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business.

(see also *Northland Properties Ltd.* BC EST #D423/98, in which sections 1(a) and (b) were comprehensively considered).

The burden of establishing that a person is excluded from the protection of the *Act* or any part of it lies with the person asserting it, and there must be clear evidence justifying that conclusion. (see *Northlands*).

The delegate concluded that Mr. Haeber was not a manager. She wrote:

Although Haeber had some supervision duties, such as scheduling staff, and some input into things such as staff vacation, and employee evaluations, it would appear that the final say in these issues would be the Huber's. (sic)

Haida also did not appear to perceive Haeber as on the Management team as when Haida states that a customer finally contacted Management to complaint, which is an indication that Haeber was not part of this Management team. (sic)

Haida agreed that Vacation time had to be submitted to Rick Huber, and that Rick and Diane arranged interview and did the hiring, and that Haeber was not officially empowered to fire employees under his supervision. Haida's also agreed that Rick and Diane Huber and Haeber attended and signed the performance assessment meeting with the employees. All these examples indicate that although Haeber did have input some of the areas pertaining to scheduling and supervision it was very limited responsibility. Haeber clearly did not have independent action, autonomy and discretion or final judgments about most of the issues dealing with Haida. (sic)

She concluded that Mr. Haeber's primary duties related to scheduling jobs, communicating with installers and overseeing time card submissions.

Mr. Haeber was responsible for ensuring that a job was completed. That meant he was responsible for overseeing the installers' work as well as the work itself. He scheduled the crews to achieve a goal. How and when the employees worked, with whom they worked, and where they worked, was his sole discretion and responsibility. He had the responsibility of pairing junior installers with more senior ones, and determine which crew to send to any particular job. He was Haida's public face, or the person the customer spoke to about the job. He was responsible to Haida for the installers' work.

I do not accept Mr. Haeber's argument that overtime was dictated by customer requirements. There was no dispute that he had significant authority and discretion when it came to job completion. If customer requirements dictated overtime, Mr. Haeber must have authorized it because he was the only person who knew what duties the job entailed. There is no evidence Mr. Haeber was required to seek permission from Mr. Huber or Mr. Veale to schedule overtime work, or that he in fact sought their permission when crews worked overtime.

Although Mr. Haeber contended that only a small part of his day was spent supervising installers because he was not on site, it is not necessary for a supervisor to be physically present at the job site at all times. His absence does not equate to a lack of responsibility for the job performed. Mr. Haeber said that he relied on the installers' reports, and assumed that work was completed competently. He said that the only time he inspected work was when a customer complained. Mr. Haeber cannot claim that he was not a manager by suggesting that he did not exercise supervisory responsibilities. It was his duty to do so. Given that he inspected a job when a customer complained indicates that he was responsible for the job. Mr. Haeber did not dispute Mrs. Huber's evidence that he dismissed one installer without either Mr. or Mrs. Huber's knowledge. I can only infer that was because Mr. Haeber was unhappy with the installer's job performance. Significantly, Mr. Haeber was not disciplined for taking this step.

The evidence of Mr. Oliver and Mr. Kinvig is that they considered Mr. Haeber their supervisor, went to him for assistance, and accounted to him for their time.

The evidence is that Mr. Haeber had significant autonomy at Haida. He was given freedom to manage his own time, had full use of a company vehicle, and did not directly report to anyone. Although Mr. Haeber did not have sole authority to hire and fire employees, his participation and input into employee hires and fires was given significant weight.

I find that Mr. Haeber participated in the reviews of some employee's performances, either physically or by way of verbal input to Mr. and Mrs. Huber. His signature is on several appraisal reports from 1999. No one else at the company could evaluate the installers' performance. I do not accept Mr. Haeber's denial of any input in this area.

Having regard to all of the evidence, on balance, I accept that Mr. Haeber's primary employment duties consisted of supervising and directing other employees. Therefore, I conclude that Mr. Haeber was a manager, and not entitled to overtime wages for the period June 8, 1999 to November 28, 2000.

Was Mr. Haeber's employment terminated for just cause?

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

To substantiate just cause for this first category, an employer must meet a four part test:

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.

(see: *Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97)

I find that Haida communicated a reasonable standard of performance to Mr. Haeber and gave him a sufficient period of time to meet the required standard in the November letter. Although Mr. Haeber claimed that the complaints had not been substantiated, and the delegate made no findings on whether they were or not, I conclude, on the evidence, that Haida's concerns were well founded. Although Mr. Haeber contended that the messages complaining about his failure to return phone calls were not directed to his performance, the evidence is overwhelming that they were. Furthermore, Mr. Haeber did not dispute calling female employees or customers of Haida. That behaviour stopped after the letter was sent. Mr. Haeber acknowledged that he did not turn in time cards in a timely fashion, and that he misplaced important paperwork causing a delay in invoicing (and thus payment).

