Employment Standards TRIBUNAL

An appeal

- by -

Williams Lake Cedar Products Ltd.
("WLCP")

- 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.: 2001/206

DATE OF HEARING: May 30, 2001

DATE OF DECISION: July 31, 2001

DECISION

APPEARANCES:

on behalf of Williams Lake Cedar Products Ltd.	Jennifer McNaught, Esq. Rick Hawkridge
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Williams Lake Cedar Products Ltd. ("WLCP") of a Determination that was issued on February 15, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that WLCP had contravened Part 8, Section 63 of the Act in respect of the termination of the employment of Wayne C. Woods ("Woods") with WLCP and ordered WLCP to cease contravening and to comply with the *Act* and to pay an amount of $1,934.94.

WLCP challenges the conclusion of the Director that Woods was entitled to length of service compensation. WLCP contends that Woods' conduct gave WLCP just cause for his dismissal and should have been deemed discharged from its liability to pay Woods length of service compensation under subsection 63(3) of the *Act*.

WLCP also contends that the Director failed to provide them with a reasonable opportunity to respond.

ISSUE

The two issues in this appeal are whether WLCP has shown the Director erred in deciding Woods was entitled to length of service compensation and whether the Director failed to provide WLCP a reasonable opportunity to respond.

THE FACTS

WLCP operates a lumber manufacturing facility in Williams Lake, British Columbia. Woods worked for WLCP from January 7, 1997 to December 22, 1999 as a loader operator. He was dismissed on December 22, 1999 without notice. Woods claimed he was entitled to length of service compensation, under Section 63 of the *Act* and claimed lost wages and benefits from the date of his dismissal to the date of resolution of his complaint.

From the material on file, it appears the complaint was filed with the Branch in late February, 2000. The Director attempted to discuss the complaint with Rick Hawkridge ("Hawkridge") on June 21, 2000. The Determination noted:

> Hawkridge was contacted on behalf of the employer and refused to provide any information to the investigating officer. Hawkridge indicated that all discussions with respect to this file would be conducted by their legal counsel.

The Director received the response of WLCP through legal counsel on or about July 12, 2000. The position taken by WLCP was stated in that correspondence as follows:

> It is the employer's position there was just cause for dismissal of Woods pursuant to section 63(3)(c) of the *Employment Standards Act* (the "Act") on the grounds of dishonesty and absenteeism.

WLCP alleged the dishonesty arose from Woods submitting a time card on December 22, 1999 claiming he had worked 8½ hours (8 hours regular time and ½ hour overtime) that he had not actually worked and continuing to assert that claim in a meeting of December 29, 1999. WLCP also sought to support the termination by reliance on an alleged failure by Woods to attend work on December 23, 1999, without seeking or obtaining permission and without calling in to notify the employer of his intended absence, and on an allegation that Woods had a "history of misconduct", the particulars of which had been recorded in his employee file.

ARGUMENT AND ANALYSIS

I will first address the issue concerning whether the Director gave WLCP a reasonable opportunity to respond to the complaint made by Woods. This ground of appeal was not vigorously pursued at the appeal hearing. There is no basis for this ground of appeal. Section 77 of the *Act* states:

> *77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

The particular concern raised by WLCP in this ground of appeal is captured in the following submission:

> Despite requests from counsel, the Delegate refused to provide the actual complaint and any supporting documentation provided to the Delegate by the Complainant. Additionally, in the Determination, the Delegate refers to submissions provided by the Complainant to the Delegate. The Appellant submits that it should have been provided opportunity to review and reply to these submissions.

The facts indicate that on June 23, 2000, two days after WLCP was notified of Woods' complaint, counsel for WLCP requested a copy of a letter from a witness, Wayne Sawatsky, the copies of all documents supplied by Woods. Counsel was advised that no documents would be provided during the investigation, but such documents could request a release of the documents under the *Freedom of Information and Privacy Act*. On June 29, 2000, counsel requested a copy of the complaint. That request was denied, but counsel was advised that the issues raised by the complaint would be communicated to her. In a letter date June 29, 2000, the Director provided particulars of the complaint made by Woods. The requests from counsel for WLCP came at the early stages of the investigation. In the circumstances, the statutory obligation in Section 77 of the *Act* was met. There was sufficient information provided by the Director to allow WLCP to make a reply to the complaint, which counsel for WLCP did, in a comprehensive submission, dated July 12, 2000. There is nothing in the context to suggest there was any obligation on the Director to provide WLCP with a copy of the complaint or the documents requested (see generally, the discussion in *Re Jack Verburg operating Sicamous Bobcat*, BC EST #D417/98).

Turning to the other ground of appeal, as I indicated to the parties at the outset of the hearing, an appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the *Act*.

Consistent with that approach, the burden in this appeal to demonstrate such an error is on WLCP. The nature of the burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L. Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director or to require the Director and the individual to re-establish the validity of the claim.

It is not the function of the Tribunal to substitute its opinion for that of the Director without some basis for doing so.

Where an appellant is challenging a conclusion of fact, the appellant must show that the conclusion of fact was either based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

The Determination set out the issues:

> The issues to be decided in this matter are:
>
> 1. Does the employer owe compensation for length of service to Woods?
>
> 2. Is Woods entitled to receive regular wages, overtime wages, annual vacation pay and statutory holiday pay from the time of his termination until the matter is resolved?

The Determination concluded there was no jurisdiction in the *Act* for the Director to award "damages" and, under the authority found Section 76 of the *Act*, effectively denied that claim. That conclusion has not been appealed.

In response to the position taken by counsel for WLCP that Woods' absenteeism on December 23, 1999 provided an additional ground for termination the Determination concluded:

> There is no evidence that the employer ever raised, either to Woods or to the Committee, that the alleged unexcused absence of December 23, 1999 was also considered as grounds for the termination of Woods.
>
> I am not prepared to consider the employer's alternative argument that Woods' unexcused absence on December 13, 1999 constitutes just cause for dismissal as there is no evidence that issue was ever raised at the time of Woods' termination.

Counsel for WLCP does not challenge the factual conclusion in the above statement, but says the Director erred in law by refusing to consider the alleged unauthorized and unexcused absenteeism as an alternative ground for dismissal. In the appeal, she submits:

> It is settled law that if cause for dismissal exists, it is immaterial that at the time of dismissal, the employer did not act or rely upon it, or did not know of its existence, or that he acted upon some other cause which is itself insufficient.

Counsel cites the Supreme Court of Canada decision *Lake Ontario Portland Cement Co. v. Groner*, (1961) 28 D.L.R. (2d) 589 at p.598 for support. This point in the context of the *Act* has previously been considered by the Tribunal in *Re Wendy Benoit and Ed Benoit operating as Academy of Learning*, BC EST #D138/00. The following passage is both applicable to the circumstances and determinative of this ground of appeal:

> This leads me to the final ground of appeal. AOL says that after October 21 it became aware of information, which had they been aware of at the time of Miwa's termination, would have provided just cause to summarily dismiss her. AOL argues that they should be able to rely on this information to seek to discharge their statutory liability to pay Miwa length of service compensation. AOL relies on the common law principle expressed in *Lake Ontario Cement Company Limited v. John A. Groner*, [1961] S.C.R. 553, at pages 563 and 564:
>
> > The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarised in Halsbury's Law of England, 2nd ed., vol. 22, p. 155, where it is said:
> >
> > > It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.
>
> The question raised by this appeal is whether, for the purposes of the *Act*, AOL should be allowed to alter the basis upon which Miwa's employment was terminated and seek to establish just cause for dismissing Miwa after the fact of termination. For the purpose of considering this question, I make no distinction between facts AOL was aware of or not aware of at the time Miwa was terminated.
>
> In my view, the position of AOL is not supported on an analysis of the purposes and objects of the *Act*. It would be an incorrect reading of Section 63 and quite inconsistent with the intent of the *Act* to allow AOL to allege just cause for

dismissal when that was not the basis upon which the termination of employment occurred.

The Tribunal has noted on many occasions that the *Act* should be interpreted in a manner that is consistent with its remedial nature and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects: see *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R.(4th) (B.C.C.A.). The *Act* sets minimum standards of employment. The following comment from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 guides the interpretive approach to the *Act*, including subsection 63(3):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (para. 21)

Section 63 is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment". Generally speaking, Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. For the purposes of this appeal, the relevant parts of that statutory provision are subsection 63(1) and paragraph 63(3)(c) of the *Act*, which state:

63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.

. . .

(3) The liability is deemed to be discharged if the employee

(c) terminates the employment, retires from employment, or is dismissed for just cause.

As the Tribunal has noted in several decisions, length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is

often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause.

The Determination correctly and succinctly notes one of the purposes for length of service compensation:

> Considering the intent of Part 8 of the *Employment Standards Act* (Termination of Employment), it becomes evident that the legislation is not designed to interfere in management's right to manage, staffing whom they wish to do the job the way they want it done. Rather, it is intended to provide the courtesy of notice, as we all have financial commitments and are dependent on our income to meet those commitments.

Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. Developments in the common law in this area have expanded the remedial authority of the Courts, but the basic objective remains unaltered. The focus in such a case is on the contractual relationship. As such, any factors, including those coming to light after the alleged breach, can have a bearing on the respective rights of the parties under the contract and, in the Courts' view, are properly considered.

The objective of Section 63 of the *Act* is different. It is intended to provide an employee with brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. This period can be provided by giving notice, by paying compensation equivalent to the required notice or by some combination of those two. As the Determination notes, it is in many respects an enforced courtesy.

Grammatically, paragraph 63(3)(c) of the *Act*, as well as in Section 63 generally, are cast in the present tense: "terminates the employment, retires from

employment, or is dismissed for just cause". That structure suggests the legislature intended the statutory liability for length of service compensation, or its deemed discharge, is to be determinable on termination. It would require a clearer statement of intention by the legislature than is indicated by the words used in paragraph 63(3)(c) before I would interpret the phrase "or is dismissed for just cause" to include the words "or had just cause for dismissal".

This view is reinforced by other provisions of the *Act*. Under the *Act*, the benefit and the corresponding liability crystallizes at the time of termination. Subsection 63(4) says, in part

63. (4) The amount the employer is liable to pay becomes payable on termination of employment . . .

The *Act* also includes an employer's liability for length of service compensation in the definition of "wages" and, pursuant to Section 18(1), requires an employer to pay all wages owing to an employee within 48 hours after the employer has terminated the employment. These provisions reflect a basic goal of the *Act*, that wages be paid in a timely way and, as it specifically relates to termination of employment, that all wage obligations existing at the time of termination be paid immediately upon termination.

It is inconsistent with those provisions to suggest, in effect, that they are all conditional on whether the employer might find some reason, after the termination has occurred and the statutory obligations have crystallized, to avoid those obligations.

Section 2 sets out the purposes of the *Act*:

2. The purposes of this Act are to

(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

(b) promote the fair treatment of employees and employers,

(c) encourage open communication between employers and their employees,

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and

(f) contribute in assisting employees to meet work and family responsibilities.

In Machtinger v. HOJ Industries Ltd., supra, the Court noted:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

Length of service compensation is a minimum requirement of the *Act*. It would not be consistent with the above provision if the *Act* was interpreted in a way that, rather than encouraging employers to comply with the minimum requirements, was encouraging employers to begin looking for reasons that would allow them to avoid those requirements.

As well, one of the purposes of the *Act* is to "provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". As this proceeding clearly demonstrates, that purpose is not served by adopting the view proposed by AOL, which most certainly will have the effect of prolonging any final resolution of a complaint while often vague allegations of employee misconduct are investigated and adjudicated.

Finally, I cannot ignore the impact the position of AOL will have on the administrative scheme of the *Act*. Under Section 79 of the *Act*, the jurisdiction to receive and investigate a complaint alleging a contravention of the *Act* belongs to the Director. In respect of each complaint, the Director must investigate unless there is reason to stop or postpone the investigation. Following investigation, the Director may issue a Determination. The primary jurisdiction of the Tribunal is to consider appeals from a Determination. The Tribunal is not intended to be an investigative body. The administrative scheme is designed to achieve finality to complaints made to the Director in a way that is fair and efficient. The position of AOL impacts that scheme in two ways. First, it forces the Tribunal into an investigative role, requiring it, in a very real sense, to investigate the merits of the respective positions of the parties as a matter of first impression. Second, it raises the spectre of a multiplicity of investigations on the same complaint depending on long an employer is prepared to continue to allege employee misconduct.

In result, the employer was not allowed to seek to alter the basis upon which the employee's termination had occurred by attempting to establish grounds for dismissal after the fact of termination. For the same reasons, the Director was correct to disallow WLCP from raising grounds for Woods' dismissal that were not relied upon at the time of the termination.

In response to the allegation that Woods had a "history of misconduct" that could also be used to support his termination, the Determination noted the absence of any evidence that Woods had ever received the notes that were found in his employee file, that he was aware of their contents or that he was ever clearly advised that his work performance was unacceptable and he was

being put on notice that his job was in jeopardy. WLCP says that is an error in the Determination.

The argument of counsel for WLCP relies substantially on two points: first, that there is no obligation on an employer to provide employees with written warnings regarding misconduct; and second, that, as a matter of fact and law, Woods was informed of his misconduct in a manner that brought home its seriousness and its potential consequences.

The Tribunal has decided, in the context of administering the "just cause" provisions in Section 63 of the *Act*, that reliance on a course of conduct by an employee as support for just cause, "requires an employer to inform an employee, clearly and unequivocally, that his or her conduct is unacceptable and that failure to meet the employer's standards in the future will result in their dismissal": *Re Hall Pontiac Buick Ltd.*, BC EST #D073/96. The burden of establishing just cause rests with WLCP and, consistent with that burden, they also bear the burden of demonstrating the alleged misconduct, recorded in the notes on Woods' file, was brought home to him in the manner required. All of these points were set out in the Determination:

> In order for an employer to support a dismissal on the basis of the employee failing to respond to corrective discipline, the employer must establish reasonable policies, standards and schedules, communicating them clearly and specifically to the employee and demonstrate that the employee was unable or willfully chose not to meet the employer's standards.
>
> Should there be any problem with an employee not meeting the expectations of the employer, the employer must be able to establish that he has severely warned and admonished the employee for poor performance or infractions of company policy. Such warnings must come very soon after the incident in question, and the employee must be made fully aware that their employment is in jeopardy should they not improve.
>
> When an employee is not clearly advised that their performance is "unsatisfactory", that employee may assume that they are doing the job correctly. Further, if an indication is made that their performance is unsatisfactory, and yet the severity of the warning is not made clear, then the employee is not given the impression their job is in jeopardy. The employee may assume these discussions about their performance were merely ongoing training, in an attempt to improve productivity.
>
> Nothing in this appeal has convinced me there was any error in how the alleged "history of discipline" was addressed in the Determination, either as a matter of fact or as a matter of law.

Finally, I turn to the central issue raised in this appeal, that the Director erred in concluding there was no just cause to terminate Woods for his dishonesty in claiming for time not worked on

December 22, 1999 and for reinforcing, and adding to, that dishonesty in the meeting of December 29, 1999. This issue is predominantly factual. Counsel contends that if I conclude the Determination was wrong on whether there was dishonesty, just cause for summary dismissal is established. At the hearing, counsel cited the British Columbia Court of Appeal's decision *McKinley v. B.C. Tel*, 42 C.C.E.L. 168 as support for that contention. That decision has now been overturned by the Supreme Court of Canada (*McKinley v. B.C. Tel*, 2001 SCC 38) and the implications of the Supreme Court's decision on this part of the appeal will need to be considered if I accept that the Director has made the error alleged.

The argument on this issue has two elements. First, counsel for WLCP says the Director erred in not concluding, on the facts, that Woods left work early and was dishonest in claiming overtime on his time sheet. Second, counsel says the Director erred in not considering Woods' conduct in and around the meeting on December 29, 1999, not simply that he continued to dishonestly deny that he had left work early, but more specifically that he lied to Hawkridge about having a conversation with Wayne Sawatsky on December 28, 1999 and that he also asked Mr. Sawatsky to lie about it.

Woods admitted in evidence he lied to Hawkridge about having talked with Mr. Sawatsky on December 28, 1999. I have no difficulty at all concluding this conduct alone would not give WLCP just cause to terminate Woods.

During the investigation, the Director was faced with competing versions of the events of December 22, 1999. The Director found support for the version of events provided by Woods in the evidence provided by Mr. Sawatsky:

> With respect to the issue of Woods leaving early on December 22, 1999, I note that the evidence of Sawatsky, an unbiased third party, supports the evidence provided by Woods.

The evidence provided by Sawatsky consisted of a letter, which stated in part:

> The copy of my weight will indicate that I left Prince George loaded for Williams Lake at 11:32 A.M. December 22/99. My driving time to Williams Lake is 4 Hrs. & 5 Mins. to 4 Hrs. & 10 Mins.
>
> I would have arrived Williams Lake Cedars log yard at approximately 3:37 P.M.
>
> It takes you from 10 Mins., to 15 Mins., to unload the logs and load the empty trailer on the truck, for the trip home.
>
> I would have left the log yard at approximately 3:47 P.M. to 3:52 P.M.

Mr. Sawatsky's weight slip was attached to the letter and confirmed he was out of the scaling station at Central Interior Log Sort Ltd. at 11:32 am on December 22, 1999. The Determination

also notes that Mr. Sawatsky was interviewed during the investigation. The information provided to the Director was set out on page 7 of the Determination.

In her initial response to the Director on the complaint, dated July 12, 2000, counsel for WLCP contended that several persons had verified that Woods left work early on December 22, 1999:

> It is the evidence of Cyril Mackey that, as he was sitting beside the First Aid room waiting for his ride home, he spoke to Woods as he was leaving the office. Mr. Mackey believes this conversation occurred at approximately 3:35 p.m. or 3:40 p.m.
>
> Sharon Preeper, the office receptionist recorded a statement on December 23, 1999 . . . stating that she is positive that Woods came into the office to fill out his time card *no later than* 3:30 p.m. on December 22, 1999. . . .
>
> Campbell also provided a statement . . . that he observed Woods leaving early on December 22, 1999. It is Campbell's evidence that he recalls Woods leaving at 3:20 p.m. Campbell remembers this because it struck him as peculiar that Woods would leave early as the work was not completed. Campbell had to call in extra help for an additional four hours to finish the job.

In the recorded statement by Sharon Preeper, referred to above, she included the following statement:

> On Wednesday afternoon Wayne [Woods] came into the office to fill out his time slip. I do not remember the exact time but I am positive that at the very latest it would have been 3:30.

In respect of that statement, the Determination noted:

> The evidence of the employer's witness Preeper is vague as to what time she allegedly saw Woods leaving. Preeper originally states she saw Woods leaving at between 3:15 and 3:30 p.m. on December 22, 1999. Finally, Preeper states she is not sure what time Woods left but is positive it was not later than 3:30 p.m.

There was also a statement provided to the Director by Maurice Prevost, who was the Planerman on the same shift as Woods on December 22, 1999, that he saw Woods "still piling strips at 3:30 on Dec. 22nd". The Determination says:

> The evidence of Prevost supports Woods to the extent that Woods was seen piling strips at 3:30 p.m., the time Preeper says she saw Woods leaving.

In the appeal, counsel for WLCP says the Director erred by failing to consider relevant evidence regarding the time Woods left work on December 22, 1999. I heard *viva voce* evidence from Ms.

Preeper, Jason Campbell, a Superintendent at WLCP, and from Mr. Mackey going to the time Woods left work on December 22, 1999. All of those individuals substantially confirmed the information provided and the statements made during the investigation, with some modifications and additions, which shall be discussed later.

Before reviewing the evidence, I will make some preliminary comments about the nature of the evidence before me. *Viva voce* evidence does not hold any greater status or deference in an appeal before the Tribunal than any other evidence. In other words, I am not bound to give any greater weight to *viva voce* evidence than to other evidence I might receive. I am able to receive hearsay evidence and I am entitled to prefer it to *viva voce* evidence.

Section 107 of the *Act* allows the Tribunal to determine its own procedure:

107. Subject to any rules made 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.

Section 109(1)(c) allows the Tribunal to establish rules about how reconsiderations and appeals are to be conducted. Section 9 of the Tribunal's Rules of Procedure, established under Section 109(1)(c) with the approval of the Minister, states:

9. If an oral hearing is held, The Tribunal may conduct the hearing without complying with the formal rules of procedure and evidence applicable in a court of law.

In Code Distribution Systems Ltd. v. General Truck Drivers and Helpers Union, Local 31 and Labour Relations Board of British Columbia, [1988] B.C.J. No. 561 (B.C.C.A.), the Court considered an appeal about the authority of an administrative tribunal, in that case the Labour Relations Board, to receive and give effect to hearsay evidence over viva voce evidence. The Court addressed that issue as follows:

> The second ground is that the Board failed to follow its own rules with respect to hearsay and direct evidence and it is put to us that there was direct evidence from Mr. George and the Board erred in preferring to it the hearsay evidence which it had by way of the officer's report, and we were referred to a decision of the Board in *Board of School Trustees No. 68 (Nanaimo) and Canadian Union of Public Employees, Local 606 (Mid Island School Employees)*, (1976) Canadian L.R.B.R. 39, and in it the Board stated these rules:
>
> (a) Uncorroborated hearsay evidence should not be preferred to direct sworn testimony;
>
> (b) Hearsay evidence alone should not be admitted to establish a crucial and essential question.

> The way the Board conducted itself in this case, or other cases, by way of following, deliberately not following, or ignoring evidentiary rules it laid down for itself in previous cases provides no basis for judicial review.
>
> As to evidence and procedure s. 19 of the *Code* provides:
>
> *19. (1) The Board may receive and accept such evidence and information on oath, affidavit or otherwise, as in its discretion it considers proper whether or not the evidence is admissible in a court of law.*
>
> S. 21, under the heading "Practice and Procedure":
>
> *21 The Board shall determine its own practice and procedure, but shall give full opportunity to the parties to present evidence and make submissions.*
>
> *(2) The Board may, subject to the Minister's approval, make rules governing its practice and procedure and exercise of its powers and establish forms it considers advisable.*
>
> It is, therefore, open to the Board to receive and accept hearsay evidence.

The Tribunal has the same power to receive and accept hearsay evidence.

It should be reiterated at this juncture that the burden in this appeal is not on Woods to reprove his complaint, but on WLCP to demonstrate an error or a basis for the Tribunal to vary or cancel the Determination. The application of that burden in the face of non-attendance by a respondent was discussed by the Tribunal in *Re Director of Employment Standards*, BC EST #D051/98 (Reconsideration of BC EST #D448/97):

> The nature of the burden on appeal was discussed in the case of *John Ladd's Imported Motor Car Co,* BC EST #D313/96. In this case the Adjudicator held that if the factual underpinnings of the Determination are in issue an oral hearing might be granted. The form of the hearing may take the form of a hearing de novo where the facts are disputed or the credibility of a witness is in issue. The Determination forms the basis of the hearing and frames the issues in dispute. The burden rests with the appellant. The form is more akin to a true appeal, but it has some characteristics of a hearing de novo.
>
> The non-attendance of a party [or, as in this case, a particular witness] does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A

> party who fails to appear at a hearing does take a risk that information or evidence helpful to the Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, an Employee or the Director's delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

I will return now to review the evidence provided by WLCP to consider whether that evidence satisfies the burden on them in this appeal.

Mr. Mackey stated, almost at the outset of his evidence, that he only vaguely remembered the day in question. At another point he stated that he had a bad memory. I do not give any weight to his *viva voce* evidence concerning the factual matter in dispute.

Mr. Campbell testified before me that on the day in question, Woods came into the office, Mr. Campbell looked at his watch, it was 3:20 pm and he commented to the secretary (Ms. Preeper) that "this guy belly-aches about too much work, then leaves before 3:20". He also stated, in respect to the time Mr. Sawatsky's truck arrived that he thought it arrived at about 2:30 pm and he saw it leave at 3:30 pm. Later in his evidence, he stated that he saw the truck pull out just before Woods entered the office. I disbelieve Mr. Campbell's evidence concerning his observations about the arrival and departure of Mr. Sawatsky's truck. It is patently absurd to suggest that Mr. Sawatsky could have made the trip from Prince George to the WLCP log yard driving a full loaded log truck on winter roads in something approximating 3 to 3¼ hours. My conclusion about that aspect of his evidence colours other aspects of his evidence.

Ms. Preeper testified that she saw Woods come into the office and she commented to Mr. Campbell, "For someone who had to be relieved, he sure is leaving early. I would be interested in seeing what he has on his time slip". She said she looked at the clock on her desk and it read 3:15, possibly 3:16. pm.

I have very carefully reviewed the information provided during the investigation by Mr. Campbell and Ms. Preeper against the evidence they gave at the hearing. At no time during the investigation did either of them indicate they had looked at a watch or a clock in reference to the time Woods was in the office on the day in question.

In her December 23, 1999 statement, which is reproduced above, Ms. Preeper said, "I do not remember the exact time". That is an unusual statement to make the day immediately following the incident in question when, as she stated in her evidence, she now recalls looking at her clock for the specific purpose of taking note of the time Woods appeared in the office and observing that it was 3:15 or 3:16 pm. It is all the more unusual that she has such clarity of recall, almost seventeen months after the event, without ever having recorded those observations at the time. Impacting on this concern about her evidence, and on the evidence of Mr. Campbell on this point, is other evidence introduced at the hearing. In her examination of Hawkridge, counsel for

WLCP had him identify notes that he had prepared of a meeting with Woods on December 29, 1999. The notes are headed up "Meeting with Wayne Woods" and identified Woods, Mr. Mackey and Mr. Hawkridge as being present. Hawkridge testified the notes were an accurate reflection of what transpired during that meeting and had been prepared by him contemporaneously to the meeting. The central purpose of the meeting was to determine the time Woods left work on December 22, 1999. Contained in the notes is a summary. Paragraph 1 of that summary states, with emphasis added:

> 1) Sharon [Ms. Preeper] and Jason [Mr. Campbell] said Wayne [Woods] put in his time card and left early. I asked how early they said give him the benefit of the doubt and say 3:30 PM. I asked them if they looked at a clock to see exactly what time **and they said no.**

While I did not hear directly from Mr. Sawatsky or from Mr. Prevost, I did receive the statements they provided during the investigation of the complaint. More to the point, I did not hear any evidence that might have diminished or nullified the validity or efficacy of the information they provided during the investigation. Like the Director, I prefer that evidence over the evidence given by Mr. Campbell and Ms. Preeper.

None of the other witnesses presented by either WLCP or Woods was of any value on the central factual issue in dispute.

WLCP has not met the burden of showing the Determination was wrong and the appeal is dismissed.

It is not necessary for me to address the effect of the Supreme Court's decision in *McKinley v. B.C. Tel*, *supra*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 15, 2001 be confirmed in the amount of $1,934.94, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal