EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

The Governor and Company of Adventures of
England Trading into Hudson's Bay
operating as the Hudson's Bay Company

("The Bay")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/70

DATE OF HEARING: May 9, 1997

DATE OF DECISION: June 9, 1997

DECISION

APPEARANCES

Colin Fortes	For Susan J. Manning
Lorene Novakowski	For The Bay

OVERVIEW

This is an appeal by The Governor and Company of Adventures of England Trading into Hudson's Bay operating as the Hudson's Bay Company ("The Bay") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against a Determination dated January 14, 1997 of the Director of Employment Standards (the "Director"). This is a preliminary decision which concerns the admissibility of videotape evidence.

ISSUE TO BE DECIDED

The issue is whether certain videotape evidence is admissible.

FACTS

Susan Manning ("Manning") was employed as a sales clerk by the Bay in its Langley Store, at the Shiseido Counter of the cosmetics department. On August 19, 1996, she was dismissed and subsequently filed a complaint with the Employment Standards Branch alleging that her employment had been unjustly terminated for breach of policy. Following an investigation, the Employment Standards Officer ("ESO") concluded that the Bay did not have just cause to dismiss Manning and that she was owed $1,102.64. The Bay is appealing this conclusion.

An oral hearing in this matter commenced at the Employment Standards Tribunal offices on May 9, 1997. As the parties began their case, an issue arose concerning the admissibility of videotape evidence which the Bay offers to substantiate just cause. The hearing was adjourned for written submissions on the admissibility of the videotape. The two questions to be canvassed by counsel were:

1. Is the videotape evidence admissible in these proceedings even though it does not appear as if it was considered by the ESO when making the original determination?

2. Is notice required for the videotape to be admitted into evidence in these proceedings?

The termination was based, in part, on evidence secured by Patricia Likness, one of the Bay's internal investigators. The Bay had received information about Manning's conduct and decided to order a further investigation. Likness installed a video camera at the Shiseido Counter; the camera was visible and Manning acknowledges that she knew of it. Six hour tapes were installed in the machine and 18 to 20 tapes were produced for a total of approximately 120 hours. Likness viewed all of the tapes and edited them into a 1/2 hour long videotape purporting to show to relevant portions of Manning's conduct. This tape was made one day before the oral hearing and was brought to the hearing; neither Manning nor her counsel were offered an opportunity to view the edited version of the videotape prior to the oral hearing. Approximately one week prior to the hearing, counsel for the Bay contacted the Employment Standards Tribunal to ask about the procedure for admitting videotape evidence and was told admissibility would be determined by the adjudicator assigned to hear the appeal.

On August 16, 1996, Likness met with Manning and Maureen McCarthy, head of Human Resources at the Bay Langley to discuss Manning's conduct. At that meeting, Likness advised Manning of, amongst other things, the existence of the videotape evidence. Manning was not offered copies of the videotape, nor did she ask to see them, but Likness produced a list which identified the relevant portion of the tape and a brief description of the offending actions. Three days later her employment was terminated. The description of the conduct was made available to the ESO and formed exhibit 1 to the Determination. It is unclear whether the ESO was offered an opportunity to examine the actual tapes and it does not appear that he requested an opportunity to view the tapes. It is clear that he knew they existed and that they were used by the Bay to make its decision to terminate Manning's employment.

On behalf of the Bay, Ms. Novakowski argues that that the appeal process cannot be used to make the case that should have been made to the Director's delegate (*Wayfarer Wholefoods Ltd.* BC EST No. 373/96) and the appellants cannot "sit in the weeds" by failing to cooperate with the Director. She argues that the Bay should not now be penalized for the delegate's "failure" to review relevant evidence. The Bay would be deprived of a fair hearing if it could not now admit the videotape evidence. As for the admissibility of the videotape in these proceedings, Ms. Novakowski argues that Manning has known that the Bay intended to introduce the video tape since May 2 but nevertheless did not demand disclosure or give notice of her objection prior to the May 9 hearing. The tapes, in their entirety, are available for viewing by Manning and she suffers no prejudice as she will have had sufficient time to view them and to prepare a response before this hearing resumes.

On behalf of Manning, Mr. Fortes argues that the videotape evidence is not admissible. He points to the narrow grounds for appeals to this Tribunal and argues that the videotape should not be admitted here as it is new evidence, and new evidence is not appropriately introduced at this stage in the litigation between the parties. He further argues that the employer did not disclose the video tape evidence with sufficient notice to Manning so that she is prejudiced. It would be inappropriate to cure her prejudice by the granting of an

adjournment since such prejudice cannot be compensated for by an award of costs as in court proceedings.

ANALYSIS

It is useful to begin the analysis in this decision with a discussion of videotape evidence in a the recent ruling from the Supreme Court of Canada in *R.* v. *Nikolovski* [1996] 3 S.C.R. 1197. Even though *Nikolovski* deals with the admissibility question in the context of criminal proceedings where the rules of evidence are more rigorous than those operating in this Tribunal, the court's discussion of the unique character of videotape evidence provides the background for the discussion in this case. In *Nikolovski*, the Crown sought to admit a videotape recording taken by a store security camera during a robbery as the sole evidence to identify the accused as the robber. After the Crown introduced the videotape into evidence, the store clerk testified that the videotape showed all of the robbery. Even though the clerk could not identify the accused as the robber, the trial judge relied on the videotape as the sole identification evidence in the case and convicted the accused. This was upheld by the Supreme Court of Canada.

In determining whether the evidence could be the sole basis for identification of the accused, the court noted that the

> . . . ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth. . . . The evidence adduced must be relevant and admissible. That is to say, it must be logically probative and legally receivable. The evidence may be that of eyewitnesses, or it may be circumstantial, including the production of physical evidence which is often termed "real evidence".

Despite the more relaxed evidentiary rules, evidence adduced in administrative tribunal hearings must be relevant and logically probative as in criminal proceedings.

The court described videotape evidence as cogent and accurate. Speaking for the majority, Cory, J. stated:

> A tape, particularly if it is not challenged as to its accuracy or continuity, can provide the most cogent evidence not only of the actual words used but in the manner in which they were spoken. A tape will very often have a better and more accurate recollection of the words used and the manner in which they were spoken than a witness who was a party to a conversation or overheard the words. . . .

> The courts have long recognized the frailties of identification evidence given by independent, honest and well-meaning eyewitnesses. . . . It cannot be forgotten that a robbery can be a terrifyingly traumatic event for the victim and witnesses. Not every witness can have the fictional James Bond's cool and unflinching ability to act and observe in the face of flying bullets and flashing knives. Even Bond might have difficulty accurately describing his would be assassin. He certainly might earnestly desire his attacker's conviction and be biased in that direction.
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> The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

The court called videotape a "powerful and probative record" and said that as long as it "is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identify of the perpetrator". Once the videotape is admitted into evidence, the trier of fact determines the weight of the evidence on the videotape, as in the case of viva voce testimony of eye witnesses.

While there can be little doubt as to the value of videotape as evidence before a trier of fact, proceedings before this Tribunal provide a narrow scope for fact finding, as appeals are not in the nature of a rehearing. Section 107 of the *Act* grants the Tribunal the authority to conduct an appeal in the manner it considers necessary:

> *107. Subject to any rules under section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.*

The wording of the section confers broad discretion on this Tribunal to determine the nature of the appeals before it. Evans, et al in *Administrative Law* (4th Ed.) describe a range of appeal options:

> Rights of appeal seem to fall broadly into three categories. The narrowest is the appeal on the record, in which the appellate body reviews the original decision for error on the material that was before the tribunal of first instance. Fresh evidence is not admissible on appeal, and any changes in the facts or the law that occurred between the time of the first decision and the hearing of the appeal are not taken into account. At the other extreme, an appeal may take the form of a trial *de novo*, in which the appellate body makes findings of fact on the evidence presented to it, decides any question of law and exercises any discretion for itself, without

> regard to the conclusions reached by the tribunal below. Tax appeals are typically of this kind.
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> Perhaps the most common form of appeal, however, is that often described as an appeal by way of rehearing. This falls between the very narrow and very broad types of appeal described above. The function of the appellate body in this intermediate category is to decide whether the original decision was wrong but, in reaching its conclusions, it may consider both the material before the original tribunal - its findings and conclusions - and any fresh evidence submitted by the parties. Relevant changes in the facts or the applicable law are also taken into account.

The fact that Section 107 of the *Act* makes an oral hearing optional suggests that the provision does not contemplate a trial de novo. This provision is also a change from the previous statutory provision which called for an appeal to court by way of a *trial de novo* and a *trial de novo* is an extraordinary type of appeal. (*Dupra* v. *Mason* (1994) 99 B.C.L.R. (2d) 266 (B.C.C.A.) Moreover, the *Act* does not spell out narrow grounds for appeal so that it is unlikely that the Legislature intended appeals to be based on narrow questions of law with no scope for additional evidence. The middle ground was endorsed in other decisions of this Tribunal, including *John Ladd Imported Motor Car Co.* v. *B.C. Director of Employment Standards* B.C.E.S.T. #D313/96.

There are a number of procedural characteristics of this type of appeal. One important consequence is that the evidence admissible on appeal will be limited. As noted in *Kaiser Stables* B.C.E.S.T. D58/97, a party which did not participate or cooperate in the initial inquiry process with the Director is not free to challenge the Determination "with evidence it acknowledged it did not give to the Director as requested." In other words, a party may not 'lie in the weeds' by refusing to participate and then be at liberty to challenge the determination with evidence that ought to have been made available in the first instance.

Previous decisions of this Tribunal have dealt with certain aspects of the admissibility of videotapes and audiotapes. In *Data Enterprises* B.C.E.S.T. #D372/96, the adjudicator refused to admit testimony which summarized the contents of a videotape offered into evidence by the employer. A videotape had been made of the employee's conduct but was not offered into evidence before the Tribunal. Instead, the employer attempted to rely on a police officer's description of what occurred on the tape and the adjudicator refused to rely on the hearsay testimony. The adjudicator reasoned that this was hearsay evidence and not helpful in assessing the employer's allegation of theft. In *Karen Schafflik* B.C.E.S.T. #D332/96, the adjudicator refused to admit a tape recording of a message left on an answering machine as she noted that the parties could adduce *viva voce* evidence on this point and could have cross examined on it. Also, she was not persuaded that the method used to produce the recording and transcription ensured an accurate representation of the conversation between the parties. These cases were based on facts which differ considerably from this case which deals with the admissibility of videotapes taken of Manning at her work station and the admissibility of an edited version of those tapes.

In this case, the videotapes existed at the time of the termination; Manning realized this and understood that the contents of the tapes formed part of the reason for her dismissal. While Manning did not view the tapes at any time prior to or after her dismissal, they were available the ESO who was investigating Manning's complaint. He was given a written description of some of the contents of the video which was appended as Exhibit 1 to the Determination. He did not apparently view the 120 hours and the edited version was not yet available. Once an oral hearing was ordered, counsel for the Bay contacted the Tribunal to determine the procedure that would govern admissibility of the videotape and was told that this would be decided by the presiding adjudicator.

Evidence offered for the first time in Tribunal proceedings must be scrutinized very closely. Not only must it pass the threshold test of relevance and probative value, it must also overcome the constraints placed on admissibility by a relatively narrow form of appeal. In this case, the employee, Manning, was aware that the videotape had been installed at her work station so that the existence of the tapes could not have been a surprise to her. She was advised at her meeting with Likness and McCarthy that the contents of the tapes formed at least part of the basis for her termination. The 120 hours of videotape was available to the ESO when he was investigating Manning's complaint and even though he did not undertake the considerable challenge of viewing all 120 hours, he could have. Instead, he chose to attach to the Determination a written summary of the evidence made available to him by Likness.

What is being offered into evidence for a first time in these proceedings is the edited version of the 120 hours. As such it is not “new” evidence. I understand that the 120 hours are still available for Manning's viewing (and that of her counsel) so that it is open to her to challenge the representative nature of the edited version prepared by Likness. If Manning believes that what is depicted on the edited version does not properly represent what happened, she will be able to view the original video tape and prepare an alternate edited version. If it is not open to her to do this, because the total 120 hours is no longer available or has been so badly altered in editing that it is not realistically open to her to produce a more representative version of events, the edited version will not be admissible.

Finally, there is a question of whether this evidence may be admitted because it was not made available to Manning or her counsel in accordance with customary Tribunal procedure requiring disclosure of evidence in advance of the oral hearing. There is a warning in correspondence from the Tribunal to submit evidence not formerly disclosed to other parties prior to the hearing. While the letter does not state it explicitly, failure to submit the evidence in advance places its admissibility in serious jeopardy and in most cases will render it inadmissible. Where the evidence was not previously disclosed, the party against whom the evidence is admitted can be severely prejudiced. The usual remedy for "surprise" in the admission of evidence is an adjournment and in civil litigation, costs against the party seeking to admit the new evidence. As pointed out by Mr. Fortes, an order for costs is not available in these proceedings so that at least part of the prejudice flowing from an adjournment cannot be dealt with. Nevertheless, a rule against the admission of new evidence must be applied to the facts of each case and there will be instances where justice demands the admission of evidence. This is one such case. A

significant factor in my decision is that it is only the edited version of the videotapes which is being made available for the first time and not the actual videotapes, and that it was only the edited version that had not been disclosed previously.

Finally, this ruling is made without regard to the evidentiary weight to be given to the videotape; the relevance and weight of the evidence contained on it will be determined when this hearing resumes and we deal with the merits of the appeal.

In response to the questions outlined at the beginning of this decision:

1. The videotape evidence is admissible in these proceedings even though it does not appear that they were considered by the ESO when making the original determination.

2. The notice requirements for admission of the videotape evidence has been met in the circumstances of this case.

The parties will be contacted by Tribunal staff to schedule a date for the resumption of the hearing.

ORDER

The videotape evidence is admissible to the extent outlined above.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal