Employment Standards TRIBUNAL

Citation: Jason A. Jeffrey (Re)
2018 BCEST 34

An Application for Reconsideration

- by -

Jason A. Jeffrey
(the "Applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

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

TRIBUNAL MEMBER:	Kenneth Wm. Thornicroft
FILE No.:	2018A/26
DATE OF DECISION:	March 27, 2018

DECISION

SUBMISSIONS

Jason A. Jeffrey on his own behalf

INTRODUCTION

1. Jason A. Jeffrey (the "Applicant") has filed an application pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2018 BCEST 13, a decision issued by Tribunal Member Gandhi on February 7, 2018 (the "Appeal Decision"). The Applicant says that the Appeal Decision should be cancelled and the matter referred back to another appeal panel.

2. By way of the Appeal Decision, the Tribunal allowed an appeal filed by the Applicant's former employer, Costco Wholesale Canada Ltd. (the "Employer"), and cancelled a Determination issued on February 8, 2017, pursuant to which the Applicant was awarded the equivalent of eight weeks' wages (plus vacation pay and interest) as compensation for length of service (see section 63 of the *ESA*).

3. At this juncture, I am considering whether this application passes the first stage of the *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98). If the application passes this hurdle, the respondents will be notified and requested to file submissions in response to the instant application. If the application does not pass the first stage of the *Milan Holdings* test, it will be dismissed and the Appeal Decision will be confirmed.

4. In assessing this application I have reviewed the entire record that was before the Tribunal when the Appeal Decision was issued as well as the Appeal Decision and the Applicant's submissions appended to his Reconsideration Application Form.

FACTUAL BACKGROUND & PRIOR PROCEEDINGS

5. On July 6, 2016, and following a complaint from a customer, the Employer suspended the Applicant and on July 11, 2016, formally terminated his employment. The Employer alleged it had just cause for dismissal (see subsection 63(3)(c) of the *ESA*) and, as such, did not pay the Applicant any compensation for length of service. The parties agree that if the Applicant is entitled to compensation, the amount is $8,208 (eight weeks' wages) together with concomitant vacation pay and section 88 interest.

6. The Applicant filed a complaint under the *ESA*, asserting that there was no just cause for his dismissal and, in particular, challenging certain allegations against him regarding his use of profanity toward a customer.

7. The complaint was the subject of a hearing held on December 6, 2016, before Jordan Hogeweide, a delegate of the Director of Employment Standards (the "delegate"). This hearing was conducted via teleconference and, given the diametrically opposed versions of the critical events that precipitated the Applicant's dismissal, an in-person hearing almost certainly would have been the preferred option.

8. As noted above, the Applicant was dismissed following a complaint from a firm customer. The customer did not testify at the hearing and this failing was a critical element in the delegate's analysis of the evidence before him. Although the customer did not testify at the hearing, her statement – in the form of an e-mail communication to the Employer – was submitted (along with the Applicant's lengthy disciplinary history) prior to the hearing and relied on by the Employer at the hearing. The customer alleged that the Applicant, who was a tire installer, walked away from her when questioned about how long her vehicle might be in the service bay and when she persisted ("excuse me, I was talking to you"), he told her to "go fuck yourself". She walked away but later, and from a distance, she took a photograph of the Applicant (since he was not wearing a name identification tag) so that she could report him to the store's management. According to the customer's statement:

> ...[the Applicant] proceeded to cross the road way and asked me what I was doing. I told him that I was planning to send an email to [the Employer] and because he had no name tag, I was going to attach a picture. He became argumentative with me, and told me he wasn't rude to me...I told my kids, let's go, and he again told me to F*ck off. Loudly enough that my 10 year old daughter repeated what he said to me...He was aggressive and rude.

The substance of the customer's complaint (including the Applicant's use of profanity) was set out, not only in the above e-mail, but also in separate conversations with the assistant store manager and the Applicant's direct supervisor, the tire shop manager.

9. During an investigative meeting that occurred later that day (July 5, 2016), the Applicant denied directing any profanities, or doing anything else improper, during his interactions with the customer and claimed that she "was just being a bitch" (see the delegate's Reasons for the Determination – the "delegate's reasons" – at pages R3 and R4). While the Applicant conceded he approached the customer when she was photographing him, he maintained he only told the customer that he was "sorry she felt that way" when she questioned him regarding his rude behaviour (delegate's reasons, page R6). The Applicant conceded at the complaint hearing that "he could have been more helpful toward the [customer]" and "that it was an important policy to be courteous and helpful toward [customers]" (page R7).

10. The Employer submitted an extensive disciplinary history regarding the Applicant but the delegate – and this constituted a legal error with respect to his analysis of the just cause issue – discounted this evidence because the Employer "argued that [the Applicant's] behaviour on July 5, 2016 was so serious that it alone established just cause" and thus his analysis focussed "on [the Applicant's] actions on that day". Unquestionably, the Employer *did* argue that the Applicant's behaviour on July 5, standing alone, justified summary termination without notice or payment in lieu of notice. However, the Employer maintained that it argued an alternative position, namely, the events of July 5 constituted a culminating event (although the Employer, who was represented by several store employees, did not use this precise term) that, in light of the Applicant's disciplinary history, justified his summary dismissal.

11. Although the Employer's evidence regarding the Applicant's use of profanity was hearsay evidence, that does not necessarily mean that this evidence had no probative value, particularly if it was otherwise "necessary" and "reliable" evidence (see, for example, *R v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; and *R. v. Baldree*, [2013] 2 S.C.R. 520). The delegate did not engage in any sort of "necessity/reliability" analysis in rejecting the Employer's evidence regarding the Applicant's use of profanity. Clearly, the Applicant had a

very strong incentive to deny using profanities inasmuch as such language, standing alone, would have, at least in my view, certainly justified his summary dismissal. It is not apparent to me what incentive the customer had to fabricate such a story – among other things, by communicating a wholly made-up story to the Employer's representatives regarding the Applicant's profane language (which undoubtedly would have resulted in the Applicant being disciplined, and quite possibly dismissed), she risked being sued for defamation.

12. The Applicant acknowledged that the customer's account of the events in question was entirely accurate save for the use of profanity (see subsection 112(5) Record at pages 52 – 53). The Applicant's disciplinary record showed that he had, in the past, directed profanity of a similar nature toward his co-workers (see Record, pages 64, 87 and 89). Further, the Applicant conceded he referred to the customer as a "bitch" in his July 5 meeting with the Employer's managers. The delegate stated that he had "reservations about [the Applicant's] account of his behaviour toward the [customer] on July 5, 2016" and that he "minimized his responsibility" and "deflected blame" for his behaviour (delegate's reasons, page R8). In my view, the delegate, based on the evidence before him, could have concluded that the Applicant did use profanity and, had he done so, I do not believe that finding would have amounted to an error of law.

13. However, since the customer was not called as a witness, thereby depriving the Applicant of an opportunity to confront her directly, and because the Applicant was the only party who provided "first hand evidence", the delegate gave "less weight to [the customer's] evidence" and concluded that the Applicant's evidence "is more reliable". In fact, the delegate completely rejected the customer's version of events and took the Applicant, despite having reservations about his account of the events in question, at his word.

14. I am troubled by the delegate's analysis of this conflict in the evidence. Tribunal Member Gandhi, at para. 20 of the Appeal Decision, accepted the delegate's conclusion that the Applicant did not use any profanities in his dealings with the customer. Member Gandhi characterized this finding as a finding of fact with which he could not interfere. Although the customer's evidence regarding the use of profanity was hearsay, as noted above, that is not, of itself, fatal to its admissibility, nor does it necessarily follow that the evidence had no probative value. The Tribunal has the specific statutory authority to receive hearsay evidence (see subsection 103(d) of the *ESA* and section 40 of the *Administrative Tribunals Act*). Although the Director of Employment Standards does not have a similar statutory power regarding the consideration of hearsay evidence, the Tribunal has held in several decisions that hearsay evidence is admissible in proceedings before the Director's delegates, but it must be viewed with some caution given that there is no opportunity to question the person who allegedly made the statement (see, for example, *D'Hondt Farms*, BC EST # D144/04, and *Dr. D. Ciarniello Inc.*, BC EST # RD060/08).

15. The customer's evidence on this matter, hearsay though it may have been, was orally communicated to two separate individuals (both of whom testified at the hearing) and later, communicated to the Employer in a closely contemporaneous written form. All three versions are consistent, the customer had no incentive to lie and, in all other respects save for the use of profanity, her version of the events was fully corroborated by the Applicant.

16. By contrast, the Applicant had every incentive to lie about his use of profanity and the delegate specifically stated that he had "reservations" regarding the Applicant's version of events. There was evidence before the

delegate showing that the Applicant had previously directed profanities at co-workers. I wholly endorse Tribunal Member Gandhi's characterization of the Applicant's disciplinary history (at para. 39):

> The [Applicant] appears to have demonstrated, since 2011, a relatively regular pattern of discourteous or contemptuous behaviour, or insubordination, in his dealings with other people – including incidents for which he received some sort of written notice or verbal reprimand on August 29, 2012, May 14, 2014, March 13, 2015, and August 29, 2015.
>
> There is evidence in the Record concerning the [Applicant's] periodic poor treatment of fellow staff, and other specific incidents of insubordination or in which the [Applicant] tells others to "fuck off".

17. None of the foregoing is intended to exculpate the Employer from its inexplicable decision not to call the customer as a witness at the complaint hearing. The Applicant, from the outset, denied directing profanities toward the customer and, very obviously, the relative credibility of the customer's versus the Applicant's version of events was going to be the central issue at the hearing. The Employer is a large, international retailer and the sloppy presentation of its case should not be countenanced (this is not a criticism of its legal counsel, who was not retained until after the Determination was issued). If the customer was unavailable to attend a teleconference hearing – and there is nothing in the record to suggest that was the case – at the very least, the Employer could have obtained a sworn statement from her.

18. Nevertheless, and despite the absence of the customer's direct evidence, in my view, it was open for the delegate to reject the Applicant's bald denial that he did not direct any profanities toward the customer and I am equally of the view that the delegate erred when he appeared to reject the customer's version of events simply because it was hearsay. While, for the purposes of this application, I accept the delegate's conclusion that the Applicant did not use any profanities, I am not fully satisfied that the delegate's finding was entitled to absolute deference and these reasons should not be taken as endorsing Member Gandhi's treatment of this particular evidentiary matter. Finally, and simply for the sake of completeness, I should observe that if the delegate had found the Applicant used profanity as the customer alleged, that egregious misconduct, especially in light of his unenviable disciplinary history, would have certainly justified his summary dismissal.

19. Returning to the Determination, the delegate concluded that "on the balance of probabilities…[the Applicant] did not say profanities or act overly aggressively toward the [customer]" and that while the Applicant was "discourteous" and "failed to provide the [customer] with the level of courtesy that [the Employer's] policies required…the misconduct was [not] so severe as to have fundamentally damaged the employment relationship beyond repair" (delegate's reasons, pages R8 – R9).

20. As discussed above, the delegate limited his analysis of the just cause issue to the events that occurred on July 5, 2016. However, the Employer also put the Applicant's entire work history in issue. With respect to this evidence, the delegate noted that the Employer "did not specifically allege just cause based on previous misconduct which had been subject to progressive discipline", but nonetheless characterized "most of this history as insubordination toward management and conflict with co-workers". The delegate concluded that since "four and a half years elapsed without a similar occurrence [*i.e.*, rudeness to a customer], I am not satisfied that these two incidents of misconduct [relating strictly to customer rudeness] combine to amount to just cause" (delegate's reasons, page R9).

21. Member Gandhi issued two separate decisions in this appeal, the second of which is the subject of this reconsideration application. The Appeal Decision followed an earlier "referral back" order – see BC EST # D084/17. The referral back order was issued because the delegate erred in law in his treatment of the just cause issue. More particularly, the delegate failed to properly apply the "contextual analysis" mandated by the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 (see also *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168 and *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127). The Tribunal has similarly held that "just cause" within subsection 63(3)(c) of the *ESA* must be evaluated "contextually" (see, for example, *Cornell Holdings Ltd.*, BC EST # D027/13).

22. The delegate concluded that although the Applicant did not use any profanity, there was misconduct on his part. Accordingly, the delegate was obliged to consider whether this misconduct, in light of all the relevant contextual evidence, warranted summary dismissal. In the "referral back" decision, Member Gandhi outlined the analytical framework that the delegate was directed to apply to the evidence (at para. 18):

> (i) Does the evidence establish misconduct, on a balance of probabilities?
>
> (ii) If yes, does the misconduct amount to a fundamental breach of the employment relationship?
>
> (iii) If no, does the misconduct relate to a standard, set and communicated to the employee, which the employee has failed to meet, having had a reasonable opportunity to do so and where the employee knows that failure to meet the standard could or would result in termination?

23. In his written submission to the Tribunal filed in response to the Employer's appeal, the delegate conceded that the Applicant behaved improperly and that the evidence in this regard was "compelling". However, the delegate also conceded that he did not consider the Applicant's disciplinary history, the nature of his employment, the impact of his behaviour on the Employer's business, or his characterization of the customer in his July 5 meeting with the Employer's managers (referring to her as a "bitch") in determining whether the Employer had demonstrated just cause for dismissal (see the "referral back" decision at para. 19). Accordingly, since the delegate failed to undertake the contextual analysis mandated by *McKinley*, Member Gandhi referred the matter back to the delegate so that he might review the evidence in light of the *McKinley* contextual framework.

24. As directed by the "referral back" decision, the delegate prepared a report, dated November 7, 2017, and filed with the Tribunal on November 8, 2017. In that report, the delegate reiterated his conclusion set out in his reasons that there was no just cause for dismissal. In particular, the delegate noted that while the Applicant had a poor disciplinary record, most of his offences did not concern "customer courtesy" and he had a lengthy period of employment (nearly 15 years). The delegate considered that an incident of customer discourtesy was not as significant for the Applicant – a tire installer who did not regularly interact with customers – as it would have been for a salesperson. The delegate concluded that the Applicant's interactions with the customer on July 5, 2016, did not, of itself, justify his summary dismissal:

> ...I am still not satisfied that this single act of misconduct was so serious that when viewed in the context of [the Applicant's] nearly 15 years of employment, his disciplinary history, and the nature of his job as a tire installer that it amounted to a fundamental breach of the employment relationship so as to establish just cause for his termination.

25. Similarly, the delegate did not consider that taking into account all of the relevant contextual circumstances, including the Applicant's lengthy disciplinary record, there was just cause for dismissal. The delegate noted:

> [The Applicant's] failures to meet other standards and the warnings he received are relevant in considering his conduct on July 5, 2016. They show that he was on notice for failing to meet many different standards. But the notices that [the Applicant] received did not specifically identify customer courtesy as a standard where he was currently deficient and clearly warn him that any subsequent failure to meet the standard would result in his termination.
>
> After considering the evidence in this light, I am not satisfied that [the Applicant] was adequately notified that he would be fired for failing to meet the standard of customer courtesy by behaving in the way he did on July 5, 2016. As such, I am not satisfied that just cause has been established...

26. The delegate's November 7 report was provided to the parties for their response and with those submissions in hand, Member Gandhi was then in a position to issue a final order in the appeal. Member Gandhi allowed the appeal and cancelled the Determination. Although Member Gandhi accepted the delegate's submission that the events of July 5, 2016, did not constitute a "fundamental breach of the employment relationship" justifying summary termination (para. 29), he rejected the delegate's finding that, *after considering all of the relevant contextual factors*, there was no just cause (see paras. 41 – 43).

27. At this juncture, I wish to briefly comment on the concept of a "fundamental breach" of the employment relationship. In *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 S.C.R. 500, the Supreme Court of Canada, albeit in a constructive dismissal rather than an express dismissal case, expressed the view that the term "fundamental breach", which has a specific meaning when interpreting contractual exclusion clauses, should not be used in the context of employment contracts; the term "substantial breach" is the preferred term (see also section 66 of the *ESA* that refers to a "substantial alteration" of a condition of employment). Either way, the concept is the same: a single momentous breach of an employment contract may justify summary termination (for example, theft or a fraud perpetrated on the employer – see *McKinley* at para. 51). However, where the employee's behaviour does not rise to this level, the employer may yet have just cause if, considering the entire context of the employment relationship, the nature and severity of the employee's misconduct is irreconcilable with sustaining the employment relationship (see *McKinley* at para. 57).

28. Member Gandhi made the following observations in the course of rejecting the delegate's position that the employment relationship in the instant case was not irreparably damaged:

- The Employer satisfied its evidentiary burden of demonstrating misconduct on the Applicant's part (para. 19);
- "The Report echoes the same conclusions drawn in the Determination – the [Applicant] did not provide the customer with the level of courtesy required according to the policies enforced by the [Employer]" (para. 18);
- There is no differential standard regarding "customer courtesy" depending on the nature of the employee's position – "...the question is not who is rude, so much as it is just how rude they are" (para. 25);

- "...the [Applicant] was 'well aware' of the need to be courteous and helpful when dealing with customers" (para. 30);
- "...in the circumstances of the July 5, 2016, incident, the [Applicant] failed to meet the standard set for him" (para. 32);
- "...the delegate erred in discounting the 2011 discipline event [because] it establishes...that the [Applicant] was on a 'short leash'' (para. 37) [this event concerned a 3-day suspension for profanities directed toward co-workers and a service refusal/rudeness incident involving a customer; a "Formal Written Warning Letter" stated that further policy breaches could result in termination – see the delegate's reasons, page R6];
- the delegate took a "far too restrictive" approach in assessing only past incidents in the Applicant's disciplinary history that involved customer discourtesy (para. 38);
- The Applicant's disciplinary history demonstrated "an underlying, somewhat pervasive, level of intemperate, petulant, and uncooperative behaviour" (para. 25; see also para. 39) and that, overall, the July 5 incident "relates to a standard set and communicated to the [Applicant], which [he] has failed to meet, having had a reasonable opportunity to do so, while knowing that such failure could or would result in termination" (para. 41). Further, this incident "was ultimately prejudicial to the [Employer's] interests in establishing and maintaining a specific standard of customer service" (para. 42).

29. Member Gandhi concluded that, considering the totality of the relevant circumstances, the Employer had just cause for dismissing the Applicant and that the delegate erred in law in concluding otherwise. Thus, the Determination was cancelled.

THE APPLICATION FOR RECONSIDERATION

30. The Tribunal has established a two-stage analytical framework, known as the *Milan Holdings* test, for adjudicating section 116 reconsideration applications. At the first stage, the application is assessed to determine if it is timely and otherwise presumptively meritorious. In order to pass the first stage, the application should not simply be an attempt to have the Tribunal reweigh evidence or reconsider previously rejected arguments in the absence of compelling new evidence, or clear and obvious error, or a fundamental natural justice failing. As stated in *Milan Holdings* (at page 7):

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

31. If the application passes the first stage, all parties will be given the opportunity to make submissions regarding the merits of the application and the Tribunal will then issue a decision fully addressing the merits of the application. If the application does not pass the first stage, it will be dismissed without further review.

32. The Applicant did not frame his application in accordance with the *Milan Holdings* analytical framework and this somewhat disjointed application includes a number of assertions that are not properly within the ambit of a section 116 application (for example, allegations regarding poor treatment at the hands of his Employer at different times during the course of his employment or that he was not part of a "favoured" group within the workplace) or are otherwise somewhat unclear (for example, the Applicant appears to be very upset that the Appeal Decision was posted – as are all Tribunal decisions – on the Tribunal's website but does not explain how or why this was improper or relates to his section 116 application).

33. Nevertheless, as I understand the Applicant's position, his various challenges to the Appeal Decision may be summarized as follows:

- First, the Tribunal erred by refusing to limit its consideration of the "just cause" issue solely to the events of July 5, 2016. In other words, the Applicant says that the Employer was only entitled to argue that the events of July 5 constituted a substantial breach of the employment contract justifying summary termination. The Applicant appears to be suggesting that the Employer was not entitled to alternatively argue that the Applicant's entire employment history, and the context within which the July 5 incident occurred, were factors that could be properly considered in determining if there was just cause for dismissal: "…We understood undeniably that ***'Termination' and 'Just Cause' for Termination was strictly based on 'Alleged' Incident July 5, 2017***" [*sic*; ***emphasis*** in original text].
- Second, and by way of a somewhat related argument, the Applicant says that since he had already been disciplined for his earlier misconduct, it was an error for the Tribunal to consider this misconduct once again following the July 5 incident. Although the Applicant did not use this term, it appears he is advancing something akin to a "double jeopardy" argument: "…the Employer was given a second opportunity with new set of circumstances with previous and dated discipline notes in work history file, to incorporate for the purpose of a different understanding of why Termination with just cause in now deemed. *How many opportunities and various strategies is it 'Fair' for an Employer to exercise in order to achieve justification for Termination?*" [*sic*].
- Third, the Employer failed to prove just cause for termination: "Failed to 'Prove' their position of the Alleged Incident, July 5, 2016 As 'Just Cause' for Termination – failed to invite [the customer] to the Hearing" [*sic*]. "Considering the serious level of accusation of Misconduct with a [customer], I was surprised and curious why in fact the [customer] was not invited to the hearing. '**Why is the [customer] not at this hearing**?'" [*sic*; **emphasis** in original text].
- Fourth, the termination was undertaken contrary to the Employer's internal policies and procedures: "Failed to follow appropriate procedures to Involve [the Employer's human resources personnel] for the purpose of a Termination procedure process" [*sic*].
- Fifth, and more generally, the Applicant has advanced several mostly unparticularized allegations against Member Gandhi, accusing him of acting "unfairly" and failing to properly consider all relevant evidence.

FINDINGS AND ANALYSIS

34. I propose to address each of the Applicant's arguments in turn.

35. First, and with respect to the delegate's treatment of the just cause issue, the delegate restricted his analysis of this issue to a consideration of whether the events of July 5, 2016, standing alone, justified the Applicant's summary dismissal. The delegate noted, at page R8 of his reasons, that the Employer was *not* arguing that the July 5 incident, *considered in light of the Applicant's entire disciplinary history*, gave the Employer just cause for dismissal. Rather, the Employer was relying solely on the events of July 5 to support its just cause argument. I should note that the Employer strongly contested the delegate's assertion in this regard – as noted in the affidavit sworn by its Director of Human Resources and appended to its Appeal Form (at para. 12), the Employer's position was twofold. First, it argued that the July 5 incident, standing alone, justified summary dismissal. However, the Employer alternatively argued that the July 5 incident "provided [the Employer] with just cause based on the entirety of the [Applicant's] employment history". The delegate notes, at page R5 of his reasons, that the Director of Human Resources testified about the Applicant's disciplinary history and one wonders why she would have provided this evidence unless it was to buttress the Employer's position that there was just cause for dismissal.

36. It may well be that the Employer's representatives at the hearing (none of whom was a lawyer) were not as clear as they might have been regarding their reliance on their alternative position; it may equally be the case that the delegate simply misunderstood the position that the Employer was taking. Either way, the legal test governing just cause is the *McKinley* framework and, in that regard, evidence regarding the Applicant's entire disciplinary history – which was placed before the delegate – should not have been wholly ignored but, rather, should have been taken into account once the delegate determined that the July 5 incident, standing alone, did not justify summary dismissal. I entirely agree with Member Gandhi's conclusion that the delegate erred in law when he refused to consider the Applicant's disciplinary history in determining whether the Employer had just cause for dismissal.

37. The Applicant's position appears to be that his prior disciplinary history should not have been taken into account because he had already been disciplined for events that occurred before July 5, 2016, and that he was, in effect, being disciplined yet again regarding misconduct for which he had already been sanctioned. While it is generally improper for an employer to impose, at a later point in time, new sanctions for misconduct that has already been sanctioned, this does not mean that an employee's disciplinary record is in some way subject to a common law "sunset clause" such that prior misconduct, for all practical purposes, no longer forms part of the employee's work history. While an employer may not be permitted, in the absence of new material facts coming to light, to levy new penalties for prior misconduct for which the employee was disciplined, the employee's work history is relevant when determining whether a new instance of misconduct, *in light of the employee's work history*, gives the employer just cause for discipline.

38. In some respects, the employer's right to rely on the employee's work record as part of its case supporting a "just cause" allegation, particularly where there has been the application of progressive discipline, is simply a civil analogue to the criminal law as it concerns prior criminal convictions. A person, once convicted and sentenced, may not be charged, tried, convicted and sentenced a second time for that prior offence. However,

if the person is convicted of another crime, his or her prior criminal record can be taken into account when determining an appropriate sentence for the most recent criminal offence.

39. In my view, the events of July 5, 2016 (even accepting that no profanities were directed toward the customer), coupled with the Applicant's disciplinary history, gave the employer just cause for dismissal and Member Gandhi did not err in law when he so found. I agree with, and adopt, paras. 41 – 43 of the Appeal Decision in this regard.

40. As for the Applicant's concerns about the customer's absence at the hearing, I must confess some puzzlement regarding how or why this is a problem for the Applicant, or how it concerns the correctness of the Appeal Decision. The customer did not appear at the hearing – and had she done so, the Determination might well have turned out very differently for the Applicant. The delegate rejected the Employer's evidence regarding the Applicant's use of profanity (principally because the customer did not attend the hearing) and this latter finding was not disturbed on appeal. Like the Applicant, I am also curious as to why the Employer did not call the customer as a witness at the complaint hearing, but that curiosity has no bearing on this application.

41. The Applicant's argument regarding the Employer's internal disciplinary policies was not advanced before the delegate. In any event, I am not persuaded that this argument is even factually sound – the Applicant did not provide any corroborating evidence to support that argument. Further, the Employer did provide a reasonable degree of what might be called "procedural fairness" to the Applicant prior to dismissing him (and in making this comment, I am not suggesting there is a legal obligation to do so in an employment relationship of the sort involved in this case). The Employer met with the Applicant privately and fully briefed him regarding the misconduct allegations that had been levied against him, it offered him a reasonable opportunity to present his side of the story, and it did not dismiss him until after it had completed its investigation of the matter.

42. Finally, the Applicant's bare allegations of bias and other misconduct levelled against Member Gandhi, wholly unsupported as they are by any cogent evidence, are absolutely devoid of merit.

43. In summary, in my view, there is no merit whatsoever, even on a *prima facie* basis, to any of the arguments the Applicant has advanced in this section 116 application. As such, this application does not pass the first stage of the *Milan Holdings* test and thus must be dismissed.

ORDER

44. The Applicant's application for reconsideration of the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal