EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Victoria Books and Volumes Bookstores Ltd.
("VBVB ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO:	98/359
DATE OF HEARING:	September 2, 1998
DATE OF DECISION:	September 14, 1998

DECISION

APPEARANCES

For Victoria Books and Volumes Bookstores Ltd.	Kenneth P. Regier, Q.C. Glen and Carolyn Kunzman
Robert J. Wiersema	On his own behalf

OVERVIEW

This is an appeal by Victoria Books and Volumes Bookstores Ltd. ("VBVB"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against Determination #083-979, issued by the Director of Employment Standards ("the Director") May 15, 1998. The Director's delegate found that VBVB had contravened Sections 18(1) and 63(2) of the Act, and Ordered that it pay Robert J. Wiersema ("Wiersema") $3910.29 in wages, annual holiday pay, and compensation for length of service.

The Director determined that VBVB had not contravened Sections 40(1), 44 and 46 of the *Act*, as he concluded that Wiersema was a manager, and accordingly, not entitled to overtime wages.

ISSUES TO BE DECIDED

The issues on appeal are whether the Director correctly determined that Wiersema was entitled to compensation for length of service, and wages and vacation pay. Specifically, at issue is whether Wiersema's employment was terminated for cause, and whether he is entitled to be paid for "banked" hours following dismissal.

FACTS

Wiersema was employed by Foreward Bookstores Victoria Ltd. (carrying on business as the Book Warehouse) as buyer/store manager from September 1, 1990 through October 1996. Carolyn and Glen Kunzman were minority shareholders in that company. In October 1996, the Kunzmans bought the company outright, and Wiersema was kept on as buyer/manager with the new business, Victoria Books and Volumes Bookstore (VBVB). He was paid $2000.00 per month semi-monthly for that period. His employment was terminated May 5, 1997. No compensation for length of service was paid.

The Director determined that as Wiersema was a manager for the purposes of the Act, and consequently, that Parts 4 (overtime requirements) and 5 (statutory holiday pay) did not apply.

The Director's delegate also found that Wiersema was paid his full salary for months in which there were statutory holidays, and concluded that Wiersema's monthly salary included compensation for statutory holidays. The Director's delegate accepted that Wiersema was paid for a one half hour lunch break, whether it was taken or not.

The Director's delegate concluded, on a balance of probabilities, that in April 1996, Wiersema and VBVB agreed that, in lieu of a 10% raise in salary, Wiersema would work 36 hours per week rather than 40 hours, and that any time worked in excess of 36 hours would be taken as

compensatory time off. The Director's delegate accepted that the agreement was effective April 29, 1996.

The Director's delegate further accepted Wiersema's record of hours of extra work (as compensatory time off) since they closely matched the work schedules maintained by VBVB, and concluded that Wiersema was owed wages and annual vacation pay for 57 hours of work.

After reviewing the evidence on the issue of whether Wiersema was dismissed for just cause, the Director's delegate found that VBVB had not met "the onus of the burden of proof". He concluded that submission failed to show evidence of prior warnings or reprimands, or any evidence that Wiersema was warned that his job was in jeopardy for failing to perform his duties as directed. He concluded that VBVB's liability to pay compensation for length of service had not been discharged, and found that Wiersema was entitled to 6 weeks compensation for length of service and annual vacation pay thereon.

ARGUMENT

VBVB's claims that Wiersema was properly terminated under Part 10 of the Act, and that no money is owed for compensation for length of service. It argues that the Director's delegate failed to consider the evidence on the issue of conversion of goods in arriving at his determination that there was insufficient evidence of cause. VBVB argues that one dishonest act is sufficient grounds to terminate an employment relationship.

VBVB also contends that the Determination in respect of payment of compensatory time amounts to payment of overtime, to which Wiersema was not entitled as a manager.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Wrongful termination

I shall first address the issue of whether the Director's delegate correctly concluded that there was insufficient evidence to support VBVB's contention that Wiersema was terminated for cause.

At the hearing, VBVB contended that Wiersema was dismissed on the grounds that he had failed to follow directions not to purchase more inventory, that he was negligent, incompetent, and that he was dishonest.

The grounds of incompetence, failing to follow directives and general negligence were put before the Director's delegate. During the investigation, three letters were sent by counsel for VBVB to the Director's delegate. The first, dated September 16, 1997, was in response to a letter from the Director's delegate dated September 11. That letter contained a short paragraph stating that Wiersema's job performance was unsatisfactory. No mention is made in the letter that Wiersema's employment was terminated for cause, and no evidence was provided in support of the allegation of poor job performance. The second letter, dated October 6, 1997, indicates that Wiersema's employment was terminated for cause on May 5, 1997. Once again, there is an allegation that

VBVB suffered damage as a result of Wiersema's "incompetence, negligence and lack of any form of a work ethic", but no evidence in support of these allegations was offered.

On October 14, the Director's delegate sent VBVB's counsel a letter stating the following:

> Respecting the issue as to whether the complaint was dismissed with 'just cause', the onus is on the employer to prove same. Your letter does not provide any specifics other than a simple statement that the complainant was dismissed for cause. Please provide this office with full particulars as to the reasons for dismissal together with any and all supporting documentation.

A reply to that letter was received on October 21. It stated

> With respect to the matter of dismissal for just cause, you correctly advise that the onus is on the employer to prove same. Particulars as to reasons for the termination of Mr. Wiersema, include the following:

Five paragraphs followed, which identified 1) problems of inventory control which became apparent to VBVB in early 1997, 2) Wiersema's defiance of a March 1997 order not to make any more purchases of books and inventory, 3) problems of computer record keeping which VBVB questioned Wiersema about in December 1996 and which led to a questioning of his honesty and integrity. Also mentioned in this heading was an allegation that Wiersema had converted numerous books to his own use but returned three boxes of them, 4) an incident regarding Wiersema's use of his own computer program which he removed at the time his employment was terminated, and 5) a change to business procedures following Wiersema's departure.

No documentary evidence was submitted, although Mr. Regier suggested that a hearing, with examination and cross examination of the parties be conducted.

The Tribunal has held in a number of decisions that it will not consider new evidence that could have been tendered by the Appellent at the investigation stage (*Kaiser Stables Ltd.* B.C.E.S.T. D058/97, and *Tri West Tractor* B.C.E.S.T.D058/97). I find that the evidence in support of the grounds of misconduct, i.e. the failing to follow directives not to continue to stock inventory, failing to record invoices, making wrong or incomplete entries in the accounting system, and buying inventory which was not saleable, were put before the Director's delegate.

If VBVB was of the opinion that Wiersema was incompetent, it had an obligation to a) establish and communicate a reasonable standard of performance, b) give the employee an opportunity to meet the required standards and show that he was unwilling to do so, c) notify the employee that he had failed to meet the standards and that his employment was in jeopardy because of that, and d) dismiss only when the employee fails or is unwilling to meet those standards. (*Kruger* B.C.E.S.T. D003/97).

I am unable to conclude that the Director's determination was in error on those grounds. There was no evidence that VBVB followed any of these criteria. Further, I am not persuaded that the incompetence alleged is such to undermine or seriously impair the essential trust and confidence the employer is entitled to place in the employee. VBVB has not persuaded me that Wiersema's behaviour was such to repudiate the contract of employment. Mr. Kunzman's evidence is that he lost trust in Wiersema only when he was told the business was $70,000 "in the hole". As I am not persuaded, on the evidence, that there is any connection between Wiersema's conduct and VBVB's financial state, there is no justification for Mr. Kunzman to suggest that knowledge led to a repudiation in the contract of employment.

VBVB also contended in the appeal notice that the grounds for the termination for cause arose immediately prior to the termination and was so serious that a warning was not necessary, in that it involved the ascertaining, at that time:

(i) secret and unauthorized purchases of such a nature and extent that the Employer incurred significant financial and business loss;
(ii) after the termination, numerous and costly invoices were found and they represented secret and unauthorized purchased made by Wiersema;
(iii) after the termination, numerous invoices were found that had been hidden by Wiersema, but had to be paid;
(iv) Wiersema conducted himself in a negligent and incompetent way, to an extent not fully determined until the actual time of his termination
(v) the Employer, even according to the Complaint itself, gave Wiersema directions regarding the purchase of inventory, which it was ascertained at that time of termination had not been followed;
(vi) it was ascertained at the time of the termination, and thereafter, that Wiersema hid invoices and purchase orders, did not record purchases, made wrong, incomplete and erroneous entries in the Employers computers;
(vii) through his course of employment converted property of the Employer to his own use, and it was not until after he was terminated, that he returned the property to his Employer.

The allegations of Wiersema's incompetence arose only after his termination. VBVB claims that he was told to cut back considerably on his purchases in early 1997. VBVB alleges that he did not do so, and that in March, he was told to stop buying altogether. Wiersema denies being told to cut back purchasing in January, but does acknowledge being told to stop purchasing in March or April, which he did. The evidence is that in February, Wiersema attended a book fair with Glen Kunzman, and made a number of purchases. Had Wiersema been under orders not to make any more purchases, it would not have been reasonable for Mr. Kunzman and Wiersema to attend a book fair, the purpose of which is to purchase books. There is evidence that when Wiersema was told in March or April not to undertake any more buying, he followed that order.
VBVB contended that another reason for Wiersema's dismissal involved an incident with Readers Digest books. I note that this information was not provided to the Director. As noted above, (*Kaiser Stables,* supra) the Tribunal has held that an appellant is precluded from producing evidence which should have been produced for the Director's delegate during the investigation

However, as this incident appears to be part of the totality of the reasons for the breakdown in the trust relationship which led to the dismissal, I have considered it in that context.

On or about July 1997, VBVB received a large shipment of books from Readers Digest which were damaged in transit. The books and boxes were retained for insurance purposes, and some books were ultimately sold as "hurt" books. Mr. Kunzman said that Wiersema approached him and told him he was taking three of the books home. Initially, Mr. Kunzman said nothing, but later asked Wiersema to return them. He did so.

I am unable to conclude that this incident, either isolated, or taken together with the other evidence, supports the grounds for termination for cause. There was no evidence that Wiersema attempted to take the books without advising Kunzman. Further, he was never told not to take them. More importantly, he returned them when asked, and was never reprimanded, or otherwise told this was not the standard of performance expected of him. The Tribunal has held that if an employer learns of an act of misconduct on the part of an employee, and does not dismiss the employee within a reasonable period of time following the incident, the employer will be held to have condoned the action and will be precluded from relying on the incident to found just cause for termination (*Reycraft v. Director of Employment Standards* BCEST D236/97). Even if the incident was an

act of misconduct, which I am not persuaded it is, VBVB cannot rely on it nine months later to found cause for termination.

VBVB also contends that the Director's delegate erred in failing to consider the issue of conversion, for which no warnings are required. I agree that a single act of theft, dishonesty, or a single act of misconduct may be sufficiently serious to constitute a fundamental breach of the employment contract, and for which immediate termination is justified.(see *Interior Pacific Litho Inc. v British Columbia* B.C.E.S.T. D098/98 and Wilfred McPhillips v. British Columbia Ferry Corporation, (1994) 5 C.C.E.L. 49). This issue was not addressed by the Director's delegate.

The law is that an employer is entitled to rely on after acquired evidence, even up to the date of the hearing, in support of an allegation of dishonesty (see *Lake Ontario Portland Cement Company Limited v. Groener* [1961] SCR 553). Nevertheless, I note that specifics of this allegation were not put before the Director's delegate, although the information was available at the time of the investigation.

Conversion is "...any unauthorized act which deprives an owner of his property permanently or for an indefinite time; the unauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with rights of owner. (Blacks Law Dictionary, 6th Edition).

Having carefully considered the evidence, I am unable to conclude that VBVB has substantiated the allegation of conversion.

The evidence, which was not challenged, is that there is a practise within the book publishing industry in Canada of giving advance reading copies (ARC's), which are uncorrected proofs of books, to buyers, reviewers, and marketing personnel. The purpose of giving ARC's to those individuals is, obviously, to assist in the marketing of that book. As it is unlawful for these books to be sold by a retailer, they have no retail value and are not taken into inventory. They are also considered, in the industry, to be the property of the buyer, not the store. There is also evidence that publishers often provide sample copies of books to buyers on request. Samples are also freely distributed at book fairs.

During his employment, Wiersema requested sample copies of a number of books from different publishers, and received many ARC's. Some of those books were of the type stocked by VBVB, some were not.

VBVB claims that the solicitation of sample books, and the accepting of ARC's was unethical and improper. It contended that the books constituted "payola". It also contended that it served only to encouraged a conflict of interest - the more ARCs or sample copies a publisher provided to a buyer, the more likely the buyer would order its books. It further argued that the samples and ARC's belonged not to the book buyer, but to the store, as they had value to collectors.

The evidence does not support this argument. The practise of distributing ARC's and sample copies of books to a variety of people is widely accepted in the book publishing industry. While there is no dispute to the claim that ARC's and uncorrected proofs have significant value to collectors, that fact does not support an allegation of conversion.

Even if the Kunzman's were of the view that the solicitation and acceptance of books was unacceptable in spite of the wide acceptance of this practise, they never established a policy prohibiting VBVB staff from following that custom. Mr. Kunzman stated that his method of communicating proper standards was to set by example a preferred mode of conduct that others

would follow. I am unable to find that is a satisfactory alternative to the establishment of clear written standards, particularly if that conduct differs from widely accepted practise.

Furthermore, Mr. Kunzman was aware that Wiersema did receive ARC's and never told him that activity was unacceptable. He was also aware that Wiersema solicited samples, and said nothing to him. His evidence was that he did not terminate Wiersema's employment when he became aware that he was receiving ARC's and soliciting samples, because he was unaware of industry practises. However, he did nothing to inform himself of those practises, and could not offer an explanation for why he did not. That being the case, there are no grounds for terminating his employment. An employer who wishes to rely on company policy to support discharge must show that the policy is reasonable, has clearly been brought to the employee's attention, has been consistently applied and that the employee as put on notice that breach of the policy could lead to serious disciplinary consequences (*Black & Lee Formal Wear Rentals Ltd.* B.C.E.S.T. D226/97). There was no policy which contradicted this widely accepted industry practise. Consequently, I am unable to conclude that it formed a proper basis for termination without notice.

However, even if I am incorrect in my findings on the book industry practises and the books were rightfully the property of the store, Wiersema returned the books at VBVB's request shortly after being asked to do so, and within ten days after being terminated. I am unable to conclude that Wiersema's act of returning books when asked to do so, shows dishonesty or supports the contention that he was dismissed for cause.

VBVB cited *Ennis v. Canadian Imperial Bank of Commerce* (1986)13 CCEL 25 as support for the position that an employer might know about dishonest acts, and fail to act on them at the time, but may rely on them to terminate later. I do not read that case as support for that position. In *Ennis*, the employee borrowed money from, and engaged in joint investment with bank customers, without approval from the supervising office, contrary to bank policy. The employee had also submitted loan applications which inaccurately disclosed his financial position. The employee was terminated because of his financial dealings with bank customers. The employee commenced an action for wrongful dismissal, and the bank raised the subsequently acquired inaccurate loan applications as additional justification for the dismissal.

In this instance, the employee was terminated for breaching the bank's written policy with respect to financial involvement with bank customers. That was known to the bank at the time of the dismissal. The court found that the employer could also rely on the false loan applications, which were discovered subsequent to the dismissal, to justify the dismissal. There is nothing in this case which supports VBVB's contention that dishonest acts do not have to be acted upon at the time they are discovered.

An employer cannot sit on its rights until another trivial or spurious issue arises to justify the termination. In this case, I find that the 'cause' for the termination, if there was one, was that VBVB was losing money. There were no other reasons.

Compensation for Hours worked

The evidence is that until April 1996, Wiersema worked a 40 hour week, and was paid $2000.00 per month. At that time, he approached Glen Kunzman regarding a raise. There were some discussions regarding a 36 hour work week in lieu of a 10% wage increase. Wiersema understood that he would work 36 hours, and anything in excess of that would be banked and taken as compensatory time off. The proposal was never rejected. Mr. Kunzman's evidence is that he agreed on a 'tentative basis', but that he 'never made it a certainty'. He argued that he felt 'extorted' when he was approached, and although he did not feel comfortable with it, he did not reject it.

The Director's delegate found that there was an agreement to pay Wiersema for a 36 hour week effective April 29, 1996, and that Wiersema's employment was terminated before he could use up his time off. After reviewing the documentation, the Director's delegate concluded that Wiersema was entitled to 57 hours of compensatory pay.

Mr. Kunzman argued that even though Wiersema was fired before he could use up the time off, he was a manager, and not entitled to any additional wages. He also argued that Wiersema 'gave up his right to banked time through his actions'.
Managers are not entitled to overtime wages. However, I accept that the 'banked' hours do not constitute overtime hours. They were hours worked over and above the 36 hours normally worked by Wiersema in lieu of a pay increase.

Section 1 of the Act defines regular wages as

> ...
> (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work
>
> ...
>
> Wages is defined to include
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work
> ....

Wages are not the same as overtime wages. They must be paid for work performed.

I am unable to conclude that the Director's determination that employees are entitled to be paid wages for all hours worked is in error. The hours worked were not overtime hours, they were hours which Wiersema, as an employee, whether or not he was a manager, was entitled to be compensated for. The argument that Wiersema gave up his right to payment for these banked hours based on his actions is not sustainable.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated May 15, 1998 be confirmed in the amount of $3910.29 , together with whatever further interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal