An Application for Reconsideration

- by -

Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL PANEL: Kenneth Wm. Thornicroft
Brent Mullin
Carol L. Roberts

FILE No.: 2017A/73

DATE OF DECISION: July 18, 2017

DECISION

SUBMISSIONS

Laurel Courtenay	counsel for the Director of Employment Standards
David Penner	counsel for Black Press Group Ltd. carrying on business as The Nelson Star

OVERVIEW

1. Under the *Employment Standards Act* (the "*Act*"), compensation for length of service ("CLS") is presumptively payable to an employee on termination of employment; however, an employer is not required to pay CLS if there is "just cause" for dismissal. Ordinarily, the employer will demonstrate just cause based on evidence known at the time of dismissal, but occasionally an employer will rely on evidence not known to it at the time of dismissal, but discovered *after* the date of termination. This latter sort of evidence is known as "after-acquired evidence" (although it is perhaps more accurately termed after-*discovered* evidence).

2. This application raises the following question: "Can an employer rely on after-acquired evidence to prove just cause under subsection 63(3)(c) of the *Act*, and thereby discharge its presumptive obligation to pay CLS to the dismissed employee?"

3. The Director of Employment Standards (the "Director"), by way of the present reconsideration application filed under section 116 of the *Act*, asks the Tribunal to clearly state that "just cause" cannot be demonstrated by evidence the employer discovered after the employee was dismissed. The Tribunal's jurisprudence regarding after-acquired evidence has not been entirely consistent and, as such, our reasons for decision in this matter will hopefully provide needed clarity and guidance.

4. This application concerns BC EST # D043/17 issued by Tribunal Member Gandhi on April 19, 2017 (the "Appeal Decision"). Member Gandhi issued the following order and direction under section 115(1)(b) of the *Act*: "In my view, this matter should be returned to the Director, and the Director should consider the evidence of Misconduct previously tendered to determine whether the Appellant has established just cause, on a balance of the probabilities".

5. In adjudicating this application, we have reviewed the subsection 112(5) record that was before the Tribunal in the appeal, as well as the written submissions filed by legal counsel for the Director and by legal counsel for the employer, Black Press Group Ltd. ("Black Press"). Although invited to do so, the respondent employee, Ms. Elizabeth Simmons ("Simmons"), did not file a submission in these proceedings.

6. In our view, although this application passes the first stage of the *Milan Holdings* test that governs reconsideration applications (see *Director of Employment Standards*, BC EST # D313/98), we have ultimately concluded that the Director's application to cancel the Appeal Decision must be refused. In the following sections we set out the relevant facts, the adjudicative history of this matter, the governing legal framework, the parties' submissions and, lastly, our decision, reasons and final order.

BACKGROUND FACTS

7. Black Press publishes the Nelson Star, a twice-weekly community newspaper. The complainant, Ms. Simmons, was employed as the paper's "circulation manager". Ms. Simmons was absent from work in July 2015 apparently due to certain medical problems and Black Press subsequently concluded that she had abandoned her position. By letter dated July 22, 2015, Black Press informed Ms. Simmons that since she had been "absent without leave or explanation…we can therefore come to no conclusion other than that you have abandoned your position at the Star". The July 22 letter continued: "We will process the end of that employment without delay". Black Press issued a Record of Employment for Ms. Simmons indicating that she had "quit" her employment.

The Determination and the Delegate's Reasons

8. Ms. Simmons filed an unpaid wage complaint that was the subject of a teleconference complaint hearing conducted by a delegate of the Director of Employment Standards (the "delegate") on April 21, 2016. Although Black Press appeared at the hearing with legal counsel and several witnesses, Ms. Simmons did not attend the hearing. The delegate concluded, at page R9 of her "Reasons for the Determination" issued on September 23, 2016 (the "delegate's reasons"), that Ms. Simmons "was given an opportunity to attend the hearing but failed to participate" and that "she did not ask for an adjournment" and, as such, the delegate was "satisfied the Complainant has been given a reasonable opportunity to participate in the complaint process".

9. The delegate determined that Ms. Simmons had not, in fact, abandoned her employment (page R11):

> While the Complainant did not follow the correct Employer procedure for advising Ms. Bennett [the Nelson Star's manager and publisher] that she was sick, the Employer was clearly aware on July 20, 2015 that she was ill, her whereabouts were unknown and her family was seriously concerned. I find the Complainant's behaviour in notifying the Employer she was sick and then appearing in person four days later with a doctor's note is not the behaviour of a person who was abandoning her employment. Therefore, I find it was the Employer who terminated the Complainant's employment on July 24, 2015 when Ms. Bennett advised the Complainant she no longer worked for Black Press.

10. Black Press advanced an alternative argument before the delegate, namely, that even if Ms. Simmons did not abandon her employment, she was nonetheless not entitled to any CLS since she was dismissed for just cause. Black Press argued that Ms. Simmons "committed fraud, stole from the Employer and covered it up" (delegate's reasons, page R3). Black Press conceded that it had not asserted just cause for dismissal when it ended Ms. Simmons' employment in late July 2015 (its sole assertion being that she had abandoned her employment). However, Black Press maintained that it later learned of Ms. Simmons alleged theft/fraud – and we wish to emphasize that Member Gandhi did not find that these allegations were proven, only that the delegate should have weighed the evidence concerning these allegations – sometime in the late summer or early fall of 2015 when Ms. Simmons' replacement "noticed some irregularities" (delegate's reasons, page R5). Black Press conducted further investigations and on March 24, 2016, sent a letter to the Complainant advising her that it was taking the position that she was dismissed for just cause. On the same date, Black Press also issued an Amended Record of Employment indicating that Ms. Simmons had been dismissed (the original ROE indicated that Ms. Simmons had "quit").

11. The delegate addressed the just cause allegation as follows (at page R11):

> …the Employer [initially] took the position that the Complainant had abandoned her job. There was no mention of theft or fraud and these issues did not form part of the Employer's reasons for deeming her employment to be at an end…
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> According to the evidence of [three Black Press employees] the investigation into the financial irregularities in the circulation department and the eventual conclusion that the Complainant committed fraud occurred after the Complainant's employment ended. The Employer argues that this evidence should be considered and the common law concept of after-acquired cause applied to result in a finding that it had just cause to terminate the Complainant's employment.
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> It is well established that evidence acquired by an employer after termination is admissible in a wrongful dismissal action in court to prove just cause. The question is whether evidence of this nature can be taken into account to determine whether an employer has discharged its liability to prove just cause under section 63 of the Act.

12. The delegate then referred to three Tribunal decisions that either hold or strongly suggest that evidence concerning after-acquired cause should not be considered when determining if CLS is owed: *Benoit*, BC EST # D138/00 (Stevenson); *BNW Travel Management Ltd.*, BC EST # D170/04 (Stevenson); and *Kootenay Uniform and Linen Ltd.*, BC EST # D126/07 (Matsuno). The delegate did not refer to other Tribunal decisions that posit precisely the opposite conclusion. In any event, the delegate observed that the *Act*, as a benefits-conferring statute, must be given "large and liberal interpretation". She then determined that in light of the purposes of the *Act*, and taking into account the express language of sections 18 and 63, "I can only consider the evidence that Black Press relied on at the time of termination, not the evidence that came to its attention afterward" (page R12). The delegate's ultimate conclusion on this issue was as follows: "As I have found the Complainant did not abandon her job and the only arguments put forth by the Employer relate to theft and fraud, which were not the reasons it decided the Complainant's employment was at an end, I find the Complainant was terminated without cause and is entitled to wages for compensation for length of service" (page R12).

13. The delegate issued a Determination dated September 23, 2016, awarding Ms. Simmons 3 weeks' wages as CLS ($1,910.88) and a further amount on account of an earned productivity bonus described as a "Growth Plan Payout" ($2,446.70). Together with section 88 interest and 4% vacation pay, the total amount awarded to Ms. Simmons was $4,675.94. The delegate also levied two $500 monetary penalties against Black Press (see section 98) thus bringing the total amount of the Determination to $5,675.94.

The Black Press Appeal

14. Black Press appealed the Determination on the sole ground that the delegate erred in law in awarding Ms. Simmons CLS and compensation under the "Growth Plan". With respect to the latter award, Black Press asserted that since Ms. Simmons was terminated for just cause, by the express terms of the Growth Plan she was not entitled to any payment under the plan. The delegate, at page R13 of her reasons, referred to the plan's provisions:

> The Growth Plan Payout states "Any employee fired for just cause will lose the rights to his or her investment units or any other proceeds for the Growth Plan. Just cause includes any conduct, or failure to carry out employment duties, which justifies termination of employment."

The delegate awarded Ms. Simmons the bonus because it fell within the subsection (b) definition of "wages" (see subsection 1(1) of the *Act*), and was thus payable given her conclusion that there was no just cause for dismissal. The delegate determined that Ms. Simmons "had met the criteria and earned the Growth Plan

Payout in the amount of $2,446.70" (page R13), and since she was terminated without just cause, she was entitled to recover that latter amount (page R14).

15. With respect to the issue of just cause, Black Press argued that the delegate erred in refusing to consider its after-acquired evidence and in so doing ignored relevant Tribunal jurisprudence (presented at the hearing) supporting its position:

> Black Press's case is not one in which an employer is raising allegations of after-acquired cause for the first time on appeal. All of the relevant evidence for cause to terminate Ms. Simmons's employment was presented in detail before the Delegate at the hearing, prior to the Determination. The evidence was undisputed by Ms. Simmons who, it should be noted, knew of Black Press's position and chose not to attend the hearing to face the allegations…
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> Where an employer raises evidence of after-acquired cause after a hearing, where a determination has already been made, particularly where the employer could have raised such evidence at the hearing, there are real concerns about re-litigating and reopening the case. In those circumstances, such concerns may well militate against allowing an employer to rely on after-acquired cause.
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> In Black Press's case, there is no such concern.

16. Black Press argued that the Determination should be cancelled. It submitted that its after-acquired evidence demonstrated serious misconduct and that "theft and fraud are each among the most serious examples of workplace misconduct" because, apart from illegality, such behaviour "irreparably damages the trust that is essential in the employment relationship". Black Press asserted that such behaviour is "particularly serious where an employee has taken steps to conceal the misconduct from his or her employer".

17. Ms. Simmons filed a 1-page submission in response to the appeal. In this brief submission, Ms. Simmons provided some details regarding her workplace absence and some information about her general medical/psychological condition. She also provided some information about the Growth Plan Payout. Curiously, Ms. Simmons did not deny, in any fashion (even by way of a general unparticularized statement of disagreement), the allegations of misconduct levied against her by Black Press. Member Gandhi observed, at para. 12 of the Appeal Decision, that her submissions "address[ed] matters unrelated to the allegations of Misconduct or the relatively narrow issue that I must decide in this appeal, and I do not consider them to be particularly helpful." We agree with that assessment.

18. The delegate's submission was, essentially, a reiteration of the position she took in her reasons, namely, that evidence concerning after-acquired cause should not be taken into account when determining if there is just cause within subsection 63(3)(c) of the *Act*.

The Appeal Decision

19. On the issue of after-acquired cause, Tribunal Member Gandhi noted that both *Benoit* and *Kootenay Uniform*, *supra*, were distinguishable from the case at hand. In *Benoit*, the after-acquired evidence was first submitted on appeal as new evidence (see subsection 112(1)(c) and *Davies et al.*, BC EST # D171/03, regarding the admission of new evidence on appeal). In *Kootenay Uniform*, no after-acquired evidence was ever submitted to the Director or to the Tribunal – "Rather, the appellant in that matter argued a breach of natural justice because it was it [*sic*] denied an adequate opportunity to respond to a complaint and, as such, was denied the opportunity to discover facts amounting to 'after-acquired cause' [and] the Tribunal referred to the doctrine, but did not actually consider how it might, or might not, apply to section 63(3)(c) of the *Act*." (Appeal Decision, para. 20). After briefly referring to some other Tribunal decisions, Member Gandhi then concluded (at para. 24):

> I agree with the Appellant's observation that these decisions reveal a difference of opinion within the Tribunal with respect to whether or not the section 63 version of "just cause" includes "after-acquired cause". *Benoit* is not determinative, in my view, and to the extent that the Tribunal's decision *BNW* relies exclusively upon that ruling, I am not convinced that I should follow it. None of the remaining cases consider the subject doctrine in a meaningful way.

20. His central findings were as follows (para. 25): "I find that the *Act* does not preclude an employer from arguing that the obligation to pay compensation under sections 63(1) and 63(2) has been satisfied where it is shown that just cause exists even though that cause was not discovered before the end of employment" and "the Director was wrong to refuse to consider the employer's evidence of after-acquired cause" (para. 27). Member Gandhi concluded that the delegate misinterpreted subsection 63(3)(c) of the *Act* and set out eight separate considerations supporting that conclusion (para. 26). We more fully review those considerations later on in these reasons.

21. By way of remedy, Member Gandhi noted that since the delegate held after-acquired evidence could not properly be taken into account for purposes of establishing just cause under subsection 63(3)(c), the delegate "did not consider, or otherwise make any determination with respect to, evidence of the alleged Misconduct" (para. 10). Thus, rather than cancelling the Determination, he issued a "referral back" order under subsection 115(1)(b) of the *Act* on the following basis (paras. 29 – 33):

> The Appellant asks the Tribunal to cancel the Determination under section 115(1)(a) of the *Act*. Although the stated ground for appeal has been met, I do not agree that my order should end with cancellation.
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> As previously noted, the Director heard but did not in the Determination consider or make any findings with respect to the evidence relating to the allegation of Misconduct.
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> Had the Director considered "after-acquired cause", the evidence would have been evaluated to determine, firstly, if the alleged Misconduct was established; secondly, if the Misconduct was egregious enough to give the Appellant just cause for dismissal (irrespective of the date of discovery); and thirdly, if there were any mitigating facts.
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> It is not the function of this Tribunal to make findings of fact in the first instance, and I am of the opinion that it would be improper for me to draw any conclusions from the evidence when the Director has not had the opportunity to do so.
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> In my view, this matter should be returned to the Director, and the Director should consider the evidence of Misconduct previously tendered to determine whether the Appellant has established just cause, on a balance of the probabilities.

22. The Director now applies for reconsideration of that order on the basis that after-acquired evidence is a uniquely common law concept that is wholly inconsistent with the scheme of the *Act* and thus cannot be taken into account when considering if an employer had just cause to dismiss an employee.

THE STATUTORY FRAMEWORK

23. An individual who believes that his or her employment was unlawfully terminated may file a complaint under section 74 of the *Act*. The *Act* does not apply if the employee worked for a federal jurisdiction employer, and, in addition, certain other exemptions and exclusions from the *Act* (for the most part, set out in the *Employment Standards Regulation*) apply. No question of jurisdiction or of the *Act*'s application to Ms. Simmons' employment arises in this case.

24. Section 63 of the *Act* provides for the payment of CLS to employees who have been dismissed. The amount payable depends solely on the employee's period of continuous service and ranges from 1 week's wages (after 3 months' employment) to a maximum of 8 weeks' wages (after 8 years' employment). The subsection 1(1) definition of "wages" expressly includes CLS within its ambit. Subsection 18(1) states: "An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment". Thus, CLS is a form of deferred wages that is earned during the course of the employee's tenure, but is only "payable on termination of the employment" (subsection 63(4)). It is important to stress that CLS, although perhaps broadly analogous to "severance pay in lieu of reasonable notice" payable under common law, is not a form of damages payable for breach of contract (see, for example, *Sitter*, BC EST # D520/00, and *Rupert Title Search Ltd.*, BC EST # D070/03, both cited with approval by our Court of Appeal in *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220).

25. Although CLS is a form of deferred wages earned over the course of the employee's continuing employment, it is not always payable on termination by the employer (see, for example, subsections 65(1), (2) and (3) of the *Act*). Further, the employer's liability to pay CLS "is deemed to be discharged" if, for example, equivalent *written* notice of termination is given (see *Zaretski*, BC EST # D214/97, and the decisions cited therein), or some combination of equivalent written notice and pay (subsection 63(3)(a) and (b)). Subsection 63(3)(c) is the particular provision of interest in this case: "The liability is deemed to be discharged if the employee…(c) terminates the employment, retires from employment, *or is dismissed for just cause*".

26. "Just cause" is not defined in the *Act* and, accordingly, the Tribunal has consistently looked to the common law for guidance (see, for example, *Kretchmer*, BC EST # D069/16). Although, unlike at common law, the dismissed employee has no duty to mitigate, and thus CLS is presumptively payable even if the employee immediately secures comparable new employment following dismissal (see *B. & C. List (1982) Ltd.*, BC EST # RD641/01), there are several provisions in the *Act* that are broadly consistent with, or otherwise similar to, the common law. For example, and consistent with the common law, the employer bears the burden of proving just cause (*McCall Bros. Funeral Directors Ltd. v. Employment Standards Tribunal et al.*, 2000 BCSC 1507) and may not justify a dismissal based on conduct it has condoned (*Haida Glass Ltd.*, BC EST # D145/03). As is the case under common law, an employer is not required to pay CLS to an employee who is dismissed at the expiration point of a fixed-term employment contract (see *Chambly (City) v. Gagnon*, [1999] 1 S.C.R. 8 and subsection 65(1)(b) of the *Act*), or whose employment contract is discharged by frustration (see *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424 and subsection 65(1)(d) of the *Act*).

27. As noted at the outset of our reasons, this reconsideration application squarely raises the question of whether an employer, in response to a complaint filed under the *Act*, can rely on after-acquired evidence to prove just cause for dismissal.

AFTER-ACQUIRED CAUSE AT COMMON LAW

28. As noted in the Appeal Decision, at para. 26(e), after-acquired cause is more aptly described as after-*discovered* cause since the doctrine does not concern evidence regarding post-dismissal conduct (although such "subsequent event evidence" may be admissible "if it helps to shed light on the reasonableness and appropriateness of the dismissal" – *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095 at para 13; see also *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at para. 74; see also *Nathan S. Ganapathi, Personal Law Corporation*, BC EST # D213/03). Rather, it concerns evidence of misconduct that occurred *during the currency of the employment relationship*, but was not *discovered* by the employer until after the employee was dismissed and, as such, is not evidence that the employer relied on when initially deciding to terminate the employee. The principle has a long history in the common law, dating from at least 1888 (see *Boston Deep Sea Fishing Ice Co. v. Ansel* (1888) 39 Ch. D. 339), and appears to have first been explicitly

endorsed by the Supreme Court of Canada in *Lake Ontario Portland Cement Co. Ltd. v. Groner*, [1961] S.C.R. 553 at pages 563 – 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 summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:
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> > 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 Supreme Court endorsed *Groner* in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 and *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 S.C.R. 500. Our Court of Appeal has repeatedly stated that an employer may rely on after-acquired cause to justify a dismissal *post hoc* (see, for example, *Carr v. Fama Holdings Ltd.*, 1989 CanLII 240; *King v. Mayne Nickless Transport Inc.*, 1994 CanLII 1735; *Deildal v. Tod Mountain Development Ltd.*, 1997 CanLII 4076; *Blomgren v. Jingle Pot Pub Ltd.*, 1999 BCCA 9; *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168; and *Smith v. Pacific Coast Terminals Co. Ltd.*, 2017 BCCA 197).

29. However, there are limits to the permissible use of after-acquired evidence: i) the evidence must concern *pre*-dismissal rather than *post*-dismissal conduct; ii) "If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated" (*Van den Boogaard*, *supra*, at para. 34; and iii) the evidence must be carefully "scrutinized" to ensure that it is not simply "an excuse by an employer who is seeking to escape its contractual obligations to the former employee" (*Herrod v. Marr's Leisure Holdings Inc.*, 1998 CanLII 14746 at para. 25).

THE DIRECTOR'S POSITION

30. Reconsideration applications do not proceed as a matter of statutory right. In *Milan Holdings*, *supra*, the Tribunal established a two-stage test for assessing reconsideration applications. At the first stage, the Tribunal will consider whether the issue(s) raised in the application "are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases" (*Milan Holdings*, page 7). If the application cannot be so characterized, it will be dismissed without any further consideration of the underlying merits. If the application passes the first stage, the Tribunal will then embark on a more searching analysis of the issues raised.

31. In this case, the Director says this application has serious implications for, not only the present parties, but "for the system as a whole and for future cases". In particular, the Director says that this application poses three fundamental questions: 1. Under the *Act*, does "just cause" include "after-acquired cause?"; 2. "When is it appropriate for a member to decline to follow a thoroughly reasoned, previous decision of the Tribunal on the same issue?"; and 3. "To what extent do common law principles apply in interpreting the [*Act*]?".

32. With respect to the Director's third question, we reject its underlying premise. This is not a case about whether the common law is incorporated into the *Act*; rather, the central question is whether, considering the *Act* as a whole, and taking into account its actual language and its broader purposes, the Legislature intended that after-acquired cause is consistent with the overall scheme of the *Act*. The Director says that whether "just cause" includes "after-acquired cause" is a question of "pure statutory interpretation" and that Member Gandhi erred in law when he held that an employer can justify its original decision to dismiss an employee by

evidence concerning conduct that occurred prior to the dismissal but was not discovered until after the dismissal. We agree that this application concerns a matter of statutory interpretation, but we also must caution that interpreting the *Act* requires us to consider not only its express terms, but also the entire scheme of the *Act*, its purposes and objectives, and the Legislature's intentions.

33. The Director, while acknowledging that section 2(b) refers to "fair treatment of employees and employers", says "treating employers fairly does not require treating them in a way that maximizes their chances of an advantageous outcome". The Director points to another statutory purpose, namely subsection 2(d) – the provision of fair and efficient dispute resolution procedures – and says that this purpose is not served if an employer is permitted to search "for new evidence of employee misconduct that did not form part of the original reason for termination" and thereby "delay the complaint resolution process".

34. The Director says that subsection 63(3)(c) was purposely drafted in the present tense ("is dismissed for just cause") and, in conjunction with subsection 18(1) – which requires that an employer pay all wages (including CLS) owing to an employee within 48 hours following his or her termination – reflects a statutory scheme that does not permit any delay in payment beyond the 48-hour period. Thus, "just cause must be known to the employer at the time of termination".

35. In response to the argument that an employee should not receive CLS if he or she has engaged in conduct that is "fundamentally detrimental to the employment relationship" (Appeal Decision, para. 26(f)), the Director says, first, that employers can avoid paying CLS simply by giving the requisite written notice of termination; second, payment of CLS "can be avoided by diligently supervising employees and investigating suspected misconduct to determine if there is just cause *before* terminating employment (*italics* in original text); third, if CLS is paid, the employer is not precluded "from bringing a civil action to recover money, time, assets or anything else wrongfully taken by an employee"; and, fourth, the section 21 statutory prohibition of employer "self-help" wage deductions "provides a strong indication of the legislature's intent that wages, as a fundamental entitlement, are to be protected, even in cases of alleged fraud".

36. The Director says that if employers were entitled to rely on after-acquired cause, the effect would be to read in words to both subsections 18(1) and 63(3)(c) such that CLS would not be payable where the employer discovers evidence supporting a just cause defence after having dismissed the employee. Further, the Director says that permitting after-acquired cause evidence to be tendered at a complaint hearing "encourages employers to put off doing any investigation to see if they have cause to terminate employment until after employment is terminated and a complaint is filed" and "encourages employers to decline to provide notice or pay [CLS] and instead oppose complaints for breach of s. 63 in the hopes that an investigation will turn up some evidence of just cause".

37. The Director maintains that the Appeal Decision is tainted by legal error because Member Gandhi failed to give appropriate deference to prior Tribunal decisions addressing after-acquired cause evidence. Although the Director concedes that a Tribunal member is not bound to follow a decision of another member, he maintains that if the "Tribunal decides to depart from an established interpretation of the [*Act*], it must provide clear and convincing reasons for doing so" otherwise the appeal process "becomes tainted with the appearance of arbitrariness". In this regard, the Director says that *Benoit*, *BNW Travel Management* and *Kootenay Uniform* (but, most particularly *Benoit*) reflect "a careful and considered examination of the statutory provision within the context of the employment standards scheme and the purposes of the [*Act*]" and that Member Gandhi did not adequately explain why he did not follow those decisions.

38. The Director says that Member Gandhi erred by incorporating after-acquired cause into the section 63(3)(c) "just cause" standard. The Director acknowledges while "the Tribunal can adapt common law doctrines

appropriate to the employment standards scheme and can modify or depart from common law doctrines as long as the doctrine it applies is reasonably consistent with its statutory framework and the policy goals of the system", the doctrine of after-acquired cause is wholly inconsistent with the scheme of the *Act*.

THE REPLY OF BLACK PRESS

39. Black Press says that the Director's application does not pass the first stage of the *Milan Holdings* test, principally because it essentially reiterates the very same arguments that the Director advanced on appeal and, as such, is simply a request to have the reconsideration panel "re-visit the [Appeal Decision]…and come to a different conclusion". Black Press further says that the Appeal Decision was carefully reasoned and compellingly explained why the *Benoit* approach to after-acquired evidence should not be followed.

40. By way of specific response to the Director's arguments with respect to the underlying merits of the application, Black Press says, among other things:

- the after-acquired evidence Black Press tendered at the complaint hearing was not submitted to secure an unduly advantageous outcome but, rather, a fair outcome;
- this is not a case of an employer seeking to avoid its obligations under the *Act* since Ms. Simmons is not entitled to CLS, and Black Press has maintained this position from the very moment she was dismissed;
- the admission of after-acquired evidence does not incentivize employers to, in effect, "shoot first, aim later" by dismissing an employee and then engage in a search for misconduct since, in that latter instance, the employer risks not only having to pay CLS but also a monetary penalty;
- the Member did not "ignore" prior Tribunal decisions; rather, he "considered all of the relevant case law and distinguished those the Director relied on" and "provided sufficient reasons for departing from certain cases where the Member did so";
- finally, Black Press says that since there is no statutory definition of "just cause", one must resort to the common law for guidance since "there is a presumption that the common law applies unless expressly abrogated by statute" and, in this case, "the Member persuasively argued that after-acquired cause is compatible with the *Act* by reference to several purposes set out in the *Act* – purposes which the Director ignores in its lengthy submissions".

41. At this juncture, we wish to note that although counsel for Black Press asserts that "Black Press consistently maintained, from the time of termination, that it had just cause", and repeated the essence of this assertion at several other points in his reply submission, that is plainly not so. The record before us clearly shows that Black Press's initial position was not that it had just cause for dismissal but, rather, that Ms. Simmons had abandoned her employment. Black Press's July 22, 2015, letter to Ms. Simmons speaks only of her having "abandoned" her position and Black Press issued a record of employment that same day indicating that Ms. Simmons "quit" her employment. While Black Press did subsequently issue a second record of employment, on March 24, 2016, indicating that Ms. Simmons had been dismissed, Black Press did not formally advise Ms. Simmons that it was taking the position it had just cause for dismissal until that date. That said, Black Press's position that it had just cause for dismissal was known to Ms. Simmons at least one month prior to the complaint hearing, and at the hearing Black Press maintained that CLS was not payable either because Ms. Simmons abandoned her employment or, alternatively, because she was dismissed for just cause (see delegate's reasons, page R3).

MILAN HOLDINGS – THE FIRST STAGE

42. Although we will address the Tribunal's jurisprudence regarding the matter of after-acquired cause in greater detail below, at this stage we simply observe that there has been some inconsistency in the Tribunal's approach to this issue with some Tribunal members affirmatively rejecting the doctrine whereas other members have expressed a contrary view.

43. Although it may be fair to say, as Black Press does, that the Director's application is essentially a repackaged, albeit slightly expanded, version of the submissions made in the appeal proceedings, that is not necessarily fatal to a broader consideration of the merits if the application raises an issue of fundamental importance, not only for the immediate parties, but also for the larger community. Whether or not after-acquired evidence will be considered in a given dispute should not depend on the particular views of the somewhat randomly chosen individual decision-maker – after-acquired evidence should be received or rejected based on a principled and consistent approach to the mater.

44. We endorse the following comments from the Director's legal counsel:

> Where the issue the reconsideration panel is asked to revisit involves questions of law, fact, principle or procedure which are so significant because of their implication[s] [for] future cases, the requirements of stage one [of the *Milan Holdings* test] will be satisfied. Here the Director is asking the Tribunal to reconsider an interpretation issue which has system-wide consequences. It is important to settle this issue so that employers can conduct themselves accordingly, employees have greater certainty as to their entitlement under the [*Act*], and future complaints are appropriately resolved.

45. In our view, this application passes the first stage of the *Milan Holdings* test. Accordingly, we shall now turn to the underlying merits of the application.

CAN AN EMPLOYER RELY ON AFTER-ACQUIRED EVIDENCE TO PROVE JUST CAUSE FOR DISMISSAL?

46. As we noted, above, the Tribunal's approach to after-acquired evidence has not been entirely consistent. As such, we shall first review the various Tribunal decisions that, either directly or indirectly, have rejected or endorsed the doctrine as it concerns the employer's presumptive statutory obligation to pay CLS.

After-Acquired Cause – The Tribunal's Jurisprudence

47. One of the earliest, if not the very first, Tribunal decisions addressing after-acquired cause is *Victoria Books and Volumes Bookstores Ltd.*, BC EST # D404/98, where Member Roberts endorsed the doctrine, but held that the employer was not entitled to rely on it since it failed to place the relevant evidence before the delegate (page 6):

> 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. Groner* [1961] S.C.R. 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.

48. In *Empire International Investment Corporation*, BC EST # D076/99 (reconsideration allowed: BC EST # D208/99), former Tribunal Chair Crampton, applied the doctrine in overturning a delegate's award of CLS. In *Empire International*, the employer did not discover the evidence – concerning an unauthorized subcontracting of certain

of the employee's duties – until it was produced to the employer as part of the Tribunal's "normal process of disclosure" (page 6). Similarly, in *Cornell Holdings Ltd.*, BC EST # D027/13 (Thornicroft), the Tribunal held that the delegate erred in refusing to consider the employer's evidence demonstrating the employee's breach of his duty of loyalty and faithful service because the employer was not aware of this misconduct when the employee was dismissed. Accordingly, the CLS award was cancelled.

49. The Director did not apply for reconsideration of any of the *Victoria Books*, *Empire* or *Cornell Holdings* decisions (although, in *Empire*, the employer successfully applied to have the CLS award made in favour of another employee cancelled).

50. *Benoit*, *supra*, appears to be the first Tribunal decision holding that evidence concerning after-acquired cause cannot be considered. *Benoit* did not reference either *Victoria Books* or *Empire International*. Tribunal Member Stevenson held that the after-acquired evidence submitted did not demonstrate that the employer had just cause for dismissal (page 15):

> I only add that even if I had considered this argument [regarding after-acquired cause], I would have concluded that [the employer] had not proven its allegations against [the complainant]. The allegations…were framed in the strongest of terms: "embezzlement of employer's funds, theft of employer's funds, fraud and misrepresentation of the employer's image, conflict of interest and direct competition of services provided by the [employer]". Those are very serious allegations, including allegations of criminal conduct, and would require clear evidence of the alleged misconduct. Not only was there no clear evidence, there was no evidence at all that would have supported any of those allegations.

51. Aside from the lack of probative value, Member Stevenson refused to consider the employer's after-acquired evidence, holding that to do so would be inconsistent with the scheme of the *Act* (page 12): "It would be an incorrect reading of Section 63 and quite inconsistent with the intent of the *Act* to allow [the employer] to allege just cause for dismissal when that was not the basis upon which the termination of employment occurred." Member Stevenson held, correctly in our view, that CLS is an earned benefit, conceptually distinct from the common law notion of severance pay in lieu of reasonable notice, and that CLS is not correctly described as "termination pay" or "severance pay" because "it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability" (page 13). Member Stevenson outlined five factors justifying his conclusion that after-acquired evidence should not be considered in a claim for CLS:

- first, CLS is an "enforced courtesy" designed "to provide an employee with [a] 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" (page 13);
- second, the admission of after-acquired cause evidence is inconsistent with the subsection 63(3)(c) statutory language ("is dismissed for just cause") and would, in effect, result in a redrafting of the provision to include the phrase "or had just cause for dismissal"; in Member Stevenson's view, "the legislature intended the statutory liability for length of service compensation, or its deemed discharge, is to be determinable on termination" (page 13);
- third, given that CLS, defined as wages in the *Act*, is payable "on termination of employment" and since subsection 18(1) requires an employer "to pay all wages owing to an employee within 48 hours after the employer has terminated the employment", it would inconsistent with these provisions to hold that the payment of CLS is "conditional on whether the employer might find some reason, after the termination has occurred and the statutory obligations have crystallized, to avoid those obligations";

- fourth, if after-acquired evidence were admissible, rather than complying with the *Act*, employers would be encouraged to "begin looking for reasons that would allow them to avoid [the minimum requirements of the *Act*]" (page 15); and
- fifth, if after-acquired evidence is admissible, the timely resolution of complaints will be frustrated "while often vague allegations of employee misconduct are investigated and adjudicated" and the Tribunal would be inappropriately forced "into an investigative role…as a matter of first impression" which, in turn, "raises the spectre of a multiplicity of investigations on the same complaint depending on long [sic] an employer is prepared to continue to allege employee misconduct" (page 15).

We note that these arguments have been adopted, largely without modification, by the Director's legal counsel in her submission in this application.

52. In *Williams Lake Cedar Products Ltd.*, BC EST # D415/01, Member Stevenson applied *Benoit*, and extensively quoted or otherwise paraphrased his key findings from that decision, in refusing to consider the employer's after-acquired cause evidence. Former Tribunal Chair Jeffries dismissed the employer's reconsideration application (see BC EST # RD073/02) holding, firstly, that the employer's application was simply an attempt to reargue the appeal and, secondly, "even reviewing this on the standard of 'correctness', there is nothing in the employer's argument that would cause me to decide that the adjudicator's interpretation of the law was incorrect" (page 6). Member Stevenson briefly disposed of the employer's after-acquired cause argument, without referring to *Benoit*, in *Praxis Technical Group, Inc.*, BC EST # D608/01 stating (at page 4): "Praxis has also complained that the Determination failed to address the question of 'after-acquired cause'. I agree with the Director that there was no reason to consider that question. Even if the principle of 'after-acquired cause' applies to entitlement to length of service compensation under the *Act*, it cannot apply unless Praxis can show just cause for terminating the complainants."

53. In *BNW Travel Management Ltd.*, *supra*, Member Stevenson once again adopted and applied *Benoit* in refusing to consider the employer's evidence regarding after-acquired cause. In *BNW*, the employer submitted evidence to the delegate during the course of her investigation that it discovered post-termination. Citing *Benoit*, the delegate refused to consider this evidence. On appeal, the employer argued that the delegate erred in refusing to consider its after-acquired cause evidence but Member Stevenson, after extensively reiterating the arguments set out in *Benoit*, refused to receive and consider the employer's evidence since he considered it "irrelevant" as the employer did not rely on (or was even aware of) that evidence as at the date of termination. Member Stevenson observed (at page 5):

> The concept of "after acquired cause" is one which has been developed and applied at common law to adjust rights in the context of breach of contract. The Tribunal has recognized that while common law principles are often helpful in interpreting the *Act*, in the final analysis, the *Act* is not merely an embodiment of common law principles or concepts, but is broad based remedial legislation that must be administered on its own terms in a manner consistent with the legislative intention expressed behind it.

54. In a later decision, *YourFloors Chilliwack Inc.*, BC EST # D131/07, the employer submitted evidence during the delegate's investigation regarding the complainant's alleged inappropriate use of an electronic "tablet" the employer had issued to her. The delegate held that these allegations "were not directly related to [the complainant], were not supported by independent observation and were, in any event, not raised as a basis for termination until much later in the complaint investigation" (para. 12). The delegate refused to consider the evidence, citing *BNW*. On appeal, Member Stevenson quickly dispatched the employer's argument regarding just cause stating (para. 30): "YourFloors disagrees with the conclusion of the Director, but no error of law, on either facts, the analysis of "just cause" under section 63 or the application of the proper approach to

"after acquired cause", has been made in the Determination on this element of [the complainant's] claim [and] as such, there is no presumptive merit to this part of the appeal and it is dismissed under section 114(1)."

55. Tribunal Member Stevenson once again addressed after-acquired cause, albeit somewhat indirectly, in at least one other decision, *Stahlcon Construction Ltd.*, BC EST # D069/14, an application to extend the appeal period which was based, in part, on evidence not before the delegate and other after-acquired evidence. Member Stevenson refused to extend the appeal period, principally on the ground that the appeal was entirely without merit. Member Stevenson said the following regarding the after-acquired evidence (at para. 31):

> The allegations supporting the argument of just cause for termination relate not only to matters that were known during the investigation, but also to facts that either occurred after Ms. Cato's termination or were uncovered after her termination and are being used in the appeal for the first time to establish or support cause for termination. The Tribunal has resisted such attempts, concluding in several decisions that the concept of "after acquired cause" is not incorporated into the statutory provisions relating to length of service compensation: see *BNW Travel Management Ltd., operating as Brave New World*, BC EST # D170/04. In other words, an employer dissatisfied with the Director's finding on just cause may not go looking for further evidence of "cause" and look for a review of the Director [*sic*] on the basis of the additional material. Such efforts do not accord with the statutory objectives of certainty, finality and efficiency in decision making by the Director.

56. *BNW Travel* was cited with approval in *Kootenay Uniform and Linen Ltd.*, *supra* (Matsuno) and *Benoit* was cited with approval in *Independent Home Care Ltd.*, BC EST # D103/15 (Roberts).

57. In *Clark Reefer Lines Ltd.*, BC EST # D114/15 (Thornicroft), the delegate refused to permit the employer to cross-examine the employee regarding his job search efforts (that resulted in his employment with a direct competitor). At the complaint hearing, the delegate refused to receive certain evidence because it concerned after-acquired cause. On appeal, the Tribunal cancelled the employee's CLS award and, in so doing, addressed the *Benoit* line of decisions, as well as some other decisions suggesting a contrary result, and concluded (para. 28):

> In my view, particularly since a reconsideration panel has never addressed this issue, it may be the case that after-acquired cause could fall within the ambit of the subsection 63(3)(c) "just cause" provision in a case where the relevant facts are provided to the Director of Employment Standards prior to a determination being issued.

58. This conclusion was predicated, in part, on the following analysis (at paras. 23 – 25):

> The concept of "after-acquired cause" refers to a breach that occurred during the currency of an employment relationship but is not discovered until after the employment relationship has ended. In *Groner*, *supra*, the Supreme Court of Canada clearly held that an employer is entitled to rely on such "after-acquired cause" in order to demonstrate that it had just cause for dismissal…
>
> The notion of "after-acquired cause" continues to be a part of our common law having been recently applied by our Court of Appeal in *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168, and by the New Brunswick Court of Appeal in *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44.
>
> Under subsection 63(3)(c) of the *Act*, an employee is not entitled to compensation for length of service if the employee was dismissed for "just cause". There is no definition of "just cause" in the *Act* and, accordingly, the Tribunal is guided by common law jurisprudence (see, for example, *Buddenhagen*, BC EST # D045/07, and the other decision cited therein; *Tortorella*, BC EST # D055/08). Consequently, common law notions such as "progressive discipline" (see *J-W Research Ltd.*, BC EST # D090/14) and

> "condonation" (see *Le Soleil Hospitality Inc.*, BC EST # D050/14) must, where possibly relevant, be considered when assessing if an employer has just cause for dismissal.

The Director did not apply for reconsideration of the *Clark Reefer* decision.

59. To date, the most comprehensive review favouring the receipt of after-acquired evidence is Member Gandhi's analysis set out in Appeal Decision. Member Gandhi concluded (para. 25) "the *Act* does not preclude an employer from arguing that the obligation to pay compensation under sections 63(1) and 63(2) has been satisfied where it is shown that just cause exists even though that cause was not discovered before the end of employment". Member Gandhi identified several factors that augured in support of this conclusion (para. 26):

- receiving this sort of evidence would be consonant with the section 2(b) purpose "to promote the fair treatment of employees and employers" and that in interpreting the *Act*, a balance must be struck among the differing statutory purposes enumerated in section 2;
- since "just cause" is not defined in the *Act*, "I do not think that this Tribunal should exclude from that phrase anything that our courts have seen fit to read into it";
- although CLS may be characterized as an "enforced courtesy", where there is just cause for dismissal, "any right to the courtesy of notice is forfeit, and I think it fair to say that the *Act* recognizes that an employee should not benefit from conduct which is at odds with the statutory objectives or otherwise fundamentally detrimental to the employment relationship"; and
- "…the section 63(3)(c) exceptions to the sections 63(1) and 63(2) obligations mirror exceptions to the common-law liability of an employer to an employee for 'wrongful dismissal' [and] it does not seem reasonable to me to conclude that our legislature intended to allow those same exceptions while expressly excluding the one in which the employer has discovered, a bit too late, an employee's act of malfeasance. It would be contrary to several of the section 2 purposes, I think, to allow – i.e. force – the payment of compensation to an employee where an employer has just cause but, whether by the employee's guile, sheer dumb luck, or a combination of the two, does not realize it. That would, in my view, promote something other than fairness, productivity, and efficiency, without concurrently ensuring basic standards of compensation."

60. Member Gandhi also stated he was not persuaded by any arguments regarding the "present tense" form of the CLS obligation, nor was he persuaded that allowing after-acquired cause evidence would encourage employers "to look for reasons to avoid the minimum standards set out in the *Act* [because] the cause must still be 'just'…and the *Act* includes provisions to deter employers looking to skirt their statutory obligations". Finally, he observed that there is nothing in section 63 requiring an employer to provide a complete explanation, at the point of dismissal, regarding the reason for the dismissal.

61. Thus, there are two competing lines of Tribunal decisions concerning whether the "just cause" defence to a claim for CLS may be proven, in whole or in part, by after-acquired evidence. Briefly, the *Benoit* line of decisions (principally authored by Member Stevenson) holds that this doctrine is inconsistent with the scheme of the *Act*, while the alternative view, adopted by at least five other Tribunal Members, is that, in an appropriate case, an employer may rely on after-acquired cause since "just cause", as set out in the *Act*, should be interpreted in a manner consistent with the common law. In *Benoit*, Member Stevenson set out several reasons why after-acquired evidence should not admissible in proceedings under the *Act*, whereas Member Gandhi, in the Appeal Decision, identified several other reasons why such evidence may, in an appropriate case, be admissible.

62. At this juncture, we must observe that whether after-acquired evidence, as a matter of law and policy, is admissible in proceedings under the *Act* to demonstrate "just cause", remains a question that is not readily answered since there are reasonable arguments on both sides of the issue. To a large degree, the answer to this question turns on the fundamental nature of CLS, the matter to which we now turn.

What is CLS?

63. As has been observed in many Tribunal decisions, CLS is fundamentally distinct from the common law notion of severance pay in lieu of notice (*i.e.*, a contractual damages claim), payable to a wrongfully dismissed indefinite employee where there is no lawful express termination provision in the parties' employment contract (see also *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220 and *Re West Bay SonShip Yachts Ltd.*, 2009 BCCA 31). CLS is an earned benefit that is specifically defined as "wages" in the *Act*; CLS is paid based on the employee's earnings in the period immediately prior to dismissal; CLS is based solely on the employee's period of continuous service; CLS is not subject to mitigation (save to the extent subsection 65(1)(f) applies); and corporate directors and officers are personally liable to pay the employee's CLS if the corporation fails to do so (section 96).

64. By contrast, severance pay in lieu of reasonable notice is a claim for damages for breach of contract (the breach being the failure to give proper notice), not a claim for unpaid wages; severance pay is based on the employee's estimated *post-termination* wages; severance pay is based on the so-called *Bardal* factors (*Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294), which include tenure, but also several other considerations such as the employee's age, position, experience and education, and prevailing labour market conditions; under the *Act*, the employer's presumptive obligation is to pay CLS, whereas the employer's presumptive common law obligation is to provide working notice of termination.

65. Although CLS is conceptually distinct from severance pay in lieu of notice, both are only payable in the event of a "wrongful dismissal" and, in our view, the Legislature intended, at least to a degree, to harmonize the scheme of the *Act* with some of the common law principles that govern severance pay. Thus, despite CLS being an earned benefit and a form of "deferred wages" that is presumptively payable on termination, there are several provisions of the *Act* that undermine this characterization. The *Act* is not consistent in its treatment of CLS. However, as we view the scheme of the *Act*, this inconsistency reflects a legislative intent to provide a measure of uniformity between the contractual and statutory regimes regarding monies payable to an employee on termination.

66. By way of example, if CLS is a form of earned (but deferred) wages, then why should it matter if the employee voluntarily quits, is discharged because a fixed-term contract has expired, or even is discharged for just cause? In each of these latter events, all other forms of earned wages (including regular wages, overtime pay, vacation pay and statutory holiday pay) are payable on termination (and within the subsection 18(1) 48-hour time frame), but the employer is not obliged to pay CLS if the employee voluntarily resigns, is dismissed for just cause or is terminated because a fixed-term contract has expired. At least to a degree, the answer is that in these latter circumstances, an employer would not be obliged to pay severance pay at common law and the Legislature deemed it appropriate to include these exceptions within the scheme of the *Act*.

67. Under the *Act*, an employer's presumptive obligation to pay CLS is discharged in several circumstances, almost all of which mirror the common law. At common law, an employer is not required to pay severance pay if the employee is given proper notice of termination (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; see subsection 63(3)(a)), or if the employee voluntarily quits (*Beggs v. Westport Foods Ltd.*, 2011 BCCA 76; see subsection 63(3)(c)), or if the termination resulted from the expiration of a fixed-term employment contract (*Chambly (City) v. Gagnon*, [1999] 1 S.C.R. 8; see subsection 65(1)(b)). There are other similarities

between the *Act* and the common law with respect to "termination pay". Although CLS is not subject to mitigation, whereas at common law a wrongfully dismissed employee has a presumptive mitigation obligation (see *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661), subsection 65(1)(f) nonetheless creates a limited statutory "duty to mitigate". Severance pay is not payable under common law if the employment contract is frustrated, and while this concept is not expressly contained in the *Act*, subsection 65(1)(d) creates a limited "frustration" exception.

68. In *Benoit*, Member Stevenson suggested that the purpose underlying the requirement to pay CLS was different from that relating to the payment of common law severance pay (page 13): "The objective of Section 63 of the *Act* is different [as] it is intended to provide an employee with brief period [*sic*], 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". However, this purpose is not markedly different from the policy underlying the common law requirement to provide reasonable notice of termination: "…the purpose of reasonable notice is to give the employee a fair opportunity to obtain re-employment instead of being thrown suddenly and unexpectedly upon the world" (*Cronk v. Canadian General Insurance Co.*, 1995 CanLII 814 per Weiler, J.A.; see also *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 at para. 32 and *Covered Bridge Golf and Country Club v. Schurman*, 2009 NBCA 1 at para. 28).

69. Thus, CLS "is neither fish nor fowl" – to a degree, CLS is a form of earned wages presumptively payable on termination. However, the Legislature also saw fit to integrate many of the common law defences or exceptions regarding the payment of severance pay into the scheme of the *Act*. As we previously explained, if CLS is a true form of earned wages, logic dictates that it should be payable regardless of the reason for the termination of employment.

70. CLS is not payable if the employer has "just cause" for dismissal, but this term is not defined in the *Act*. This term also appears in the *Labour Relations Code* (section 84) – an employer must not dismiss or discipline an employee "except for just and reasonable cause". Labour arbitrators in B.C. (and across Canada) have accepted that after-acquired evidence may be admissible to prove "just cause" (see, for example, *Canadian Springs Water Co.* (2006), 146 L.A.C. (4th) 367 (Glass)). The term "just cause" also appears in the *Public Service Act* (section 22), without further definition, but so far as we can determine, there has never been a judicial pronouncement regarding whether "just cause" under this statute includes after-acquired cause.

71. Nevertheless, "just cause" has a well-understood meaning in employment law and we are of the view that decision-makers under the *Act* may properly take into account the jurisprudence regarding this term of art (including the concept of after-acquired cause), provided the statutory scheme supports so doing.

After-acquired cause and the scheme of the Act

72. The most compelling arguments against allowing an employer to rely on after-acquired evidence to justify an employee's dismissal may be those concerning the interplay between CLS and the payment of wages on termination. We do concede, as Member Stevenson contended in *Benoit*, that there are some legitimate arguments favouring refusing to admit after-acquired evidence.

73. The *Act* must be interpreted and applied taking into account the entire context of the statutory language, read in its grammatical and ordinary sense, and in a manner that is harmonious and consistent with the statutory scheme, its objects and the legislature's intention (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21). In *Rizzo*, the court concluded that these latter considerations meant that the plain and literal wording of the statute had to be relaxed in order to give full effect to the statutory scheme and the legislature's intentions

(see para. 23). Accordingly, loss of employment due to the employer's bankruptcy and resulting receiving order, was held to be a termination "by the employer" under the Ontario employment standards statute. With this approach top of mind, we now turn to the specific statutory provisions at play in this dispute.

74. CLS is presumptively payable on termination but not if, for example, the employee voluntarily resigned or the employer has just cause for termination. In this particular case, Black Press argued the former (asserting the employee abandoned her employment), but not the latter, at the point of termination. Thus, Black Press had a *prima facie* justification for refusing to pay CLS on termination but, ultimately, that alleged justification was found wanting (and Black Press did not appeal the delegate's determination on that issue). Leaving aside the question of after-acquired cause, since Ms. Simmons did not abandon her employment, she was entitled to CLS and it was "payable on termination of the employment" (subsection 63(4)). By reason of subsection 18(1), Black Press was obliged to pay CLS to Ms. Simmons "within 48 hours after the employer terminates the employment" and because it failed to do so, Black Press seemingly breached its obligations under the *Act*. This contravention, in turn, would ordinarily lead to a determination being issued, not only for the CLS payable, but also including a monetary penalty under section 98 (as occurred here).

75. Black Press did not suspect that Ms. Simmons' had perpetrated an allegedly fraudulent scheme for at least a month, or even two, after her termination. Black Press did not conclude its formal (and seemingly carefully conducted) investigation, and communicate its conclusions regarding the matter to Ms. Simmons, until about eight months after her termination. However, all of its evidence was in hand prior to the complaint hearing and Ms. Simmons was well aware of the position that Black Press would be taking at that hearing regarding the matter of cause. Assuming, without deciding, that Black Press had just cause to dismiss Ms. Simmons in July 2015, it was nonetheless unaware of that fact at that point in time, principally because Ms. Simmons, who held a position of some trust, was secretive and not forthcoming regarding her actions. The matter only came to light when her replacement queried certain irregularities and raised the matter with the newspaper's publisher.

76. These facts placed the employer in a difficult position. It may well have had *bona fide* reasons to terminate Ms. Simmons for just cause, but it did not know that in July 2015, principally because its employee, assuming the allegations against her are substantially accurate, fundamentally breached her duty of loyalty and faithful service, and apparently went to some lengths to conceal her misconduct. On the one hand, the *Act* seemingly directs an employer, even in these circumstances, to pay CLS and, in effect, the employee benefits from their own wrongful conduct (contrary to the fundamental legal maxim *ex dolo malo non oritur actio* – "no action arises from deceit"). On the other hand, the *Act* specifically states that one of its purposes is to promote the fair treatment of employees *and employers* and we see nothing fair about a situation where an employee can furtively engage in fraudulent activity but still recover CLS simply because he or she carefully and successfully covered their tracks (at least for a period time).

77. The Director's response to Black Press's position that CLS should not be payable in circumstances where, as is alleged here, the employee's conduct "is fundamentally detrimental to the employment relationship" (quoting from the Appeal Decision, para. 26) is threefold: in such circumstances, the employer i) can provide written notice of termination; ii) diligently supervise its employees; and iii) sue the employee civilly to recover any CLS "wrongfully" paid to a former employee. We do not accept that any of these options provides an adequate explanation for requiring an employer to pay CLS to an employee who has acted in a manner that is fundamentally incompatible with a continuation of the employment relationship (even though the employee's actions may not have been discovered until after the employee's termination).

78. While the employer's presumptive obligation to pay CLS is deemed to be discharged by providing written notice in accordance with subsection 63(3)(a), where the employee has conducted a surreptitious fraud on his

or her employer, the provision of notice would simply give the employee an enhanced ability to "cover their tracks" (say, by destroying relevant documents) while still being carried on the employer's payroll. As for diligent supervision, many employees are given a measure of independence and autonomy in their work (in other words, the employer entrusts them to provide competent, loyal and faithful service). We do not believe it is a proper response to suggest that the answer to uncovering a secret campaign of fraud is to require employers to micromanage their employees. Finally, with respect to the employer's right to later sue the employee to recover CLS from a defalcating employee, that remedy may ring hollow in many cases, either because the transaction costs make the claim uneconomic to pursue or because there is no reasonable prospect of recovery. We do not accept the Director's counsel's assertion the Legislature's intent was to require employers to pay CLS "even in cases of alleged fraud".

79. The Director further submits that since all wages (including CLS) must be paid within 48 hours of an employer-initiated termination, and because CLS is, by subsection 63(4) "payable on termination of the employment", the point at which just cause must be assessed is not the common law position (namely, when the serious breach occurred); rather, the employer must assert just cause when the employee is dismissed and it cannot argue just cause at some later point in time. The Director "submits that a grammatical and contextual analysis of the [*Act*] and s. 63(3)(c) reveals that the legislature intended that an employer would have evidence amounting to 'just cause' at the time the employment is terminated in order to be discharged of its duty". The Director's argument continues: "…far from promoting the goal that wages be paid in a timely way, interpreting 'just cause' as including 'after-acquired cause' injects uncertainty into the question of statutory entitlement to compensation for length of service". Finally, and with respect to the timeliness of wage payments, the Director submits that permitting employers to argue after-acquired cause would only "encourage employers to delay the complaint resolution process while the employer searches for new evidence of employee misconduct that did not form part of the original reason for termination".

80. We do not interpret subsection 63(3)(c) as requiring an employer to both *have* – and formally *invoke* – "just cause" as of the date of termination. The relevant time frame for determining whether the employer had just cause is the point in time when the serious misconduct occurred. Whether the employer does, or does not, have express notice of the employee's misconduct is not determinative insofar as the obligation to pay CLS is concerned; the key question is whether the employee's serious breach of their employment duties or obligations occurred prior to dismissal. As was discussed above, CLS is something of a hybrid – it represents a statutory right to deferred wages that are earned over the course of employment but, at the same time, the *Act* also includes provisions whereby CLS is not payable, and in many aspects, these provisions mirror the common law.

81. Issues concerning after-acquired cause simply will not arise under the *Act* if the employee is given proper written notice or is paid CLS on termination. In the latter event, while the employer might have the right to pursue a civil action to recover CLS from a defalcating employee, there is no mechanism in the *Act* that gives the employer a right to recover *any* form of "wrongfully paid" wages (including, for example, an erroneous and perhaps significant overpayment of regular wages) from a former employee. A question concerning after-acquired evidence will only arise when the employer terminates an employee without paying CLS or giving proper written notice.

82. We are unable to conclude that the Legislature, when it adopted the "just cause" standard, intended to include almost all of the common law surrounding that standard save for the notion of after-acquired cause. If the Legislature intended to require an employer to affirmatively – and irrevocably – state a reason for dismissal at the point of dismissal, it could have readily done so. In our view, "just cause" may be demonstrated by after-acquired evidence but other employment law principles such as "condonation" (*i.e.*, waiver of breach) are also relevant. We also endorse the principle that after-acquired evidence must be closely scrutinized to ensure that

it is reliable, cogent and probative. Further, the employer must demonstrate that it could not have reasonably discovered the evidence at an earlier point in time (in other words, the employer must show that it acted with all "due diligence").

83. We do not accept the Director's assertion that if employers can rely on after-acquired evidence to prove just cause, they are thereby encouraged to delay proceedings while they search for incriminating evidence. First, to the extent the employer condoned or was wilfully blind to the misconduct later alleged, after-acquired evidence will not be admissible. Second, employers who deliberately refuse to pay CLS (or to alternatively provide written notice) run the very real risk that no misconduct will be uncovered in which case the employer must pay both CLS (with interest) and a $500 monetary penalty. Subsequent contraventions could result in penalties of $2,500 or as much as $10,000; surely, an inducement that encourages statutory compliance rather than contravention. Third, it is not within the employer's direct ability to "delay" proceedings; indeed, section 2(d) of the *Act* mandates the timely resolution of complaints. To the extent that unpaid wage complaints are addressed in a timely manner (and, in this regard we heartily endorse the Supreme Court of Canada's observation that "One major legislative objective of [the employment standards] scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things": *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 50), employers will have a limited opportunity to delay matters while searching for some evidence of employee misconduct. Further, at least in our view, any application to adjourn a complaint hearing, or to delay a complaint investigation, based on a vague assertion that the employer is "investigating" the employee *post-hoc*, is an application that should be summarily rejected.

84. The Director submits that the *Benoit* approach to after-acquired cause is correct and that Member Gandhi erred when he held the delegate should not have refused to consider the employer's evidence regarding Ms. Simmons' misconduct. The Director says that *Benoit* constituted "an established interpretation of the [*Act*]" and that "*if the Tribunal is going to decline to follow well-reasoned decisions like Benoit and BNW, it must provide a better explanation as to why it is rejecting the reasoning in such decisions*" (italics in original text). While we agree that *Benoit* is a carefully considered decision, it must also be recognized that, almost from the beginning of the Tribunal's existence, other decisions have accepted that an employer may rely on after-acquired evidence to defend a claim for CLS. Further, we reject the suggestion that the Appeal Decision is not "well-reasoned"; the decision, in our view, carefully reasoned why the *Benoit* line of authorities was distinguishable from the case at hand and set out multiple explanations regarding why *Benoit* should not be followed. While the Director disagrees with the reasoning of Appeal Decision, we cannot accept that the Appeal Decision simply dismissed the *Benoit* approach without providing a cogent explanation.

85. We conclude that an employer can, in an appropriate case, justify an employee's dismissal on the basis of after-acquired evidence. We now turn to when after-acquired evidence may be properly taken into account.

The Admissibility of After-Acquired Evidence

86. There are three points in time when after-acquired evidence might be tendered. The first point is prior to a determination being issued; the second is during the course of an appeal; and, third, the evidence might be presented to the Tribunal as part of an application for reconsideration.

87. If the after-acquired evidence is presented to the Director prior to a determination being issued, it might be provided to the delegate during the course of an investigation and, in that event, the delegate would be obliged by considerations of natural justice to provide this evidence to the complainant for purposes of reply. Alternatively, the evidence might be provided prior to, or at, a complaint hearing. Either way, before the Director could receive and consider the evidence, the employer must demonstrate that it was duly diligent

regarding the matter and that the evidence does not relate to conduct that it condoned. The delegate is entitled to closely scrutinize the evidence to ensure that it has significant probative value. If the evidence is presented, for the first time, at a complaint hearing, the delegate might well refuse to receive it because of considerations of fundamental adjudicative fairness. In this regard, parties are entitled a reasonable opportunity to know the other party's basic case in advance of the hearing so that they are afforded a reasonable opportunity to prepare a response. Where no prior notice is given, the decision-maker might adjourn the hearing to a later date to afford that opportunity to the other party but, in some circumstances, it would be unfair to adjourn the hearing and thus it would proceed without the impugned evidence being heard.

88. If the after-acquired evidence is not tendered until after a determination was issued (*i.e.*, in a section 112 appeal or a section 116 reconsideration application), different considerations apply. Although the Tribunal may receive evidence that might not be admissible in a court of law (*Tribunal's Rules of Practice and Procedure*, Rule 7(2)), it does not follow that there are no limits whatsoever regarding the admissibility of evidence. The after-acquired evidence would only be admissible on appeal as "new evidence" (see subsection 112(1)(c) of the *Act*) and, in addition to considerations relating to due diligence and condonation (see, for example, *Burnell Ventures Inc.*, BC EST # D025/17, where the impugned evidence was in the employer's hands prior to the dismissal but was not relied on to support the dismissal), the strict requirements for admissibility set out in *Davies et al.*, *supra*, and in particular the requirements that the employer demonstrate it acted with all proper diligence and that the evidence is material and has significant probative value, must be respected. Thus, for example, in *Southern Cross Machining Inc.*, BC EST # D048/10 (Bhalloo), the employer's after-acquired evidence was rejected principally because the evidence was not probative and, in any event, with proper diligence could have been discovered and presented to the delegate at the complaint hearing (see also *Landrock Construction Ltd.*, BC EST # D093 (Thornicroft), reconsideration refused: BC EST # RD113/16 (Groves)). These latter considerations apply with even greater force if the after-acquired evidence is first presented to the Tribunal as part of a section 116 reconsideration application.

89. In the present case, Black Press presented its after-acquired evidence to both the delegate and the complainant prior to the complaint hearing – this was manifestly not a case of "trial by ambush". Black Press carefully explained both prior to, and at, the complaint hearing how it first became aware of the complainant's misconduct and the subsequent steps it took to verify the new circulation manager's suspicions concerning the complainant's pre-dismissal conduct. There is no suggestion here that Black Press condoned the complainant's actions. As noted in the delegate's reasons, Ms. Simmons was given ample notice of the hearing "but failed to participate" and "did not ask for an adjournment" (page R9). The delegate did not conclude that the employer's uncontroverted evidence was not probative nor did she find that it condoned the behaviour in question. The sole basis for the delegate's decision to award CLS to Ms. Simmons was that the employer's evidence relating to misconduct was not "relied on at the time of termination" and that any evidence discovered post-termination could not be considered.

90. In our view, Member Gandhi correctly determined that the delegate should have received (which she did) and carefully weigh (which she did not), the employer's after-acquired evidence and that the delegate "was wrong to refuse to consider the employer's evidence of after-acquired cause" and thus "misinterpreted section 63(3)(c) of the *Act*" (Appeal Decision, para. 27). We do, however, wish to emphasize that the delegate, relying as she did on the *Benoit* line of decisions issued by this Tribunal, acted entirely in good faith and, having accepted *Benoit* as good law, quite understandably refused to consider the employer's after-acquired evidence.

91. We now turn to the final matter before us, namely, the appropriate form of order.

The appropriate form of order

92. Member Gandhi, noting that the Tribunal is not a decision-making body of first instance, concluded "that it would be improper for me to draw inferences from the evidence when the Director has not had the opportunity to do so" (Appeal Decision, para. 32). Accordingly, he declined to cancel the Determination but, instead, referred the matter back to the Director. His referral back order required the Director to "consider the evidence of Misconduct previously tendered to determine whether the Appellant has established just cause, on a balance of probabilities" (para. 33).

93. As we conceive this form of order, the delegate has not been ordered to conduct a new evidentiary hearing, or to offer Ms. Simmons any further opportunity to submit evidence. Rather, the Director must consider the employer's evidence, as previously tendered at the complaint hearing, in order to determine if the employer has demonstrated that it had just cause for dismissal. If the delegate were to conclude that there was just cause, presumably both the CLS award and the bonus award would be cancelled.

94. Although Black Press did not apply to have the Appeal Decision reconsidered, in its submissions in response to the Director's application, it maintains that it has shown that it had just cause for dismissal and, as such, presumably believes that the Determination should simply be cancelled outright. Nevertheless, Black Press has only formally requested that the Director's application be refused and that the Appeal Decision be confirmed.

95. Counsel for Black Press has not sought any other remedy beyond a confirmation of the referral back order. In the circumstances of this case, particularly where the delegate merely identified the after-acquired evidence without making any findings regarding the credibility or probative value of that evidence, we find that a referral back order was appropriate and, as such, it is confirmed.

ORDER

96. Pursuant to section 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft **Member and Panel Chair** **Employment Standards Tribunal**	**Brent Mullin** **Tribunal Chair** **Employment Standards Tribunal**	**Carol L. Roberts** **Member** **Employment Standards Tribunal**