

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

489535 B.C. Ltd. d.b.a. / Chalet Bakeries  
("Chalet.")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	John McConchie
<b>FILE NO.:</b>	96/214
<b>DATE OF HEARING:</b>	July 29, 1996
<b>DATE OF DECISION:</b>	August 20, 1996

**DECISION**

**OVERVIEW**

This is an appeal by 489535 B.C. Ltd. d.b.a. / Chalet Bakeries ("Chalet") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination No. CDET 001576 issued by the Director of the Employment Standards Branch (the "Director") and dated January 30, 1996. The Determination found that Chalet had contravened the *Employment Standards Act* by failing to pay compensation to the complainant, Agnes Wong-Russell, upon her termination from employment. The Determination required Chalet to pay the sum of \$842.40 to the complainant, who had left Chalet's service on September 8, 1995.

Chalet has appealed the Determination alleging that the complainant was not entitled to notice or payment in lieu of notice under Section 63 of the *Act* as it had offered reasonable alternative employment to the complainant and the complainant had refused it.

**FACTS**

Chalet Bakeries operates retail bakery outlets in the lower mainland. Dominique Dien and Tricia Cochran bought Chalet in June 1995. At that time, Agnes Wong Russell had already been working with the company for some three years, having begun her employment in July 1992 with the former owner. She worked at the New Westminster store, working four days a week excluding Wednesdays. On Sundays, she often worked at the company's Metrotown location.

Dien testified that Wong Russell was a good worker but that he and Cochran came to see that the New Westminster store was suffering from a lack of continuity in staffing.

Wong Russell's replacements on Wednesdays were not nearly as familiar as she was with store practices. They decided that this required a change. Dien testified that he spoke with Wong Russell on several occasions about changing her hours of work. He asked her to consider working full-time, but she declined as she had commitments on Wednesdays. She did agree to work a half-day on Wednesdays but this did not fit the company's plans, and so Dien rejected the offer. He testified that on several occasions he offered Wong Russell the opportunity to move to the company's Surrey outlet where she could retain her current schedule but that she said it was "too far" and asked to be laid off. It would have been acceptable to him for Wong Russell to work at the Surrey store four days a week, he said, because the store was staffed in any event by part-timers and Wong Russell's hours would therefore have represented an improvement in the continuity of service at that location.

Dien testified that he told Wong Russell that he would have to hire a new person to replace her. He testified that Wong Russell said that she would quit when he did this. Ultimately, sometime prior to September 5, 1995, the company hired a new full-time employee for the New Westminster store. Dien testified that he asked Wong Russell if she would stay and work with the new employee for a couple of days, and she agreed to do so. At close of business on Tuesday, September 5, Dien came to the store and asked Wong Russell for her keys. He did so, he testified, not as a means of confirming her termination but rather because there was only one set of keys for the New Westminster store, and he needed them for the new employee. Wong Russell asked him how she would get in on Thursday, and Dien told her that the store would be open when she arrived. Wong Russell worked for the last time on September 8th.

Cochran testified that she spoke with Wong Russell a short time after the latter's conversation with Dien. Wong Russell asked Cochran if the company was laying her off. Cochran testified that she told Wong Russell that the company was not laying her off but that instead she had two options. She could either work full-time at New Westminster or she could move to the Surrey store and work her usual hours. Wong Russell said she wanted her hours back at the New Westminster store, but Cochran replied that the company needed a full-time employee at New Westminster. Cochran said that she may have asked Wong Russell if she wanted to work her usual four days at New Westminster and add a Saturday, but Wong Russell declined. Cochran testified that the company was moving towards having full-time employees at all of the stores.

Wong Russell testified that when she was hired by the previous owner in 1992, she agreed to work a minimum of four days per week, and did so. At Christmas, she often worked more than five days in a week. She had seen the new owners only a few times before she took a vacation in July. On her return, Cochran asked her if she would work on Wednesdays but Wong Russell told her that she could not work Wednesday afternoons as she had a commitment teaching Tai-Chi to senior citizens. She could not recall Dien ever talking to her about working Wednesdays.

Wong Russell testified that she never spoke to Dien about working in Surrey.

On September 5th, the Tuesday, Dien came to the store near the end of the day and asked her for her keys because there would be someone working in the store on Wednesday. This had never happened before. She asked him how she would get into the store on Thursday upon her return, and he told her that someone would be in the store to let her in. She was puzzled because she knew that the company had never had two people working on the same day in the New Westminster store. She testified that she asked Dien if this person was going to be working there now and if she was laid off. Dien told her that he was not laying her off and wanted her to continue working for him, but that she was to take a rest. Dien told her that he was planning some other stores and wanted her to work in them, but that she should keep this information confidential. Wong Russell testified that she did not want a rest because she had just returned from vacation.

Dien came back to the store on Friday and said something to her about calling her later -- she could not quite understand what he was saying. She knew however that it was her last day and so she left the store and did not return.

Wong Russell testified that she later telephoned Cochran to find out what was going to happen with her employment. Cochran told her that if she did not wish to work full-time at New Westminster, she could give Wong Russell 11 hours of work on the weekends at the Metrotown store. She told Cochran that she could not survive on 11 hours, and Cochran replied that all of the company's positions were filled and that she could not do better. Wong Russell asked her if she was laying her off, and Cochran replied that she was not -- if Wong Russell did not want to work 11 hours, then this meant that Wong Russell was quitting. Wong Russell did not agree. Wong Russell also testified that there was no discussion at all about working in Surrey. The first time she heard about this was when she read a submission from the company which was filed in these proceedings. If the company had offered her the same hours in Surrey, she testified, she would have certainly taken them. The Surrey store was only nine minutes away by SkyTrain, her usual mode of transport, and there was no reason why she would not have worked in Surrey. However, the possibility was never raised by either Dien or Cochran.

**ISSUES TO BE DECIDED**

The issue in this case is one of fact. Did the company offer Wong Russell a position in Surrey with the same hours as she was working in New Westminster? If it did, by Wong Russell's own admission, the Surrey job would have constituted reasonable alternative employment. If she turned it down, section 65(1)(f) of the *Employment Standards Act* would operate to deny her any entitlement to notice or payment in lieu of notice. If the company did not offer an alternate position in Surrey, Wong Russell was terminated from her position at the New Westminster store without proper notice.

**ANALYSIS**

The evidence of Dien and Cochran conflicts with that of Wong Russell on the crucial issue of whether Wong Russell was offered reasonable alternative employment. In these circumstances, it is my task to make a finding on fact based on a determination of the credibility of the witnesses in the circumstances of this case. An assessment of credibility is made not to determine merely whether one or more persons are lying to the Tribunal but rather to determine which story is more probably true in all of the circumstances. It is possible for witnesses testify with sincerity, and yet be mistaken or untruthful. The passage of time and the introduction of self-interest can have this effect. The following excerpt from the B.C. Court of Appeal decision in *Farnya v. Chorny* illustrates the manner in which a determination of credibility must be made:

*“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth.*

*The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. **In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions** . . .” (Farnya v. Chorny (1952) 2 D.L.R. 354, B.C.C.A., my emphasis)*

In this case, I have decided that I must prefer the testimony of Wong Russell wherever it conflicts with that of Dien or Cochran. Wong Russell's testimony was consistent with the probabilities of the situation whereas the testimony of Dien and Cochran was not. I find that it is improbable that the company offered Wong Russell a position in Surrey with the same hours as she was working in New Westminster

There are two reasons for this. The first is that moving Wong Russell to Surrey would not be consistent with the company's objective of moving to full-time employment in the stores. Wong Russell could not work full-time as she had a commitment on Wednesdays which prevented it. It was not explained to me how the company would benefit by resolving one continuity problem in New Westminster by taking steps which would ensure the persistence of the same problem in Surrey. It may have been the case that Wong Russell's presence in Surrey would have been an improvement over the situation as it then existed in that store, but why not hire the full-time employee for Surrey first and then address the New Westminster continuity issue? The second reason is that, based on her history and her own testimony, which I accept, Wong Russell would have had no difficulty accepting an equivalent position in the Surrey store. As she said, the store was only nine minutes away by SkyTrain, which was her mode of transport. Prior to her vacation, she had been working on Sundays in Metrotown, which is considerably further away. She had worked at other locations during her employment with the company. There is no reason why she would not have taken the position if it had been offered.

I find that it was not offered, and that Wong Russell was therefore not given an offer of reasonable alternative employment with the company. She was therefore terminated without notice from her position at the New Westminster store. She was entitled to notice of termination or payment in lieu thereof under Section 63 of the *Act*.

**ORDER**

Pursuant to Section 115, I order that Determination No. CDET 001316 be confirmed.

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**John McConchie**  
**Adjudicator**  
**Employment Standards Tribunal**

JLM:jel