

An appeal

- by -

Elaine Waldrif  
("Waldrif")

- 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:** David B. Stevenson

**FILE No.:** 2003A/155

**DATES OF HEARING:** September 3, 2003, October 9, 2003,  
November 5, 6, 7 and 27, 2003

**DATE OF DECISION:** December 16, 2003

## DECISION

### APPEARANCES

Elizabeth Woods	on behalf of Elaine Waldrif
Robert Dennison and Judy Dennison	on behalf of CSA Care and Share Agency Ltd.

### SUBMISSIONS

Amanda Clark Welder	on behalf of the Director
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### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Elaine Waldrif (“Waldrif”) of a Determination that was issued on May 1, 2003 by a delegate of the Director of Employment Standards (the “Director”).

Waldrif had filed a complaint with the Director on June 7, 2002 alleging she was owed regular and overtime wages for a period from April 4, 2000 to January 10, 2002, statutory holiday pay and compensation for length of service. The Determination concluded the *Act* had not been contravened, a conclusion based on findings that Waldrif was a manager for the purposes of the *Act* and that her former employer, CSA Care and Share Agency Ltd. (“Care and Share”), had established just cause for her dismissal on January 10, 2002.

An appeal of the Determination was filed with the Tribunal on June 3, 2003. The appeal identified the grounds of appeal as error of law, failure by the Director to observe principles of natural justice in making the Determination and new evidence. The appeal submission alleged a bias against the Director and an error in law and breach of principles of natural justice arising from the manner in which the Director conducted the investigation, accepted evidence and assessed credibility. Essentially, the appeal challenged the conclusions of the Director that Waldrif was a manager for the purposes of the *Act* and that there was just cause for her dismissal.

The appeal and initial submission was supplemented by a more comprehensive submission from Waldrif’s representative, Elizabeth Woods, which was received by the Tribunal on July 18, 2003. Care and Share and the Director responded to the appeal and the submissions. It was apparent from the Determination, the record and the appeal submissions that credibility was, and continued to be, a central issue. The Tribunal decided an oral hearing was appropriate. The parties presented a total of nine witnesses over five days of hearing.

### ISSUE

The issues raised in this appeal are whether Waldrif has shown the Director erred in finding she was a manager for the purposes of the *Act* and that she was dismissed for just cause.

## THE FACTS

Some of the facts relevant to the Determination are not disputed. Care and Share operates a care home in Kelowna. The business operates out of two buildings that are in close proximity to each other. Within the business, one of the buildings is known as “B pod” and the other as “C pod”. Waldrif was hired by Care and Share on April 3, 2000 and terminated on January 10, 2002. Her rate of pay at the time of her termination of employment was \$1906.66 a month, paid bi-monthly. She received 4% annual vacation pay on wages paid in each pay period.

The Director concluded that Section 80 of the *Act*, specifically, subsection 80(1.1), limited any period of recovery to a six month period preceding her termination. That conclusion has not been appealed.

The Determination indicated there were three issues in dispute: whether Waldrif was a manager; if she was not a manager, whether she was owed overtime and statutory holiday pay; and whether she was dismissed for just cause.

The Director found that Waldrif was a manager for the purposes of the *Act*. That finding is set out as follows in the Determination:

A person may be determined to be a manager when some of their primary employment duties consist of the following:

- hiring or firing employees
- training, disciplining or evaluating the performance of employees
- budgeting or altering work processes
- regularly and frequently scheduling work (calling employees into work, or sending them home early)
- directing the work of other employees

Typically, managers have the ability to act independently and make final decisions about supervising and directing employees or the conduct of the business.

I accept the employer’s position that Ms. Waldrif and Ms. Klassen approached the employer about creating a new management structure upon Ms. Croft’s departure. I find Ms. Waldrif was delegated the authorities and responsibilities outlined on the job description dated May 24, 2000 (Appendix A) and that these duties support the conclusion that Ms. Waldrif was a manager as defined by the Regulation. I find that Ms. Waldrif’s assertion that Ms. Klassen was her immediate supervisor and that Ms. Klassen had all final decision making authority, is not consistent with the evidence provided by other employees nor is it externally consistent with the fact that the employer accepted a proposal from both Ms. Waldrif and Ms. Klassen to change the management structure within the organization.

I prefer the employer’s evidence that Ms. Waldrif had the authority and exercised her discretion with respect to hiring, firing, disciplining, training, scheduling and directing the day-to-day work of other employees. I prefer this evidence as it is corroborated by the statements provided by Ms. Klassen and the five co-workers as well as by the payroll documentation of other employee files, which reflect that Ms. Waldrif made hiring and firing decisions. Ms. Dueck’s written statement (provided by Ms. Waldrif) also confirms the finding that Ms. Waldrif had the authority to hire staff.

Furthermore, the fact that Ms. Waldrif was responsible for participating in management meetings during which the scheduling, staff levels and budgeting issues were discussed, (as was the case on December 5, 2001 and January 7, 2002) is also indicative of duties consistent with those of a manager.

Based on those findings, I have concluded that Ms. Waldrif was a manager as defined by the Regulation. Accordingly, and pursuant to Section 34(1) and 36 of the Employment Standards Regulation (attached), I have concluded that Ms. Waldrif is not entitled to overtime wages or statutory holiday pay.

As I have found that Ms. Waldrif was not a manager as defined by the Regulation I make no finding with respect to the credibility of the records she has provided.

The Director's findings on the issue of just cause were as follows:

In the case at hand, the fact that Ms. Waldrif disclosed information to other staff about budget cuts and possible staff reductions after attending a meeting with Ms. Dennison and Ms. Klassen on January 7, 2003 is not in dispute. Rather, Ms. Waldrif has acknowledged that she informed at least one other employee of the contents of this meeting. However, Ms. Waldrif claims that she does not recall having been instructed not to discuss this information. On the other hand, Ms. Dennison and Ms. Klassen are both clear on the point that during the meeting Ms. Waldrif and Ms. Klassen were instructed not to discuss the issues regarding budgeting and staffing with other staff. Given the nature of the issues discussed at the meeting I prefer the employer's evidence that Ms. Waldrif was instructed not to share this information with the other staff. A practical and informed person would likely recognize that disclosing potential staffing reductions to staff prior to any final decision being made with regard to such issues would not be in the best interest of the business. This makes the employer's evidence more plausible than Ms. Waldrif's evidence.

Having made the finding that Ms. Wildfire was instructed not to discuss the issues of the meeting on January 7, 2002 with other staff and the finding that she in fact discussed these issues with at least one other employee, I have concluded the employer had just cause to terminate Ms. Waldrif. Ms. Waldrif's actions constituted wilful misconduct and a breach of trust and as such, I find she behaved in a manner inconsistent with the continuation of her employment.

In the appeal and appeal submissions, Waldrif and her representative, Mrs. Woods, assert the above findings contain errors of law, "some of which proceed from erroneous findings of fact". The errors which are alleged are identified in the following excerpts from the appeal and appeal submissions:

"... an error in law occurred when the Director disregarded my testimony that I did not in fact receive a memo/job description dated May 24, 2000, nor an enclosure. However, Ms. Welder accepted the Employer's statement that I did not submit a request for monies owing to me on November 23, 2001. It is this bias in favour of probability that I believe is an error in law." (appeal submission – June 2, 2003)

"I relayed messages to employees on Ms. Klassen's behalf, that were of a managerial nature, but I did not initiate any managerial activities. There is no evidence that I performed such, nor was the survey of staff appropriate. Incidentally, I did not attend any meetings at which Mr. Dennison was present. (appeal submission – June 2, 2003)

"I asked that Ms. Welder discuss the form responses with employees, but she declined. Additionally, I advised Ms. Welder that I was aware that one employee had indicated on the form

that I was “head cook” but that form was not amongst the others returned to Ms. Welder. I asked Ms. Welder to follow up with that employee, but she did not.” (appeal submission – June 2, 2003)

“After recounting the evidence submitted by both parties, Ms. Welder makes a number of findings of credibility in favour of the Employer to the prejudice of Ms. Waldrif. In at least one instance, her reasons for doing so are not stated; in others, her reasons are insufficient or not supported by the evidence before her.” (appeal submission - July 18, 2003)

“Overall, Ms. Welder’s various decisions on credibility do not demonstrate a fair balancing of probabilities based on an objective and reasoned view of the facts before her. She failed to consider the whole context of the situation before her, and did not take crucial facts (such as the source of the questionnaire) into account when making her decisions. Her choices regarding which evidence to accept is therefore flawed, and the factual basis upon which she bases her legal analysis is consequently erroneous. This misunderstanding of the key facts in this case have led to a misapplication of the law to the circumstances.” (appeal submission – July 18, 2003)

“Having started from a flawed interpretation of the law, Ms. Welder’s decision on this point[whether Waldrif was a manager for the purposes of the *Act*] cannot stand. But her misinterpretation of the law flows into her analysis as well.” (appeal submission – July 18, 2003)

“In making this decision [that Waldrif was terminated for just cause], however, Ms. Welder failed to consider 3 crucial issues.” (appeal submission – July 18, 2003)

During the investigation, the Director received evidence and argument from Care and Share and Waldrif, spoke with several past and present employees and with a friend of Waldrif. The Determination included reference to the following information:

- Waldrif was originally hired as a cook. At the time, Care and Share had two managers, Beverley Klassen (“Klassen”) and Judy Croft, with each responsible for managing one of the “pods”. Ms. Croft left in, or around, May 2000.
- After Ms. Croft left, Klassen and Waldrif approached “the employer” proposing a change in the management structure. They suggested dividing management responsibilities by function rather than by “pod”, with Klassen taking responsibility for overseeing the care aides and Waldrif taking responsibility for overseeing the cooks and housekeepers. The proposal was accepted. The Determination attached a memo from Rob Dennison to Waldrif dated 24-May-00, re Cook/Housekeeper Management Proposal, which Waldrif said she had neither seen nor received a copy of.
- Waldrif was responsible for managing 4 to 6 employees at any given time. She interviewed and hired several employees.
- Waldrif was responsible for the day-to-day operation of the food and housekeeping programs. She hired, trained, scheduled, disciplined and fired employees.
- Waldrif participated in management meetings to discuss staffing levels and budget.
- The employer provided to the Director a number of questionnaires completed by employees who “reported to” Waldrif that identified her responsibilities.

- Waldrif was responsible for scheduling and recording the hours worked by herself and other employees and provided to Mrs. Dennison daily records of hours worked for employees other than herself on a regular basis for payroll purposes.
- Waldrif did not record any of her own hours after she assumed her management position.
- Waldrif provided the Director with a record of hours worked and with a letter dated November 23, 2001 requesting, among other things, clarification of her job duties and hours of work. In the letter, Waldrif said she had been working 50 hours a week, as follows:
  - Monday 6:00 am to 6:30 pm (1/2 hour lunch) = 12 hours
  - Tuesday 6:00 am to 6:30 pm (1/2 hour lunch) = 12 hours
  - Wednesday 6:00 am to 1:00 pm (no lunch break) = 7 hours
  - Thursday 6:00 am to 6:30 pm (1/2 hour lunch) = 12 hours
  - Friday 6:00 am to 1:00 pm (no lunch break) = 7 hours
- Robert and Judy Dennison (the “Dennisons”), the owners of Care and Share, say they did not receive the letter dated November 23, 2001 and were never informed that Waldrif had any concerns with her hours worked.
- On December 5, 2001, Mrs. Dennison, Klassen and Waldrif met to discuss staffing needs and costs. Waldrif was asked by Mrs. Dennison to provide schedules for her and the staff she was responsible for managing, but did not produce the information requested.
- The Dennisons provided a comparison of hours worked by the housekeeping/cooking staff prior to and after Waldrif’s dismissal.
- On January 7, 2002, Mrs. Dennison, Klassen and Waldrif met to discuss staffing reductions. Klassen and Waldrif had been asked to analyze their departmental staffing needs and to determine if it would be possible to reduce some hours. Klassen and Waldrif presented their proposals. At the end of the meeting Mrs. Dennison asked both Klassen and Waldrif not to discuss the contents of the meeting with anyone until Mrs. Dennison had a chance to discuss some alternatives with Care and Share clients.
- Waldrif informed staff of the contents of the meeting, indicating to some they would be losing their jobs. The Dennisons became aware of Waldrif’s actions when staff began questioning Klassen about the potential of losing their jobs.
- Waldrif was terminated by Mrs. Dennison on January 10, 2002. Waldrif was presented the option of resigning, but refused.
- The Dennisons also became aware that Waldrif was attempting to organize a union certification of the employees at Care and Share, but say her termination was unrelated to her union activity.
- Waldrif received a decision from the Board of Referees (Employment Insurance) which found Waldrif’s conduct did not constitute misconduct under the employment insurance legislation. The Dennisons did not participate in the employment insurance hearing.

- Klassen was Waldrif's immediate supervisor when she was promoted to head cook/housekeeper and performed her head cook/housekeeper responsibilities, including hiring, training, disciplining, firing and scheduling employees, under the direction and control of Mrs. Dennison and Klassen.
- Waldrif performed cooking and housekeeping duties.
- Other persons at Care and Share besides Waldrif trained new employees to cook/housekeeper duties.
- Waldrif did not do any performance appraisals of employees.
- Waldrif discussed her hours of work with Mrs. Dennison on November 26 and December 5, 2001.
- Klassen brought a schedule for the cook/housekeepers to the December 5, 2001 meeting. Klassen made the decisions relating to scheduling and hours worked by other employees.
- Before she became head cook/housekeeper, Waldrif recorded her hours on daily time sheets, which were altered by Klassen if there were too many hours recorded. Once she became head cook/housekeeper, Waldrif no longer recorded the number of hours worked each day on daily time sheets. The cook/housekeeping staff gave their daily time sheets to Waldrif and given to Klassen for Mrs. Dennison, who did the payroll.
- On August 9, 2002, the Director informed Waldrif that without daily records of hours worked there would be insufficient evidence to prove her overtime claim. Waldrif stated she had a recollection of the hours she worked. On September 4, 2002, the Director met with Waldrif and discussed the number of hours she worked. Waldrif said she worked 50 hours a week as reflected in the November 23, 2001 letter and the schedule presented at the December 5, 2001 meeting. On October 22, 2002, the Director met with Waldrif and asked about the number of hours she worked. Waldrif said she regularly worked from 6:30 am to 7:00 pm on Mondays, Tuesdays and Thursdays and from 6:30 am to 1:00 pm on Wednesdays and Fridays. On October 28, 2002, the Director met with Waldrif and was presented with a journal in which Waldrif said she had recorded the hours she worked each day for the period July 1, 2000 to January 10, 2002. Waldrif also said the schedule in the November 23, 2001 letter was an estimate as she did not have her journal with her when she composed that letter.
- Waldrif provided a detailed submission to the Director, dated October 15, 2002, of events surrounding the termination of her employment
- Waldrif became aware in December 2001 of an intention by the Dennisons to restructure aspects of the business and re-organize the workforce.
- On January 7, 2002, Waldrif attended a meeting with Mrs. Dennison and Klassen regarding organizational restructuring and budgeting. Waldrif was told during this meeting that her head cook/housekeeper position would be taken away in February and she would, thereafter, only be responsible for housekeeping.

- Waldrif discussed the contents of this meeting with at least one other employee, Lori Chrest, and on, or about January 7 and 8, 2002, discussed the possibility of joining a trade union with a number of employees.
- On January 9, 2002, Klassen told Waldrif she was aware Waldrif had discussed the contents of the meeting with an employee. On January 10, 2002, Mrs. Dennison terminated Waldrif's employment.
- Klassen confirmed Waldrif had decision-making authority typical of a manager, that she was responsible for the cooking and housekeeping program, and had authority to hire, fire, train and schedule staff, and that when Waldrif was promoted to Manager of Housekeeping and Cooking, Mrs. Dennison met with her and reviewed the job description and duties.
- Klassen and Waldrif lived together for a period May to December 14, 2001. During that period Klassen never saw Waldrif's journal or day timer and did not believe she recorded her hours on a daily basis.
- Klassen never saw the November 23, 2001 letter.
- The schedule of housekeeping hours was created with Waldrif after a December 5, 2001 meeting regarding labour costs and scheduling where Klassen and Waldrif had been asked to prepare schedules and look for ways of reducing labour costs.
- In a meeting on January 7, 2002, Mrs. Dennison instructed both Klassen and Waldrif not to discuss the contents of the meeting with any of the staff or clients until plans were finalized.
- Waldrif was visibly upset at the meeting.
- On January 8, 2002, Klassen was approached by an employee, Lori Chrest, who was upset and told Klassen that Waldrif had said her hours would be reduced and there was potential for job loss. Klassen told Mrs. Dennison of the discussion.
- Five employees of Care and Share completed questionnaires prepared by Care and Share. The questionnaire asked employees to identify Waldrif's job duties and responsibilities and whether they were made aware of job cuts, service cuts and price increases to clients prior to Waldrif's termination. The employees identified Waldrif as the Manager of Housekeeping and Cooking and that she was responsible for all aspects of managing the housekeeping and cooking programs and staff. Lori Chrest confirmed that Waldrif had told her that hours would be cut.
- Margaret Elaine Dueck said she was hired by Waldrif and Waldrif led by example.
- Mrs. Dueck was told at a meeting on January 11, 2002 that Waldrif was dismissed and briefed on changes the employer intended to make.
- Judith Elliot, a friend of Waldrif, said she had assisted Waldrif in writing the November 23, 2001 letter. Ms. Elliot said Waldrif did not have her journal or day timer with her when the letter was being written, but indicated her belief that Waldrif worked the hours claimed.



It should be apparent from the above that there was a considerable amount of information made available to the Director by the respective parties. It should also be apparent that the Director was provided with competing views of the facts in several key areas and was required to choose between those competing views.

At the hearing of this appeal, I heard evidence from Tami Lessard and Mrs. Dueck, on behalf of Waldrif, and from Waldrif herself. I also received an affidavit from Melissa Elizabeth Lark Wilson. I have considered the evidence given in the affidavit, while recognizing Ms. Wilson was not subjected to cross examination on her evidence as other witnesses were.

I heard evidence from Ms. Chrest, Terren Mykytiw, Margit Stratten, Klassen, Mr. Dennison and Mrs. Dennison on behalf of Care and Share.

## ARGUMENT AND ANALYSIS

The burden is on Waldrif, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. The Tribunal has consistently said that an appeal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
  - (b) *the director failed to observe the principles of natural justice in making the determination;*
  - (c) *evidence has become available that was not available at the time the determination was made.*

The argument and analysis will address the two elements of the appeal separately, dealing first with the question of whether the Director made any reviewable error in finding Waldrif was a manager for the purposes of the *Act* and second with the issue of whether there is any reviewable error in the conclusion that Waldrif was terminated for just cause.

The *Act* does not allow an appeal to be based on an error on the facts alone. The Tribunal has recognized, however, that in some circumstances errors of fact can be considered an error of law where there is no evidence to support the findings of fact made or a view of the facts has been taken that cannot reasonably be entertained based on the evidence that was before the Director (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, [1998] B.C.J. No. 2275 (BCCA)).

The Tribunal has recently addressed the scope of review in the context of appeals based on error of mixed law and fact (see *Britco Structures Ltd.*, BC EST #D260/03). In that decision, the Tribunal concluded that errors of mixed law and facts which do not contain extricable errors of law are not reviewable under Section 112 of the *Act*.

In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, it was said that questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

### **The Manager Issue**

At the relevant time, the definition of manager in the *Regulations* read:

*“manager” means*

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

In this appeal, Mrs. Woods, on behalf of Waldrif, submits that the Director committed a number of errors of law, some of which proceeded from erroneous findings of fact. She argues that the Director made findings on credibility without providing any, or sufficient, reasons. She specifically addresses the finding that Klassen and Waldrif approached the Dennisons in, or around, May 2000 with a proposal to create a new management position for cooking and housekeeping and appoint Waldrif to that position, arguing that conclusion was reached without explaining why Waldrif’s denial of such events should be rejected.

She also argues that the Director’s acceptance and use of the questionnaires generated through the employer ignored the Tribunal’s prescription against determining a person’s status for the purposes of the *Act* by what some third party understood, rather than by law applied to the established facts.

Mrs. Woods submits the Director failed to evaluate credibility in the overall employment context at Care and Share, and in particular failed to take into account that at the time of her termination, Waldrif was involved in attempting to organize the employees to join a union, that Care and Share had resisted such an attempt in the past and the organizers of the previous effort had all left the workplace for one reason or another. She says that, at a minimum, the Director should have done a more detailed analysis of the potential impact on the evidence of Waldrif’s involvement in attempting to organize the employees.

Mrs. Woods says the Director’s errors in the factual analysis and a misunderstanding of the key facts led her to a misapplication of the law on the issue of whether Waldrif was a manager for the purposes of the *Act*. Mrs. Woods did not pursue the allegation of bias raised by Waldrif in her appeal submission.

In reply, Care and Share argues in support of the Determination, saying the Director did a thorough investigation and the conclusions reached are supported by the information which was made available to her. The Director, in her reply, characterizes the appeal as an attempt by Waldrif to re-argue her case because she disagrees with the result. The Director says all the substantive issues raised in the appeal, including questions of credibility of evidence provided during the investigation, were addressed in the Determination.

I have reviewed all the testimony. In sum, it was not significantly different from what was presented to the Director during the investigation. It is unnecessary to set out or analyze all of the evidence.

Mrs. Woods says the “key building block” in the Director’s conclusion that Waldrif was a manager for the purposes of the *Act* was her accepting that Klassen and Waldrif had proposed a new management structure in, or around, May 2000. Having heard oral evidence on that point, I find Waldrif has not met the burden of showing the Director’s conclusion was an error of law. That evidence generally conforms to the Director’s conclusion about how Waldrif came to be in the salaried position. I also find no error in, and in fact agree with, the finding that Waldrif was informed in a meeting held on May 24, 2000 that she was moving to a salaried position and what duties and responsibilities would be expected of her in that position. I am supported in this conclusion by the largely uncontested and unchallenged evidence that from July 2000 she actually performed most of the responsibilities set out in the May 24 memo. I am not persuaded to reach a contrary conclusion by the absence of a formal employment contract or the absence of Waldrif’s initials on the May 24, 2000 memo. Waldrif has conceded that she moved to head cook/housekeeper in June 2000. For the most part, she acknowledges carrying out many of the responsibilities that are listed. Her point is, and was during the investigation, that she carried out those responsibilities under the direction of Mrs. Dennison and Klassen, not as a “manager”.

Based on the totality of the evidence, there is no doubt that Waldrif had, and exercised, the kind of power and authority typical of a manager. She hired, disciplined and fired employees in her “department of cooks and housekeepers” (Waldrif’s term). I accept that she consulted with Klassen in respect of some of the discipline and dismissal, but her assertion that she hired, disciplined and dismissed *only* under the direction, and with the approval, of Klassen and/or Mrs. Dennison is not supported by the evidence or by any other witness and is not accepted. Within her department, Waldrif was responsible for training employees, scheduling the work of the cook/housekeeping employees and inspecting their work. The weight of assertions made by Waldrif to the contrary are affected by the number of such assertions that were disproved on objective evidence (such as her assertion that she “had no contact with time sheets” and her evidence that she went to Mrs. Dennison after Brenda Wilson had sworn at her and was told by Mrs. Dennison to fire her) and by the evidence of persons with no apparent interest in the outcome of this proceeding, including her own witnesses. The evidence establishes that Waldrif set her own schedule and hours of work. I accept that from time to time, because of an absence, a quit or a termination, she might fill a shift she did not normally work, but as she was not required to record her time, it is impossible to know with any certainty how frequently she might have done this and for what amount of time.

Mrs. Woods argues that exercising these responsibilities are not demonstrative of Waldrif having authority typical of a manager because employer policies dictated how she handled disciplinary matters and because the cook/housekeepers’ work schedule was a continuing routine that, once established, did not change. I shall return to this argument later.

There is also no doubt on the evidence that she performed work that was typical of the work performed by all of the cook/housekeeping employees. She cooked and cleaned. Waldrif regularly worked Monday to Friday. The evidence indicates that from Tuesday to Friday, Waldrif was the only cook/housekeeping employee in “C pod” until 10:30 am. She prepared and served breakfast to the clients in “C pod” on those days. On Tuesday and Thursday she was the only cook/housekeeping employee in “C pod” for all of the work day. She cooked and served all of the meals (breakfast, lunch and dinner) to the clients in “C pod” on those days. She cleaned, either alone or with another cook/housekeeper, six clients’ suites each week, did clients’ laundry, general housekeeping and miscellaneous related tasks. As well, she cooked desserts for clients on both sides.

There is no issue that Waldrif was initially hired as a cook/housekeeper. It was Mr. Dennison’s evidence at the hearing that before Waldrif was hired, most of the cooking and housekeeping was contracted out

and care-aides did the rest. This evidence was available to the Director. At about the same time as Waldrif was hired, four other persons were also hired as cook/housekeepers – Ms. Chrest, Mr. Mykytiw, Marie Voss and Brenda Wilson. There were five employees in the cooking/housekeeping, including Waldrif, in July 2000, when Waldrif became a full-time salaried employee. There was no evidence that the number of cooks/housekeepers increased after Waldrif began to run the cook/housekeeping department. In the three months before Waldrif's termination, there were five employees in the cooking/housekeeping department – Waldrif, Ms. Chrest, Mrs. Dueck, Diane Rouselle and Ms. Lessard (who also worked as a care aide). Between Monday and Friday, Ms. Chrest was normally scheduled for, and worked, 32 hours (8 hours a day, Tuesday to Friday), Ms. Rouselle 8 hours (4 hours, Thursday and Friday) and Ms. Lessard 5 hours in the cooking/housekeeping department (Monday). Ms. Chrest, Ms. Rouselle and Ms. Lessard, when working as a cook/housekeeper, worked all their normal hours on the "B pod". Mrs. Dueck was normally scheduled for 22.5 hours (7.5 hours a day, Monday, Wednesday and Friday) all of those on the "C pod". There was no evidence that the amount of work to be done in one "pod" was significantly lesser or greater than in the other. The same number of clients needed to be fed and cleaned and the same number of suites needed to be cleaned. It seems reasonable and probable, therefore, to conclude that Waldrif contributed significantly to the routine cooking and housekeeping on the "C pod".

On its face, the Determination did not consider the amount of time Waldrif spent supervising and directing the other employees in the cook/housekeeping department or the nature, and extent, of her non-supervisory duties. It is telling that Klassen, in a statement provided to the Director on August 22, 2002, described the following discussion taking place at the January 7, 2002 meeting:

Judy [Mrs. Dennison] and I had discussed this previous to the meeting and had thought we might have to try bringing in more care aide hours during the day and that care-aides could pick up some of the cooking functions as they had in the past. Elaine [Waldrif] said "What you are saying is I will be out of a job". Judy and I were stunned at this remark as this was not what was said. Judy said "No, that is not what I said. *You will still have your same job just a heavier housekeeping component for the time being until things change.* Cooking has always been the component that remains flexible in our program as the care-aides can do this component if they don't have enough to keep them busy and it is in their job descriptions that they will perform cooking duties as required." (emphasis added)

While the Determination indicated Waldrif "was responsible for participating in management meetings during which scheduling, staffing levels and budgeting issues were discussed, there is no evidence at all of Waldrif having been involved in any meeting where budgeting issues were discussed and the evidence showed her involvement in "staffing issues" was marginal.

Waldrif held her salaried position from June 2000 to January 2002 – a period of more than 18 months. The evidence indicates she attended two "management" meetings during that time, one on December 5, 2001 and the other on January 7, 2002. Both meetings were about scheduling and staffing, not budgeting. In fact, the evidence indicated there was no "budgeting", as that term is normally understood, done at all for the cooking/housekeeping department. As Mrs. Dennison put it, she had an idea about how many hours could be "spent" in that department. As long as the payroll and money being spent was "within limits" and she was not running in the hole, she was content.

Specifically in respect of the December 5 meeting, the Determination set out Care and Share's position about that meeting as follows:

Ms. Dennison stated that on December 5, 2001, she met with Ms. Waldrif and Ms. Klassen to discuss staffing needs and costs. Ms. Dennison wanted to know exactly what work Ms. Waldrif was doing and asked that she provide schedules for her and the staff she was responsible for managing. Ms. Dennison said that at this meeting Ms. Waldrif did not produce the information requested.

Mrs. Dennison's oral evidence differed somewhat from the above. Mrs. Dennison said she had asked Waldrif in September to provide hours and schedules for the cooks/housekeepers. She told Waldrif that information was needed "in order to determine whether we had to decrease staff". She did not receive any response from Waldrif and set the December 5 meeting. She asked Klassen and Waldrif to bring some ideas about cutting back hours in their respective departments. At the meeting Waldrif said she could reduce the cooking/housekeeping schedule by 12 hours. A proposed schedule had been prepared, which Mrs. Dennison didn't fully understand although she was told it involved Waldrif doing breakfasts in both "pods" during the week (a move that reduced the hours scheduled for other employees by at least 8 hours). A decision was made to implement the proposed schedule. Waldrif was told to advise affected employees of the reductions after Christmas and they would take effect in early January. The evidence supports a conclusion that the schedule was changed in the first week of January.

The proposed schedule had been prepared by Waldrif and Klassen. Klassen said in her evidence that Waldrif gave her the information, she wrote it down, "made suggestions", typed it up on her computer and Waldrif presented it. There is evidence that Mrs. Dennison and Klassen had discussed staffing options that directly affected both Waldrif and other cook/housekeepers without seeking any input from her and decisions were made by Mrs. Dennison without any input from her.

The January 7, 2002 meeting was originally described by Care and Share in their submissions to the Director in July 2002 as a meeting to consider proposals for reducing costs, where Waldrif proposed a reduction of 12 hours a week from the cooking/housekeeping department and Mrs. Dennison indicated she was considering offering the residents options that might reduce or eliminate some of the cooking and housekeeping. The testimony I heard from Mrs. Dennison and from Klassen did not accord with the original description. In her evidence, Mrs. Dennison said that she wanted to know from Waldrif if the reductions were "still feasible", that Waldrif said it was "feasible to follow through". Mrs. Dennison said she told Klassen and Waldrif that she was considering giving clients options about meals and housekeeping. Klassen testified that Mrs. Dennison told her and Waldrif that rents were going up and she and Mr. Dennison were putting together a proposal so that some people might do their own breakfasts and have family do laundry and housekeeping.

In her evidence, Waldrif said the purpose of the January 7 meeting was only to inform her that care options were going to be made available to the clients, which as described would mean she would be doing no more cooking, only housekeeping.

Based on all the evidence, I am satisfied the January 7 meeting was not, in any real sense, a "management" meeting, but was a meeting to inform Waldrif of changes, either actual or contemplated is irrelevant, that would significantly impact her job and the jobs of other employees in the cooking/housekeeping department. She was not being asked for her input on any aspect of those changes and was not consulted in respect of them.

In *Director of Employment Standards (Re 429485 B.C. Limited operating Amelia Street Bistro)*, the Tribunal said the following about deciding whether the *primary* employment duties of an individual consist of supervising and directing employees:

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon 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. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.

...

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

Also, when considering the reason for the employment of a person, it would be relevant that the person was hired to perform, and was continuing to perform, a job that would not normally be thought of as related to supervising and directing other employees. For example, in *Anducci's Pasta Bar Ltd.*, *supra*, the Tribunal thought it was relevant that the job which the employee was hired to perform was food handler/server, not supervisor or manager. In this case Telemans was hired as the chef at Amelia Street Bistro.

(at pages 6 – 7)

The *Amelia Street Bistro* decision was an exercise in statutory interpretation, providing a reading of the definition of manager in the *Regulation* harmoniously with the remedial nature and the purposes of the *Act*. The Tribunal recognized the potential consequences of a broad interpretation of the definition of manager on persons, like foremen and first line supervisors, who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager.

I am satisfied the Director has not applied the correct test on the issue of the status of Waldrif for the purposes of the *Act*.

Based on the analysis in the Determination, the decision about whether Waldrif's "*primary employment duties consist of supervising and directing other employees*" was based on a finding that "some" of her "primary employment duties" consisted of having authority to make final judgments about hiring, firing, disciplining, training and evaluating employees, authorizing time off or leaves of absence, scheduling

work, including calling employees in to work or sending them home and budgeting and directing work processes. While all of those matters considered by the Director are proper considerations and weigh in favour of the finding that Waldrif was a manager for the purposes of the *Act*, it was incorrect to confine the analysis to a review of whether in “some” of her duties, Waldrif exercised the kind of power and authority typical of a manager. A proper application of the test required the Director to consider all relevant facts and factors, including those that pointed against a conclusion that Waldrif was a manager, and reach a decision based on a total characterization of her duties. The following matters, which were present in the evidence before the Director, were relevant but not considered by the Director.

Waldrif was hired, and continued, to perform a job that was not associated with supervising and directing other employees. Many of her “management” responsibilities were not associated with supervising and directing other employees. There were mixed messages in the evidence about the degree to which she exercised the kind of power and authority typical of a manager. For example, I agree with Mrs. Woods that it is inconsistent with a finding that Waldrif was acting “independently” in making final decisions on terminating employees, when the evidence showed Klassen was involved in the process leading up to Mr. Mykytiw’s termination. She wrote up one of the disciplinary entries on Mr. Mykytiw in 2001 – more than twelve months after Waldrif assumed her salaried position. Klassen said in her oral testimony she believed it was part of Waldrif’s “training”, but would not concede she had helped Waldrif with any earlier recorded discipline or terminations. She later tried to resile from that evidence by saying she didn’t remember why she wrote up Mr. Mykytiw. She also said she had enough authority over Waldrif to train her and that, from time to time, Waldrif would ask her a question and she, “as a friend”, would give her answers. While Waldrif interviewed applicants for cook/housekeeping positions and selected from among those applicants, it was Mrs. Dennison, not Waldrif, who decided whether and when any employees would be hired. The business did not require that the employees to be constantly supervised by Waldrif. There was no evidence at all that Waldrif was involved in “budgeting work processes”. Waldrif was not even consulted with respect to the decision to have most of the cooking done by care-aides rather than cooks.

Additionally, there is no indication the remedial nature and purposes of the *Act* were considered.

On a proper interpretation of the definition of manager in the *Regulation* and on a proper application of the test for determining whether a person is a manager for the purposes of the *Act*, the conclusion of the Director on this issue cannot stand.

I specifically reach no conclusions on whether, as a result of my decision on this issue, Waldrif is entitled to regular or overtime wages or statutory holiday pay. There are still some decisions to be made about the merits of Waldrif’s claim and I will leave those to the Director.

### **Just Cause**

Mrs. Woods argues that while the Director applied the correct test in determining whether there was just cause to terminate Waldrif, she failed to consider three crucial issues: first, that Klassen had made a similar disclosure, in an off-hand manner in a social setting, to a care aide in late December; second that at the time Waldrif made the disclosure, she was attempting to organize the employees of Care and Share to join a union; and third, that the confidentiality provisions in the employment documents signed by Waldrif do not speak of disclosing information to other employees about working conditions.

Mrs. Woods also argues the Director erred in not considering the opinion of the Board of Referees (Employment Insurance) in reaching her conclusion on just cause. Finally, Mrs. Woods says the evidence does not disclose the employer met the burden of proving just cause for termination.

Nothing in the evidence which was presented to me justifies a conclusion that the Director erred in law on the issue of just cause. As indicated above, the Tribunal has said that the *Act* does not allow an appeal based on facts alone. Even before the amendments to Section 112 of the *Act*, an appeal was not viewed as a re-investigation of the complaint or simply an opportunity to have the Tribunal second guess the Director's decision and alter the result without showing a reviewable error. While, in some circumstances, errors of fact can be considered an error of law where there is no evidence to support the findings of fact made or a view of the facts has been taken that cannot reasonably be entertained based on the evidence, Waldrif has not shown that any such error arises in this case. Clearly, there was evidence to support the findings of fact made by the Director on the just cause issue.

In the circumstances it was open to the Director, and not unreasonable, to conclude Waldrif's misconduct justified summary dismissal.

The main point of this aspect of the appeal is that the "real reason" Waldrif was terminated related to her involvement in organizing a union. There are two responses to that point. First, the burden in this appeal is on Waldrif to show an error – specifically in this context to show that she was not terminated for misconduct and breach of trust relating to her disclosure of the matters discussed in the January 7 meeting. Second, the evidence does not support a finding that the Dennisons were aware of Waldrif's involvement in organizing the employees to join a union at the time the decision was made to terminate her. The evidence was that the Dennisons were not made aware of any union organizing until late in the day on January 9, 2002. The decision to terminate Waldrif was made before then. The uncertainty of Klassen about when she was told by Ms. Chrest about Waldrif saying jobs would be cut and when she conveyed that information to Mrs. Dennison does not alter that conclusion.

The decision of the Board of Referees (Unemployment Insurance) was made available to the Director. The position of the respective parties on the effect of that decision on the issue of just cause is set out in the Determination. The Director was not bound to give any consideration or effect to that decision. What the Director was bound to do was consider the termination in the context of the provisions and requirements of the *Act* and the Director did so.

This aspect of the appeal is dismissed.

One final matter needs to be addressed. In her cross examination of Mr. Dennison, Mrs. Woods asked several questions in an area collateral<sup>1</sup> to the substantive issues raised in the appeal and received answers which were obviously inconsistent with her understanding of events relating to that area of questioning. Following completion of Care and Share's evidence, Mrs. Woods made application to call rebuttal evidence on the answers given by Mr. Dennison. She submitted the proposed evidence went to Mr. Dennison's credibility. I denied her application. She asked that I note her strong objection to my decision, and I do so, as well as setting out the reasons for it.

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<sup>1</sup> A matter is collateral where it is not determinative of an issue arising in the appeal, or not relevant to matters which must be proved for the determination of the case (see *R. v. Krause*, [1986] 2 S.C.R. 466, [1986] S.C.J. No. 65).



Allowing collateral evidence that goes to prove a contradiction is a matter of discretion for the decision maker. Generally, using collateral evidence to impugn credibility is not allowed (see, for example, the case of *R. v. B.(A.R.)*, (1998) 41 O.R. (3d) 361 (O.C.A.) where Justice Finlayson, writing for the majority, stated "the general rule is that one cannot impugn a witness's credibility by contradicting the witness on matters which are collateral even in a case where the "core" issue is credibility."). Collateral evidence to prove a contradiction should only be allowed in compelling circumstances, where it is apparent the probative value and nature of the contradicting evidence significantly outweighs considerations of efficiency and fairness. That was not apparent in this case.

As well, there is a prohibition against splitting one's case. If it was Mrs. Woods' position that, based on a meeting Mr. Dennison had with representatives of the union after Waldrif was terminated, I should reject his evidence about the reason for terminating Waldrif and find she was terminated for reasons relating to her efforts to organize the employees to join a union (which is clearly demonstrated in her argument), she was bound to produce and enter in her own case all the clearly relevant evidence she had, and intended to rely upon, to establish that point. She is not allowed to wait until the completion of Care and Share's case to attempt to make that point under the guise of calling "rebuttal" evidence.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 1, 2003 be referred back to the Director to determine whether there are any wages owed to Waldrif.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**