An appeal

- by -

Danielle Lavoie
(“Lavoie” or “Employee”)

- 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: Paul E. Love

FILE No.: 2002/438

DATE OF HEARING: November 1, 2002

DATE OF DECISION: December 2, 2002

DECISION

OVERVIEW

This is an appeal by an employee, Danielle Lavoie, from a Determination dated July 22, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate ceased investigating the Employee's complaint for compensation for length of service because the Delegate concluded that Ms. Lavoie spoke to Ms. Kalwa, the owner of Kalvas Restaurant Ltd. ("Employer" or "Kalwa") in such a way that the Employer felt intimidated and threatened, and that this was insubordinate and wilful conduct justifying termination. In this case the issue of what happened between Ms. Lavoie and Ms. Kalwa was in dispute, and the Delegate resolved the issue of credibility against the Employer, without considering the approach in *Faryna v. Chorney, [1952] 2 D.L.R. 354 (C.A.)* and by considering events which were unrelated to the dealings on April 2, 2002. There was no objective evidence which confirmed the Employer's version of alleged insolent conduct. It is apparent that Ms. Lavoie was dismissed without notice, and without cause. I referred the issue of remedy to the Delegate for further investigation.

ISSUE:

Did the Delegate err in determining that Ms. Lavoie engaged in insubordinate conduct justifying her termination on April 2, 2002?

FACTS

I held an oral hearing and decided this case after considering the evidence and the submissions of the Employer and Employee. The Delegate did not attend the hearing, but did file a written submission, which I have also reviewed and considered.

This case turns almost entirely on an issue of credibility between Ms. Danielle Lavoie, and the principal of the Employer, Ms. Hildegard Kalwa. At issue is one week of severance pay for an Employee who earned income at the rate of $9.00 per hour, and worked on a part time basis.

Ms. Lavoie was hired as a part time housekeeper by the Employer, Kalva's Restaurant Ltd. Kalvas operate a restaurant in Parksville, and has been in business for a number of years. Ms. Lavoie worked between September 22, 2001 and April 2, 2002 on a part time basis. She wished to increase her hours. In approximately March of 2002, Val Gellner another housekeeper, left the employment of Kalva's because of carpal tunnel syndrome and the need for surgery. Ms. Lavoie expected her hours to be increased. Instead Ms. Kalwa hired a full time housekeeper.

Ms. Lavoie was expecting to have further discussions and negotiations with Ms. Kalwa, and believed that she would be getting more hours. Those negotiations did not take place before Ms. Kalwa went on vacation. Ms. Glenda Gellner was a manager in her absence. Ms. Kalwa left instructions with Glenda Gellner, that Ms. Lavoie's hours were not to be changed during her absence. Ms. Kalwa went to Europe on a holiday for six weeks, and Ms. Lavoie did not have this issue resolved, before the holiday. On April 2, 2002, after Ms. Kalwa returned from Europe, she asked to speak with Ms. Kalwa about this issue. Ms. Lavoie was terminated without notice on April 2, 2002, after her discussion with Ms. Kalwa.

Ms. Lavoie's position is that she was terminated without just cause, and the Employer's position is that she terminated Ms. Lavoie for insubordination on April 2, 2002. There was a gap in time between the discussion about the hours, and the termination. I am not satisfied that I can fix the timing of the conversations because of the differing evidence of Ms. Lavoie, Ms. Kalwa, and Mr. Vern Wood, and the fact that Ms. Kalwa and Mr. Wood gave their evidence on the basis of estimates.

At the time of termination, Mr. Vern Wood witnessed the termination. He was asked by Ms. Kalwa to "witness" the termination. He did not witness the events leading up to the termination, although he apparently heard an argument between Ms. Lavoie and Ms. Kalwa on the day Ms. Kalwa terminated Ms. Lavoie.

The Delegate was presented with two different stories. The story given by Ms. Lavoie was that she wished to discuss the additional hours issue with Ms. Kalwa, and as a result of that discussion formed the conclusion that she was not going to get additional hours, and that she left the scene not knowing whether to quit or not. Ms. Lavoie admits that she was upset during the discussion but indicates that she did not swear, did not threaten Ms. Kalwa in a verbal or physical manner. Ms. Lavoie says that there was no one present when this discussion occurred. She put the time of the discussion at after 11:00 am. She says that Vern Wood was present at her termination which happened about 3:00 pm, and that she signed out after that.

Ms. Kalwa says that she was pinned against the steam table, that she couldn't get away, and that Ms. Lavoie said "you will regret this all your life". Ms. Kalwa says that she is afraid of Ms. Lavoie, and that she was shaking after the incident. She says that she asked Vern Wood to witness her termination of Ms. Lavoie.

The Delegate preferred the Employer's version of the discussion, reasoning as follows:

> There appear to be two different versions of the same story. Although the employer says there was a witness, the employee claims there was none, and further believes that Vernon Wood is not a credible witness. The question must be asked, on a balance of probabilities, could Ms. Lavoie have been capable of yelling, being disrespectful to her employer, and threatening?
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> During the investigation, Mrs. Kalwa called to inform me of an incident that had occurred at a bank in Parksville. Apparently, Ms. Lavoie confronted Vernon Wood at the instant tellers, and caused such a commotion, that the bank staff were prepared to call the police. I confirmed this story with Vernon Wood, who claims that Ms. Lavoie had 'snapped' at him, and proceeded to yell at him and threaten him about his evidence to this branch.
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> Ms. Lavoie seemed quite calm and reasonable in all of our telephone conversations during the investigation, until I had advised her of my preliminary findings. In a telephone conversation on July 9, 2002, Ms. Lavoie became quite agitated with our conversation. She became loud, aggressive, and angry, when I suggested to her that perhaps she didn't realize how she affected people. When I advised here of a conversation with another witness (Val Gellner, employee of Kalvas, who advised me that she had witnessed Ms. Lavoie be disrespectful to Mrs. Kalwas on a few occasions), she said that Ms. Gellner is biased, because she has connections to Mrs. Kalwas.
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> I believe, on a balance of probabilities, that Ms. Lavoie spoke to her employer on April 2, 2002 in such a way that the employer felt intimidated and threatened. Speaking disrespectfully, and in a threatening way to your employer can be considered insubordination, and willful misconduct.

Both Ms. Lavoie and Ms. Kalwa referred to the "evidence of Val Gellner". I place no weight on the comments of either party concerning what Ms. Val Gellner said, as she was not called as a witness in the proceedings.

The Employer also called Glenda Gellner as a witness. Ms. Glenda Gellner was a manager left in charge of the restaurant while Ms. Kalwa went to Germany for six weeks. In particular in considering the evidence of Ms. Glenda Gellner, no evidence was given before me which could be considered to be evidence of past insubordinate conduct by Ms. Lavoie to Glenda Gellner. It was apparent that Ms. Gellner knew of Ms. Lavoie's need for additional working hours, and I find that she had spoken to Ms. Kalwa particularly about this point before Ms. Kalwa left on holidays. In my view, this evidence that there was an unresolved work place dispute concerning additional work hours before Ms. Kalwa left to go on holidays.

Mr. Wood, a chef, was called by the Employer as a witness. Mr. Wood was openly hostile to Ms. Lavoie during the course of his evidence. Both Ms. Kalwa and Mr. Wood state that after the argument Ms. Kalwa was shaking. In my view this is equivocal evidence - people can shake from fear or anger. In my view there was evidence of anger on the part of both Ms. Lavoie and Ms. Kalva. Mr. Wood was not sure what was said, who said what, but that it was a heated argument. His attention was drawn to the argument, and the argument stopped when he came into the view of the parties. His evidence cannot support the Employer's assertion that Ms. Lavoie behaved in a threatening manner. The evidence of the transaction at the Bank cannot be used to buttress "alleged threatening conduct" at the time of termination, for the reasons set out below.

I note that in Ms. Kalwa's submission she claims that her head chef came running and "I told him to stay for assistance and then I fired her". On the evidence of Mr. Wood, there was at least a 20 minute separation in time between the incident and the termination. While the exact times at which events occurred is difficult to find (some parties had watches others did not), Mr. Wood's version of events seems to be more closely similar to Ms. Lavoie's then Ms. Kalwa's. This version differs from Ms. Lavoie's version which places the argument at about 11:00 am, and the termination at about 3:00 pm. I do not find that the evidence before me was precise enough for me to fix the time of the incidents. It appears that there was an argument between Ms. Lavoie and Ms. Kalwa concerning additional hours of work, followed by Ms. Lavoie's termination by Ms. Kalwa at a later point in the afternoon.

I note that both witnesses called by the Employer, exhibited partiality towards the Employer during the course of their evidence.

Employer's Argument:

The Employer submits Ms. Lavoie was rude, threatening and insubordinate on April 2, 2002, and the Employer felt that it had no choice but to terminate Ms. Lavoie. She said that there were other incidents, and she was "out of control more than once".

Employee's Arguments:

The Employee submits, that the Delegate erred in resolving the issue of credibility on the basis of an incident between Ms. Lavoie and Mr. Wood at the bank sometime after her termination, on the basis of the Employee's views of the Employer's "thought process" communicated by Ms. Lavoie to the Delegate after termination, and on the basis of "other incidents of rudeness and insubordination, not properly investigated by the Delegate.

Delegate's Argument

The Director's Delegate submitted that :

> Ms. Lavoie has gone into great detail to discredit the employer, the witnesses, and my investigation. I have no further comments on this matter, except that the main issue is that Ms. Lavoie was terminated for an alleged act of insubordination toward her employer. The manner in which Ms. Lavoie spoke with her employer on the day her employment was terminate, was perceived by the employer and witness Vernon Wood a, as aggressive and threatening.
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> There is no rule of law outlining what degree of employee misconduct constitutes just cause. Ms. Lavoie was terminated because the employer felt that Ms. Lavoie threatened and harassed her. The Director considers wilful misconduct or harassment to be just cause.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employee, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that an Employee is entitled to compensation for length of service, unless an Employer can establish that it gave notice to the Employee, or that it had just cause. There was no advance notice given to Ms. Lavoie, and it is apparent that prior to April 2, 2002, the Employer had no intention of terminating Ms. Lavoie. The Employer considered the events of April 2, 2002 as insubordinate conduct of Ms. Lavoie justifying her termination. The question, however, is whether the conduct on April 2, 2002 was sufficiently insolent to justify the termination of the Employee. The focus of the conflict is a dispute about additional "hours of work". As a result of the discussion the Employee was terminated. Neither party kept notes. I note that this rests on the evidence of the two disputants, with little in the way of objective information or third party witnesses.

There are a number of errors in the Determination, which warrant a finding that the Delegate erred and should have determined that Ms. Lavoie was dismissed, without just cause. I heard all the evidence from the parties, and I am not prepared to defer to the Delegate's assessment of credibility of the parties, particularly where the Delegate's approach to credibility was flawed.

In my view, the Delegate erred in concluding the conduct of Ms. Lavoie was insubordinate conduct. Generally, insubordinate conduct is the failure of the employee to carry out the lawful instructions of the Employer. The incident alleged by the Employer as forming the basis for the insubordinate conduct did not involve any failure by the Employee to carry out directions of the Employer. It was not in the presence of other employees. The conduct alleged by the Employer in this case falls more properly into

the category of "insolence". Insolent conduct by an employee can be grounds for a just cause termination. The question with insolence is whether the employee's conduct was so extreme as to repudiate the contract of employment and is incompatible with the continuance of the employment relationship: Ball, Canadian Employment Law, p 11-26. The learned author notes:

> The courts are, however, reluctant to use this in itself as a ground for dismissal, and will examine all of the circumstances in order to determine whether the employee's conduct was so extreme as to repudiate the contract of employment and incompatible with the continuance of the employment relationship.

If the Employer is at least partially responsible for the "outburst" this may be mitigating factor: *Redfearn v. Elkford* (District) (1998), 34 C.C.E.L. (2d) 309 (BSCC).

In my view, during the course of the investigation it is for the Employer to establish its defence of insolent (or alternatively insubordinate) conduct. In the absence of such a defence, on the undisputed facts - termination without notice of an Employee who has worked three consecutive months - the Employer is required to pay compensation for length of service. After an investigation in order for Kalva's to succeed in avoiding payment of compensation for length of service, the Delegate must be satisfied that it was more probable than not that Ms. Lavoie engaged in insolent behaviour of such a magnitude or "was so extreme as to repudiate the contract of employment and incompatible with the continuance of the employment relationship". It is apparent that the Delegate did not apply this approach, and did not consider any issue of mitigation.

In assessing cause one has to engage in an objective analysis of the facts, and apply the applicable legal test to resolving factual disputes, and apply the applicable law. I have no doubt that Ms. Kalwa felt that "Ms. Lavoie threatened and harassed her". The question however is not what the Employer felt, but what was said or done on the date in question, and whether what was said or done was sufficient to destroy the employment relationship.

In my view, Ms. Kalva's conclusion on the issue of insubordination- that she felt threatened and harassed - must be given some degree of scrutiny. It is apparent to me, that there is a tendency on her part to exaggerate her evidence, or alternatively to express her conclusions on a matter, without a supporting factual basis. This was apparent when one compares her evidence to the evidence of other witnesses. I am uncertain whether this is conscious or unconscious exaggeration, and certainly I do not find "fabrication". Persons perceive events differently, and there is often at least two different perceptions of events where two or more people witness events.

For example Ms. Kalwa indicated that while she was away in Germany she left Ms. Glenda Gellner in charge, and Ms. Lavoie was rude and insubordinate to Ms. Glenda Gellner. It appears that the incidents referred to are a telephone call which was a request for cleaning supplies - a spray bottle, a report that Ms. Lavoie's car had broken down and that she would not be in to work, unless someone could pick her up, and requests for additional hours. All of these issues are legitimate areas for employee communication to a manager or employer. Ms. Gellner was in the position of being a manager while Ms. Kalwa was away. While Ms. Lavoie was "direct" in her communication, there was no evidence that she was threatening or rude to Ms. Gellner. I note Ms. Lavoie was not cross-examined on the issue of this "past insubordinate or insolent conduct". The absence of such cross-examination is a matter of fairness, and in my view, fatal to the Employer's contention of past insubordinate conduct to Ms. Gellner. I further note, that this information was not referenced in the Determination, and therefore I conclude that it is in the nature of new evidence tendered on the appeal, and not before the Delegate.

It is apparent that the Delegate considered the single event on April 2, 2002, as insubordinate or "just cause" for the dismissal of Ms. Lavoie. While the Determination reports that the Employer believed that Ms. Lavoie was disrespectful to her in the past and was always trying to control everything, there is no factual support in the evidence of Ms. Kalwa at this hearing, or in the Determination for a "history of insubordinate conduct by Ms. Lavoie".

Further in my view, the Delegate erred in resolving the issue of "what happened" by referring to a capacity of Ms. Lavoie to engage in disrespectful conduct. It is apparent that this approach was taken by the Delegate:

> The question must be asked, on a balance of probabilities, could Ms. Lavoie have been capable of yelling, being disrespectful to her employer, and threatening?

In resolving issues of credibility between witnesses, the appropriate test is that set out in *Faryna v. Chorny, [1952] 2 D.L.R. 354 (C.A.).*:

> The credibility of interested witnesses, particularly in cases on conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of truth. The test must reasonably subject his story to the examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be truth, but he may be quite honestly mistaken. For a trial Judge to say " I believe him because I judge him to be telling the truth" , is to come to a conclusion on consideration of only half the problem. In truth it may easily be self direction of a dangerous kind.
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> The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reason for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based no on one element only to the exclusion of others, but is based upon all the elements by which it can be tested in the particular case.

It is apparent that the Delegate did not apply this test, and in particular did not consider the context and nature of the dispute.

Further, the Delegate, rather used "events after the fact", to form findings related to the credibility of Ms. Lavoie. The Delegate focused unduly on whether Ms. Lavoie was a person capable of being argumentative and insubordinate. The Delegate resolved the issue of credibility by finding that Ms. Lavoie was capable of yelling, being disrespectful and threatening. In my view this line of analysis is dangerous, and does not assist in resolving the issue of credibility. If a Delegate engages in this type of analysis, the Delegate should consider the conduct also of the other party engaged in the conflict. In this hearing, for example, there were numerous incidents of Ms. Kalwa disrupting and criticizing Ms. Lavoie, during the course of her evidence and submission. Common sense tells us that any person is capable of yelling and being disrespectful when in conflict. The capacity for "an angry outburst" does not assist in determining whether Ms. Lavoie was insolent when discussing her need for additional hours of work. It

may be a factor, but in this case, it is of little assistance given that the Delegate did not consider the capacity of each party. Particularly, this is an error where the Delegate has erred in finding this capacity on the basis of post incident events, and where it is clear that angry words were likely exchanged by both parties (evidence of Wood) during the course of the transaction on April 2, 2002.

The Banking Incident:

The Delegate chose to support her findings of credibility based on an incident at the CIBC branch in Parksville, which occurred some time after the date of the termination. For the reasons outlined below, it is my view that Ms. Kalwa exaggerated to the Delegate an incident which occurred at the CIBC bank. Ms. Kalwa reported this incident to the Delegate, after learning of the incident from Mr. Wood. I heard the evidence of what occurred from Ms. Lavoie, and Mr. Wood, and I heard about the physical setting and an investigation conducted by a bank manager, when the Delegate's version of events was brought to the attention of the manger by Ms. Lavoie.

I particularly find, as a fact, that the transaction at the CIBC branch at Parksville, did not occur in the manner set out by the Delegate in the Determination. The discussion between Ms. Lavoie and Mr. Wood commenced in the instant teller area of the bank. This area is separated from the main portion of the bank by shatter proof glass doors, and is capable of secure operation when the bank is closed. Any conversation that occurred simply was not loud enough to cause any disturbance in the main portion of the bank. After some conversation, Mr. Wood appears to have gone into the main portion of the branch, and Ms. Lavoie had further discussion with him, while he was attempting to ignore her and had his back to her. It may be that she opened the door and called to him from the instant teller area after finishing her transaction. It is apparent from the evidence before me, Mr. Wood simply felt uncomfortable with Ms. Lavoie raising with him in a public setting, whether the evidence that he gave to the Delegate was true or not. Mr. Wood was uncomfortable with a suggestion that if his evidence was untrue he should discuss it with the Delegate. There was no yelling by Ms. Lavoie or "snapping" by Ms. Lavoie at Mr. Wood. This incident was not reported by Mr. Wood to the bank. The bank staff were not prepared to call the police, as the Delegate stated in the findings of fact. The Bank manager conducted an investigation of this matter at the request of Ms. Lavoie, and was unable to confirm an incident of the nature set out in the Determination. It appears that if the incident had "gone further" Mr. Wood was prepared to report the incident to the police and get a "restraining order" against Ms. Lavoie.

It appears that Ms. Kalwa exaggerated the incident to the Delegate. Mr. Wood's evidence before me certainly did not support the findings of fact relating to this incident in the Determination. It is apparent that the Delegate relied on this incident in determining that Ms. Lavoie was capable of being insubordinate. The incident itself is completely irrelevant on the issue of whether Ms. Kalwa's evidence should be preferred to Ms. Lavoie's evidence concerning the April 2, 2002 incident.

Incident During the Delegate's Investigation:

The Delegate chose to make her own dealings with the Employee part of her reasons for disbelieving the Employee's version of the termination incident. I note that the Delegate did not appear at this hearing. The only person that gave evidence of the investigation at this hearing was Ms. Lavoie. In her written submission to the Tribunal, the Delegate has not addressed Ms. Lavoie's comments concerning the investigation other than to note that "Ms. Lavoie has gone into great detail to discredit the employer, the witnesses, and my investigation".

In her written submission to the Tribunal, and at the hearing, Ms. Lavoie explained her dealings with the Delegate. Ms. Lavoie claims that she became agitated in her dealings with the Delegate, when she expressed to the Delegate the words "Ms. Kalwa probably was thinking what the fuck is this housekeeper doing questioning me", in the context of attempting to describe Ms. Kalwa's authoritarian management style. Ms. Lavoie was attempting to communicate why she believed Ms. Kalwa may have "thought she was being insubordinate", when she was not engaging in that type of behaviour. Ms. Lavoie became upset when the Delegate flipped around Ms. Lavoie's words and advised her that "she could be aggressive".

In her submission to the Tribunal dated September 27, 2002 Ms. Lavoie expressed this as follows:

> During a conversation with the ESO, I imitated what I believed was Mrs. Kalwa's mental and internal reaction to my enquiry about additional hours. Since Mrs. Kalwa has a very authoritative management style, I believed that simply asking her about her intention to give me additional hours was perceived as inappropriate by her. In other words, she would be thinking "How dare she question the boss!" The ESO believes that my imitation of Mrs. Kalwa mental processes could be construed to say that on the day of my dismissal, I was sufficiently aggressive enough, both verbally and physically, to justify my dismissal.

This occurred, apparently, after the Delegate advised Ms. Lavoie that she would not be interviewing any of the other kitchen staff on duty at the time, who could possibly have shed some light on the disputed facts. Further, this was at a time after the Delegate told Ms. Lavoie there were "other incidents of insubordination witnessed by Val Gellner". Ms. Lavoie asked the Delegate for details, and the Delegate apparently was unable to relate any details to Ms. Lavoie. Ms. Lavoie communicated to the Delegate that it was unlikely that there was evidence of "insubordination" from Val Gellner as she worked different shifts on different days. It did not appear to Ms. Lavoie that the Delegate intended to fully investigate the issue of alleged past insubordination.

In my view, the investigative experience of the Delegate is of little assistance in resolving the issue of credibility, particularly where such evidence is before me in an unsworn form, and has been fully explained, under affirmation, by the Employee.

Val Gellner's "Evidence":

At a meeting between the Delegate and Ms. Lavoie, the Delegate apparently told Ms. Lavoie that the Employer communicated to her other incidents of insubordination witnessed by Ms. Gellner. The Delegate apparently relies to a certain extent on these other incidents of rudeness in coming to the conclusion that Ms. Lavoie had the capacity to be aggressive and insubordinate in her dealings with the Employer. Neither party called Ms. Gellner to give evidence in this proceeding. Each party attempted to provide hearsay evidence concerning Ms. Gellner's evidence.

I accept the Employee's evidence that it is improbable that Val Gellner had the opportunity to observe any dealings between Ms. Lavoie and Ms. Kalwas. These two individuals, both housekeepers, worked on different days. Ms. Lavoie asked the Delegate for details and no details were provided. Ms. Gellner ceased working for the Employer some time in March of 2002. No details of the "insubordinate conduct" alleged to have been witnessed by Ms. Gellner were provided in the Determination.

It is apparent that the Delegate used the comments made by Ms. Val Gellner in concluding that Ms. Lavoie was capable of insubordinate conduct. In my view this is an error, particularly where a full investigation was not conducted into what Val Gellner said, after the Employee raised the issue of opportunity to observe. Further when one assesses credibility and issues a Determination on the basis of credibility, it is incumbent on the Delegate to give reasons. There are insufficient details of the "other insubordinate conduct" witnessed by Val Gellner set out in the Determination, for me to be able to safely conclude that there was "other conduct". It is apparent that the Delegate used the "other insubordinate conduct" to come to the conclusion that there was insubordinate conduct on the date of termination. This is a serious error which warrants the setting aside of the Determination.

The Context of the Dispute:

The background is a dispute between the parties concerning hours of work. Ms. Lavoie was seeking more hours of work, and Ms. Kalwa had no intention of giving her more hours of work. I find from both the evidence of Ms. Lavoie and from Ms. Gellner, that the issue of more hours was "unresolved" before Ms. Kalwa went on holidays. I do not accept Ms. Kalwa's evidence that she had told Ms. Lavoie that "she was not going to be full time", before April 2, 2002. It is inconsistent with the probabilities, that an incident would have occurred on April 2, 2002, if Ms. Lavoie was informed that her hours would not be increased, when the other housekeeper was hired. The fact that the incident arose appears to confirm Ms. Lavoie's evidence that there was an unresolved matter between Ms. Kalva's and herself concerning hours.

After hearing the evidence of Ms. Kalwa, I find that Ms. Kalwa had a number of disputes with Ms. Lavoie, which she made no attempt to disclose to Ms. Lavoie or resolve during the working relationship, including her view that Ms. Lavoie should not have used a "microwave" at the kitchen to "microwave" her lunch without asking. There also appear to have been unresolved issues relating to the manner in which Ms. Lavoie was reporting her time on her time sheets, using the actual time in rather than recorded it to the nearest 1/4 hour.

It is apparent to me, from the evidence of Ms. Kalwa, that she had no intention of giving Ms. Lavoie further hours. It is also apparent that Ms. Lavoie had waited for a period of time to discuss the additional hours with Ms. Kalwa, and Ms. Lavoie was distressed by her financial circumstances. This distress is confirmed by Ms. Glenda Gellner. It is apparent that Ms. Kalwa knew of Ms. Lavoie's unresolved request for further hours, because she directed Glenda Gellner not to change Ms. Lavoie's hours, during Ms. Kalwa's vacation. I have no doubt that on April 2, 2002, Ms. Lavoie was upset. I have no doubt that Ms. Kalwa was upset at having to deal with this issue, which she had ignored, immediately upon her return from vacation.

Under the *Act*, an Employer has control of the work place and can set hours of work. There is no remedy available to an Employee to resolve "grievances" with an employer. An Employee who cannot negotiate a resolution to a dispute, either "puts up" with the terms and conditions set by the employer or "leaves" the employment of the Employer. Ms. Lavoie had no right to compel Ms. Kalwa to provide her with additional hours, and indeed no right to compel Ms. Kalwa to speak to her about it. In my view, an Employee cannot be dismissed for attempting to resolve a dispute about the terms and conditions of employment, unless the Employer can clearly establish insolent conduct or conduct "which was so extreme as to repudiate the contract of employment and incompatible with the continuance of the employment relationship ." In my view, there is no objective evidence, that Ms. Lavoie's conduct was insolent on April 2, 2002. She was discussing a dispute with her Employer. That discussion became heated. Ms. Kalwa perceives that she was backed into a corner by Ms. Lavoie, or "pinned against the

steam table" although the "sketch of the scene" prepared by Mr. Wood, and filed as an exhibit, does not support this - there were avenues for her to "escape".

There is some measure of exaggeration in Ms. Kalwa's evidence concerning the transaction on April 2, 2002. Mr. Wood came in on the tail end of an argument. He does not support his employer's view that Ms. Kalwa was pinned against the steam table, although he indicates that Ms. Lavoie was "in Ms. Kalval's personal space and about two feet away". In cross-examination Ms. Kalwa agrees that she was not touched, was not physically threatened, was not sworn at by Ms. Lavoie during the transaction.

Because of exaggeration, in my view it would be unsafe for me to accept Ms. Kalwa's evidence that she was threatened by Ms. Lavoie. She may have felt threatened, but I am not satisfied that there is an appropriate basis in the evidence to conclude that she was threatened. In summary, I find that there was no insolence or insubordination in the conduct of Ms. Lavoie on the date that she was terminated. Further, it is my view that the failure of Ms. Kalwa to discuss the "issue of additional hours"with Ms. Lavoie at an earlier time was conduct which mitigated any conduct by Ms. Lavoie on April 2, 2002. The Employer contributed to Ms. Lavoie's uncertainty and distress concerning her position by hiring another housekeeper, and by failing to address Ms. Lavoie's request for additional hours, all during a time when Ms. Lavoie had a need for increased hours.

I note that there is nothing in the Determination which permits me to assess compensation owing to Ms. Lavoie. I note that she appears to earn $9.00 per hour, but there is uncertainty with regard to hours worked, and her original complaint also alleges that she has more hours owing than the employer paid. I am unable to fix a remedy based on the information before me, and therefore refer the issue of remedy to the Delegate.

New Evidence Ruling:

During closing argument, the Employer attempted to file with the Tribunal new evidence consisting of "alarm code" information. This information was not produced in any submission to the Tribunal prior to the hearing, and is not referred to in the Determination. I surmise that because it was not referred to in the Determination, that the material was not tendered by the Employer to the Delegate. There was some equivocation on this point by the Employer. The Employer did not cross-examine Ms. Lavoie on the issue of alarm codes in the hearing. The Employer sought to introduce the evidence to show that the Employee lied about the times that she recorded on her calendar for entering the premises, and also to show that the amounts claimed by the Employee were incorrect. Further it appears that another purpose for introducing the evidence was to impeach Ms. Lavoie's credibility. The Employer indicated that she did not have the opportunity to file this material because she received late notice from the Tribunal on the issue of filings. In my view the information sought to be tendered is not admissible. It does not relate to the main issue in this case of whether or not Ms. Lavoie was insubordinate on April 2, 2002. It may relate to the issue of compensation, but I advised the Employer that should I find "no insubordination" I would be referring the issue of wage entitlement to the Delegate as the Delegate did not consider compensation issues in the Determination she issued finding insubordination justifying dismissal. If the information relates to the hours actually worked by the Employee, the Employer can provide the information to the Delegate. I leave it to the Delegate to decide if such information is helpful in fixing the quantum of compensation for length of service.

ORDER

Pursuant to s. 115 of the *Act* I find that Ms. Lavoie was dismissed without just cause. I refer the issue of remedy to the Delegate for further investigation.

Paul E. Love
Adjudicator
Employment Standards Tribunal