

Citation: *Goncharova v. Marsh Lake Waste Society*,
2015 YKSM 4

Date: 20151230
Docket: 14-S0002
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Cozens

EVGENIA GONCHAROVA

Plaintiff

v.

MARSH LAKE SOLID WASTE MANAGEMENT SOCIETY

Defendant

Appearances:

Evgenia Goncharova
Richard A. Buchan

Appearing on own behalf
Counsel for Defendant

REASONS FOR JUDGMENT

[1] Evgenia Goncharova has filed a Claim seeking damages on the basis that she was wrongfully dismissed from her position as an attendant at the Marsh Lake Solid Waste Facility (“the Facility”). Ms. Goncharova is also seeking damages for injury to her reputation resulting from the dismissal. Her total claim is for \$24,500.00 plus costs.

[2] The Defendant, the Marsh Lake Solid Waste Management Society (the “Society”) states that Ms. Goncharova was dismissed for just cause.

[3] Ms. Goncharova was employed at the Facility from February 27, 2011 until her employment was terminated on March 11, 2014. She was employed part-time from February 27, 2011 until she became full-time on July 11, 2011.

[4] When Ms. Goncharova was hired, she was under the supervision of the part-time off-site Manager, Katherine Alexander. Ms. Alexander had been in this position since July 2010.

[5] While initially supportive of Ms. Goncharova in her role as attendant, Ms. Alexander expressed concerns about Ms. Goncharova to the Board of the Facility (the “Board”) in summer 2013.

[6] As a result of Ms. Alexander’s concerns regarding Ms. Goncharova’s performance of her duties, there was a meeting between Ms. Goncharova, Ms. Alexander, and Board members Walter Latour, Paul Sparling and Don Bernier on September 9, 2013.

[7] Ms. Alexander resigned from her position after this September meeting, due to what she expressed as a lack of Board support regarding her concerns about Ms. Goncharova’s performance of her duties as an attendant.

[8] By letter dated October 1, 2013, Ms. Goncharova was notified that her present position was going to be re-evaluated and reviewed for a 60-day period. I note that in the Reply filed by the Society, this period of time is referred to as a period of “probation” and was stated to be for three months ending in mid-December, however the letter filed and dated October 1, 2013 states as follows:

Recent indiscretions on your part have led the MLSWM Board of Directors to re-evaluate your present position.

These indiscretions include the phone bills and confusion regarding overtime submissions.

We plan to review your position for a period of 60 days.

Your integrity and commitment to the MLSWM Board and the general public will be considered.

[9] This “probationary” period expired and was not extended. Ms. Goncharova continued in her employment as she had been prior to being placed on probation.

[10] Mr. Latour replaced Ms. Alexander as Manager on an interim basis until the hiring of Reba Miller on December 13, 2013, and the commencement of Ms. Miller’s duties on January 3, 2014.

[11] Ms. Miller subsequently resigned from her position in mid-March, 2014. She stated that she felt that she had no option but to resign due to her being unable to work with Ms. Goncharova, coupled with a lack of Board support.

[12] Ms. Goncharova was notified by letter hand-delivered to her on March 11, 2014 that she was being terminated. She received three weeks’ pay in lieu of notice.

[13] Upon receiving this notice of termination of her employment, Ms. Goncharova requested an explanation. In correspondence dated March 18, 2014, the Board stated that some of its reasons for dismissing Ms. Goncharova were her:

1. Inability to work as a team player;
2. Unannounced absenteeism during working hours;
3. Falsifying time sheets;
4. Smoking in non-smoking facility; and

5. Inability to follow worksite safety procedures as outlined by WCB [Workers Compensation Board]

Issue

[14] The primary issue is whether the Society had “just cause” to terminate Ms. Goncharova’s employment. The Society bears the onus, on a balance of probabilities, to establish that just cause existed in order for the termination to be lawful.

[15] Secondly, if it is determined that the Society did not have cause to dismiss Ms. Goncharova, what are the resultant damages?

[16] I find that there was no evidence before me that would support a claim for damages to Ms. Goncharova’s reputation. As such I do not consider this to be an issue that needs to be addressed any further in this decision.

Witnesses

Katherine Alexander

[17] Ms. Alexander testified that what was once a good working relationship with Ms. Goncharova deteriorated over time.

[18] She stated that there was never a question of Ms. Goncharova working hard in what was a stressful, labour-intensive job. Ms. Alexander provided two reference letters in February 2012 in which she stated that Ms. Goncharova was “a highly respected employee” of the Facility. She also provided correspondence to Ms. Goncharova on June 12, 2012 in which Ms. Alexander agreed with a

statement by “Monti” [Board member Walter Latour] that Ms. Goncharova was the “best dump attendant in the Yukon”.

[19] Ms. Alexander testified, however, as to the following areas of concern in regard to Ms. Goncharova’s employment:

Absenteeism

[20] Ms. Alexander stated that there were always some absenteeism issues with Ms. Goncharova. As Ms. Alexander understood Ms. Goncharova to be dealing with issues related to her marriage break-up and care of her children, she tried to accommodate her as much as possible in order to be supportive.

[21] Much of Ms. Alexander’s information regarding Ms. Goncharova’s apparent absenteeism came from information provided by others, who had told Ms. Alexander that they had attended at the Facility on some occasions and that Ms. Goncharova had not been present. Ms. Alexander stated that Ms. Goncharova advised her that most absences were for short periods of time. Ms. Alexander asked Ms. Goncharova to note these absences on the time sheets, but she stated that this was never done by Ms. Goncharova.

[22] Ms. Alexander agreed that Ms. Goncharova was allowed to leave the site during operating hours to get fuel. She also agreed that the site cameras would have allowed her to track Ms. Goncharova’s comings and goings had she wished to do so.

[23] Ms. Alexander stated that on one occasion Ms. Goncharova had asked

her for a couple of days off, which was denied. Ms. Alexander stated that Ms. Goncharova left town regardless.

Overtime

[24] Ms. Alexander testified that, towards the end of her term as Manager, Ms. Goncharova was improperly claiming overtime of up to four hours at a time. She stated that Ms. Goncharova had rarely claimed overtime during the first two years of her employment. Ms. Alexander stated that Ms. Goncharova had never been called to come back in to work overtime and that typically, any overtime work would consist of less than ½ an hour at the end of the day.

[25] Ms. Alexander denied the statement in the Claim that she had advised Ms. Goncharova that she would be paid a minimum of four hours for any overtime worked or that she had approved any such claim for overtime on Ms. Goncharova's time sheets.

Relationship with others

[26] Ms. Alexander testified that Ms. Goncharova got along well with some individuals but had conflict with others. Much of this was largely hearsay evidence that was not based on Ms. Alexander's own observations.

[27] Ms. Alexander stated that she had to settle a number of verbal disputes between Ms. Goncharova and others and, in particular, one instance involving a very vocal dispute with an employee, Andrew MacDonald. Both Ms. Goncharova and Mr. MacDonald were provided letters from Ms. Alexander. No date was

provided for this incident.

[28] Ms. Alexander stated that she found it hard to keep employees because of difficulties with Ms. Goncharova. Scant information with regard to the specifics of this assertion was provided, however.

Cell Phone Use

[29] Ms. Alexander stated that Ms. Goncharova was using the Facility cell phone for personal calls beyond those which she had been authorized to make. This occurred over a four to six month period. She stated that Ms. Goncharova had only been authorized to use the cell phone for long distance calls on one occasion for a trip to Vancouver, and that Ms. Goncharova had agreed to reimburse the Facility.

[30] Ms. Alexander denied Ms. Goncharova's statement in the Claim that she had ever told her to carry the Facility cell phone in order not to have to carry two phones at once.

[31] Ms. Alexander had asked Ms. Goncharova to reimburse the Facility for several hundred dollars for long distance calls, and Ms. Goncharova did so.

Compliance with Safety Requirements

[32] With regard to Ms. Goncharova's compliance with safety requirements, Ms. Alexander testified that this was always a back-and-forth issue. She stated that Ms. Goncharova did not like to wear her vest and steel-toed boots, despite it

being a job requirement that steel-toed boots and safety vests be worn at all times. Ms. Alexander stated that Ms. Goncharova was constantly being reminded by her to wear her steel-toed boots. She was also often reminded to wear her hardhat. The hardhat was to be worn whenever Ms. Goncharova was engaged in an activity that required it.

[33] Ms. Alexander stated that she advised Ms. Goncharova that she could lose her job if she did not wear the required safety equipment.

Other Issues

[34] Ms. Alexander stated that she worked one weekend for Ms. Goncharova. Some windows were dropped off at the Facility. These windows were not at the site shortly afterwards and, when asked by Ms. Alexander, Ms. Goncharova stated that she hadn't seen them. Approximately one week after being told that, Ms. Alexander was at Ms. Goncharova's residence and saw the windows there. At that point Ms. Alexander formed the belief that Ms. Goncharova would "lie to my face". Ms. Alexander testified that this, along with some other incidents, caused her to lose her sense of trust regarding Ms. Goncharova.

[35] Ms. Alexander also stated that the spill kit on the site was for oil spill equipment to be stored but that she often saw items missing from the spill kit and Ms. Goncharova's personal items stored in the spill kit, including a footbath. She stated that despite being told to not use the spill kit for personal storage, Ms. Goncharova continued to do so.

Reason for Resigning

[36] Ms. Alexander testified that, due to her increasing concerns, she called a meeting in September 2013. Several Board members were present as well as Ms. Goncharova. At this meeting she confronted Ms. Goncharova who in turn became defensive and accused Ms. Alexander of not doing her job properly. Ms. Alexander stated that she resigned shortly after this meeting primarily because the Board was not acting on the concerns she had regarding Ms. Goncharova's work performance. She felt that something was going to go wrong, so she resigned.

Walter Latour

[37] Mr. Latour was a Board Director for three years until March 14, 2014. He resigned his position as a Director in order to take over the job of Manager of the Facility. He took this position over from Ms. Miller. Between the time that Ms. Alexander resigned her position as Manager and Ms. Miller became Manager, Mr. Latour acted as Interim Manager.

[38] The role of Manager required 60 hours a month of work. Mr. Latour estimated that he spent 80 hours a month working in this position.

[39] The Board Directors are not paid. Mr. Latour became a Director as he considered himself to be a community-minded person and the Board needed

members. He took on the role of Interim Manager because no one else wanted to do it. He stated that he had no personal benefit or gain from becoming Interim Manager.

[40] Mr. Latour's entire experience with Ms. Goncharova was in his role as a Director and then as Interim Manager.

[41] He stated that he had occasion to observe Ms. Goncharova at work on an average of one time per week.

[42] He stated that he observed issues regarding safety equipment and Labour Code laws. He felt that these needed to be discussed with Ms. Goncharova.

[43] He recalls meeting with Ms. Goncharova two times when Ms. Alexander was Manager and two times when Ms. Miller was Manager.

[44] He stated that he had observed Ms. Goncharova being corrected in regard to rules and policies, although he was not aware of there being any consequences.

[45] He stated that after a Worker's Compensation Board ("WCB") audit in the fall of 2013, the Board instituted rules regarding the use of safety equipment. The Board adopted a "safety first" attitude.

[46] Mr. Latour said that there were several discussions with Ms. Goncharova over her non-compliance with the hard hat requirement. While WCB only required the use of hard hats in certain specified areas, the Board decided that

they needed to be worn everywhere on the site.

[47] He stated that Ms. Goncharova did not agree and would not wear her hard hat as required.

[48] Mr. Latour denied ever telling Ms. Goncharova that she did not have to wear a hard hat.

[49] Mr. Latour recalled that on one occasion Paul Sparling contacted him and asked him why he had told Ms. Goncharova that she did not have to wear a hard hat, as she was not wearing one when Mr. Sparling saw her in the yard.

[50] Mr. Latour believes that this may have been in February 2014 and that the hard hat policy was in effect in December 2013. He said this policy was communicated to all the staff.

[51] He testified that the oil spill kit was full of Ms. Goncharova's magazines, but that he never spoke to her about this.

[52] Mr. Latour testified that Ms. Goncharova would regularly violate the no-smoking rules as well. Smoking was a safety hazard on the site. He said that Ms. Goncharova was smoking in the office and hiding the ashtray under the coffee table. He stated that she also allowed a non-employee, Stuart Wallace, to smoke in the office. He said that he had advised Ms. Goncharova that she could be fired for not following the non-smoking rules. He said this was in February 2014 as Ms. Miller was still there at the time.

[53] He stated that although he never observed any hostilities between Ms. Goncharova and Ms. Miller, he was aware of tension between them. His impression that this was because Ms. Goncharova felt that, due to past occurrences, Ms. Miller should not be employed as Manager.

[54] Mr. Latour stated that on two occasions he arrived at the Facility and Ms. Goncharova was not there. He passed this information on to the Manager. He was unsure whether Ms. Goncharova had permission to not be on the site on these occasions and he never heard back from the Manager.

[55] He stated that he believed Ms. Goncharova was dismissed for cause due to her not being a team player. He said that no matter how many times he spoke to Ms. Goncharova it made no difference, as she just did what she wanted.

Reba Miller

[56] Ms. Miller was hired December 13, 2013 as Manager for the Facility, with her first day of part-time employment to be January 3, 2014. Ms. Miller resigned from this position in mid-March, 2014. Ms. Miller stated that she resigned due to an inability to work with or supervise Ms. Goncharova. She felt that the Board was not supportive of her so she had no choice but to resign.

[57] Ms. Miller adopted the contents of a letter which she had prepared, dated April 27, 2014 and which was attached to the Reply filed in this matter. She also reviewed a letter dated April 24, 2014 provided by Ms. Alexander and stated that Ms. Alexander's experience resonated with her own.

[58] In her letter, Ms. Miller states that she believed Ms. Goncharova resented her having been hired as Manager. As a result, Ms. Goncharova was completely insubordinate to her on an almost daily basis. Her complaints regarding Ms.

Goncharova's insubordination included the following:

- a refusal to train Ms. Miller, including a refusal to assist her in any program or interpretation of such on the Facility computer;
- being verbally abusive to her and to Robert [Darichuk];
- not wearing safety gear as required;
- cigarette smoking in the office and around customers; and
- contacting the Yukon Government, Great Waste Management and the Facility bookkeeper contrary to instructions not to do so directly.

[59] Ms. Miller stated in the letter that on one occasion she advised Ms. Goncharova that any further failure on her part to wear safety gear would result in her dismissal.

[60] Ms. Miller provided her opinion that Ms. Goncharova "...regarded the office and the Dump as her domain".

[61] She stated that her opinion that Ms. Goncharova was smoking in the office was based upon the presence of an ashtray under the coffee table, and the strong smell of smoke, especially on two occasions when Stuart Wallace was present. She reported another occasion when she smelled smoke and Ms. Goncharova blamed it on Mr. Darichuk who had been standing in the doorway smoking.

[62] Ms. Miller stated that on one occasion, after an argument, Ms. Goncharova "stormed out of the office", lit a cigarette and smoked it while

standing in front of her, which Ms. Miller viewed as a blatant challenge.

[63] Ms. Miller stated that on one occasion she felt that Ms. Goncharova had manipulated her into lying to Mr. Latour about the purpose of a structure Ms. Goncharova had been building on the Facility property.

[64] Ms. Miller stated that she uncovered mathematical mistakes in calculating returns at the bottle depot, and that Ms. Goncharova brushed off her concerns.

[65] Ms. Miller stated that, while in her Managerial role, she heard no complaints from customers regarding Ms. Goncharova's fulfillment of her duties. She stated, however, that she has since heard some complaints, in particular in regard to Ms. Goncharova's "posturing threatening attitude around free store claims, [and] mistakes on bottle money returns".

[66] Ms. Miller summarized that in her experience, Ms. Goncharova was "...contentious, contrary, oppositional, defiant, and plain difficult." She believed that Ms. Goncharova's actions were deliberately calculated to drive Ms. Miller from the Facility and her Managerial position.

[67] In her testimony on the witness stand, Ms. Miller stated that she reviewed the various job descriptions and rules. She stated that she communicated her expectations clearly to Ms. Goncharova, in particular in regard to the wearing of Personal Protection Equipment ("PPE"). Ms. Miller stated that she told Ms. Goncharova that the PPE was to be worn 100% of the time, including hard hats.

[68] Ms. Miller also stated that she advised Ms. Goncharova in her first

meeting with her that there was to be no smoking by staff on the site or in the office as this was a policy of the Board. Ms. Miller stated that she could smell smoke in the office right away and that she believed this was as a result of Ms. Goncharova smoking there. She stated that the other staff members would smoke in their own vehicles, which was the one exception allowed for on-site smoking. When she confronted Ms. Goncharova about smoking in the office Ms. Goncharova would deny doing so. She stated that Ms. Goncharova would smoke in her presence outside of the office. Ms. Miller acknowledged that she never observed Ms. Goncharova smoking in the office.

[69] Ms. Miller testified that Ms. Goncharova had to be repeatedly reminded of the requirement that she abide by the rules, in particular in regard to the wearing of hard hats and the non-smoking policy. She stated that Ms. Goncharova would not usually comply with the directions that she was given, and that she would attempt to find ways to circumvent these directions, often by contacting others such as Mr. Latour in order to try to obtain different interpretations of the requirements.

[70] Ms. Miller stated that she heard Ms. Goncharova asking Mr. Darichuk whether he had “punched her in [to the time clock]”. She said that she told both Ms. Goncharova and Mr. Darichuk that they were not to punch in the other person. She further stated that Ms. Goncharova would give Mr. Darichuk contradictory instructions to those given to him by her.

[71] Ms. Miller also testified that she told Ms. Goncharova not to communicate

with outside authorities whether verbally or by e-mail.

[72] She stated that when she told Ms. Goncharova that it was her job to ensure that the directions of the Board were followed, Ms. Goncharova would roll her eyes and state “that’s bullshit”.

[73] She stated that she felt like she was “...walking on eggshells in Jane’s [Ms. Goncharova’s] domain”.

[74] Ms. Miller stated that on three occasions she came to the Facility and Ms. Goncharova was not present. On one occasion Ms. Goncharova arrived late and asked Mr. Darichuk if he had punched her in. Mr. Darichuk replied that he hadn’t and Ms. Goncharova yelled at him for not doing so.

[75] On a second occasion Ms. Goncharova had left the site during the day and had left a message stating that she was sick and had to leave. On a third occasion, Ms. Miller arrived at the Facility at 12:30 or 1:00 and Ms. Goncharova was not there. When asked, Mr. Darichuk stated that he did not know where Ms. Goncharova was. Ms. Miller did not ask Ms. Goncharova for an explanation as this was near the time that she resigned her position. Ms. Miller did not have any documentation in regard to the dates of these absences.

[76] Ms. Miller stated that, to the extent Ms. Goncharova would provide her any assistance in regard to the computer programs, she would do so “very reluctantly and very aggressively”. It was clear to Ms. Miller that Ms. Goncharova did not want to assist her.

Paul Sparling

[77] Mr. Sparling had been a Board Director since spring of 2012. He stated that he joined in order to facilitate the construction of the composting component of the Facility. He acted in the capacity of Secretary of the Board and was responsible for keeping Minutes of Board meetings.

[78] He was a Board member when Ms. Goncharova was dismissed. He acknowledged that he was present at a meeting in September 2013 with Ms. Goncharova when her job performance was discussed.

[79] Mr. Sparling had heard at Board meetings that Ms. Goncharova was unable to work as a team player, although he did not actually directly witness incidents of any such conduct on the part of Ms. Goncharova.

[80] He testified to having heard about issues regarding Ms. Goncharova smoking, not wearing safety equipment, and of inappropriate timekeeping. He also stated that he had heard complaints from individuals about Ms. Goncharova arriving at the Facility late and leaving early.

[81] He also testified that he knew that Ms. Goncharova was given directives that she did not follow although, again, he did not directly witness her failing to follow directives. No documentation in the form of any such directives was proffered as evidence at the trial.

[82] He stated that he had a conversation with Ms. Alexander in which she told him that either Ms. Goncharova had to go or she would leave.

[83] Mr. Sparling recalled one incident at the Facility where Ms. Goncharova told him that she had been directed to respond one way in regard to an issue. Mr. Sparling stated that he had spoken to Mr. Latour, who was Interim Manager at the time, both before and after speaking to Ms. Goncharova, and that what Ms. Goncharova had told him was contrary to what Mr. Latour stated she had been told. Mr. Sparling stated in cross-examination that he was “affronted by the fact that [Ms. Goncharova] lied directly to him”.

[84] Mr. Sparling stated that the Board provided a directive in December 2013 regarding the Facility becoming non-smoking. He stated that he “probably” saw Ms. Goncharova smoking at the Facility, but doesn’t specifically recall doing so.

[85] Mr. Sparling acknowledged under cross-examination that he had never spoken directly to Ms. Goncharova in regard to safety issues, her apparent inability to act as a team player, her absenteeism, or in regard to timekeeping issues. He stated that it was not his role to do so. He stated that he may have talked to Ms. Goncharova at one time about overtime. He said that he was aware Ms. Goncharova had been spoken to about the phone bills and overtime on at least one occasion.

[86] Mr. Sparling testified that, at the end of the 60-day probationary period in 2014, he was at a Board meeting where there was discussion about sending Ms. Goncharova a letter regarding her successful completion of probation. However, he stated that other issues came up at the time, in particular concerns regarding her smoking at the Facility and not wearing the PPE. There was further

discussion regarding extending the probationary period, however, in the end, nothing was done. He stated that, to his knowledge, Ms. Goncharova was never advised about the discussion that occurred at this Board meeting.

[87] In cross-examination Mr. Sparling was directed to the portion of the Reply where it is stated that:

The decision to let Jane go was not taken lightly in view of her personal situation, in fact Jane's position was discussed by the Board for almost a whole year. Jane knew how the board felt and had been made aware that the terms of her employment were tenuous.

[88] Mr. Sparling stated that this statement was "apparently" true, but he could not say with certainty, as he had not been present for the earlier Board meetings.

[89] Mr. Sparling stated that he had the Minutes of Board meetings held December 3, 2013, and January 6 and February 5, 2014. When queried as to whether he had the Minutes from the March 2014 Board meeting he replied that there were lots of meetings that he didn't make. He stated that no one replaced him for the meetings he did not attend as the Board was understaffed.

[90] Mr. Sparling stated that he believed Ms. Goncharova had re-paid all the phone bills for which she was responsible and that he did not believe there were any further problems after that in regard to inappropriate phone usage.

[91] While stating that he believed there were ongoing problems in regard to the time sheets submitted by Ms. Goncharova, such as a staff member punching another staff member's time sheets, he did not actually know whether these

problems in fact existed. Mr. Sparling stated that time sheets did not fall within his role as a Board member.

[92] Mr. Sparling was called as a witness to provide rebuttal evidence. He testified that he had asked Robert [Darichuk] if he had ever punched Ms. Goncharova's time card when she was not on site. He stated that Robert told him that he had on one occasion, but that Ms. Goncharova did not end up coming in and the matter was subsequently resolved. Mr. Sparling was unable to state when this incident apparently occurred.

Don Bernier

[93] Mr. Bernier became a Board member in August 2013. His motivation in doing so was to fill vacancies on the Board. He stated that he was Ms. Goncharova's neighbor.

[94] He stated that on one occasion around noon he attended at the Facility and Ms. Goncharova was not there. When she arrived approximately one half hour later, she asked the other employee, Robert [Darichuk], to punch in her time card. Robert responded that he wouldn't and Ms. Goncharova started "ragging on him" until he walked away. He believes that this was in early October 2013.

[95] Mr. Bernier testified that Ms. Goncharova would wear her hard hat only when someone of importance was around and she would remove it as soon as this individual was gone. He stated that he observed this perhaps one-half dozen times. No dates for these observations were provided and Mr. Bernier

stated that he never spoke to Ms. Goncharova about this.

[96] He testified that in his experience Ms. Goncharova wore her safety vest most or all of the time.

[97] He stated that he saw Ms. Goncharova smoking in the yard at the Facility. He also stated that he saw Ms. Goncharova smoking in the office and had an ash-tray half full of butts that were visible under the coffee table. He testified that he never said anything to her about this.

[98] No dates were provided for the incidents Mr. Bernier stated that he observed.

[99] In cross-examination, Mr. Bernier stated that he did not really know what happened after the end of the 60-day probation period because he didn't really pay any attention. He did not have any recollection of whether there was discussion at a Board meeting about Ms. Goncharova's probationary period after it had expired.

[100] Mr. Bernier testified that he believed Ms. Goncharova was not a team player because she didn't get along with others, mentioning Mr. Darichuk, other past employees and another individual who had told him this.

[101] As to the concerns regarding Ms. Goncharova being improperly absent from the Facility, he stated that she had passed him driving on the highway once before lunch. He stated that he did not know why Ms. Goncharova was not at the Facility and that he never talked to her or the Facility Manager about this

incident. He stated that he was not aware of any other days that Ms. Goncharova was not present at the Facility when she was being paid to be there. Mr. Bernier did not provide a date for this incident.

[102] Mr. Bernier testified that he never observed Ms. Goncharova falsifying time sheets.

[103] Mr. Bernier testified that he would attend at the Facility approximately every other day and as often as two or three times a day when he was helping out.

[104] He stated that he did not have any worries about safety issues at the Facility. He stated that he brought Ms. Goncharova a book regarding Yukon Health and Safety as she had expressed to him that she felt she was being railroaded. He stated that he had not read the book and that he did not discuss Ms. Goncharova's dismissal with members of the community.

Jean Kapala

[105] Ms. Kapala testified that she became a Board member on August 13 2013.

[106] She stated that she did so to help the community of Marsh Lake.

[107] Ms. Kapala stated that she has known Ms. Goncharova since close to the time Ms. Goncharova began working at the Facility.

[108] In her experience in attending at the Facility approximately one or two

times a week, Ms. Goncharova was present most times. She testified, however, that prior to her becoming a Board member that there was no one present at the Facility on some occasions that she attended there. No dates for these occasions were provided.

[109] Ms. Kapala recalls Ms. Alexander bringing her concerns about Ms. Goncharova's job performance to the Board in September 2013 and Ms. Alexander resigning as a result of the Board's failure to terminate Ms. Goncharova's employment. Ms. Kapala could not recall whether she attended with the other Board members in this September meeting with Ms. Goncharova and Ms. Alexander.

[110] Ms. Kapala stated that she was present at a Board meeting after Ms. Goncharova's probationary period was over. She stated that she recalls there being discussion regarding extending the probationary period, although she could not recall why, mentioning the smoking and safety vest issues as possibilities. She stated that she did not think things had really changed that much.

[111] Ms. Kapala stated that once she became a Board member, she noted that staff at the Facility were not in compliance with some of the Board's directions.

[112] Ms. Kapala stated that the biggest issue was smoking in the office. Ms. Kapala testified that while she never observed Ms. Goncharova smoking in the office, she believed someone was, mentioning one occasion involving a 'Stuart' in November 2013. She stated that she had only observed Ms. Goncharova

smoking outside in the Facility yard.

[113] No dates were provided for Ms. Kapala's observation(s) in this regard.

[114] In regard to Ms. Goncharova disregarding the smoking rules, Ms. Kapala stated that this continued until Ms. Miller resigned in March 2014 and that this was reflected in the September and November 2013 Board meeting Minutes.

[115] Ms. Kapala testified that the Facility employees generally were very inconsistent in complying with the requirements to wear safety gear. Following the September 2013 WCB report on safety at the Facility, the policies regarding the wearing of PPE at the Facility were changed by the Board.

[116] Ms. Kapala testified that employees were not wearing safety vests and hard hats. She stated that the recommendation was for hard hats to be worn at all times and that this recommendation was adopted as Board policy.

[117] Ms. Kapala stated that eye and ear protection had to be purchased for the employees as well as hard hats.

[118] Ms. Kapala stated that she rarely saw Ms. Goncharova wearing a hard hat. She said that she never spoke to Ms. Goncharova about this but that she advised the Manager. She never witnessed the Manager speaking to Ms. Goncharova about this issue.

[119] Ms. Kapala testified that she did not discuss any concerns about non-compliance with Ms. Goncharova, leaving this to the Manager(s).

[120] She stated that the primary problem she was aware of after September 2013 was in regard to the wearing of PPE.

[121] In regard to the comment in the Reply regarding the Board discussing concerns about Ms. Goncharova for over a year, Ms. Kapala testified that this was true and that this was reflected in the Minutes of the Board meetings. She stated that Minutes were kept at every meeting and that these were available.

[122] I note that no Minutes of any of the Board's meetings were in evidence in these proceedings. In regard to the comment in the Reply that the Board "...has an excellent record of the events that have led to this outcome [Ms. Goncharova's termination]", Ms. Kapala stated that this record was reported and recorded by the Managers. I note that on the evidence before me there is not, in my opinion, any such "excellent record" of events. In fact, I note a distinct absence of any such recorded documentation and reports before me.

[123] Ms. Kapala stated that she has extensive files in her possession but that she did not have these files with her at the time of testifying.

[124] In regard to the reference in the Reply to the Board regarding "...consulting with the Labour board many times..." before letting Ms. Goncharova go, Ms. Kapala stated that she had not herself consulted the Labour board.

[125] Ms. Kapala testified that the reasons for Ms. Goncharova's termination as contained in the letter dated March 18, 2014, were written out after Ms.

Goncharova was provided her letter of termination, although Ms. Kapala stated that the Board was aware of these as being the reasons for termination prior to this letter being provided to Ms. Goncharova.

[126] Ms. Kapala stated that she did not discuss the termination of Ms. Goncharova with community members.

Evgenia Goncharova

[127] Ms. Goncharova adopted the contents of the letter filed in her Claim.

[128] In this letter she stated that when she was hired in February 2011, the Facility was in disarray. There was no compliance with Occupational Health & Safety (“OH&S”) Regulations and environmental rules. She stated that she took steps to familiarize herself with the relevant regulations and requirements as well as obtaining first-aid certification and completing the Workplace Hazardous Materials course. She stated that she developed relationships with the various regulatory agencies. Ms. Goncharova testified that when she started work at the Facility there were no Employee Guidelines or job description. She stated that she educated herself by visiting other dumps and reading articles on the internet.

[129] Ms. Goncharova stated that she trained and supervised staff and summer students and developed a rapport with Facility users, educating them in the recycling aspect of the Facility.

[130] She testified that Ms. Alexander told her that it was mandatory to wear steel-toed boots and a safety vest.

[131] She stated that she loved her job and that there were no problems for the first two years.

[132] In the summer of 2012 Ms. Alexander hired a summer student to work at the Facility. Ms. Goncharova testified that this student was problematic as an employee, being abusive, drinking and not working the hours he was paid to work. She stated that Ms. Alexander blamed her for the issues that arose between this student and Ms. Goncharova.

[133] Ms. Goncharova stated that she was placed on probation from October 1 until December 1, 2013, and that she completed this probationary period without any concerns being expressed to her.

[134] Ms. Goncharova stated that as of late 2013 there was inadequate first-aid equipment at the Facility and that this was not rectified until after her employment had been terminated.

[135] She further stated that a member of the Board advised her that the entire Facility area was to be non-smoking and that OH&S had ordered the wearing of hard hats at all times on the Facility site. She was advised that any employee who did not comply would be fired.

[136] Ms. Goncharova stated that she contacted Paul Smythe at OH&S who advised her that the wearing of hard hats at all times was not a requirement of OH&S. He advised her that hard hats needed to be worn in the construction and metal waste areas only.

[137] Ms. Goncharova testified that she was unsure what the actual rules and policies were in regard to PPE and that she was being told different things by different people. She stated that she wanted to have the requirements written down. She testified in cross-examination that all the time she was working at the Facility she was trying to comply with the rules. She stated that the difficulty was the lack of clarity of the rules. She stated that the rules imposed following the October 2013 WCB audit were not part of the Employee Guidelines Mr. Latour provided her on December 6, 2013. She asked Mr. Latour what she was supposed to do. Ms. Goncharova agreed in cross-examination that the rules were evolving.

[138] Ms. Goncharova further agreed that she was aware that if any employee did not follow the rules the employee could be fired. It was her position, however, that she was trying to follow the rules; it was simply that it was unclear to her exactly what the rules were in regard to particular issues, such as the wearing of hard hats. Ms. Goncharova testified that what she wanted was a written policy that clarified just exactly what was required.

Smoking on Site

[139] Ms. Goncharova testified that she did not smoke in the office. She stated that on one occasion Stuart Wallace came into the office to help fix some video and television equipment. Ms. Kapala saw him smoking. Ms. Goncharova stated that she did not see Mr. Wallace put the ashtray under the coffee table. She stated that had she seen the ashtray she would have removed it. She

stated that Mr. Wallace smoked in the office on one other occasion.

[140] Ms. Goncharova stated that she had asked Mr. Wallace not to smoke in the office.

[141] Ms. Goncharova stated that Mr. Wallace would come to the site and bring her lunch or visit her maybe one time per week on average. There may have been occasions when he was in the office alone while Ms. Goncharova was outside of the office on the Facility site.

[142] Ms. Goncharova stated that she had requested an area on-site be designated for smoking but she was told to smoke in her vehicle. She stated that she did so and that she never smoked in the office, the free-store or buildings on-site.

Hard hats

[143] Ms. Goncharova testified that the policy in regard to the wearing of hard hats was not written down anywhere but was verbally conveyed to her.

[144] Ms. Goncharova agreed that she had a discussion with Mr. Latour on December 6, 2013 regarding the issue of wearing hard hats.

[145] Ms. Goncharova testified that Mr. Latour told her that Ms. Kapala was pushing the issue of wearing hard hats at all times on site. She stated that she told Mr. Latour that she was not able to wear a hard hat at all times. It was her opinion that she was getting different information in regard to the hard hat

requirements.

[146] She disagreed that Ms. Miller subsequently had told her that she had to wear a hard hat at all times. She stated that Ms. Miller in fact had told her in January 2014 that she did not have to wear a hard hat at all times.

[147] I note, as counsel for the Society pointed out, that Ms. Miller was not cross-examined in accordance with the rule in *Browne v. Dunn* (1893), 6 R. 67 (Eng. H.L.), in regard to the issue of hard hats as she should have been.

Overtime

[148] Ms. Goncharova testified that she had understood from Ms. Alexander that if she worked less than one hour overtime on any particular occasion she would be paid for two hours and anything over one hour would result in her being paid four hours overtime.

Occupational Health and Safety

[149] Ms. Goncharova stated that she knew that if she did not comply with the rules she could be fired. She stated, however, that she was doing her best to comply with the rules. She testified that she wanted the rules to be written down so that it would be clear what the rules were. She stated that she was being told different things by different people. It was not that she disagreed with the policies *per se*, she just didn't understand them.

[150] Ms. Goncharova stated that she believed that the WCB/OH&S

communications were in relation to what the employer was required to provide on-site at the Facility, but did not stipulate that the individual employees were required to wear the various PPE at all times on-site.

[151] Ms. Goncharova agreed in cross-examination that the employer could make the rules in regard to when and where the PPE was to be worn by the employee.

[152] Ms. Goncharova stated that she met and spoke to Paul Smythe because she wanted to discuss the dangers of wearing PPE like ear plugs all the time and she wanted to clear up the issue of what safety equipment was required at all times. She stated that Ms. Miller was aware of her meeting with Mr. Smythe but did not attend despite having been afforded the opportunity to do so.

Consulting Outside Officials

[153] In cross-examination, Ms. Goncharova stated that she only consulted outside officials when it was unclear to her what to do. She stated that she did try to consult with Ms. Miller beforehand about issues.

Inability to work as a team player

[154] Ms. Goncharova stated that she attempted to train the new Manager [Reba Miller], but that the new Manager was not very receptive and resigned on March 7, 2014.

[155] Ms. Goncharova stated that no member of the Board ever spoke to her

about the issue of her not being a team player, other than saying to her that two Managers quit because of her.

[156] Mr. Latour told her it was because she didn't follow procedures that led to this being an aspect of the letter of termination to her.

Unannounced Absenteeism during work hours

[157] Ms. Goncharova testified that she was confused by this. She pointed to a lack of any specificity as to dates this allegedly occurred. She stated that she would not have been paid if she was not working.

Unauthorized cell phone use

[158] Ms. Goncharova stated that she had understood that she was allowed to use the Facility cell phone for personal use. When the Board was expanded to include two new members in August 2013, she was advised that she was required to pay \$350.00 in cell phone charges and could not use the cell phone for personal use. She repaid the money and agreed not to use the cell phone outside of employment purposes.

Falsifying Time Sheets

[159] Ms. Goncharova testified that she never falsified a time sheet.

Job Description (Exhibit V)

[160] Ms. Goncharova testified that the Dump Attendant Job Description was provided to her by Ms. Miller. She stated that this job description differed from what she had been told her duties were so she questioned Ms. Miller on this.

[161] The only reference in regard to safety within the Job Description reads as follows:

Safety

Frequency: At all times

Attendants must wear a safety vest and steel toed boots at all times.
Attendants must be aware of the cleanup spill kits on site.

Severance Pay

[162] Ms. Goncharova agreed in cross-examination that she received a payout of three weeks severance pay as part of her final cheque.

Affidavit of Sara Joy Wallace

[163] Ms. Wallace provided an Affidavit declared on September 29, 2014. In her Affidavit, Ms. Wallace stated that she worked with Ms. Goncharova at the Facility in the summer of 2013. She stated that Ms. Goncharova was punctual in her attendance at work and a very hard worker. This was in contrast to another individual that worked on the site and was regularly late in attending for work. This employee was also rude and extremely unprofessional, as well as being verbally abusive to Ms. Goncharova and to customers. This employee would

also drink alcohol at the Facility while working. Ms. Wallace stated that Ms. Goncharova did her best to fulfill her job requirements while avoiding conflict with this employee. Ms. Wallace felt that Ms. Goncharova did her best to handle a difficult situation.

[164] I note that counsel for the Society objected to this evidence on the basis of its hearsay nature and the unavailability of Ms. Wallace for cross-examination on her Affidavit.

[165] While I have some latitude with respect to the admissibility and use of hearsay evidence of this nature in Small Claims Court proceedings, I am aware of the cautions applicable to the use of untested evidence.

Stuart Wallace

[166] Ms. Goncharova stated that Mr. Wallace was unavailable to testify at trial because of significant health issues.

Steve Perrin

[167] Mr. Perrin testified that he was involved with the Facility for approximately three years, although not directly for the last two years, since approximately December 2012. His prior involvement was as a Yukon Government Community Service Operator.

[168] While he was involved with the Facility, he states that he attended at the Facility on a weekly basis.

[169] He stated that in his experience with Ms. Goncharova she was not difficult to work with and there was no trouble from his perspective.

[170] He understood that there were to be two employees on-site at the Facility but often it was only Ms. Goncharova who was present and working.

[171] Mr. Perrin testified that in his experience, Ms. Alexander was difficult to work with and the Facility was not run well prior to Ms. Goncharova starting to work there.

Robert Darichuk

[172] Mr. Darichuk has been employed at the Facility since July 2013. He testified that he has no personal interest in the outcome of this case.

[173] He testified that Ms. Goncharova was not difficult to work with. He stated that they made a good team, that she never yelled at him and that she was not verbally abusive towards him.

[174] He stated that at times he or Ms. Goncharova would have to leave the site during working hours in order to get fuel and water. On such occasions they would let each other know.

[175] He stated that he never saw Ms. Goncharova working in sandals or not wearing her safety gear.

[176] Occasionally it would be difficult to drive up the hill to the Facility in winter because of road conditions. This would sometimes result in either of them being

a few minutes late for work.

[177] Mr. Darichuk testified that he was told to wear a hard hat when he was doing any work such as on the steel pile, the compactor, the hazardous waste area or the construction area. He stated that he was told that he did not need to wear a hard hat all the time but only in these locations. He stated that Ms. Miller had told him this. He denied that Ms. Goncharova ever told him that he did not need to wear his hard hat at all such times.

[178] In cross-examination, however, he stated that Mr. Latour told him that he had to wear the hard hat whenever he was outside, but not in the office or in personal vehicles on-site. He stated that it took approximately three to five weeks for the Board to provide direction regarding the wearing of hard hats. He did not recall Ms. Miller providing the same direction as Mr. Latour did regarding wearing hard hats at all times when outside of the office and on-site.

[179] Mr. Darichuk stated that Ms. Goncharova did not wear her hard hat when she was not at the steel pile, the construction area or the hazardous/compactor areas. Other areas included in the office or at the recycling area. He stated that Ms. Goncharova did wear her hard hat at the free store. While initially they would both forget to wear the hardhat at all times when it was required, he stated that eventually they “got down to wearing it”. He stated that he was aware that if he did not wear the PPE as required he could lose his job.

[180] Mr. Darichuk stated that while he had punched the time clock for Ms. Goncharova, he had not done so if she was not at the Facility, other than on one

occasion when Ms. Goncharova was not at the Facility when he punched her in, but she had arrived almost right away. He stated that on a couple of other occasions Ms. Goncharova had called from the bottom of the hill into the Facility and he punched her time card as she requested. He stated that if Ms. Goncharova was not at the Facility he would not punch her time card, although he acknowledged in cross-examination that maybe it happened one time that Ms. Goncharova did not show up at work. No date for this one possible occasion was provided.

[181] Mr. Darichuk stated that he was told by Ms. Miller that there was no smoking at the Facility site other than in the employees' own vehicles. He said that he was told this by Ms. Miller. He stated that if he had smoked at the office door on occasion he got out of that habit pretty quickly.

[182] He stated that Ms. Goncharova would smoke in her vehicle.

Employee Guidelines

[183] Attached to the Claim are a set of Employee Guidelines. These were provided to Ms. Goncharova by Mr. Latour on December 6, 2013. These Guidelines were different from those originally prepared and provided by Ms. Alexander.

[184] Ms. Goncharova testified that she was told by Mr. Latour not to lose sleep over these Guidelines as these were being pushed by Jean Kapala.

[185] Mr. Sparling testified that he believes these Guidelines were prepared

perhaps in August 2013. He stated that he thinks there was a previous set of Guidelines but that this later set was modified to include items such as cell phone use, smoking and the use of safety equipment.

[186] Ms. Alexander testified that she created the original Employee Guidelines Policy.

[187] When she started working as Manager at the Facility, Ms. Alexander stated that there were no employee sick days and accrued holidays. These were items that she implemented.

[188] There was also no power/hydro or employee cell phone when Ms. Alexander started working as Manager. Ms. Alexander obtained a cell phone for the employees for safety reasons.

[189] Ms. Alexander noted that the December 2013 Employee Guidelines policy was revised from the original one that she had written while employed by the Facility, noting several differences.

[190] Ms. Kapala testified that the Employee Guidelines filed as Exhibit 3 were prepared by Ms. Alexander in 2011. (I note that this evidence is contrary to the testimony that these Guidelines were modified from those originally prepared by Ms. Alexander).

[191] Some excerpts from the December 2013 Employee Guidelines are as follows:

Smoking

All buildings are nonsmoking. The brush pile, construction area, tank storage and hazardous waste areas are also non-smoking.

...

Safety Equipment

Employees shall wear PPE vests at all times (provided)

Employees shall wear steel shank/steel toed boots (personal)

Employees shall wear protective eyewear (provided)

Employees shall wear gloves (personal)

...

Complaint Related to Work

Should an employee have ac [sic] complaint related to work, working conditions, personnel policies and procedure, he/she should thoroughly discuss it with the Supervisor within 48 hours.

If the issue has not been resolved satisfactory [sic], the Employee shall be granted an interview at is/her [sic] written request with the President. The request shall clearly detail the cause of the complaint and shall be submitted no later than five days after the discussion with the Supervisor.

If the complaint has not been resolved satisfactorily within ten days, the Employee may, through the President, submit the complaint in writing to the Board for its consideration, The Board shall reply in writing within ten days after receiving the complaint. The decision of the Board shall be final in all cases.

E-Mail Exchanges

[192] There is an e-mail dated January 15, 2014 from Ms. Goncharova to Paul Smythe of the Yukon Worker's Compensation and Safety Board requesting that

he meet with her to discuss some concerns about her work at the Facility. Mr. Smythe replied to Ms. Goncharova that day stating that he would make himself available for a meeting, which Ms. Goncharova then asked for later that day.

[193] On December 7, 2013, Ms. Goncharova e-mailed Mr. Latour wishing to discuss some mistakes in the Employee Guidelines he provided to her. Mr. Latour responded to Ms. Goncharova the next day stating “See you Monday. Do not lose sleep over it just a guide line that Jean K [Kapala] is pushing”.

[194] There was an e-mail exchange between Ms. Goncharova and Ms. Miller on January 17 and 18, 2014. Ms. Goncharova points out that the document Ms. Miller provided her was an “assessment” only and not rules or laws. Ms. Goncharova pointed out the impracticality of wearing earplugs all the time due to the difficulties and dangers present from being unable to hear at times when it is necessary to do so, either from a customer service or safety point of view. Ms. Goncharova requested the last report from YCHS. Ms. Miller responded that these were rules endorsed by the Board and WCB. Ms. Miller stated that “...we must comply while on-site outside in the line of duty, or be let go (fired for non-compliance)”.

[195] Ms. Goncharova testified that the January 18, 2014 e-mail was in relation to the wearing of all safety gear.

[196] Ms. Goncharova provided an e-mail to Ms. Miller on January 28, 2014 in which she states that Mr. Smythe attended at the Facility and pointed out that while it was a requirement to wear the safety vest and safety boots all the time,

hard hats only needed to be worn when an employee was working on the top of the dump (construction, metal and bush piles).

Submissions of Counsel for the Defendant

[197] Counsel for the Facility submits that the accumulated acts of Ms. Goncharova over the year prior to her dismissal provided sufficient grounds for the termination of her employment.

[198] He acknowledges that there was no single act of Ms. Goncharova that provided just cause for dismissal. There were, however, a series of behaviours that suggest an attempt to manipulate the employer-employee relationship to further her interests.

[199] He acknowledges that Ms. Goncharova could perhaps be given the benefit of the doubt in regard to the overtime issue, as she provided a plausible explanation for her actions.

[200] With respect to the cell phone use, however, he submits that her evidence is in contradiction with Ms. Alexander's, and that Ms. Goncharova took the authorization to use the cell phone on one occasion only and, without any belief that she was entitled to do so, used the cell phone on further occasions, when she should have known that this was wrong.

[201] He submits that there is an underlying theme of questionable honesty and ethics.

[202] He submits that the earlier incidents are important when considering the impact of the later incidents of questionable conduct.

[203] He further submits that the Board is comprised of volunteers, who do not have the same level of organization and professionalism that could be expected of a company.

[204] The Board chose to provide Ms. Goncharova a further chance to remain employed over the advice of the Manager at the time, Ms. Alexander.

[205] While Ms. Goncharova's level of compliance had improved by the end of the 60-day review period, the Board was considering extending this probationary period, as they were not entirely satisfied with her work performance, although they in fact did not do so.

[206] Ms. Goncharova's inability to work cooperatively with Ms. Miller is further evidence supporting the Board's position that Ms. Goncharova was unwilling to work in a subservient position.

[207] The "Professional Discipline Approach" applied in the context of a company must be applied differently in the context of this volunteer association.

[208] What counts is that the evidence shows that Ms. Goncharova repeatedly behaved in a manner inconsistent with the directions and expectations of her supervisors and her contractual obligations. Ms. Goncharova wanted to do

things her own way and her conduct demonstrated no respect for her Managers, and for the rules and policies she was expected to conduct herself in compliance with.

[209] After losing two Managers who resigned over Ms. Goncharova's conduct, the Board was justified in taking the steps that it did as they did not want to face the possibility of losing another Manager.

[210] Counsel submits that all the witnesses put forth by Ms. Goncharova are past employees of the Facility, with no stake in the outcome.

[211] If Ms. Goncharova was, in fact, dismissed for cause, she has received three weeks of severance pay (\$2,700.00) that she was not entitled to.

[212] Counsel submits that the evidence about Ms. Goncharova smoking in her office, noting the ashtray under the coffee table and at various locations on-site, and not wearing her hard hat and vest as required, is indicative of her defiant attitude. He submits that the evidence supports the position expressed by Mr. Latour that "talking never had any effect" on Ms. Goncharova, in regard to her becoming compliant with the rules and policies.

[213] He submits that Ms. Goncharova's attitude and insubordination were connected to her resentment about not being the Manager herself.

[214] Counsel cited the following excerpts from Randall Scott Echlin, Matthew L.O. Certosimo, *Just Cause: the law of summary dismissal in Canada* (looseleaf) (Aurora, Ont.: Canada Law Book, 1997-):

6:440 Cumulative Cause

The court is entitled to take into account the cumulative effect of an employee's record, in determining whether the employer's decision to summarily dismiss the employee was justified (citing *Atkinson v, Boyd, Phillips & Co.* (1979), 9 B.C.L.R. 255 at pp. 271-2 (C.A.), leave to appeal to S.C.C. refused 28 N.R. 139, as well as other cases).

...

Moreover, the notion that an employer may not be able, nor ought to be required, to pinpoint a single act of misconduct to justify dismissal, where the employee is generally deficient, has been accepted (citing *Ross v. Willard Chocolates Ltd.*, [1927] 2 D.L.R. 461 (Man K.B.) at p. 469)

...

As expressed in the context of the doctrine of condonation, by MacLennan J.A. in *McIntyre v. Hockin* (footnote reference missing):

...condonation is subject to an implied condition of future good conduct, and whenever any new misconduct occurs, the old offences may be invoked and may be put in scale against the offender as cause for dismissal.

...

There appears to be some uncertainty as to whether the employee's cumulative misconduct must be similar to be weighed together. Zuber J.A., on behalf of the Ontario Court of Appeal, in *Nossal v. Better Business Bureau of Metropolitan Toronto Inc.*, [(1985) 19 D.L.R. (4th) 547], remarked as follows:

The learned trial judge appears to have been of the view that past misconduct would have to be of the same kind as the subsequent misconduct before it became significant. I do not agree. The critical question remains, whether or not the accumulated misconduct, composed of similar and dissimilar misconduct, amounts to just cause.

[215] Not highlighted in the excerpt provided to me, however, is the following excerpt from 6:440:

However, in *Morrell v. Grafton-Fraser Inc.*, (1982)51 N.S.R. (2d) 138 (C.A.), Hart J.A. of the Nova Scotia Court of Appeal, held that previously condoned conduct “may be revived if conduct of a *similar* nature occurs so as to accumulate the totality of the activity as a ground for dismissal for cause” (Emphasis added). And, in *Metz v. Con-Stan Canada Inc.*, (1982), 16 Sask. R. 270 (Q.B.), vard 33 Sask. R. 3 (C.A.), the dissimilar nature of the subsequent misconduct seems to have caused the Court to take the more restrictive approach to the reliance upon earlier misconduct.

[216] My view is that the more similar the prior misconduct of the employee is to the present misconduct complained of, the greater the cumulative effect in supporting an argument for dismissal for cause. Conversely, the less similar the prior acts of misconduct are to the present misconduct, the less persuasive the cumulative effect in supporting an argument for dismissal for cause.

[217] While the past dissimilar misconduct can nonetheless be taken into account in supporting an argument for dismissal for cause on the basis of cumulative misconduct, a more restrictive approach to the prior misconduct should be taken. In such cases, I consider that the employer has a greater responsibility to provide the employee with clear and unequivocal notice of the employer’s concerns about the employee’s performance and has a greater responsibility to ensure that the employee has an opportunity to address these concerns before dismissal for cause is warranted, than in the case where the prior acts are similar, assuming, of course, that the employer has already addressed with the employee the employer’s concerns regarding the prior similar

misconduct.

Analysis

[218] The evidence in this case was somewhat convoluted and unclear at times. There is much in the way of hearsay and little by way of documentation to support the positions of the parties.

[219] For example, I note that in the Reply, the Society states:

The board has an excellent record of the events that have led to this outcome [the dismissal of Ms. Goncharova]

[220] Frankly, I find that this claim of possessing an excellent record of events is not even close to being accurate. In fact, what complicates the Society's ability to establish that Ms. Goncharova was justifiably dismissed with cause is the opposite; the lack of an adequate record of events.

[221] I consider the Society's witnesses to have provided their testimony in a fairly straightforward and unassuming manner, with, generally speaking, no obviously apparent malice or bias towards Ms. Goncharova. However, the witnesses' manner of testifying does not overcome some of the inadequacies in the evidence with respect to establishing with sufficient detail what occurred and when. There is considerable vagueness with respect to the timing of certain events and, to some extent, this vagueness diminishes the probative value of the evidence.

[222] In considering the fact that Ms. Goncharova was placed on probation for

60 days commencing October 1, 2013, I am not certain where there was any jurisdiction to do so. Probation is generally utilized in the employment area when an employee has first been hired in order to assess the employee's performance prior to committing to a permanent hire of the employee. In such cases it is not unusual for the probationary period to be extended in some circumstances. In this case, Ms. Goncharova was a permanent employee already and there was no term of her employment contract stating that she could be placed on probation at any time.

[223] In fact, the letter itself states that her position was to be reviewed and there is no specific mention of a period of 'probation' *per se*. I am prepared to treat this period of purported 'probation' as a period of time when Ms. Goncharova was on notice from her employer that there were sufficient concerns about the performance of her employment duties such that her performance was going to be reviewed for this 60 day period.

[224] In the end, my treatment of this period of 'probation', whether actually probation or simply a review of Ms. Goncharova's performance, does not create a distinction that in any way impacts upon my decision.

Dismissal for Cause

[225] In *McKinley v. BC Tel*, 2001 SCC 38, the Court adopted the "contextual approach" in determining whether the conduct of an employee provided cause for dismissal. Iacobucci J. states at para. 29:

When examining whether an employee's misconduct - including dishonest misconduct - justifies his or her dismissal, courts have often considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.

[226] In para. 33 the Court cited favourably the reasoning of the Nova Scotia Court of Appeal in *Blackburn v. Victory Credit Union* (1998), 36 C.C.R.L. (2d) 94 where Flinn J.A. stated at p. 110 that:

The difficulty which I have with the position of counsel for the employer is that, in dealing with this aspect of his first ground of appeal, he treats the acts of misconduct in isolation. The courts do not consider an act of misconduct, in and of itself, to be grounds for dismissal without notice, unless it is so grievous that it gives rise to the inference that the employee intends no longer to be bound by the contract of service.

There is no definition which sets out, precisely, what conduct, or misconduct, justifies dismissal without notice, and rightly so. Each case must be determined on its own facts... .

[227] The Court in *Blackburn* relied on the following passage in H. A. Levitt's *The Law of Dismissal in Canada* (2nd ed. 1992), at p. 124:

What constitutes just cause in a specific situation is particularly difficult to enumerate because it depends not only on the category and possible consequences of the misconduct, but also on both the nature of the employment and the status of the employee... .

The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

[228] In applying this reasoning, Iacobucci J. stated at para. 33 that:

Thus, according to this reasoning, an employee's misconduct does not inherently justify dismissal without notice unless it is "so grievous" that it intimates the employee's abandonment of the intention to remain part of the employment relationship...

[229] The ability of an employer to dismiss an employee for misconduct and disobedience to work rules is discussed in Geoffrey England, Roderick Wood & Innis Christie, *Employment Law in Canada* (looseleaf), 4th ed. (Markham, Ont. LexisNexis Canada, 2005-). A number of factors are set out as follows at §15.37

Where the misconduct alleged to justify summary dismissal takes the form of disobedience to work rules, the courts have taken an approach which is strongly reminiscent of the arbitral treatment of insubordination and which encapsulates the salient features of the "rights" approach to discipline, namely rationality, proportionality and procedural fairness. Thus, the courts have held that work rules alleged to have been violated must display the following characteristics in order to ground cause:

- The rules must be made known to the employee. It follows that the rules must be unambiguous and clear so that the employee knows precisely what is expected of him and her. This requirement may be difficult for employers to fulfill with employees who exercise a high degree of discretion in how they perform their work. Nevertheless, the courts insist that even with these employees summary dismissal will not be grounded unless an "express, clear and unequivocal" directive has been given to the employee so that he or she plainly understands that the matter falls outside his or her discretion...
- The rules must have been consistently enforced...
- The order in question must have been clearly communicated to the employee...
- The order must be authorized in the sense of being within the scope of the worker's duties under the employment contract. Thus, in *Kokilev v. Picquic Tool Company Inc.*, (citation omitted) the employer claimed a number of incidents of insubordination but the court,

per Loo J., held that “I do not think it can be said that Mr. Kokilev ever refused to carry out the tasks that were **essential conditions** of his contract of employment...

- The employee must have been made aware unequivocally that dismissal is the penalty for disobedience... . In *Ahmed v, Concord Hard Chrome Ltd.*, Howden J. of the Ontario Superior Court of Justice found that the repeated failure of the plaintiff to “punch in” with the time-clock was not cause for dismissal given the employer never stated that discipline would follow for a failure to do so and similarly with the use of the cell phone at work. The plaintiff completed his work each day and his behavior was no more than a minor irritant...
- The rules must be lawful and “reasonable” in content...
- The employee must not have a “reasonable excuse” for disobedience...
- Breach of the rules must be sufficiently serious to justify dismissal according to the common law standard of “cause”. For example, while finding that the plaintiff had not properly submitted expense claims, Griffin J. of the British Columbia Supreme Court also stated that “in its entire context” the submission of the receipts as an expense claim “ was not such to give rise to a breakdown in the employment relationship” (*Hawkes v. Leviton Holdings Ltd.*, [2012] B.C.J. NO. 170

[230] The “Corrective” theory of punishment in misconduct and incompetence situations, as noted in §15.46 of the *Employment Law* text, is:

...universally applied by collective agreement arbitrators and statutory adjudicators...” and “...requires the employer, prior to invoking dismissal, to have warned the employee of his or her faults and given the employee a reasonable chance to improve.

[231] It is noted in §15.47 that most courts have adopted the application of this theory in cases of dismissal for cause. In doing so, it is further noted that the

courts, in applying this theory have not:

...addressed the issue of whether or not the requirements of corrective discipline – especially the need to notify the employee of his or her faults prior to dismissal for misconduct or incompetence – are consistent with the traditional view of the common law that employers are under no duty of procedural fairness in dismissing their workers. Instead, generally, the courts have simply ignored the latter authorities when applying corrective discipline.

[232] The principle of corrective or progressive discipline was specifically adhered to in the case of *Henson v. Champion Feed Services*, 2005 ABQB 215, which is further favourably referred to in *Gillespie v. 1200333 Alberta Ltd.*, 2011 ABPC 167 (rev'd on other grounds, 2012 ABQB 105) which states in paras. 23 – 25 as follows:

23 The "progressive discipline approach", has a well established litigation history as referenced by our Court of Queen's Bench in *Henson v. Champion Feed Services Ltd.*, [2005] A.J. No. 323 (Greckol, J.), and in *Amos v. Alberta* [1995] A.J. No. 182, a decision of Veit, J., also of our Court of Queen's Bench.

24 At paragraph 51, the Court, in *Henson, supra*, stated as follows:

"51 Champion cannot use cumulative misconduct to prove just cause without having employed clear and effective warnings and the progressive discipline approach. In a unanimous decision in *Lowery v. Calgary (City)* (2002), 312 A.R. 393, [2002] A.J. No. 1225, 2002 ABCA 237, Berger J.A. stated at para. 3 that, where cumulative cause for dismissal for incompetence is alleged, the employer must prove:

1. The employee was given express and clear warnings about his performance.
2. The employee was given a reasonable opportunity to improve his performance after the warning was issued.

3. Notwithstanding the foregoing, the employee failed to improve his performance.

4. The cumulative failings "would prejudice the proper conduct of the employer's business.

52 Certainly, as suggested in *Boulet v. Federated Co-operatives Ltd.*, 2001 MBQB 174, affirmed 2002 MBCA 114, an employer faced with a chronically careless employee may prove just cause on the basis of cumulative misconduct. If Henson was such an employee, then it was up to Champion to implement warnings and progressive discipline in order to rely on such misconduct. Champion failed to do so, in striking contrast to other cases."

[233] In *Daley v. Depco International Inc.* [2004] O.J. No. 2675 (S.C.), the Court stated:

25 Given that it is open for the Courts to look at the well documented theoretical basis for progressive discipline within the arbitral jurisprudence (see paragraph 53 of *Henson, supra*), it is my view that these arbitral provisions support the following two principals:

1. It is generally unfair to impose discipline in the workplace without the employee being advised that the conduct complained of is wrong or their job performance is unsatisfactory in order that they have an opportunity to correct their behaviour or improve their performance.

2. It is generally unjust and unreasonable to pose the more serious penalty (of dismissal) before a less serious one has been used in an effort to correct an employee's behaviour (see paragraph 54 of *Henson, supra*).

[234] The requirement for procedural fairness in dismissing an employee for cause is grounded in the principle of proportionality. There must be a balancing of the misconduct of the employee against the measures that the employer has

taken to notify the employee of the employer's concerns about the employee's job performance. Employee misconduct continuing in the face of clear and unequivocal notice by the employer that the employee's job performance is unsatisfactory, coupled with a clear and unequivocal warning to the employee of the potential consequences of continued misconduct, provides the employer with just cause for dismissal of the employee and is consistent with the requirement that the employer exercise procedural fairness in dismissing an employee for cause.

[235] If the employer does not provide the employee with sufficient notice in regard to unsatisfactory job performance and adequate warning as to potential consequences, the dismissal of the employee is not a proportional response.

[236] At §15.48 of *Employment Law in Canada* it is noted that:

There are numerous recent cases in which summary dismissal has been held to be without cause by reason of the employer having failed to warn the employee clearly and unequivocally that repeated acts of misconduct would result in discharge. No warning is expected, however, where extremely serious misconduct is involved.

[237] In *Fleming v. (J.F.) Goode & Sons Stationers & Office Supplies Ltd.* (1994), 132 N.S.R. (2d) 84 (S.C.), at para. 32, sufficient notice was considered to have been provided to the dismissed employee where a warning letter that was clear and unambiguous was provided to the employee. The contents of the letter read as follows:

Mr. Bill Fleming:

This letter has reference to your failure to show up for work on Thursday, October 10, 1991, without having received prior approval, and your uncontrollable outburst in the office during the early a.m. of Friday, October 11, 1991. This type of behaviour by you has occurred in the past and we have advised you on more than (1) one occasion that such behaviour will not be tolerated from employees of this company.

On this occasion, we are advising you in writing, so there can be no mis-understanding, that should there be a re-occurrence of this type of conduct, your employment with J.F. Goode & Sons will be terminated immediately."

[238] In *Parsons v. N1 Cablesystems Inc.* (1994), 121 Nfld. & P.E.I.R. 238 (Nfld. S.C.T.D.), the employer claimed it had cause for dismissal. At para. 9, the Court noted the submission that the employee:

...was guilty of serious misconduct, habitual neglective duty, incompetence, conduct incompatible with his duties or prejudicial to his employer's business and gave as examples the following:

- (a) repetitive unauthorized use of the defendant's service vehicle outside working hours notwithstanding warnings from his supervisor(s);
- (b) repetitive misuse of expense accounts notwithstanding warnings from his supervisor(s);
- (c) repetitive misuse of company credit card;
- (d) inadequate work performance notwithstanding warnings from his supervisor(s);
- (e) inappropriate and embarrassing public conduct while using the company service vehicle;
- (f) submitting reports indicating that certain critical technical assessments were completed on behalf of the defendant, with favourable results, when subsequent investigation, following dismissal, showed that these jobs had not and clearly could not have produced favourable results, which caused the defendant considerable additional expenses, embarrassment and lost revenue; and

(g) generally failing to abide by the defendant's policies.

[239] The Court, in finding that the employer did not have just cause to dismiss the employee, made the following comments in paras. 78 and 79 in regard to the concept of adequate warning to the employee that his job was in jeopardy:

78 Warnings are sufficient where they refer to the areas of employer concern, and where, objectively, it could be implied that the employee's job is in jeopardy unless the employer's concerns are satisfied. There is no requirement that the warnings be in writing. However it must be given in clear terms and the employee must understand and appreciate the significance of the warning (*Legge v. Newfoundland Telephone Co. Ltd.* (supra)).

79 I agree that warnings given to an employee need not be in writing, but I believe, as the court said in *Legge* that any warning must be given in clear terms and it must be affirmatively shown that the plaintiff in this case understood and appreciated the significance of the warning. Not only here do we have the plaintiff denying that any warnings were, in fact, given, but we have his supervisor agreeing that, in fact, if there was anything said it was more or less said in a casual conversation and he goes as far as to say on one occasion that there was "nothing official". Under these circumstances, it is difficult to see how the company can say that the plaintiff was in fact told in sharp, clear and unmistakable tones that he would have to improve or his job would be in real jeopardy. There is just no evidence here to satisfy that requirement.

[240] In *Horvath v. Nanaimo Credit Union* (1998), 39 C.C.E.L. (2d) 148 (B.C.S.C.), the Court found that there was insufficient cause to terminate the employee on the basis of incompetence. The employer's concerns about her job performance had been provided to the employee in writing on three occasions and the employee was further notified in writing that she was being placed on a period of probation for 90 days. In para. 6 the judgment notes that in the memorandum regarding the probationary period, the employer stated:

We have had several discussions over the past six months and I have endeavored to assist you to obtain the skillsets and understanding of your position that you require. It is evident that you are having difficulties handling the responsibilities of your position, and that is having an impact on the staff and management team. Should you continue in this matter (sic) and do not show reasonable improvement by March 5, 1997 I will recommend proceedings that may lead to your immediate termination. I will assist you where ever possible, however the onus is on you to meet the challenges of your position.

[241] The employee was subsequently advised in a memorandum that directed the employee's attention to the areas in which the employer had concerns about job performance and in which improvement needed to be shown, and a new date for the employee to demonstrate the necessary improvement was extended to allow for a period of time that the employee was off work on sick leave. The employer testified that the employee could be terminated at any time within that period although could not explain why this information was not communicated to the employee in writing. The Court accepted the employee's denial that she had ever been so advised.

[242] Within this notice period as extended, the employee was provided seven e-mails or memoranda which pointed to concerns the employer had in regard to the employee's job performance. The employee was then terminated partway into the probationary period without notice.

[243] The Court found that the employer had not established employee incompetence to the requisite standard to allow for a dismissal on the basis of just cause. The Court noted, in para. 18, that the employer "...must warn the employee that her job is in jeopardy and she must be given a reasonable

opportunity to improve". The Court found that there was no such warning prior to the memorandum that indicated that the employee was being placed on probation and that the employee's job performance after that was affected by her being in an upset state while being closely supervised.

[244] The Court went on to state:

22 The plaintiff was given 90 days to show improvement, a time period selected by the defendant: after 40 days she was dismissed without notice and without the chance to show improvement within the defendant's self imposed time limits. Such conduct smacks of unfair treatment or bad faith of the kind contemplated by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. Iacobucci J. at page 742 said this for the majority:

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger*, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

23 In her minority reasons McLachlin J. agreed with Iacobucci J. that there is a duty on an employer when dismissing an employee to act in good faith: she found that it was necessary to imply a term into the contract of employment to that effect. She agreed with the notice period set by the trial judge which had been restored by

Iacobucci J., which was generous. She differed with Iacobucci J. on the method of reaching her decision. She said at pages 757 to 758:

. . . I agree with Iacobucci J. that an employer must act in good faith and in fair dealing when dismissing employees, and more particularly that "employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive"

24 The defendant's conduct in this case satisfies me that at the time of dismissal the defendant acted unfairly and demonstrated an absence of good faith in the manner of dismissal. The conduct that I find was unfair has been set out in detail earlier in these reasons. It includes the abridgement of the time for improvement; the public monitoring of her performance by Ms. Grass; and the barrage of written criticism from Ms. Braithwaite.

[245] I accept that there are circumstances, such as in the case before me, where the employer is more in the nature of a Board of volunteers than a well-established corporate entity. Certainly, in such cases, it is to be understood that the degree of business acumen expected will be lesser, including in the understanding of the employer-employee relationship. This said, dismissal of a permanent, full-time employee is nonetheless a significant and serious consequence for the employee, and she or he, regardless of the sophistication of the employer, is nonetheless entitled to procedural fairness.

Application to Ms. Goncharova

[246] As I have stated earlier, the evidence in this case is somewhat convoluted and unclear. Much of it is based on hearsay as opposed to direct observation. On numerous occasions when a witness purported to have observed something, the witness possessed little or no recollection as to date and time of the observed

event.

[247] There is little in the way of notes taken contemporaneously to events or further documentation to support any particular version of events regarding a specific instance.

[248] This is not necessarily surprising given the nature of the volunteer Board for the Facility and the nature of the employment. Although not surprising, it remains nonetheless problematic when attempting to assess credibility and reliability in order to assist in determining whether the Facility has discharged its onus to establish just cause for dismissal.

[249] In addition, the rule in regard to cross-examination as set out in *Brown v. Dunne* was often transgressed, in particular by Ms. Goncharova. This can be a somewhat difficult rule for counsel to observe, as I have often noticed, therefore I am not surprised that Ms. Goncharova failed to comply with it, notwithstanding the fairly high degree of competency demonstrated in the manner in which she conducted the trial of this matter. This said, the failure to follow this principle nonetheless affects my ability to properly consider and assess certain evidence.

[250] After considering all the evidence and applying such weight to the testimony of the various witnesses as I believe to be appropriate in each case, including any hearsay evidence, I find that the employer has not discharged its onus to establish that Ms. Goncharova was dismissed for cause.

[251] Briefly stated, I find that Ms. Goncharova was not provided procedural

fairness in the manner in which her employment was terminated in that the employer did not clearly and unequivocally advise her of what the employer's expectations were, where Ms. Goncharova was falling short of these expectations, and what the consequences would be for Ms. Goncharova if there was continued non-compliance on her part, in particular that she could be terminated.

[252] This said, I find that there was clearly a basis in the evidence for Ms. Goncharova to be put on strict notice regarding the Facility's expectations, her shortcomings in this regard and the consequences of continued non-compliance by her, preferably in writing, but at least documented in such a manner that the evidence of the giving of notice in this regard and the contents of such notice would be reliable.

[253] Such notice, however should have been based upon a comprehensive and complete set of rules, guidelines, and policies, preferably reduced to writing and clearly brought to Ms. Goncharova's attention. On the evidence as adduced, it is apparent to me that such clarity did not exist. While some areas were clear, such as the non-smoking policy, others were not, such as the requirement to wear hard hats.

[254] Again, I appreciate that the Board was comprised of unpaid volunteers and that the Manager position was part-time. I also appreciate that Ms. Miller only commenced her position as Manager in January 2014 and Ms. Goncharova was dismissed in March. This said, and recognizing the context, I find that

procedural fairness in relation to the provision of adequate notice could have been easily accomplished and that this simply was not done.

[255] I also find that, had the employer provided Ms. Goncharova such clear and unequivocal notice as to expectations, performance and consequences earlier, perhaps even as late as the start of December 2013 after the expiration of her 'probationary period', and had the employer kept a better record of events that transpired after such notice had been given, and had this record of events supported the testimony of the Society's witnesses, that there would quite likely have been cause to dismiss Ms. Goncharova.

[256] The failure to extend Ms. Goncharova's probationary period or to communicate to her after the 60 day period had expired that her job performance remained unsatisfactory is indicative, on its face, that Ms. Goncharova had demonstrated a satisfactory degree of compliance with the Facility's expectations.

[257] That does not mean that the Facility may not have had legitimate concerns regarding Ms. Goncharova's job performance or that the conduct of Ms. Goncharova prior to this probationary period is not relevant. However, concerns not communicated to Ms. Goncharova do not convey to her an expectation that her behavior still requires modification and mitigates to some extent this prior conduct, in particular as the behavior mentioned in the probation letter does not appear to have continued afterwards.

[258] As stated earlier, while I agree that prior acts of misconduct do not have to

be similar to recent misconduct in order to allow for just cause for dismissal on the basis of cumulative acts, certainly to the extent that the acts of misconduct are similar, the case for just cause for dismissal is more readily made out. If the prior acts of misconduct are substantially different than recent acts of misconduct, then the linkage between the acts needs to be well-established to allow for just cause for dismissal to be made out, and the employer's communication of concerns and expectations more clear.

[259] The Facility set out the following areas of concern in their response to Ms. Goncharova's request for reasons for her termination:

Inability to work as a team player

[260] I find that Ms. Goncharova was in many ways a difficult employee to manage. It is clear to me that if Ms. Goncharova did not agree with something, whether it was direction from a Manager or a rule or policy that she was told she had to abide by, that she would seek out other opinions in order to create an atmosphere of uncertainty. I also find that she would not go out of her way to be cooperative or provide assistance to her Managers, at least towards the end of Ms. Alexander's term as Manager and throughout Ms. Miller's term.

[261] I note that Ms. Goncharova did not avail herself of the complaints process set out in the Employee Guidelines in order to obtain a clear understanding of what the expectations were regarding the conditions of her employment, in those areas in which she states she was unclear. She had this opportunity but, for whatever reason, chose not to pursue it.

[262] This said, however, I find that while Ms. Goncharova walked the line of insubordination, I am not satisfied on the evidence that her conduct was such that it would allow for her to be dismissed on this basis.

[263] I find that Ms. Goncharova's personality brought her into conflict with some individuals at the Facility, in particular those who were in a position of authority in regard to her. A personality conflict, however, does not provide grounds for dismissal for cause, as such a conflict is not the equivalent of insubordination, which, in certain circumstances, may provide sufficient grounds for dismissal for cause.

Unannounced absenteeism during working hours;

[264] I find that there is little in the evidence to support a finding that Ms. Goncharova was, in any significant way, absent from the Facility in an unauthorized manner. I take into account Ms. Alexander's testimony that Ms. Goncharova took leave despite her request being denied by Ms. Alexander, in coming to this conclusion.

[265] I find that there was no evidence to support any pattern of such behavior on the part of Ms. Goncharova or regular occurrences of absenteeism. To the extent that there may have been times that Ms. Goncharova was absent from the Facility when she should have been there, even were I to accept the Society's evidence at its best, I find that such absences from the site would have been minimal.

Falsifying time sheets;

[266] I find that there is little to no evidence in support of a finding that Ms. Goncharova was falsifying time sheets. To the extent that there was credible evidence regarding Mr. Darichuk punching Ms. Goncharova's time-card, I find that on virtually every occasion Ms. Goncharova was present or entering into the Facility. The evidence of Mr. Darichuk in cross-examination that there was maybe one occasion that he punched Ms. Goncharova's time card and she did not come to work was, in my opinion somewhat speculative and not sufficiently reliable to place any weight upon.

Smoking in non-smoking facility

[267] I find Ms. Goncharova's evidence that she was not smoking in the office to be somewhat suspect. While most witnesses stated that they did not actually see Ms. Goncharova smoke in the office, I am satisfied that someone was smoking there and, if not Ms. Goncharova, it was certainly being done with her being compliant in this regard.

[268] I find it much more likely that Ms. Goncharova was smoking at times in her office and that she was allowing at least one other person to do so. The presence of the ashtray in the office as observed by several witnesses is evidence that I find credible, as was the smell of smoke also testified to.

[269] Certainly, to the extent that Ms. Goncharova's evidence on this issue raises some concerns about her credibility, I must consider whether these concerns are sufficient to find that the remainder of her testimony is unreliable

and not credible. I have done so and am not prepared to find that her credibility when testifying on other issues has been undermined to the extent that I would find her evidence not to be reliable.

Inability to follow worksite safety procedures as outlined by WCB [Workers Compensation Board]

[270] I find that this evidence in this area is somewhat more difficult to assess and draw conclusions in regard to.

[271] I find the evidence of the witnesses to be not particularly helpful in resolving the issue of whether Ms. Goncharova was or was not following the Society's rules and policies in this regard. In part, I am unable to come to a clear conclusion in this regard because it is not entirely clear to me what the rules and policies were and of the extent to which these were made clear and communicated to the Facility employees.

[272] I find that, in regard to PPE other than hard hats, there is insufficient evidence to allow for a finding that Ms. Goncharova was, with any degree of regularity, not wearing the required PPE. The biggest issue is whether Ms. Goncharova wore her hard hat when required.

[273] I am satisfied that Ms. Goncharova did not wear her hard hat at all locations at the Facility. There is, however, evidence that I cannot discount, that she did regularly wear her hard hat at certain locations where it was clearly required.

[274] I accept that the Society had the ability to make the wearing of hard hats mandatory at all locations at the Facility, regardless of the requirements set out by OH&S officials.

[275] I find, however, that the hard hat requirement was not as clearly set out by the Society as it needed to be in order to allow for a finding that Ms. Goncharova was ignoring safety requirements.

[276] For example, the Employee Guidelines provided to Ms. Goncharova in December, 2013 by Mr. Latour, did not stipulate that hard hats needed to be worn at all times and at all locations at the Facility. In fact, no mention is made of hard hats at all. These Employee Guidelines were issued after the WCB safety audit.

[277] While there may perhaps be an explanation for why the hard hat requirement was omitted from the Employee Guidelines, certainly I would have expected that a clear and unequivocal written direction should have issued from the Society when the hard hat controversy was becoming apparent in early 2014. No such written direction was ever in fact done.

[278] I am not satisfied that Ms. Miller's evidence that she had told Ms. Goncharova that the PPE had to be worn "100% of the time" or that on one occasion she told Ms. Goncharova that a failure to wear the required safety gear could result in her being fired, to amount to the required clear and unequivocal warning and direction that could allow for this to be a contributing factor to allow for dismissal for cause.

[279] Also, wearing PPE “100% of the time”, is not a logical requirement if taken as a blanket statement that means wearing all the PPE, at all locations and all the time. For example, ear plugs are not going to be worn when in the office and on the phone. Hard hats are not going to be worn when in one’s personal vehicle on-site and having a smoke break. It is much more logical to view the requirement to wear PPE “100% of the time” as referring to when the employee is at those locations and involved in such activities that required the wearing of PPE, and not at other times and locations. The Employee Guidelines in fact stipulated that safety vests needed to be worn at all times, but did not say the same in regard to the wearing of any other safety equipment.

[280] I find that the Society did not take the necessary steps to ensure that there was a clear and unequivocal set of rules, guidelines and/or policies that made it clear what equipment was to be worn at what locations and at what times. I find that, to the extent that there was some verbal direction provided, this direction was not entirely clear and cannot be relied upon as establishing a standard that Ms. Goncharova can then be viewed as having breached.

[281] The power to establish clear and unequivocal standards and requirements lay with the Society. It simply was not done. I say this, recognizing that I am dealing with a volunteer Board that is not paid for their time and effort for their work on behalf of the Society. I understand the distinction between the Society and the Board, and that of an employer with full-time, paid employees in charge of establishing, implementing and enforcing the employer’s expectations for employees. This said, that does not absolve the Society of providing its

employees with the necessary procedural fairness in handling the employer/employee relationship, in particular when taking steps to dismiss an employee.

[282] In conclusion, I find that the Society has failed to discharge its burden to establish that the dismissal of Ms. Goncharova was with just cause.

Damages

[283] There was little in the evidence that assists in establishing what damages should be awarded. Ms. Goncharova testified that she was unable to obtain employment insurance benefits as she was fired. That was not fleshed out any further, such as whether she ever appealed any such decision, assuming such a decision had been made. I also have no evidence as to whether and when Ms. Goncharova was able to obtain employment following her dismissal, or what the options for other employment in her community or elsewhere were.

[284] Rather, however, than re-opening the case to adduce further evidence in this regard, I am satisfied that, in the circumstances, I should proceed to assess damages on the evidence I have before me and the jurisprudence.

[285] In *Nelson v. Champion Feed Services Inc.*, 2010 ABQB 409, the court found that a dismissal was not justified due to a failure to warn the employee of about the consequences of his job performance and the fact that the employee's position was in jeopardy. In assessing damages, the Court, in para. 87, referred to the judgment in *Bardol v. Globe and Mail Ltd.*, (1960) 24 D.L.R. (2d) 140 (Ont.

H.C.) in which several factors were set out in paragraph 21 relevant to the calculation of a reasonable period of notice for dismissing an employee. These factors, as noted in *Nelson*, are:

1. The nature of the employment -- the more senior the position, the longer it is likely to take to find a replacement position. There are fewer senior management jobs around.
2. The length of service -- the longer an employee has worked for one employer, the more difficult it may be to find an alternate job. Either because the employee has narrowed his or her skills by working for one employer for a long time, or the employee has been paid more than the job is worth because of long service.
3. The age of the employee -- the older the employee is, the less likely he or she is to find a suitable position, or the longer it is likely to take. Older employees are sometimes perceived as less worthwhile to invest in.
4. The availability of suitable similar employment having regard to the employee's experience, training and qualifications together with surrounding economic circumstances -- what is the realistic prospect of this employee getting a similar replacement job? What is the job market like? In good economic times, jobs may be plentiful and the employee may have little difficulty finding a good replacement job; in poorer times, there may be few jobs around.

[286] The *Bardol* factors were confirmed in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, and were noted not to be exhaustive (paras. 81, 82)

[287] In para. 66 of *Wallace* the Court stated:

66 In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice.

[288] Ms. Goncharova had worked at the Facility for just over three years, all but several months as a full-time employee. While not a Manager, she was primarily responsible for ensuring that the day-to-day operations at the Facility ran smoothly. This included providing direction at some levels to at least the other regularly employed worker at the Facility.

[289] She is older and is in that category of individuals who will likely face more barriers from prospective employers with regard to employment opportunities than younger individuals.

[290] The community of Marsh Lake is relatively small and I would think that equivalent employment opportunities might be somewhat difficult to obtain in the community.

[291] I also take into account the manner in which Ms. Goncharova was dismissed. While I do not find any bad faith *per se* on the part of the Society, there was, in my mind, a degree of carelessness as to process, notwithstanding the attempt to ameliorate the impact by providing three week's pay in lieu of notice.

[292] In all the circumstances I am satisfied that an adequate period of notice would be 14 weeks. Deducting the three weeks pay already provided, this leaves 11 weeks pay outstanding. Rather than attempting to calculate this amount myself, using the pay stub filed as Exhibit 13 in this proceeding, the Society and Ms. Goncharova can attempt to resolve what the final amount will be. In the event that the parties cannot reach an agreement, either party can

bring an application before me on notice to the other party, to obtain an order quantifying this amount.

[293] Ms. Goncharova shall have her costs, as well as pre and post-judgment interest in accordance with the *Judicature Act*, RSY 2002 c. 128.

COZENS T.C.J.