The delegate expressed concern as to whether the letter "had any effect" because Haida did not dismiss Mr. Haeber when he failed to adhere to the standards set out in the letter. She also found that Haida did not establish a time frame to improve the performance, and that it did not dismiss Mr. Haeber for a further 6 months, "allowing further instances of the alleged problems to continue to occur before Haeber was dismissed." The delegate concluded that Haida had "clearly condoned" Mr. Haeber's actions by being lenient and allowing him to continue to work for 6 months after the letter was issued.

Factors relevant to determining whether an employer condoned an employee's conduct include:

1. whether the employer had knowledge of the employee's misconduct, disobedience, neglect of duty, incompetence or other impugned conduct;
2. whether, as a matter of fact, and despite that knowledge, the employer condoned the employee's wrongdoing by electing to continue the employment;
3. whether the employee has satisfied the onus of proof, on a balance of probabilities, that the employer condoned the employee's transgressions;
4. whether the employer intended to condone the employee's misconduct or shortcomings, and intention may be inferred from the employer's act or omission, including delay;
5. whether the employer decided to dismiss the employee within a reasonable period of time, having regard to the nature of the alleged transgressions or shortcomings, as well as other relevant factors such as length of service, position and the employer's other relevant communications;

6. whether the employer breached the implied conditions of future good conduct, to which condonation is subject, such that the previous condoned misconduct may be invoked upon the occurrence of the other misconduct; and
7. whether the employee specifically pleaded condonation.

(Echlin & Certosimo, *Just Cause, The Law of Summary Dismissal in Canada*, (Canada Law Book, 2002) at para. 7:110)

Haida was aware of Mr. Haeber's misconduct. It provided him with a warning letter setting out all the areas in which his performance was considered unacceptable. Haida elected to continue his employment on conditions (the probationary or "transition" period), and indicated that any further difficulties would result in his termination.

Although the letter did not set out a specific time frame within which Mr. Haeber's performance was to improve, the time frame must be a reasonable one. I do not find a six month probationary period to be unreasonable in these circumstances. Mr. Haeber was a very experienced and valuable employee. Indeed, Mrs. Huber testified that Haida had yet to replace Mr. Haeber with someone of equivalent skill and knowledge. He had been a long time employee of Old Haida Glass, working alongside Mr. Veale and Mr. Huber. He was trusted, and considered part of the management team.

In my view, there is no evidence that Haida's actions could lead to Mr. Haeber's belief that his behaviour had been accepted. Haida provided the delegate with a number of sworn and unsworn documents regarding Mr. Haeber's continued failure to respond to customer concerns, his failure to attend job sites, and providing them with inaccurate information on the state of completion of jobs leading them to lose several valuable customers. The delegate acknowledged that Haida's evidence indicated they were not satisfied with Mr. Haeber's performance "over and over and over again", and that the ongoing problems were being brought to Mr. Haeber's attention. However, she then concluded that there was "no evidence that Haeber was aware that there were any more problems." (my emphasis) It is not clear to me why the delegate placed more weight on the uncorroborated, unsworn evidence of Mr. Haeber than the sworn evidence of Haida's principals that he was warned repeatedly. I prefer the evidence of Mr. and Mrs. Huber and Ms. Misola over Mr. Haeber's denials. Mr. Haeber put forward no evidence at all that Haida condoned his misconduct, and on the evidence presented, I do not accept that he could not have known that his performance was not satisfactory.

Mr. Haeber was on notice that his performance was unsatisfactory. It did not improve. Haida was entitled to rely on his previous misconduct upon the when it terminated his employment on June 7, 2001 as a result of his misconduct on the RMC job.

Mr. Haeber was the person responsible for the RMC job. He assured Mrs. Huber that the RMC job was complete, and was aware she had issued invoices on the strength of his assurances. He knew that Haida had instituted legal proceedings to recover payment. He also knew RMC had filed a counterclaim alleging that the work was not complete. He knew Mr. Incantalupo was trying to contact him. Mr. Haeber claimed that he attempted to contact Mr. Incantalupo on May 31 and was unsuccessful. The evidence does not support his assertions. Although Mr. Haeber claims he was never asked to call Mr. Incantalupo after May 31, I find that he was. However, even if he was not asked to call, it is difficult to understand why he would not. Given Mr. Haeber's responsibilities and his knowledge about the legal proceedings, by May 31 he ought to have been concerned about the state of completion of the job, and taken positive steps to

continue to try to contact Mr. Incantalupo, even without a request by Mrs. Huber. I find that his failure to make any inquiries into the state of completion of the job was neglect of duty.

I find that Mr. Haeber's misconduct on the RMC job justified dismissal, and discharged Haida's statutory obligation to pay compensation for length of service.

Given my conclusion on this point, I need not consider whether the evidence of Mr. Haeber's threats to Ms. Misola after his employment was terminated, or Haida's subsequently acquired knowledge of Mr. Haeber's alleged use of alcohol while on the job provides further support for his termination.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 18, 2002 be cancelled.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal