



An appeal

- by -

Karl McClure carrying on business as Chilliwack Dry Cleaners
("CDC")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE NO.: 2017A/119

DATE OF DECISION: February 5, 2018

DECISION

SUBMISSIONS

Daniel Sorensen

counsel for Karl McClure carrying on business as
Chilliwack Dry Cleaners

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Karl McClure carrying on business as Chilliwack Dry Cleaners (“CDC”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on August 28, 2017. In that Determination, the Director found that CDC had contravened sections 40, 63 and 58 of the *ESA* in failing to pay Eleanor Winters \$7,862.56 representing overtime wages, annual vacation pay, compensation for length of service and interest. The Director also imposed three administrative penalties in the total amount of \$1,500 for the contraventions, for a total amount owing of \$9,362.56.

2. CDC appeals the Determination on the grounds that the Director’s delegate erred in law and failed to observe the principles of natural justice in making the Determination.

Completeness of the Record

3. Following the filing of the appeal, the Tribunal sought disclosure of the section 112(5) record. The Director provided 132 pages of documents obtained during the course of the appeal, including the complaint form, correspondence and legal submissions.

4. Upon receipt of that record, counsel for CDC sought disclosure of the Delegate’s “notes, memorandums or documents relating to the conduct of the hearing, or how he came to his ultimate decision.”

5. The delegate relied on Tribunal decisions *United Specialty Products Ltd.*, BC EST # D057/12, and *Fraser Valley Community College Inc.*, BC EST # D027/16, in support of his position that notes taken during the hearing did not properly form part of the record. The delegate submitted that the record was complete.

6. Counsel for CDC contended that disclosure of the delegate’s notes would not stop the delegate from taking notes, as suggested in *United Specialty Products Ltd.*. Alternatively, counsel argued, that this case was an exception to the principle set out in *United Specialty Products Ltd.* because there was “a large disconnect between the determination of facts found by [the delegate] and their application to the law.” CDC contends that although the delegate issued a decision with written reasons, there is “no explanation or record” as to how he arrived at his conclusion.

7. For the reasons outlined by the Tribunal in Reconsideration decision *Director of Employment Standards* (BC EST # RD100/15) (which were relied on by the Tribunal in *Fraser Valley Community College Inc.*) I find that the delegate’s notes of the hearing do not form part of the record and need not be disclosed. Furthermore, given that the delegate issued an 18 page Determination consisting of 8 pages outlining the evidence, 3 pages

outlining the arguments and 7 pages of analysis, I find that CDC has received the delegate's explanation of how he arrived at his conclusion.

8. This decision is based on CDC's submissions, the section 112(5) record, and the Reasons for the Determination.

FACTS AND ARGUMENT

9. Mr. McClure operates a dry cleaning business ("CDC") at which Ms. Winters was employed as a dry cleaner from October 30, 1994, until August 2, 2016. On February 2, 2017, Ms. Winters filed a complaint alleging that CDC had contravened the *ESA* by failing to pay her overtime wages and compensation for length of service.
10. The delegate conducted a hearing on June 12, 2017. CDC was represented by Mr. Sorensen, and Ms. Winters was represented by Ken Soe, a student with the Law Students' Legal Advice Program. The evidence, arguments and analysis are summarized as follows.

Facts

11. Ms. Winters was hired to work on a salary basis by the original owner of CDC, Norma Nelles, who had known Ms. Winters since childhood. Mr. McClure, Ms. Nelles' grandson, assisted Ms. Nelles with the business, and in October 2013, purchased it from her. Ms. Winters and Bridget McGlynn were largely responsible for operating the business, so Mr. McClure was not present at the premises on a full time basis.
12. Mr. McClure said that Ms. Winters was paid a salary for all hours worked. Ms. Winters worked an average of 40 hours per week on a rotating schedule that included six shifts one week followed by four shifts the following week. Although CDC did not maintain a daily record of Ms. Winters' hours of work, Mr. McClure contended that Ms. Winters was frequently late for work, including many instances after Mr. McClure told her that she would have to be on time or he would have to find someone more reliable.
13. CDC argued that there were a number of instances of misconduct that justified the termination of Ms. Winters' employment for cause, including theft of change. Mr. McClure said that he discussed the taking of change with Ms. Winters and that she explained that this had been an acceptable practice while working for Ms. Nelles. After Ms. Nelles informed Mr. McClure that she had not permitted Ms. Winters to pocket excess change, Mr. McClure told Ms. Winters that her actions were not acceptable and that her employment would be terminated if it continued. He testified that, thereafter, Ms. Winters left CDC an "IOU" for change she took and, rather than address the issue, he "moved on."
14. Other reasons CDC advanced for terminating Ms. Winters' employment included two instances in which she damaged drapes and clothing and removed the damaged items from the premises to repair them. Mr. McClure said that he reminded Ms. Winters that she was not to remove items from the premises and to report all damages. Mr. McClure testified that he told Ms. Winters that failure to comply with directives would result in the termination of her employment.

15. On another occasion, Ms. Winters used CDC equipment to launder her own clothes. When Mr. McClure asked Ms. Winters about this, she informed him that Ms. Nelles had allowed her to do so in the past. Mr. McClure told Ms. Winters that her actions were dishonest and that her employment would be terminated if she continued to use CDC equipment to clean garments for herself or friends.
16. Finally, Mr. McClure said that staff was aware that he was to be informed of any errors or refunds involving credit or debit cards. Mr. McClure said that he implemented this policy because of suspicious activity relating to the Point of Sale (“POS”) system and he believed that Ms. Winters was using customer refunds to misappropriate funds. While reviewing financial records in July or August 2016, Mr. McClure discovered a refund completed by Ms. Winters that she had not reported to him. When Mr. McClure discussed this transaction with Ms. Winters, she explained that she had overcharged a customer but that the customer had returned to the business to resolve the error. She also explained that she had contacted a POS representative who confirmed that everything had been resolved. Mr. McClure then investigated the transaction and discovered that Ms. Winters’ refund procedure caused CDC to suffer a loss of \$456.96. Although Mr. McClure testified that he discussed the loss with Ms. Winters, the only detail of the call he remembered was that Ms. Winters swore at him and hung up the telephone. Mr. McClure then went to the business and terminated Ms. Winters’ employment based on her outburst.
17. Mr. McClure testified that Ms. Winters’ disciplinary record and her failure to show improvement was also a factor in his decision to terminate her employment. After terminating her employment, Ms. McGlynn informed Mr. McClure that Ms. Winters had been closing the business early, taking money from the cash register for lunch and coffee, taking supplies from the workplace for her personal use and had continued to use the equipment to launder her own clothing after being told to stop.
18. Ms. McGlynn, a ten year employee of CDC, testified that Ms. Winters’ performance was unsatisfactory, and identified a number of infractions of workplace policies including taking items of damaged clothing home to repair and leaving time-sensitive dry cleaning items for her to complete.
19. Ms. McGlynn testified that she became suspicious of Ms. Winters’ balancing of cash at the end of each shift, and observed that Ms. Winters took change by rounding cash down to a whole number (\$175.68 down to \$175.00). Although Ms. Winters was told to stop this practice, she testified that Ms. Winters did not. Ms. McGlynn said that most of the suspicious activity regarding the cash drawers ended two or three years before Ms. Winters’ employment was terminated. Ms. McGlynn also testified that Ms. Winters took extended breaks and withheld a customer refund. Ms. McGlynn was not certain if Ms. Winters took any supplies from the business nor did she recall reporting this to Mr. McClure.
20. Ms. McGlynn also testified that on occasion, customers complained about Ms. Winters leaving and closing the business before it was scheduled to close, and that Ms. Winters continued to dry clean garments for friends or herself after Mr. McClure directed her to stop. Ms. McGlynn did not report these actions to Mr. McClure until after Ms. Winters’ employment was terminated.
21. The delegate considered two statements from Ms. Nelles, who was unable to attend the hearing in person for health reasons. Ms. Nelles stated that she was unable to recall everything about Ms. Winters’ employment, but did recall that Mr. McClure had many challenges with Ms. Winters. She also reported that Mr. McClure

had brought a number of concerns to her attention, including theft of change from the cash drawer, but she did not address those issues because she did not believe the reports or because she was too busy with other matters.

22. Ms. Nelles stated that she spoke to Ms. Winters about warnings Ms. Winters had received from Mr. McClure. According to Ms. Nelles, Ms. Winters said that Mr. McClure threatened to fire her if she continued to “cherry pick” work or hid anything from him, but Ms. Nelles was unable to recall what had been hidden. Ms. Nelles also indicated that Mr. McClure had expressed disappointment with Ms. Winters’ performance; that he was suspicious that she was stealing from the business, turning away customers and underperforming on dry cleaning duties. Finally, Ms. Nelles indicated that Ms. Winters had apparently been bringing her own or friends’ garments to the business and cleaning those garments without paying CDC for those services. Ms. Nelles did not authorize those activities.
23. After her employment was terminated, Ms. Winters informed Ms. Nelles that Mr. McClure fired her because he was upset over a mistake she made regarding a credit card transaction and had blamed her for incurring a several hundred dollar charge. Ms. Winters said that she had sworn at Mr. McClure during the discussion about this transaction and hung up on him.
24. Ms. Winters testified that she had worked for CDC for 22.5 years and had previously worked for Ms. Nelles at another dry cleaning business. She said that her shifts were between 7 and 8.5 hours long and included one hour breaks. She agreed that she sometimes took longer breaks but that Mr. McClure only asked for an explanation on one occasion. After providing her explanation, she informed Mr. McClure that it would not happen again. She also acknowledged that she took additional smoke breaks, but only if there were no customers or work to be done. She denied leaving the business before it was scheduled to close although she did agree that, on occasion, she would arrive five or ten minutes late for work on Tuesdays or Wednesdays and leave ten minutes early on Thursdays and Fridays due to transit issues. She said that she made up extra time by shortening her breaks or working after the end of her shift. Ms. Winters testified that Mr. McClure never expressed concerns about her arrival or departure times during her employment.
25. Ms. Winters also denied that she took change from CDC’s cash register for personal reasons or that Mr. McClure addressed that suspicion. She testified that she only removed money from the register if it was necessary to exchange it for other coin or bills at the bank. She also denied that she committed credit card fraud of any kind while employed by CDC.
26. Although Ms. Winters could not recall damaging a leather jacket and denied taking a jacket home to repair any damage, she did acknowledge taking a set of drapes home to fix them after realizing that they should not have been dry-cleaned. Her efforts were unsuccessful and Ms. Winters acknowledged that Mr. McClure may have told her not to do it again. Unknown to Mr. McClure, she did take a quilt home that Ms. McGlynn had damaged and repaired it to the customer’s satisfaction. Ms. Winter said that CDC had no policies or instructions regarding damaged garments; rather, Mr. McClure became frustrated and threatened to deduct the cost of the repairs from her paycheck.
27. Ms. Winters also confirmed that she turned away customers if she felt their garments could not be dry-cleaned or informed them of any risk that the garment could be damaged during the process so they could

choose whether to proceed with the cleaning or not. She further acknowledged that she cleaned and pressed her own clothes while at work, but stopped doing so after Mr. McClure told her it was no longer appropriate. She denied stealing any of CDC's supplies.

28. Ms. Winters denied that she had been warned that her employment was in jeopardy and contended that her employment was terminated without any warning. She said that four days before her employment was terminated, she unintentionally entered wrong numbers into a credit card transaction resulting in a customer overpaying for services. At the time, neither she nor the customer noticed the error. She discovered the error later that day and notified the customer, who returned to the business to obtain a refund. Although Ms. Winters did not notify Mr. McClure about the overpayment and refund, he was aware of it because he requested that she confirm the error had been resolved. Ms. Winters contacted a POS representative to do so, and after receiving the confirmation, informed Mr. McClure. When Mr. McClure was later told by POS management that his business actually suffered a loss, Mr. McClure became angry and voiced his frustration to Ms. Winters by text, in person and over the telephone. According to Ms. Winters, Mr. McClure accused her of pocketing money from the refund and demanded that she reimburse CDC. Ms. Winters agreed that she became frustrated and likely raised her voice, and told Mr. McClure to "take it out of her cheque" and hung up on him. Ms. Winters denied that she swore at Mr. McClure or used profanity in his presence.

Delegate's analysis and conclusions

29. After considering extensive submissions by counsel for both Ms. Winters and CDC, the delegate concluded that Ms. Winters was entitled to overtime wages for those hours in excess of eight hours each day and 40 hours per week every second week. The delegate noted that while Ms. Winters took extended and extra breaks and periodically would be late for work or leave early, CDC did not maintain a record of those instances or any record of Ms. Winters' daily hours of work. The delegate also noted that Ms. Winters' salary was never reduced for tardiness or failure to work. The delegate determined that those issues were performance problems that ought to have been addressed through corrective discipline or a reduction in pay based on actual work performed during employment. The delegate dismissed CDC's argument that Ms. Winters' salary was inclusive of overtime, determining that there was no evidence, either in a written employment agreement or payroll records, to demonstrate that was the case. The delegate found that Ms. Winters' salary was not inclusive of overtime wages and determined that she was entitled to overtime wages and vacation pay on the outstanding wages.
30. The delegate also imposed two administrative penalties on CDC for failing to pay overtime wages in contravention of section 40 of the *ESA*, and for failing to maintain a record of Ms. Winters' daily hours of work contrary to section 28 of the *ESA*.
31. In assessing whether or not CDC had established just cause to terminate Ms. Winters' employment, the delegate decided that the decision of the Supreme Court of Canada in *McKinley v. BC Tel* ([2001] 2 S.C.R. 161), which was relied on by both parties, to be a helpful and leading authority. The delegate considered this case along with relevant Tribunal decisions.
32. The delegate found as a fact that Ms. Winters was late for work, took cash from the cash drawers, concealed customer property damage, and laundered her own garments at CDC's business free of charge. The delegate

also found that Ms. Winters failed to report an error/refund to Mr. McClure contrary to instructions. The delegate concluded that all of these incidents constituted minor workplace infractions unworthy of immediate dismissal for cause and were treated as such by CDC. The delegate noted that while taking cash from a cash register could be considered as serious dishonesty, Ms. Winters' employment was not terminated after CDC discovered this behaviour and the delegate was not convinced it ought to be treated any different than a minor workplace infraction.

33. The delegate noted Ms. Winters' evidence that she was never warned by Mr. McClure that her employment was in jeopardy, and despite evidence to the contrary from Mr. McClure, determined there was no reliable evidence to substantiate Mr. McClure's testimony. The delegate gave little weight to Ms. Nelles' statement in light of the fact that it was unsworn and that Ms. Nelles had trouble recalling details of Ms. Winters' employment and disciplinary warnings. The delegate found that there was no evidence establishing that Ms. Winters was clearly warned that her employment was in jeopardy.
34. The delegate then analyzed whether the incident in which Ms. Winters was insubordinate in failing to advise Mr. McClure about a customer refund, the allegation of theft and dishonesty for misappropriating funds through a credit card refund and insolence constituted just cause for the termination of her employment.
35. The delegate found that Ms. Winters' failure to report a customer refund constituted a minor workplace infraction given that this was an isolated breach of a policy that was never repeated and could not therefore constitute just cause. The delegate determined that CDC's allegation that Ms. Winters misappropriated funds were unsupported by any evidence. The delegate concluded that, in the absence of any compelling evidence, CDC's suspicions were not grounds for termination for cause.
36. The delegate then considered the alleged act of insolence during a conversation just prior to Ms. Winters' termination. The delegate noted that Mr. McClure could not recall anything about the conversation except that there was an outburst. The delegate considered the evidence of both parties that they were upset, and found it likely that Ms. Winters said "take it off my cheque."
37. The delegate found it difficult to determine, on the evidence presented, whether or not Ms. Winters swore at Mr. McClure. However, he determined that even if she had, that isolated incident was insufficient, in the context of a 22 year employment relationship, to establish grounds for just cause termination. The delegate noted that although Ms. Winters and Mr. McClure's working relationship was troubled at times, there was no evidence Ms. Winters had ever directed similar, inappropriate outbursts towards him. He noted CDC had never previously warned Ms. Winters about any similar misbehaviour or misconduct. The delegate found that, while unfortunate and deserving of discipline, the outburst in the circumstances was not extreme and dismissal without compensation for length of service was a disproportionate response.
38. The delegate also considered CDC's argument that, in the alternative, CDC had grounds to terminate Ms. Winters' employment for after-acquired cause.
39. The delegate noted the Tribunal's comments in *Director of Employment Standards* (BC EST # RD074/17) that "after-acquired evidence must be closely scrutinized to ensure that it is reliable, cogent and probative"

and that the employer must demonstrate that it could not have reasonably discovered the evidence at an earlier point in time.

40. The delegate noted that, with respect to the fact that Ms. Winters took cash from the cash register, Ms. McGlynn's evidence was that any suspicious activities subsided two years prior to Ms. Winters' termination, and that, while he was aware that Ms. Winters continued to take change and left "IOU" notes in the cash drawer, Mr. McClure "moved on" rather than address the issue. Determining that Mr. McClure condoned Ms. Winters' actions, the delegate found that this did not constitute after-acquired evidence.

41. Similarly, the delegate determined that Mr. McClure was aware that Ms. Winters was taking excessive breaks during her shifts and condoned it. Furthermore, he noted that Ms. Winters was never given any written warnings about her actions and that this could not be used to justify termination on the basis of after-acquired evidence.

42. The delegate determined there was an insufficient evidentiary basis to conclude that Ms. Winters was engaged in wrongdoing in taking CDC supplies home during her employment or closing the business and leaving work before its scheduled closing time. Consequently, the delegate found no basis for termination for just cause on these grounds.

43. Finally, the delegate considered the evidence that Ms. Winters was cleaning her own laundry at the business without paying for it despite being warned not to do so, and found no credible evidence that Ms. Winter continued to launder her own clothes after September 2015, when Mr. McClure issued the warning. The delegate was not persuaded Ms. Winters willfully and deliberately disobeyed Mr. McClure's directive or that she was clearly warned that her employment would be in jeopardy if she continued to do so, and found CDC had not established just cause.

44. The delegate concluded Ms. Winters was entitled to compensation for length of service plus interest.

Argument

45. CDC argues that the delegate erred in his conclusion that the Employer had failed to establish that Ms. Winters was dismissed for cause and entitled to compensation for length of service and in his conclusion that Ms. Winters was owed overtime wages.

46. CDC argues that the delegate improperly placed the onus on the Employer to establish that Ms. Winters' salary included overtime. CDC contends that the onus is on the Employee to demonstrate that they were not paid overtime and that Ms. Winters provided no evidence to suggest that her salary did not include overtime.

47. CDC argues that despite finding as fact that Ms. Winters committed theft, concealed property damage, laundered her own clothes at work free of charge, was insolent, tardy and failed to correctly report returns, the delegate erred in concluding that all these were minor workplace infractions unworthy of immediate dismissal. CDC says the core question to be decided is to determine whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. CDC argues that theft is generally considered a serious breach of the employment contract. It also contends that lateness will

constitute grounds for summary dismissal where it is sufficiently serious to amount to conduct incompatible with the employee's duties.

48. CDC also argues that the delegate incorrectly applied the test for just cause based on cumulative misconduct. CDC says that while the delegate considered the alleged condonation of the acts of misconduct by Mr. McClure, he failed to take into account the principle that where certain acts may have been condoned earlier on, they can still be taken into account when assessing the cumulative effect of those actions. CDC says that all of Ms. Winters' acts of misconduct, either independently or cumulatively, establish just cause for the termination of Ms. Winters' employment.
49. Finally, CDC argues that the delegate incorrectly applied the facts to the law surrounding after-acquired cause. CDC says that while Mr. McClure may have been aware of some instances of theft as well as tardiness and prolonged breaks, the frequency and scope of these actions did not become clear to Mr. McClure until after he dismissed Ms. Winters and spoke to Ms. McGlynn. CDC asserts that this evidence could not have been reasonably discovered at an earlier point as it would have required Mr. McClure to constantly surveil Ms. Winters.
50. Alternatively, CDC argues that the Determination was procedurally unfair and the decision was not within the range of possible outcomes. As I understand the argument, CDC says that the delegate's reasons are not transparent or intelligible, failing to answer why Ms. Winters' repeated transgressions did not amount to just cause for dismissal.

ANALYSIS

51. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.

Error of law

52. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.

Overtime wages

53. I am not persuaded that the delegate erred in placing the onus on the Employer to establish that Ms. Winters' salary included overtime. Section 28 of the *ESA* requires an Employer to maintain certain employee records, including the hours worked each day by an employee regardless of whether the employee is paid on an hourly basis. The delegate considered the Employer's statutory obligation to maintain records, the absence of proper records as well as the employment contract, in arriving at his conclusion. I find no legal error in his analysis.

Compensation for length of service

54. CDC advances a number of arguments in support of its appeal of the delegate's conclusion that CDC had not established just cause. I am not persuaded, after a careful review of the delegate's extensive reasons, that his conclusion was irrational or perverse, or was not one he could reasonably arrive at.
55. The delegate determined, correctly in my view, that the Supreme Court of Canada's decision in *McKinley (infra)* was relevant to his analysis. In *McKinley*, the Court mandated that a "contextual approach" should be taken when evaluating if an employee's dishonesty gives an employer just cause for dismissal (at paras. 48 and 49):

... I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

56. The delegate also considered Tribunal decisions on the concept of just cause.
57. In *Kenneth Kruger* (BC EST # D003/97) and many other Tribunal decisions, the Tribunal has stated that the burden of establishing just cause rests with an employer.
58. In *Kruger*, the Tribunal set out the following principles:

Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

- 1) A reasonable standard of performance was established and communicated to the employee;
- 2) The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
- 3) The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
- 4) The employee continued to be unwilling to meet the standard.

Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

59. The Tribunal has followed and applied these principles to questions of just cause on many occasions. In *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST # D374/97), the Tribunal noted that:

... the concept of just cause requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that his or her work performance is acceptable to the employer.

60. The delegate considered the fact that Ms. Winters was a 22 year employee without any written disciplinary warnings before her employment was terminated following an isolated outburst. The delegate found no evidence of any progressive discipline for any of the minor instances of misconduct which Ms. Winters acknowledged. The delegate also concluded that while Ms. Winters' taking of money could be considered serious misconduct, because the employer did not issue any written warnings or follow up with any disciplinary actions, the employer in effect condoned her behaviour or considered it minor misconduct. The delegate noted that, in any event, Ms. Winters had stopped the practise of taking money several years before her employment was terminated and did not support just cause termination. I am not persuaded that the delegate's conclusions were perverse or unreasonable.
61. The delegate found that the culminating event that led to Ms. Winters' termination, that is an incident of improper reporting of a credit card transaction leading to a heated discussion between the parties, was not sufficiently serious to justify termination for just cause, noting that the allegation of fraud was unsupported by credible evidence, that if in fact Ms. Winters used profanity, it was an isolated incident and, in the context of the 22 year employment history, did not warrant immediate termination. Considering the factors outlined in *McKinley*, I find that his conclusion was within a range of reasonable outcomes.
62. While it is apparent that CDC disagrees with the ultimate conclusion, it has not shown that any of the factual findings or conclusions were made without any evidence at all or were perverse and inexplicable, or that the delegate misapplied the law of the *ESA* relating to just cause.
63. I am also not persuaded that the delegate erred in his conclusion that the cumulative effect of Ms. Winters' conduct was insufficient to establish just cause. Many of Ms. Winters' actions had stopped after she had been warned or were condoned. In those circumstances, the Employer cannot rely on that conduct to substantiate just cause termination.

64. The delegate also considered CDC's argument of after-acquired cause and found that the Tribunal's test for termination based on after-acquired cause had not been met. Not only did the delegate find the evidence to be lacking, he determined that the CDC was aware of much of the conduct it relied on to establish just cause prior to terminating Ms. Winters' employment. I find no error in his analysis.
65. The appeal is dismissed.

ORDER

66. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated August 28, 2017, be confirmed in the amount of \$9,362.56 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal