IN THE MATTER OF AN ADJUDICATION UNDER DIVISION XIV - PART III OF THE *CANADA LABOUR CODE* - COMPLAINT OF ALLEGED UNJUST DISMISSAL

B E T W E E N :

DOUG GERTH
(Hereinafter called the "Complainant")

- and -

TRANSFREIGHT INC.
(Hereinafter called the "Respondent")
Canadian Labour File No. YM707-6003

ADJUDICATOR: Richard H. McLaren, C. Arb.

COUNSEL FOR THE COMPLAINANT: Keith Millikin, Esq.

FOR THE RESPONDENT: Ian S. Campbell, Esq.

HEARINGS IN RELATION TO THIS MATTER WERE HELD AT LONDON, ONTARIO, MARCH 8th and 10th, MAY 11th, 12th, 13th and 18th , 2004. Written Argument was completed on 22 June 2004.

AWARD

Doug Gerth is a 45 year old bonded A-Z licensed long haul truck driver, who has worked in the trucking industry for approximately 27 years. Prior to being employed by the Respondent, the Complainant worked for Al's Cartage of Kitchener, Ontario and Jones Feed Mill of Linwood, Ontario. During his 5 year employment history at the Respondent, Doug Gerth claims to have never been absent from work except for brief absences due to health. At the time of his termination, the Complainant was ranked No. 30 out of 75 drivers in terms of seniority. The Complainant has received his "Dangerous Goods" certificate.

From 1997 to 2002, the Complainant drove various routes for the Respondent. In his initial years at the company, he drove the Toronto, Ontario, Rochester, New York and Lansing, Michigan routes. For approximately 1 ½ years he drove a shunt truck in the Toyota yard after being trained by Edith Hooper, another Complainant. In May 2002, Mr. Gerth became one of the Respondent's drivers assigned to the Chicago route from Cambridge to the Union Pacific rail yard in Chicago, Illinois. The Complainant drove the Chicago route from May 2002 until the end of July 2002. After which he transferred to the Michigan run until he was terminated.

Cellular phones were available in the Respondent's trucks for many years. The initial purpose was to allow the drivers to contact the Respondent's Traffic Department directly with respect to any problems they encountered during their run. The phones were locked in such a way that the driver of the truck could only use the phone to dial a Transfreight Office or Traffic Department number. This method of cellular monitoring prevents the drivers from dialing any numbers that the Respondent did not authorize or was unaware of ahead of time.

A meeting was held on the 12 June 1999 to announce a change in the company policy for cellular phones. The phones would now be unlocked. At the meeting, a question was asked regarding what would happen if a personal call were made to home in the case of an emergency. Mr. Andrew Douma, Toyota Motors Manufacturing Company {"TMMC"} Contract Manager at the time responded that this would be considered unauthorized use of the Company's cellular phone and could give rise to discipline depending on the circumstances. Another question was raised regarding the use of the cellular phone to speak with other drivers, Mr. Douma responded that it would be viewed as personal use and would be prohibited. A further question was posited regarding a situation whereby if the Traffic Department could not be reached to report a delay in pick-up, if it would be deemed personal use to call another driver. Mr. Douma stated that only as a last resort would it be permitted to call another driver to report a delay in pick-up, and that it was preferable if the drivers communicated with the Traffic Department. The mandatory call in requirements for all TMMC drivers are set out in the Respondents *Operation Manual* under Section B page 1. Mr. Douma repeated the Company's position on the primary purpose of the Company cellular phones. The change in policy to unlock the cell phones was made later in the month allowing calls to be made to any number.

The Company rules with regard to cell phone use are included in the 1999 Employee Handbook under the section *Company Cellular Phone Use.* The following is an excerpt from that section:

> "*Transfreight tractors may be outfitted with a cellular telephone, primarily for the purpose of business communication with the team member's Traffic Department.*
>
> *Unauthorized use of the cellular telephone for personal use is prohibited, and use in this manner will result in corrective action."*
>
> The "corrective action" eluded to in the above passage refers to section 5.6 of the 1999 Employee Handbook which states:
>
> ***CORRECTIVE ACTION***
>
> *Transfreight has developed a Performance Discussion Form. Supervisors utilize this form to document both corrective action discussion as well as recognition discussion.*
>
> *In both instances whether the discussion is for corrective action or for recognition, a one on one discussion will occur and the following areas of the form will be completed.*
>
> *1) A description of the incident/behavior*
> *2) How the incident/behavior impacts The Respondent and*
> *3) The team member's understanding of the situation.*
> ***…***
> *Please note that depending on the severity of the incident/behavior, corrective action may result in anything up to and including suspension and/or termination.*

While the Company did follow the rules in disciplining the drivers who violated the policy of using the cell phones for personal use, they did not follow the procedures that are explicitly written in their rules. The Respondent neglected to complete a Performance Discussion Form documenting the incident and went straight to disciplining the Complainants.

A further clarification of the cell phone use was explicitly documented in a memo

dated 17 August 1999 delivered to all TMMC based drivers.

> *"The cell phones are in the truck for the exclusive use of company business, and are not for personal use. Please ensure that you do not deviate from the above practice, as they*

are not meant for any other use. Should you require clarification on these items, please do not hesitate to contact the writer directly."

Prior to the Respondent's corporate restructuring in October of 2001, it was the job of Darryl Brown, TMMC Operations Manager, to monitor cell phone usage. He was provided with a summarized cell phone usage report by the Accounting Department consisting of the overall cell phone cost to the company each month. If he felt the cost incurred by the company as a result of the cell phones was excessive, he would request an audit to determine the cause. Mr. Brown continued to monitor the charges up until his position with the Company changed leaving the cell phone monitoring duties unassigned. This resulted in the truck drivers using the cell phones without being notified if they were violating the company policy on cell phone usage.

This period of inactivity on the part of management continued for 8 months until May 2002 when Mr. Darryl King noticed that the cell phone costs were higher than he anticipated. At this time Mr. King requested detailed information from the Accounting Department regarding truck cell phone use. After all the information had been provided, Mr. King felt that the bills were higher than he was comfortable with and decided to examine the June bill when it arrived as well. Mr. King gave instructions to perform a detailed audit from the period of January to August 2002 for any cell phones that had accrued more than $100.00 per month of non-business calls. Non-business calls are calls that were not made to any telephone numbers within the Respondent or to the Traffic Coordinator.

A meeting was scheduled involving the Complainant being one of the four drivers brought to the attention of Mr. King through the audits. On 3 September 2002, Darryl King, Josh Inglis and the Complainant had a meeting where the Complainant was questioned about the personal calls that were made on his truck cell phone. The Complainant admitted to making personal calls home quite frequently as he was trying to acquire some land upon which to build a house but was having difficulties completing the transaction. As a result, he needed to be in contact with his wife quite often. The Complainant confirmed at this meeting that he was aware of the policy regarding cell phone use. The Complainant stated that at no time was he advised of the amount of his cell phone usage in a dollar amount.

Following the meeting, the Complainant was informed that a short-term suspension was to follow while an investigation of the Complainant occurred. On 6 September 2002, the Complainant received a dismissal letter from the Respondent. The findings of the investigation resulted in dismissal. The Respondent concluded that:

"The investigation had been concluded with the following findings:

- *You did admit to the use of the Company cell phone for personal use the calls being unrelated to work, a major event or crisis.*
- *You were unable to identify the numbers which repeatedly appeared on the bill as the numbers you had called to conduct personal conversations.*
- *You acknowledged that you had not informed management of the personal ell phone use.*
- *You acknowledge your awareness that the use of Company cell phone for personal calls was in contravention with company policy.*

Doug, your actions are in direct contravention of company policy. Your conscious effort to misappropriate company resources for personal benefit has resulted in a breach of the essential element of trust between yourself and The Respondent."

The Complainant disputes the fact his actions warrant terminating his employment with the Company. In the meeting with Mr. King, the Complainant admitted to making personal calls during the period of January to June 2002. He identified the phone numbers as Edith Hooper's and his home phone number. The Complainant submits he was under the impression that the Company had a "flat rate" on the phones where the usage was independent of the cost. The Complainant was not aware of any roaming charges that might be charged to the Respondent if the phone were used outside of the network's regional service.

Following the termination the Complainant and the other two drivers in this matter, Mr. Art Jackman and Ms. Edith Hooper, a joint Complaint of Alleged Unjust Dismissal was filed under Division XIV – Part III of the *Canada Labor Code*. Hearings on 8 and 10 March 2004 commenced when the Respondent's counsel advised the Adjudicator that a settlement between the parties involved could not be reached. A Procedural Order No. 1

was issued detailing the procedure that was to follow. It was decided that a consolidated hearing would commence for the purposes of presenting evidence to the Adjudicator. The arguments in the case are based on consolidated evidence but made separately in respect of each Complainant and a separate Award will be issued for each of the three Complainants involved.

The Respondent makes it clear from the relevant excerpt in the 1999 Employee Handbook that the use of the Company's cellular phone was restricted to business communication use primarily. However, the 17 August 1999 memo stated that the use of Company cell phones are for exclusive use of Company business, and not for personal use. Furthermore, in the termination letter dated 6 September 2002, Mr. King outlined that the personal use calls were calls unrelated to "work, a major event, or crisis". There are three different definitions of what constitutes personal use by the Respondent, by which the Complainant was to govern his actions. It was the belief of the Complainant that all calls not work related were of a personal nature, and therefore classified as personal use calls.

The audits was completed by tabulating the totals of the Rogers cellular phone bills for the amounts accrued in the period of January to June 2002. In addition, they calculated the totals for the months of July and August 2002 to further show that the usage was continuing after said time period. However, these final two months were not used to justify the termination of the Complainant. The Respondent's audit shows that they incurred a total of $1137.09 for the period . The Respondent felt that this excessive use of the cellular phone constituted a grave misappropriation of company resources and the actions lie in stark contrast to the behavior expected of the Complainant. The Respondent felt this offence was serious enough to warrant the termination of the Complainant's employment.

The amount tabulated by the Respondent differs from the amount that the Complainant believes has accrued during the same time period. The Complainant believes that the total amount is $930.66 for the months of January to June 2002. The difference in total amounts calculated by the Complainant and Respondent results from the Complainant believing that all calls to truck cell phones are work related, and therefore do not constitute personal use.

In May 2002, the Complainant became one of the drivers on the Chicago route. He was trained by Ms. Hooper. The Complainant submitted that he had two training runs with Ms. Hooper and began to work on his own truck soon after the second training run was complete. However, the Respondent disputed that fact as the Company asserted that he had more than two complete runs for training. The Chicago route entailed a 32-hour round trip run to the Union Pacific Railway yard in Chicago. Drivers leave Cambridge towing an empty container and chassis arriving at the rail yards in Chicago to pick up a full container of parts arriving from California. Usually the drivers would make scheduled pick-ups in the main Union Pacific rail yard; however, there were three other rail yards that also involved pickups.

There are many challenges that the drivers face on the Chicago route; crossing the international border, receiving authorization to enter the rail yard, dropping off the empty container and chassis, phoning the yard to find the location of the container for pick up, and locating that container in a yard stocked with 1,000 to 3,000 containers. The containers are usually on chassis, although there are times where that is not the case. A thorough inspection of the container must take place to determine whether the chassis are safe and roadworthy. If the chassis is not fit, there are fines and infractions for both the driver and the Respondent.. The Canadian regulations are more stringent than American regulations, drivers must ensure that the chassis will pass Canadian inspection. Many of the chassis might require work to pass both countries regulations, therefore ensuring that no infractions occur is another task for a driver. This poses another problem, the repairs may take too long for the driver to meet the delivery schedule. Sometimes it is easier to find another empty chassis in the yard, as repairs can take up to four hours. Once the chassis are satisfactory, the driver must again call the yard tower for authorization to leave the yard. All of these tasks in picking up the parts must be carried out within tight time lines, as there was never more than a 12-24-hour window for delivery of the container in Cambridge.

The Complainant asserts that the driver's found that the tasks involved in the Chicago route worked most efficiently if the drivers spoke with each other, because the Traffic Department at the Respondent could not help with the logistics of the Chicago rail yards. It was for this reason that Traffic would offer the cellular phone numbers of other drivers, or patch a three-way call together between drivers. Brian Levy, Traffic Coordinator for the Respondent, received individual requests regarding these calls and assessed them on an individual

basis. Receiving and delivering the containers from the Union Pacific rail yard in Chicago within the time constraints were compounded by the high fines for late deliveries.

During the cross examination of Mr. Gerth, Counsel for the Respondent asserted that the use of the cell phones to communicate with other drivers was not required for any of the tasks involved. Namely, pre-trip inspection, receiving authorization to enter the rail yard, dropping off the empty chassis, locating the new container, or the final inspection. However, during Ms. Hooper's cross examination, she indicated that situations could arise where calls between drivers would help out immensely. For example, when a driver arrives at the rail yard and has information that there is a delay in the trains. This information is very useful for a driver following behind, as it allows them to know that they do not have to rush, nor do they have to make needless arrangements to get to the rail yard in the case of a road emergency. Ms. Hooper also mentioned another situation whereby a cell to cell call between trucks would be warranted involving broken chassis. If a driver notices the chassis that the following driver is to pick up, it would make sense to notify them as to its location, as well as condition, this would make their tasks in the yard much easier and more efficient. Her testimony is important to this matter because she is the one who trained the Complainant. It is during and after that training period that the Complainant engages in the use of the cellular phone. She also had instructed him that there was only a flat monthly use fee to the Company meaning that no additional charges arose, so he believed, by his use of the phone in the truck.

The Respondent submits that the Complainant's use of the truck cell phone during his time on the Chicago route from May 2002 through July 2002 constituted a breach of Company policy. The Respondent created a summary of the "personal use" calls for the Complainant, which consisted of a monthly breakdown of the cell phone bills deemed "personal" called the "*Cell Phone Abuse Summary*". They submit that the "personal use" bills totaled $1137.09 for the time period above. The Complainant has a different view on the "personal use" calls definition. The Complainant feels truck to truck calls are not "personal use" but "business use" which lowers the figure that the Respondent asserts has accrued. The cell phone costs without truck to truck cell calls total $930.66.

The Complainant's definition of what constitutes "personal use" comes from two events. The first event occurred during his training with Ms. Hooper. While being trained for the Chicago run, the Complainant believed that he would have at least a two week training period because there was so much to learn. This claim contradicts with the submission of Darryl King who did not feel 2 weeks was required. Instead he was only given 4 days and 2 runs to learn the entire route, which was disputed by the Respondent at the hearing. Mr. Gerth claimed that he was especially concerned at the amount of training he received for the Chicago run as he witnessed the result of a colleague's mistake during a Chicago run resulting in their termination. He testifies that he was adamant that he wanted to learn the route as well as possible so as to not put his employment with the Company in any sort of jeopardy. As a result of this shortened training period, the Complainant asserts that he told Brian Levy, Fleet Coordinator for TMMC that he would only do the run if he could contact Edith Hooper whenever necessary. The Complainant also asserts that Mr. Levy told him that he did not have a problem with this. During cross-examination, Mr. Levy did not recollect indicating this to Mr. Gerth. However, with a Company as large as the Respondent, it is plausible that a conversation could have occurred between the Complainant and Mr. Levy without Mr. Levy recollecting such a conversation.

The second event occurred during his first run, as the Complainant remembers asking Ms. Hooper about the cellular phone usage. Ms. Hooper told him not to worry because there was a flat rate plan on all cellular phone billings. Prior to this conversation, Mr. Gerth submitted that he thought the usage of cellular phones in Canada would not be subject to roaming charges. The Complainant was surprised to find out that roaming charges were incurred on all calls made outside the local network in Cambridge.

As per the authorization the Complainant felt Mr. Levy gave him, he was in regular contact with Edith Hooper concerning work-related issues he encountered. Mr. Levy would also occasionally call the Complainant in his truck about schedules or holiday hours. This resulted in Mr. Gerth calling home to check with his family, and then calling Mr. Levy back. These calls comprised at least two phone calls alleged by the Respondent not to be personal. In May and June 2002, the Complainant and his wife were purchasing some land upon which to build a house. They needed to take money from an RRSP to do the purchase and ran into complications. The Complainant asserts that this resulted in many cell phone calls including communications with Julie Hinks, an employee in the Accounting Department at the Respondent. Ms. Hinks helped the Complainant with phone calls to straighten out the land purchase problems. At no time during this problem with the land purchase did

Ms. Hinks ever say that making cell phone calls for personal reasons was prohibited by the Company. The Complainant contends that despite the official policy, drivers were always using their cell phones.

As a result of his conversation and subsequent agreement with Mr. Levy, the Complainant thought that all of the calls from his truck cell phone to Ms. Hooper were authorized. The CB radios in each truck were not a viable option for communication because of the staggered departure times of the drivers. As a result, the cell phones were used to communicate with one another on the Chicago route, according to the Complainant. The Traffic Department would frequently provide another driver's truck cell phone number if requested, or even patch a three-way call together between trucks. In fact, drivers of The Respondent would routinely compile a list of cell numbers given to them by the Traffic Department so they could contact the drivers directly. The Complainant does not ever recall being told that this was unauthorized use.

At the 3 September 2002 meeting, the Complainant admitted to making and receiving personal calls on the Company cell phone located in his truck. Mr. Gerth was asked to identify two phone numbers, and he did so. These were Edith Hooper's number and his home phone number. When asked why he did not inform management of these personal calls, the Complainant asserted that he felt that there was no reason to. He pointed out that on many occasions management knew that he was phoning home, and gave Julie Hinks' name in particular. The Complainant offered to pay off all of the charges incurred through personal use calls while in his truck. Mr. Gerth was unaware that the Respondent did not have a set rate plan and was being charged extra for his cell phone use.

After the meeting Mr. Gerth was informed that he was suspended, pending the completion of an investigation. Mr. Gerth claimed that he had no idea of the meeting's purpose and was surprised once the meeting began. As a result of the meeting and the uncertainty of the ramifications, Mr. Gerth suffered from nausea, sleep deprivation and loss of appetite, which was attributed to acute stress reaction.

Varying definitions of "personal use" and "business use" are present in this case and require clarification. The Respondent feels that any of the Company's business numbers or Traffic numbers constitute "business use" and all other numbers constitute "personal use". The Complainant feels that the Respondent's definition with the addition of truck to truck calls constitute "business use" and all other numbers are "personal use". As the Adjudicator in this matter, I have to weigh each side and make a determination of what a "business use" call represents. During Ms. Hooper's cross examination, she brought up two examples as to when a cell to cell call would be beneficial in completing tasks on the Chicago route. This indicates to me that a "business use" phone call could be a cell to cell call depending on the topic of conversation. This is a rather hard determination to make because there is no way to accurately determine whether or not a cell to cell call actually was about something on the route or if it was of a personal nature.

On review of all of the evidence, I have concluded that cell to cell phone calls should not be excluded from the "business use" definitions. I also find that it is unrealistic of the Respondent to prevent it's drivers from using the cell phones to call home in times of an emergency or important personal matters. With that, all the calls to home should not be considered "personal use" calls, but rather some considered "personal use" with authorization. Mr. Gerth also appears to have in the course of his training reasons to believe that he could make personal calls. He also has some other apparent authorizations to make personal calls. In this regard his case is different than the other two Complainants. His explanations do not strain the credulity of the Adjudicator as to the veracity of his testimony. He was a believable witness in every respect.

With the above findings of fact, the usage figures are effectively invalidated on both sides. The Respondent has a much higher figure in mind as to the costs that the Complainant is responsible for. The Complainant's figure of what they should be responsible for is lower than it should be. The actual amount accrued is somewhere in between the two values and quantifying that number would be nearly impossible. The inability to quantify the precise amount of the violations of the rules would have been much easier had there been the corrective action and monitoring which the Company rules contemplated.

ARGUMENTS

Arguments of the Respondent

Counsel for the Respondent argued that the Company followed their procedures properly when disciplining the Complainant. They submit that the Company had a policy governing the usage of cellular phones. Mr. Douma indicated specifically to drivers during the June 1999 meeting that the cellular

phones were not to be used for personal calls and Chris Luery issued a memo stating the phones are in the truck for "*the exclusive use of Company business*" on 17 August 1999*.* They argue that the Complainant was aware of the policy as he acknowledged during the 3 September 2002 meeting with Mr. King and Mr. Inglis that he was aware of the Company policy regarding cellular phone use. They also submit that the Complainant's reaction to his interview and concern for loss of employment were due to the fact that he was aware of the policy in question and that he knew he had violated this policy. They bring attention to the absence of any denial from the Complainant as to neither whether he was present for the driver's meeting with Mr. Douma nor that he did not receive the August 1999 memo from Mr. Luery.

It is submitted that the Complainant's conduct contravened the policy because the cellular phone records indicate that there were calls made to non-company numbers and to Ms. Hooper's truck and home phone. The Respondent submits that the Complainant has no credible explanation for these calls as he was making personal calls during the months of January, February and April 2002 all prior to the conversation he had with Ms. Hooper where she informed him about the "flat rate cell phone plan". They also submit that since his land transaction was completed in July 2002, one would expect a decline in the personal usage but the cellular phone bills for July and August indicate otherwise. Regarding the Complainant's reasons for cell to cell usage, the Respondent submits that his actions are inconsistent with his reasons. The claim that cell to cell communication between drivers was a common occurrence is not borne out by his conduct before starting on the Chicago route as his cellular phone bills during January and February 2003 indicate that no cell to cell calls were made. In fact, it was not until May 2002 that cell to cell calls were made. They also submit that if cell to cell communication was a common occurrence, he would not have to gain authorization from Mr. Levy when he felt he needed to speak with Ms. Hooper. Also, if communication with Ms. Hooper was granted to the Complainant, such conversations would occur after his training for the Chicago route commenced. However, records indicate that he was using his truck cell phone to talk to Ms. Hooper in April and early May 2002. The Respondent also submits that after Ms. Hooper finished the Chicago route, the only possible reason for the Complainant to converse with her during his route would be directional issues. The Complainant continued to have conversations in excess of any reasonable length of time required to ask for directional help after Ms. Hooper finished her time on the Chicago route in June 2002.

The Respondent argued that the Company did nothing to lead the Complainant to believe that the policy was not going to be enforced. The Respondent submits that calls from Mr. Levy to the Complainant on his truck cell phone requiring the Complainant to call home then call Mr. Levy back do not indicate that the truck cell phones could be used "carte blanche" for making personal calls. Furthermore, discussions between Ms. Hinks and the Complainant were business related and should not be interpreted as an indication that the Company allowed personal calls.

The Respondent submits that the only mitigating circumstances that exist are the length of the Complainant's service and a clear discipline record. Furthermore, in justifying the Complainant's position of innocence, the Respondent submits that the Complainant put forward a number of explanations that proved to be inaccurate, misleading and false. They submit that the Complainant has demonstrated a lack of candor and provided evidence in an attempt to mislead the Adjudicator.

The Respondent submits that the type of conduct exhibited by the Complainant has always been viewed by the Courts, Arbitrators and Adjudicators as one of the gravest forms of misconduct in an employment relationship. In support of its position, reference was made to the following cases:

Re Cara Operations Ltd. 31 L.A.C. (4th) 1 (Knopf, 1992); *Re Gibraltar Mines Ltd.* 45 L.A.C. (4th) 377 (Blasina, Bowman, Jordan, 1995); An unreported decision between *Pavaco Plastics Inc. and Union of Needle Trades, Industrial and Textile Employees* a decision by Board of Arbitration chaired by Aribtrator Mary Lou Tims dated November 20, 1995*;* An unreported decision between *K. Duhamel and Bank of Montreal* a decision by Arbitrator Hickling dated October 26, 1981; *Sandu and D.H.L. International Express Ltd.* [1997] C.L.A.D. No. 308 (Albertini, 1997); An unreported decision between *Labatt Breweries Ontario Division of Labatt Breweries of Canada and Brewery, General and Professional Workers' Union, Local 304* a decision by Arbitrator Surdykowski dated October 4, 2002; *Re Delta Chelsea Hotel 111* L.A.C. (4th) 22 (Surdykowski, 2002); An unreported decision between *Stelwire Ltd. – Burlington Works and United Steel Workers of America, Local 5328* by Arbitrator Surdykowski dated November 27, 2003; An unreported decision between *Bernard Charlebois and Bell Canada* by Arbitrator Bergevin dated June 19, 1986; An unreported decision between *Savio De Souza and Bank of*

Montreal by Arbitrator Armstrong dated July 30, 1998; An unreported decision between *Richard Roulette and West Region Tribal Council Inc.* by Arbitrator Deeley dated August 2, 1991; An unreported decision between *Bell Canada and David Muise* by Arbitrator Langille dated May 20, 1993; An unreported decision between *Labatt Ontario Breweries, Division of Labatt Brewing Company Limited and International Union of Operating Engineers, Local 796* by Arbitrator Surdykowski dated January 16, 2001; *Re Work Wear Corporation of Canada Ltd.* 35 L.A.C. (4th) 373 (Starkman, 1993); *Re Stelco Inc.* 50 L.A.C. (4th) 120 (Rose, 1995); *Atomic Energy of Canada Limited* 98 CLLC (Marceau, 1998); An unreported decision between *James A. Graham and Bison Diversified Inc.* by Freda M. Steel dated October 11, 1991

The Respondent submits that knowingly misappropriating Company resources for your own personal benefit is a dishonest act and one which *prima facie* carries the penalty of discharge. They further submit that dishonest intent can be presumed where the employee fails to provide a credible explanation for his or her conduct and included case law supporting that assertion. Regardless of the standard of proof applied to the evidence, dishonest conduct on the Complainant's part has been proven. They further submit that the Complainant cannot rely upon any laxness of enforcing the cellular phone use policy on the Respondent's part to relieve them of the consequences of their misconduct. They want the existing penalty to remain but submit that in the event of a substitution of penalty, that the Adjudicator limit it to permission for the Complainant to resign or a very modest monetary award rather than re-instatement.

Arguments for Complainant

The Complainant does not dispute the existence of a cellular phone policy for the Respondent. The issue of these proceedings is the extent to which the driver breached that policy, if any. If a breach of the policy is found, the issue is whether such a breach amounted to misappropriation of corporate resources. Specifically, whether that breach gives rise to an inescapable inference that the driver acted dishonestly, to the extent to justify dismissal.

The Complainant acknowledges that personal use telephone calls were both made and received on the cellular phone provided by the Respondent in their truck. The issue in dispute is whether or not the Complainant believed that he had made appropriate arrangements with the Respondent concerning personal cellular phone use. The issue is not whether the Respondent caused the Complainant to believe that they were excluded from the policy, rather the issue is whether there was an honest belief that the Complainant had made such an arrangement with the Respondent. Correspondingly, the central issue regarding the Complainant is whether the dismissal by the Respondent was in fact just.

The Respondent offered no evidence at the hearing that any one of the three Complainants or any of its employees were ever specifically advised that their employment would be terminated on the basis of unauthorized cellular phone use. This fact was surprising to the Complainant's counsel because Darryl King names an instance whereby an employee of the Respondent's Windsor office was terminated for unauthorized usage of the Company cellular phone. Furthermore, Jeff Riddell, another driver working the Chicago Route was only suspended for unauthorized use of the cellular phone.

With respect to assessing the credibility of witnesses, the Complainant contends that the argument made by the Respondent and supported by *Faryna v. Chorny* set out in *Cara Operations Ltd.* is equally applicable to those witnesses appearing for the Respondent. Therefore, those witnesses with the exception of Debbie Baker, who is no longer employed by the Respondent are equally in conflict with regards to their credibility, as a result of their vested interest in the success of this matter. This issue of credibility can be directly applied to Brian Levy who was disciplined for writing a letter of recommendation on behalf of the three Complainants.

The aforementioned policy concerning personal cellular phone usage is not disputed, however, the Respondent by its own admission selectively enforced that policy. Furthermore there is no evidence that any other persons other than the Complainants and Mr. Riddell has ever been disciplined by the Respondent's Cambridge office for alleged unauthorized cellular phone use.

There are inconsistencies in the audit's performed by the Respondent. Mr. King has repeatedly stated that the Respondent carried out monthly audits of the cellular phone bills in excess of $100.00. However, Mr. Douma testified that it was the practice to audit each truck's cellular phone bill with respect to usage. Mr.

Douma claimed to have no knowledge of the $100.00 threshold testified to by Mr. King. In cross-examination Mr. Douma refused to agree that this would have left the Respondent unable to properly monitor unauthorized cellular phone usage, where the unauthorized use was below $100.00 in a month. Such testimony indicates the extent to which he was an interested witness.

The Complainant does not merely contend that the Respondent's investigation of the cellular phone usage was flawed. The Complainant asserts that the Respondent acknowledges this as well. In particular, the Respondent acknowledges that it ceased the phone bill audits in 2001 and did not resume them until 2002. The Respondent also failed to actively enforce its own policy against personal cellular phone usage. The fact that there existed a $100.00 threshold for detection of the audits resulted in only those bills in excess of the minimum amount being detected. This leaves all abuses under the threshold undetected. The Complainants were at a much higher risk to appear to be abusing the cellular phones because of their international routes. All cellular calls made from the trucks would be considered long distance and would incur roaming charges, these charges would only be applicable to these few drivers. If the roaming charges were not calculated as a part of the threshold by the Respondent many of the Complainants bills would have been beneath the $100.00 cut-off. Furthermore, it is the contention of the Complainants that because there is a "flat rate plan" the total number of minutes used is not representative of the actual charge incurred. Therefore, an employee could be speaking or abusing the phone privileges and never exceed $100.00 and another could be making routine calls and easily exceed the threshold because their rout requires a more expensive type of call.

The charge of misappropriation correlated directly to dishonesty, and even an unsuccessful attempt may warrant grounds for termination. However, the value of the items taken or sought to be misappropriated has a clear bearing upon whether adequate grounds do in fact exist. (*McKinley* v. *B.C. Tel*) By the Respondent denying any benefit from the communications of its drivers, and by inflating the monetary value of the calls it is seeking to strengthen its case for both grounds and for penalty. The actual amounts of misappropriation by the Respondent fluctuate, to date there have been three different totals for the alleged cellular abuse of the Complainants. First, the "Cell Phone Abuse Summary". Second, following complaints of unjust dismissal and disclosure of the cell phone bills, adding July and August. Third, the "re-audit".

The attempt by the Respondent to increase its claim for unauthorized use of the Company cellular phone after the date of termination is an attempt to enlarge its position. This is a violation of procedural fairness and an indication of the Respondent's actions.

The Respondent has attempted to limit the appropriateness of the attempt by the Complainants to explain their conduct. However, to do so is to ignore the employer's duty of progressive discipline. The Respondent would deny the necessity of driver contact on the Chicago route, however Complainant counsel states that their limited familiarity with this run and the complexity and logistics of it do not give an informed position to make such a claims. Rather, it is the drivers who can make such a claim, and whom all agree with the necessity of truck to truck cellular contact.

The Complainant states that he avoided personal cellular phone use throughout most of his career with the Respondent, and was ridiculed for doing so. The Complainant was unclear as to the policy concerning personal cellular phone use, as he was driving a Shunt Truck when the phones were first unlocked. Personal calls were made by the Complainant regarding a land purchase gone awry in 2002. However, in the course of his training the Complainant received permission to make personal use calls from his Truck's cellular phone for all issues arising from the Chicago route. Mr. Leury has testified to having no recollection of this conversation.

There was no intent to misappropriate any corporate resources by the Complainants. Each had an honest belief that their activities were not contrary to the Respondent's interests. Therefore, none of the Complainants gave grounds for dismissal, and each should be entitled to reinstatement.

In support of the Complainants position, reference was made to the following cases:
Re Carling O'keefe Breweries of Canada Ltd. and Western Union Brewery 3 L.A.C. (4th) 222 (Ponak, 1988); *Re Toronto Harnour Commissioners and Toronto Harbour Commissioners Employees* 29 L.A.C. (4th) 428 (McLaren, 1992); *Re McKinley v. BC Tel* 2001 SCC 38 (McLachlin, L'Heureux-Dube, Iacobucci, Major, Bastarache, Binnie and Arbour, 2001); *Re Evaniuk v. TC Bank Financial Group* [2002] C.L.A.D. No. 520 (Teskey, 2002); *Re Varsity Plymouth Chrysler Ltd. V. Pomerleau* 2002 A.B.Q.B. 512 (Erb, 2002); *Re Minaker v. Toronto-Dominion Bank*

[2003] C.L.A.D. No.39 (Liang, 2003); *Axworthy v. S & M Trucking Ltd.* [2003 C.L.A.D. No.97 (Lederman, 2003)

DECISION

The basis for determination of this adjudication is derived from four issues/facts.

1. Were there Rules in place to govern the actions of the Complainant?

In October of 1999 the Respondent developed and distributed the 1999 Employee Handbook. This Handbook provided all employees of the Respondent including the Complainant with the guidelines in which they were to perform their duties.

This Handbook dealt specifically with the repercussions of violating, and guidelines for using the company cellular phones provided within the trucks.

> "*Transfreight tractors may be outfitted with a cellular telephone, primarily for the purpose of business communication with the team member's Traffic Department.*
>
> *Unauthorized use of the cellular telephone for personal use is prohibited, and use in this manner will result in corrective action."*
> (Book of Exhibits, Tab 4)

The Respondent has outlined what types of calls are deemed permissible and/or authorized in this excerpt from the Handbook. Calls that are "primarily for the purpose of business" are authorized. Conversely, the Respondent has outlined the repercussions of violating the Handbook guideline, and clearly states that a violation "will result in corrective action". This "corrective action" eluded to refers to a procedure by which the Respondent completes a Performance Discussion Form documenting any/all behaviour breaching the Rules set forth in the 1999 Employee Handbook. The purpose of completing this form is twofold:, first, it is used to document any corrective action; and, second it is used to initiate discussion with employees regarding their behaviour or actions. Following the completion of the Form a discussion will commence regarding the incident, the potential impacts to the Respondent and the employee's acknowledgement and understanding of the effects of their actions. If the Respondent feels that the employee deserves a disciplinary response, it reserves the right to apply any penalty ranging from a warning to termination.

2. Were the governing Rules followed by the Complainant?

The Complainant, having received only 4 days to train and only 2 runs of practice to fully learn his route required extra assistance to fulfill his duties with the Respondent. The Complainant came to the realization that he was not adequately trained, and as a result told Mr. Levy that he was only prepared to begin the Chicago route if he could contact the Ms. Hooper who trained him whenever necessary. I find it to be believable that permission was granted by Mr. Levy to permit cellular telephone calls between this Complainant and Ms. Hooper whenever necessary. As a result of this permission, the Complainant obtained both Ms. Hooper's truck phone number as well as her home phone number. Therefore, these calls had some level of authorized use associated with them.

The Complainant was also told by Ms. Hooper that the Respondent had a "flat-rate" cellular phone plan that would limit the amount of charges they would receive. However, in cross-examination it became apparent that the Complainant was making cellular phone calls with the Company phone before he had any knowledge of a cellular plan between Rogers and the Respondent.

In May 2002, while attempting to purchase land the Complainant had problems with receiving a pay-out from his RRSP. As the timing was imperative, the Complainant made several phone calls from his truck's cellular phone to his wife, his lawyers, as well as Standard life about the purchase. The Complainant also made several phone calls to a Ms. Julie Hinks who is an employee of the Respondent's Human Resources department about the problem with benefits he was having. The Complainant contends that at no time did Ms. Hinks

tell the Complainant not to use the Company cellular phone. These calls also have some degree of authorization associated with them.

The Complainant states that the telephone calls that were made from his Truck's cellular phone were all business, and therefore do not constitute personal use with the exception of those calls pertaining to the land purchase problems.

The Complainant believed that the calls pertaining to the land purchase problems constitute a major event or crisis. That all of those calls were warranted, because according to the termination letter that the Complainant received from Mr. King, calls not related to "work, a major event or crisis" were unauthorized.

3. Were the Rules interpreted correctly by the Complainant?

The Rules imposed by the Respondent are two-fold. In one respect the Respondent states unequivocally that "use of the cellular telephone for personal use is prohibited". This would lead a reasonable person to believe that if they were to use the Company cellular telephone for personal use then they are liable to be subject to some form of appropriate discipline. It is acknowledged that in the September 3, 2003 meeting the Complainant admitted to using the Company cellular telephone for personal use calls. However, in addition to the Rules written in the 1999 Employee Handbook, employees were given verbal instructions regarding the cellular phone use. Conversations with Mr. Douma resulted in drivers having the ability to make emergency calls from their trucks, which would be unauthorized by the 1999 Employee Handbook. Furthermore, due to the Complainant's training period and subsequent conversation with Mr. Levy, the Complainant believed that he was authorized to both make and receive cellular telephone calls regarding any problems that occur regarding the Chicago route. In the termination letter that the Complainant received from Mr. King, it was stated that calls not related to "work, a major event or crisis" were unauthorized. It seems that from the time that the 1999 Employee Handbook was published to the date of termination there were several different guidelines of what constituted unauthorized use of the company cellular telephone.

An issue that must be weighed is whether the principle of employer condonation applies. The Respondent cites *Duhamel and Bank of Montreal* as an example of an Arbitrator weighing the applicability of the principle. The Arbitrator states "*an employer condones a wrong when with full knowledge of an employee's misconduct, he continues to retain that employee in his service".* In that case, Mrs. Duhamel diverted funds from various banking activities to her branch's staff party fund. She claimed that the Bank knew about her actions and was surprised when she was informed it was the reason for her termination. The Arbitrator granted her appeal and re-instated Mrs. Duhamel to her former position. The Respondent in the case before me did not condone the actions of the Complainant. However, in failing to manage the enterprise they contributed to the on going development of the problem and the growing conviction among its employees that they were acting in an authorized fashion. Mr. Gerth was never notified of any problems with his use of the truck cellular phone after he believed he had received management authorization for his use of the phone. The corrective discipline process never occurred due to lack of monitoring.

I also note that the Respondent may be condoning the activity because if there were an absolute prohibition on the use of cellular phones for personal use it would have indicated so in the Employee Handbook. Instead, the use of "primarily" and "unauthorized" allow for the possibility of obtaining authorization to use the phones for other non-business uses. Furthermore, the omission of including a prescribed procedure for obtaining such authorization from a designated person at the Company is another reason why this situation arose. The Company contributed significantly to what occurred in this case.

The issue of identifying what constitutes personal use became paramount at the hearing. The Complainant noted at the hearing that as a result of the Traffic Department not providing adequate notification to drivers of conditions or updates, that the drivers chose to do it themselves. The particular type of call is not accepted as 'personal' by the Complainant nor myself. The Complainant decided that it was worth defying the protocol of the Respondent regarding personal use if it would greatly increase the efficiency of the Company. The Complainant believing this to be the case made truck to truck cellular calls to report road conditions instead of using the TMMC Traffic department

4. Were the governing Rules enforced by the Respondent?

The Rules that the Respondent employed are found in the 1999 Employee Handbook. The definition of Corrective Action previously stated provides the steps in which disciplinary issues are to be dealt with by the Respondent. The Respondent's disciplinary approach states that it has developed a "Performance Discussion Form" to both document and recognize a corrective action and discussions. There is to be a one on one discussion with a superior involving three areas: a description of the incident/behaviour, how the incident/behaviour impacts the respondent, and the team members understanding of the situation. Furthermore, in a memo dated August 17, 1999 the Respondent stated that the "phones are in the truck for exclusive use of company business, and are not for personal use".

In the case of the Complainant, there was no Performance Discussion Form filed by the Respondent. A description of the incident was not noted, nor were its impacts to the Respondent. The Respondent had received the Complainants understanding of the situation, however only at the September 3, 2003 meeting, after months of cellular phone bills had been received.

It is my conclusion that the Respondent did not comply with its own corrective devices. By not using their own corrective devise, the Respondent precluded any possibility for the Complainant to maintain his employment with the Company, and to conversely fulfill his obligation to the Respondent within the proper guidelines. The fact that the Respondent did not comply with its own corrective mechanism led to higher billing amounts being accrued over the months that were audited. The results of the audit were known at the end of each month once the total amount of the cellular phone bills were tabulated. Since the audit took place over several months there was also a significant amount of time for the Respondent to bring the bills that it was unsatisfied with to the Complainants attention. When action was taken it was to terminate employment.

From all of the foregoing I would conclude that some of the disputed calls were at least arguably within the category of permitted business use and in some instances authorized personal use. Nevertheless, the Complainant knew he had made personal calls and was continuing to make them at the time the Company put a stop to the situation. In these circumstances, I find that discipline was appropriate. The actions of the Company are excessive in discharging the individual when they have contributed to the problem and not engaged in the monitoring or progressive discipline of which they were promised by the Employee Handbook and the employee has a colour of right to have done what he did. Therefore, I find that it is appropriate to have disciplined the Complainant by a one and a half month suspension. I substitute that discipline for the discipline imposed upon the Complainant as I am empowered to do under the legislation applicable in this matter.

REMEDY

There is no question that both parties in this adjudication have either violated guidelines, or failed to enforce guidelines at one time or another. The Complainant admits to making personal use calls, the Respondent has offered no physical or testimonial evidence that it complied with its "corrective action" guidelines. As a result both parties bear a degree of fault in what has transpired. I have concluded that some discipline was warranted for the conduct of the Complainant. The issue is whether discharge is justified in the circumstances.

The Respondent's contention is that the Complainant's actions contravened the policy with enough malice warranting the harshest penalty available to them. Furthermore, they claim the Complainant made a "*conscious effort to misappropriate company resources for personal benefit"* resulting in a breach of the confidence an employer must have in an employee particularly where their work as a driver is largely incapable of direct supervision.

The Complainant admits to making many personal telephone calls but claims authorization to have done so. With the adjudicator's personal usage definition in mind the Complainant did violate the rules of the Company. However, the breach is not to the extent and severity that the Respondent claims. There was no conscious effort to misappropriate Company resources for personal benefit. This individual thought with some reasonable justification that his actions were in accordance with Company polices. His situation is a classic illustration of why corrective action is necessary before going to the sanction of discharge being the first and only employer response. The Complainant lost the substantive procedural due process of "corrective action" that

should have been extended. The Complainant did not knowingly misappropriate Company funds by the use of the cellular phone for personal calls and certainly some of those calls were authorized. The Company has established some justification for discipline but not discharge, which is too harsh given the lack of monitoring and corrective action. I therefore, have concluded that an appropriate level of discipline would have been a one and a half month suspension. The length of the suspension varies from the other two Complainants as a result of this Complainant having less training time as well as significantly less amounts of monetary charges on the Company cellular phones and being a credible witness in the totality of his evidence. The Complainant must repay the monies owing to the Company other than for the truck-to-truck calls which for purposes of the remedy in this matter which ought to be treated as business use.

The Complainant cast his lot with the other Complainants when he brought a joint application for these proceedings. I have found that the relationship is such that in the case of the other two Complainant the circumstances are unsuitable to return them to their employment. The employment relationship has not been affected to the same extent as with the other two Complainants. However, I find that the relationship between the Complainant and the Respondent has been affected to an extent that the usual remedy of reinstatement after the discipline imposed by this award ought not to be applied in this case. The loss of the trust relationship in a job where the individual works without supervision while driving the Company's trucks has occurred in this case. As a result of the lack of trust afforded to each of the parties a remedy in lieu of reinstatement is required.

The remedy in this complaint will follow the process set out in *International Brotherhood of Electrical Workers, Local 2228 v. NAV Canada*, arbitrated by Thomas Kuttner under the Canadian Labour Code. In that case it was ruled that "mitigation is irrelevant to the calculation of damages awarded in lieu of reinstatement, where an employee has been unjustly discharged but the employment relationship is no longer viable."[1] The arbitrator awarded the grievor one-half month's wage per year of service, as compensation, plus benefits and severance pay. This decision not to reinstate the grievor and replace the usual reinstatement with monetary damages is allowed for under the legal principles governing the arbitral jurisdiction. Section 60(2) of the *Canada Labour Code* states that "…power to substitute for the discharge or discipline such other party as to the arbitrator or arbitration board seems just and reasonable in the circumstances". This section makes it clear that an arbitrator is not limited to a determination of reinstatement, and it is currently not viewed as a requirement if the dismissal is deemed to be unjust that reinstatement must follow as the remedy.

For purposes of determining the remedy in this case I will adopt the six factors favouring an award of damages in lieu of reinstatement as set out in the aforementioned case. The factors that allow for a damage remedy instead of reinstatement are: (1) the refusal of co-workers to work with the grievor, (2) lack of trust between the employer and the grievor, (3) the inability or refusal of the grievor to accept responsibility for any wrongdoing, (4) the demeanour and attitude of the grievor at the hearing, (5) animosity on the grievor's part towards management or co-workers, and (6) the risk of a "poisoned" atmosphere in the workplace. While not all aspects of these factors are present to a strong degree in this case there is some element of each factor present and in some factors such as (2) and (3) there is a significant element present. In this case the Complainant does not fully accept responsibility for his wrongdoing, despite his admission of making the personal use calls. There is also the factor that this case is part of a larger problem dealt with in two other decisions by the Adjudicator. There exists a lack of trust between the two parties, and there seemed to be animosity in the testimony given at the hearing between both the Complainant and the Respondent. For these reasons the remedy of reinstatement of the Complainant is not granted, however damages in the form of monetary compensation will be granted as follows.

Arbitrator Kuttner held that both parties were "under the misapprehension" that damages should in fact be divided into an amount for lost wages from the date of the dismissal which in this case would be September 3, 2002. This view is counterintuitive according to Kuttner because the award is for damages in lieu of reinstatement. There is no order for reinstatement, therefore there can be no back pay owed. In determining the quantum of damages in lieu of reinstatement, the common law doctrine of mitigation had no application. Kuttner explains this rationale by explaining that " an important element in this modern approach is that it eschews the interposition of statutory or common law concepts to lessen an award premised on the economic value of being a member of a bargaining unit under the protective umbrella of the collective agreement." Therefore the remedy

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[1] Unreported, International Brotherhood of Electrical Workers, Local 2228 v. NAV Canada, Canada Labour Code, Kuttner, January 6, 2004

should represent as close as possible the amount of monetary value resulting from the Complainant's loss of employment.

The particular job of the Complaint does not generate the same earnings in any given year due to the variation in hours of work depending on the trucking industry. Therefore, the monetary damages awarded result from the average of the Complainant's last calendar year earnings with the total sum of income paid by the Respondent before the termination on September 6, 2002. The amount of income earned by the Complainant in the 2001 calendar year is $47,326.36. The amount the Complainant earned before termination in 2002 was $37,997.48, this amount has been prorated to equal a full calendar year. The final amount of earnings in the 2002 year on a grossed up basis would have been $47,496.85. The average of the last two years of employment is $47,411.61. On a monthly basis that is equal to an average monthly salary of $3,950.97. If that sum is divided in half and added to the base the figure the value for one and a half month's wages is $5,926.46. To that sum I have added a figure of 10% to reflect the value of Company benefits available during employment. Thus, the figure for 1 ½ month wages is to be $6,519.10. The Complainant worked for the Company for 4 years, 9 months and 2 weeks. Thus the total compensation to be paid in lieu of reinstatement should be $6,519.10 x 4.7 = $30,639.77.

From the foregoing calculation must be deducted a sum for the discipline which at 1 ½ months equals $6,519.10. Also to be subtracted from the total is the amount owing to the Company for the unauthorized personal use calls. That sum cannot be determined by a mere reference to the accounting and cellular phone numbers as is well known by the counsel in this case. Thus, I am taking an arbitrary figure, which is the midpoint between the Company's allegation and the Complainants claim. The Respondent's written submission gives their figure of cellular phone usage by the Complainant at $1,850.30. The Complainant's affidavit gives their figure of cellular phone usage at $312.18. That leaves a sum of $1,538.12 in the grey zone as still encompassing calls that this decision would consider to be either justified business calls or authorized personal calls. As a result of the Complainant admitting to making at least some unauthorized calls the amount alleged by the Respondent cannot simply be divided into half. Instead the Complainant is ordered to repay 75% of the grey zoned disputed amount ($ 1,538.12) Therefore, the sum for repayment is $1,153.59.

Therefore, the amount of damages in lieu of reinstatement awarded to the Complainant is $30,639.77 - $6,519.10 for discipline, less $1,153.59 for unauthorized calls. The Complainant is allocated a fixed amount of $21,967.08 as damages in lieu of reinstatement and the loss of employment that has resulted. It is ordered that the Company pay this fixed sum of damages to the Complainant not later than 30 days from the date of the award.

DATED at LONDON, ONTARIO this DAY of OCTOBER, 2004

Richard H. McLaren, C.Arb