

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 :

ART JACKMAN
(Hereinafter called the "Complainant")

- and -

TRANSFRIEGHT INC.
(Hereinafter called the "Respondent or Company")
Canadian Labour File No. YM707-6004

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

Art Jackman is a 49-year-old bonded A-Z licensed long haul truck driver, who has worked in the trucking industry for approximately 30 years. Since his termination from the Respondent, the Complainant has obtained his FAST accreditation. Prior to being employed by the Respondent, the Complainant worked for C.P. Express & Transport for 22 years. That company downsized and offered its senior employees a buyout package, which he took. During his 7 ½ years with the Respondent, Art Jackman claims to have never been late for work but was off work for a few days on bereavement leave. The Complainant has never had an "at fault" accident nor has he received a traffic ticket.

The Respondent hired the Complainant in March 1995. He was hired to drive the Chicago, Illinois route and continued to do so for the first 2 ½ to 3 years of employment with the Respondent. For the next 6 months, the Complainant drove the Michigan run. Then he was moved back to the Chicago, Illinois route until August 2002 when that route began to be outsourced to a different company. From 2 August 2002 until the date of termination, he drove the Michigan route again as he had done in 1998. In addition to his driving duties, the Complainant chaired the Health & Safety Committee and the Accident Review Committee for approximately 5 of the 7 ½ years he worked for the Respondent. Mr. Jackman was also instrumental in setting up the Respondent's Social Club. At the time of his termination in September 2002, the Complainant was ranked No. 12 out of approximately 75 drivers in terms of seniority. Prior to September 2002, Mr. Jackman was never disciplined or reprimanded by the Respondent.

Cellular phones were available in the Respondent's trucks for many years. The initial purpose was to allow for 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 12th 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 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 Respondent's *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" referenced 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 Transfreight 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.

(Book of Exhibits, Tab 6)

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

A further clarification of the cellular 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 cellular phone usage. He was provided a summarized cellular phone usage report by the Accounting Department consisting of the overall cellular 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 because he was 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 during which the Complainant was questioned about the personal calls that were made from his truck cell phone. The Complainant admitted to making personal calls to his home quite frequently as he was going through a divorce during the time period in question. The Complainant confirmed at this meeting that he was aware of the policy regarding cellular 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's letters 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 cell phone use.*
- *You stated that you had been given authorization to use the company cell phone for personal calls approximately five (5) years*
NOTE: The Company Cellular Phone Use Policy, Section 7.3 of the Transfreight Employee Handbook issued October 1999 supercedes any verbal authorization that may have verbally been given
- *You acknowledge your awareness that the use of Company cell phone for personal calls was in contravention with company policy.*
- *You stated that even though you had obtained a personal cell phone in May 2002, you had continued to use the company cell phone for personal use*

Art, 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 Transfreight. “

The Complainant does not feel that his actions warranted the termination of his employment with the Respondent. During the meeting he admitted to making personal use calls during the period from January to

June 2002 to his girlfriend and other drivers. He stated that the calls were strictly personal and were unrelated to any major events or crises which occurred while he was performing his duties. He advised that he was given clearance to use the phone for personal calls approximately 5 years before by Mr. Chris Leury, the Safety & Compliance Coordinator for the TMMC Contract.

This Complainant and the other Complainants in this matter filed a joint Complaint of Alleged Unjust Dismissal under Division XIV – Part III of the *Canada Labor Code*. Hearings on March 8th and 10th 2002 commenced when the Respondent's counsel advised the Adjudicator that a settlement between the parties involved on a basis discussed with the Adjudicator would not be reached. Thereafter, Procedural Order No. 1 was issued detailing the procedure that was to follow. That Order considerably shortened the number of hearing days by requiring evidence in chief to be submitted by sworn affidavits. It was also 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 is issued for each of the 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 is 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, of 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 audit 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 July and August 2002 to further show that the usage was continuing after the initial time period. However, these final two months were not used to justify the termination. The Respondent's audit shows that they incurred a total of \$2324.78 for the period. The Respondent felt that this excessive use of the cellular phone constituted a grave misappropriation of Company assets and the actions were in stark contrast to the behavior expected of the Complainant. The Respondent felt this was a serious enough offense to warrant termination of employment.

There is a difference in agreed totals of the cellular bills from the Complainant and Respondent as a result of their respective views on prohibited use. The Complainant believes that the total amount is \$686.92. 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.

Shortly after his hiring, the Complainant began to drive the Chicago route. The Chicago route entailed a 32-hour round trip run to the Union Pacific Railway yard in Chicago. It was driving on this route where the alleged infractions occurred as a result of the Complainant using the truck cell phone. Drivers leave Cambridge towing an empty container and chassis and arrive 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 must contend with 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 for highway use, there are fines and infractions for both the driver and the Respondent. The Canadian regulations are more stringent than the American regulations; therefore the driver must ensure that the chassis will also pass Canadian inspection. Many of the chassis might require work to pass both countries' regulations, thus ensuring no infractions occur is another task. 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 drivers 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 yards. It was for this reason that Traffic would offer the cell 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. The Complainant asserts that during his employment with the Respondent he was never late in delivery except due to circumstances beyond his control. On his own initiative in 1999, the Complainant reported delays caused by the route set up which he understands may have saved as much as \$50,000 a year as a consequence.

During cross-examination, the Complainant testified that cell-to-cell calls between drivers would not aid in completing many of the previously outlined tasks associated with the Chicago route. 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 (another Complainant), she testified that there is a need to make cell-to-cell calls between drivers in some circumstances. 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 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.

The Respondent submits that the Complainant's use of the cellular phone during his assignment to the Chicago route from January 2002 through June 2002 constitutes 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 the "*Cell Phone Abuse Summary*". They submit that the "personal use" bills totaled \$2324.78 for the time period above. The Complainant has a different view on the definition of "personal use" calls. The Complainant feels that truck-to-truck calls are not "personal use" but "business use", which lowers the figure that the Respondent asserts. The cellular phone costs without truck-to-truck cell calls total \$686.92.

The Complainant's definition of what constitutes "personal use" calls arose from two places. First, he asserts that during a Company Christmas party in 1999, he spoke with Chris Leury, the Safety & Compliance Coordinator for the TMMC Contract at that time. He explained that due to the amount of time he would be spending on the road, that he was going to be checking in at home periodically using the truck cell phone. The Complainant asserts that Mr. Leury stated it would not be a problem. Mr. Leury states that he believed that the Company would not have a problem if a driver who had experienced difficult weather conditions such as a blizzard called home to his family to let them know that he made it through all right.

The Complainant submits that he believed the Respondent would go through his cellular phone bills "line by line" and issue him a personal bill for repayment. However, Mr. Leury asserts that he instructed the Complainant to speak with Mr. Darryl Brown, his manager, should he have any further question about cell phone use. He suggested this route because he was no longer in a position of authority to grant such a request. This was the last time the Complainant heard anything about the cell phone use for three years, and therefore assumed that his occasional personal use was allowed. The Complainant admits to making personal calls during late 2001 and early 2002 as a result of the break up of his marriage.

The second reason why the Complainant does not agree with the Respondent's definition of "personal use" calls is because of a conversation with Mr. Darryl King. The Complainant recalls at least one and maybe two conversations with Mr. King about calls between the other Complainants and himself, concerning issues on route in which Mr. King acknowledged that it was a good idea. Mr. King submits that this is not the case, as he had no recollection of such a conversation. It would not be unreasonable to assume that such a conversation could have occurred and that Mr. King cannot recollect the specific conversation put forth by the Complainant. The Respondent is a large company and the chances of a conversation happening between one of seventy-five drivers and their manager without the manager remembering the conversation is plausible. In addition, because the trucks were sent on staggered departure times, their CB radios were out of range of one another and

conversations could not take place. This meant that the drivers' only way to communicate with one another was to use their truck cell phones.

The Complainant assisted the Respondent on a Milton run to pick up trailer seats for Toyota, and was told all of the drivers' cell phone numbers and encouraged to talk with them along the way. The Complainant asserts that although the Manual states that drivers should speak with the Traffic Department, it was common practice among the Respondent's drivers to call between trucks, and in particular, on the Chicago run. Furthermore, the Traffic Department would provide cell phone numbers of other drivers as well as patch three-way calls between trucks. The Complainant explained in cross-examination that the drivers often compiled lists of such numbers during their employment. Mr. Jackman produced such a list at the hearing.

The Complainant recalls a discussion with Mr. King in which he was informed that his truck cell phone costs were approximately \$100.00 per trip. At this time the Complainant offered to use his personal cell phone because it has a much better rate if the company would reimburse him. Even after receiving his own cell phone, the Complainant admits to occasionally using the truck cell phone instead of his own. During the previous conversation with Mr. King, the Complainant believed that he was never told not to use the cell phone and that nothing was said about its personal use. He therefore assumed his actions were in compliance with the rules governing cellular phone use.

Varying definitions of "personal use" and "business use" are present in this case and require clarification. The Respondent feels that any of the Respondent'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 both definitions 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 truck-to-truck call would be beneficial in completing tasks on the Chicago route. This indicates to me that a "business use" phone call could be a truck-to-truck 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 truck-to-truck cell call was business related or if the topic was of a personal nature.

On review of all of the evidence, I have concluded that truck-to-truck cell phone calls should not be excluded from the "business use" definitions. I also find that it is unrealistic of the Respondent to prevent its drivers from using the cell phones to call home in times of an emergency or important personal matters. Therefore, all the calls to the Complainant's home should not be deemed "personal use" calls but rather some considered "personal use" with authorization.

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 owing is somewhere in between the two values and quantifying that number would be nearly impossible.

ARGUMENTS

Argument 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 on 17 August 1999 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 that he received the Team Member Handbook in early 2000. The Complainant also acknowledged that during the 3 September 2002 meeting with Mr. King and Mr. Inglis that he was aware of the Company policy regarding cellular phone use.

It is submitted that the Complainant's conduct contravened the policy as the cellular phone records indicate calls were made to his home phone number and to other drivers employed by the Respondent. The Respondent submits that the Complainant has no credible explanation for these calls. He had run the Chicago route for more than half his employment with the Respondent without having access to a cellular phone. They submit that the Complainant's alleged discussion with Mr. Luery could not have taken place as it is implausible that Mr. Luery, after issuing a memo to all drivers setting out the company's policy, would grant authorization

specifically to the Complainant. They allege that his explanation for truck-to-truck calls with other drivers only occurred after one of his friends was assigned to the Chicago route. They also submit that he conceded that the majority of the tasks involved on the route would not benefit from communications with other drivers. Specifically in regards to communication with Ms. Hooper, the Respondent alleges that it would be plausible that communication between the Complainant and Ms. Hooper would occur during her training period but the cellular phone bills indicate calls between the two occurred after her training had been completed. Furthermore, the Complainant continued to call Ms. Hooper at home after she ceased performing the Chicago route in June 2002. Therefore, their calls are personal.

The Respondent asserted that the company did nothing to lead the Complainant to believe that the policy was not going to be enforced. The Complainant suggested in his affidavit that the Traffic Department condoned cell-to-cell communications because they had provided him with other truck cellular phone numbers. During cross-examination, the Complainant produced a list that only had Ms. Hooper's number and the number of another driver, Brian Morris. The Respondent also states that the only mitigating circumstances that exist are the length of the Complainant's service and a clear discipline record.

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 Arbitrator 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 personal benefit is a dishonest act and one that *prima facie* carries the penalty of discharge. It further submits 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 this assertion. Regardless of the standard of proof applied to the evidence, dishonest conduct on the Complainant's part has been proven. It further submits that the Complainant cannot rely upon any laxness of enforcing the cellular phone use policy on the Respondent's part to relieve the Complainant of the consequences of his misconduct. The Respondent wants the existing penalty to remain but submits 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.

Argument of Complainant

The fact that the Respondent had a cellular phone policy is not disputed. The issue in these proceedings is the extent to which the Complainant breached that policy, if any. If a breach of the policy is found, the issue is whether such a breach amounted to a misappropriation of corporate resources. Specifically, whether that breach gives rise to an inescapable inference that the Complainant 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 in the truck provided by the Respondent. The issue in dispute is whether or not the Complainant believed that they 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 that 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 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* as 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 to 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 Complainant and Mr. Riddell has ever been disciplined by the Respondent's Cambridge office for alleged unauthorized cellular phone use.

There are inconsistencies in the audits 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. This discloses 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 Complainant was at a much higher risk to appear to be abusing the cellular phones because of his 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 the Complainant and a few other drivers. If the Respondent did not calculate the roaming charges as a part of the threshold, many of the Complainant's bills would have been beneath the \$100.00 cut-off. Furthermore, it is the contention of the Complainant 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 the employee's route 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

Complainant. 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 determination is an attempt to take a 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 Complainant to explain his 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's counsel states that the Respondent's limited familiarity with this run and the complexity and logistics of it do not give the Respondent an informed position to make such a claim. Rather, it is the drivers who can make such a claim, and who all agree with the necessity of truck-to-truck cellular contact.

There was no intent to misappropriate any corporate resources by the Complainants. The Complainant had an honest belief that his activities were not contrary to the Respondent's interests. Therefore, the Complainant did not give any grounds to warrant dismissal, and 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 Harbour 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 policy governing the use of cellular phones in the Respondent's vehicles is delineated in the 1999 Employee Handbook:

"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."

(emphasis added)

The Handbook prescribes the use of a truck cellular phone to be for business communication. The word *primarily* suggests that there are other permitted uses. One other such use would be authorized personal use. The Handbook prohibits *unauthorized use of the cellular telephone for personal use*. It is then indicated that if unauthorized personal use occurs it will result in corrective action. The implication of that statement is that there will be monitoring of the use of a truck cellular phone by the management of the Company.

The "corrective action" refers to Section 5.6 of the 1999 Employee Handbook quoted earlier. It refers to a process the Company will follow in which a Performance Discussion Form is completed to document any behavior contradicting the Handbook (that can be taken to be the rules of the Company). This form has one of two purposes, either to document the corrective action or to initiate a recognition discussion. Following the completion of the form, a one on one discussion will occur, discussing the description of the incident, how it impacts the Respondent and the offending employee's understanding of the situation. If discipline is warranted the Respondent may apply "corrective action", which is described as *anything up to and including suspension and/or termination*.

The Handbook and the corrective action by the employer took on a more important role after the management decision to unlock the cellular telephones in the trucks. The meeting held with employees in June of 1999 to explain this decision begins the ambiguity of the previously clearer Company rules in the Handbook. Mr. Douma endeavored to draw a distinction between personal use and business use and apparently conceded

that as a last resort alternative to calling the Traffic Department, truck-to-truck communications on the cellular phone would be permitted. He thus defined business communication to include, in his prescribed circumstances, truck to truck calls as a last resort. He gave illustrative examples of what would be unauthorized personal use, such as calls in an emergency to one's home and truck-to-truck calls. The ambiguity of the dividing line is obvious from the ambiguous explanation by Mr. Douma. Furthermore, there is one thing he failed to delineate. There is no method to be followed in order to have an authorized personal use of the cellular telephone. This case is all about that failure.

The Complainant was aware of the Company's policy on cellular phone use. In his affidavit, he deposed that he may have seen the 17 August 1999 memo of Mr. Chris Leury because it was shortly after that date that he spoke with him about cellular phone use. In addition, he acknowledged during his cross-examination that he received and read the Team Member Handbook in early 2000. Furthermore, he acknowledged in the 3 September 2002 meeting with Mr. Darryl King that he was aware that cellular phones in the Respondent's trucks were not to be used for personal use. Thus, the Respondent's policy on cellular phones was clearly known and communicated to the Complainant. The Complainant's lawyer does not contest knowledge of the policy.

The issue is whether the cellular phone use by Mr. Jackman was authorized or unauthorized. If it was authorized no discipline was justified. If it was unauthorized then the employee ought to have been subject to the corrective action program of the Handbook.

The Respondent's audit reveals that during January to June 2002, the Complainant was making numerous personal calls on his truck cellular phone. The calls included ones made to his home and to both Ms. Hooper's home and truck cellular number. In the Complainant's submissions, he indicates that he honestly believed that management had authorized these calls after a series of discussions he had with them. He claimed to have had a conversation with Mr. Leury at a Christmas Party along with a discussion with Mr. King at a later date. He was under the impression that he was able to make calls to his home in emergency situations. He was going through a difficult divorce during this period of time, requiring him to make many phone calls while away from home and driving his truck. He also believed making calls to other drivers on his route were authorized because he was able to get the driver's cell phone numbers from the Traffic Department. If the Respondent forbade drivers from talking to each other on their cell phones, the Traffic Department would not have revealed the cell numbers. In other words, he believed he had implicit authorization for truck-to-truck calls as being within permitted business use.

Referring back to the strict interpretation of the policy, the Complainant honestly felt that he received authorization from management. He recalls a series of conversations he had with them. He recognized the "unauthorized" nature of his intended use and made sure management was aware ahead of time to ensure his actions were authorized. The Complainant did not even realize what was going to cause the problem. The large cellular phone bills, which seem to have triggered the audit, are due to roaming charges and not the cost of airtime.

The Complainant concedes his actions involved some personal use of the cellular telephones. However, he never received any Performance Discussion Forms throughout the period of personal use as is contemplated by the Handbook. Therefore, no "corrective action" took place in the form of a "corrective action discussion" or a "recognition discussion". It was not until May 2002 that the monitoring duties were re-assigned, giving rise to the matter at hand. The problem with the Respondent's management of the situation is that while they were enforcing their rules, they were selective in the time periods of enforcement and never used the progressive discipline process the Company rules called for. Progressive discipline is particularly important in dealing with a long-term employee with no disciplinary record and an exemplary driving record. This person had never been a problem employee and had held positions of responsibility in relation to Health and Safety.

The Complainant's justification of his actions is that he only made authorized personal use calls and much of what the Company called unauthorized calls was in fact truck-to-truck calls that were, in his view, business use. This evidence goes back to the time of Mr. Douma's meeting in June of 1999 when the cellular phones were unlocked. The truck-to-truck business use was left somewhat vague and open. There was no prescribed method of obtaining authorization described by Mr. Douma. If there had been active monitoring of the cellular use then these failures would have less importance because there would have been "corrective action" and progressive discipline.

On the other hand, in examining the submissions of the Respondent, an interesting behavior is evident. From the time that the cellular phones were unlocked in August 1999 until the time that Ms. Hooper joined the Complainant's Chicago truck route, no truck-to-truck cellular phone calls were made by the Complainant. He did not feel the need to make truck-to-truck calls until one of his friends joined the route with him. If the calls to other truck drivers were so important, why would the Complainant not feel it was pertinent to make calls to the other drivers on the route except for Ms. Hooper? These facts strain the credulity of Mr. Jackman's testimony of at least a colour of right to make such calls as being business calls. Mr. Jackman's testimony that he had management authorization from a discussion at a Christmas party to make personal cellular calls also strains his credulity. However, it does underscore the absence of a Company policy of how to obtain authorized use for personal calls. As indicated at the outset of these reasons, the policy is not an absolute prohibition on personal calls only, on unauthorized calls.

I would conclude from the foregoing that some discipline was warranted for the conduct of the Complainant. The next 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, thus 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 supervision.

The Complainant admits to making many personal telephone calls to family and other truck cellular phones but felt he had the authorization to do so. With the adjudicator's personal usage definition in mind, the Complainant did violate the rules of the Company but not to the extent and severity that the Respondent claims. The Respondent also did not manage the enterprise by monitoring cellular phone usage, thus making the situation much worse when it was uncovered. The Respondent's policy was not actively enforced throughout the time period in question while the Complainant's actions were not in total violation of the policy. Timely "corrective action" would have given both the employer and employee the opportunity to correct the situation. In effect, the Complainant lost the substantive procedural due process set out in the Handbook. The Respondent, by its lack of monitoring contributed to the development of the situation to the level where it was both uncovered and intolerable. The whole problem was exacerbated by the lack of monitoring and much of the problem could have been averted had proper management techniques been in place.

I was referred to no cases involving the unauthorized use of an employer supplied cellular phone. However, I was provided with references to unauthorized use of company expense accounts and fraudulent expense reports with submissions analogizing those cases to the use of company cellular phones.

In *DeSouza and Bank of Montreal*, Mr. DeSouza was terminated for the misuse of two company expense accounts. The Bank's policy was that expense accounts were only to be used for business purposes and not for personal purposes. Mr. DeSouza claimed he was unaware of the Bank policy prohibiting such use. Ultimately, the Arbitrator concluded that Mr. DeSouza was unable to meet the onus of establishing that his understanding of the expense account usage was reasonable. Although the decision not to re-instate Mr. DeSouza was the final order, the primary reason cited was because of his dishonesty during testimony; not his inability to meet the onus of reasonability. I find the case to be distinguishable here. Mr. Jackman behaved under what I have called a colour of right that some of the cellular phone usage was business. However, I have found his belief that he had authorization to be lacking in credibility. Nevertheless, I found him to be a straightforward and honest individual of personal integrity. He finds himself in the current predicament partly by his own actions but also by the unclear policy of the Company and the failure to monitor the use of cellular phones. Therefore, he is in a very different position than Mr. DeSouza, who was found to have been dishonest even in his testimony to the Arbitrator. I find no such dishonesty here, but rather naivety and stupidity. Therefore, I do not find that the Complainant knowingly misappropriated Company funds by his use of the cellular phone. However, he will be required to repay all the monies owing to the Company other than for the truck to truck calls which for purposes of the remedy in this matter ought to be treated as business use. This order is a condition precedent to all of the other remedies herein.

Another 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. Jackman 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.

What ultimately resulted in this case was the Respondent’s inaction in enforcing their own policy, which led to an enlarged cell phone bill due to the roaming charges the Complainant accrued when he changed to the Chicago route. This cell phone bill is what the Respondent is now using as his argument for termination. Adding to the confusion is the omission of a procedure an employee should follow to gain authorization. What should have happened was the Respondent should have taken notice of the escalating cellular phone bills earlier than May 2002 and approached the Complainant to correct his actions. Instead, they appear to have blindsided the Complainant once the charges became large enough, in their view, to support termination.

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 Respondent put a stop to the situation. In these circumstances, I find that discipline was appropriate. The actions of the Respondent seem to be excessive in discharging the individual when the Respondent itself has contributed to the problem and not engaged in the monitoring or progressive discipline which was promised by the Employee Handbook. Therefore, I find that it is appropriate to have disciplined the Complainant by a three-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 reinstatement 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, it claims that 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 the employee’s 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. Nevertheless, the Complainant’s explanations strain credulity. The form in which the authorization is allegedly obtained strains the credulity of the testimony. On the other hand the Complainant lost the substantive procedural due process of “corrective action” that should have been given by his employer. The Complainant did not knowingly misappropriate Company funds by the use of the cellular phone for personal calls. Some discipline is justified, but not discharge, which is too harsh, given the lack of monitoring and corrective action by the Company. I

therefore, have concluded that an appropriate level of discipline would have been a three-month suspension. He would also be required to repay all the monies owing to the Company other than for the truck-to-truck calls, which for purposes of the remedy in this matter, ought to be treated as business use.

The Complainant's testimony is not entirely satisfactory in its veracity when speaking about the facts and circumstances of the cellular phone use. I find the manner in which he alleges to have obtained permission to make the calls is somewhat extraordinary. Furthermore, there was a considerable amount of money involved in these calls even when allowance is made for the deduction of some part of the monies claimed by the Company due to the fact that I have found some calls to be permitted business calls and some personal calls to be authorized. 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 grievance will follow the process set out in *International Brotherhood of Electrical Workers, Local 2228 v. NAV Canada*, arbitrated by Thomas Kuttner under the *Canada 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 demeanor 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), (4) and (5) there is a significant element present. In this case the Complainant does not fully accept responsibility for his wrongdoing, despite the admission of making the personal use calls. 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 should represent as close as possible the amount of monetary value resulting from the Complainant's loss of employment.

The particular job of the Complainant 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 average of the two full years of employment is \$56,072.79. On a monthly basis that is equal to an average monthly salary of \$4,637.03. If that

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

sum is divided in half and added to the base the figure for one and a half month's wages is established totaling \$6,955.55. 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 \$ 7,651.11. The Complainant worked for the Company for 7 and a half years. Thus the total compensation to be paid in lieu of reinstatement should be $\$7,651.11 \times 7.5 = \$57,383.29$.

From the foregoing calculation must be deducted a sum for the discipline, which at 3 months equals \$15,302.22. 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 mid-point between the Company's allegation and the Complainants claim. The Respondent's written submission gives its figure of cellular phone usage by the Complainant at \$2,124.78. The Complainant contends that the amount of charges incurred by the Respondent are \$295.00. 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 amount outstanding from unauthorized personal usage of the Company cellular phone alleged by the Respondent. The sum for repayment is \$1,372.34.

Therefore, the amount of damages in lieu of reinstatement awarded to the Complainant is \$57,383.29 - \$15,302.22 for discipline, less \$1,372.34 for unauthorized calls. The Complainant is allocated a fixed amount of \$40,708.73 as damages in lieu of reinstatement. 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.