

An Application for Reconsideration

- by -

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

- 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 CHAIR:** Jacquie de Aguayo

**FILE No.:** 2018A/25

**DATE OF DECISION:** April 18, 2018

## DECISION

### SUBMISSIONS

Daniel Sorensen

counsel for Karl McClure carrying on business as  
Chilliwack Dry Cleaners

### OVERVIEW

1. Karl McClure carrying on business as Chilliwack Dry Cleaners (the “CDC”) applies pursuant to section 116 of the *Employment Standards Act* (the “*ESA*”) for reconsideration of a Tribunal decision issued on February 5, 2018, 2018 BCEST 12 (the “Appeal Decision”). The Appeal Decision confirmed a Determination issued on August 28, 2017, by a Delegate of the Director of Employment Standards. The Determination required CDC to pay a former employee, Eleanor Winters, \$7,862.56 in overtime wages, annual vacation pay, compensation for length of service, and interest. The Determination also imposed administrative penalties on CDC totalling \$1,500.00 for contraventions of the *ESA*.

### BACKGROUND

2. The factual background to this matter is set out in the Determination and summarized in the Appeal Decision. In essence, Ms. Winters was employed as a dry cleaner by CDC for approximately 22 years, from October 30, 1994, to August 2, 2016, when she was dismissed from her employment by the owner of CDC, Karl McClure. The Delegate concluded CDC had not established just cause for dismissal pursuant to section 63(3)(c) of the *ESA*, and accordingly Ms. Winters was entitled to compensation for length of service pursuant to section 63. He calculated that she was owed eight weeks’ wages, which amounted to \$6,221.54, and associated vacation pay amounting to \$566.00.
3. In addition, the Delegate found Ms. Winters worked a schedule that involved regular overtime hours. CDC argued that she was not owed overtime wages for those hours pursuant to section 40 of the *ESA* because her salary was inclusive of overtime. The Delegate, however, rejected this argument and concluded she was entitled to overtime wages in the amount of \$853.45.
4. Finally, the Delegate imposed three administrative penalties of \$500.00 each for: contravention of section 40 of the *ESA* in failing to pay overtime; contravention of section 63 of the *ESA* in failing to pay compensation for length of service; and contravention of section 28 of the *ESA* in failing to keep required payroll records.
5. CDC appealed the Determination, arguing that the Delegate erred in law in finding that it had failed to establish just cause for dismissing Ms. Winters and that she was owed overtime wages. After the record before the Delegate was disclosed pursuant to subsection 112(5) of the *ESA*, CDC argued that the Delegate’s “notes, memorandums or documents relating to the conduct of the hearing, or how he came to his ultimate decision” should be disclosed as part of that record.
6. The Appeal Decision addressed the three issues raised by CDC. With respect to the procedural issue of whether the Delegate’s hearing notes should be disclosed, the Member relied on Tribunal authority to

conclude that the Delegate's hearing notes do not form part of the subsection 112(5) record and need not be disclosed (Appeal Decision, paras. 3 – 8).

7. With respect to CDC's appeal of the Delegate's finding that Ms. Winters was owed overtime wages, the Member stated she was not persuaded the Delegate had erred by placing the onus on CDC to establish that Ms. Winters' salary included overtime. The Member noted that section 28 of the *ESA* requires employees to maintain certain payroll records, including the hours an employee worked each day, regardless of whether the employee is paid on an hourly basis. She stated that 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", and she found "no legal error in his analysis" (para. 53).
8. With respect to CDC's appeal of the Delegate's finding that it had not established just cause for dismissing Ms. Winters, the Member reviewed the arguments made by CDC on this issue and the matters considered by the Delegate in reaching his determination on just cause. The Member concluded that the Delegate had not "misapplied the law of the *ESA* relating to just cause" (para. 62) and had not "erred in his conclusion that the cumulative effect of Ms. Winters' conduct was insufficient to establish just cause" (para. 63). The Member further noted the Delegate also considered CDC's argument of after-acquired cause, and she found "no error in his analysis" (para. 64).
9. In the result, CDC's appeal was dismissed and the Determination confirmed.

## **ARGUMENT**

10. In seeking reconsideration of the Appeal Decision, CDC submits the Appeal Decision should be reconsidered on all three issues it addressed.
11. With respect to the procedural issue, CDC submits that it constitutes "a breach of the principles of natural justice for the delegate's notes to not form part of the record". It submits that the hearing was not recorded, and the Delegate's notes "would provide at least a partial record of the hearing". It further submits the Delegate was directed to produce "all investigation notes and written summaries of information provided orally by witnesses during the investigation", and therefore the Delegate should be required to disclose the hearing notes as part of the subsection 112(5) record. CDC submits disclosure is an important aspect of civil procedure before the courts, and while those rules may not be binding on the Tribunal, it submits that "finding in favour of disclosure of evidence that is necessary and relevant to a proceeding [is] a general principle that should be applied and followed". It further submits the Delegate "came to a determination that is both unreasonable and a misapplication of the law (in regard to just cause, and overtime issues)", and that disclosure of the Delegate's hearing notes would allow CDC "to either better understand the Determination, or to raise challenges on [a] fully informed basis against what we say [are] errors of law and breaches of the principles of natural justice on the part of the delegate".
12. With respect to overtime wages, CDC reiterates its argument that the Delegate "incorrectly placed the onus on [CDC] to establish whether or not overtime was owing", and submits that the Member erred in upholding the Delegate in this regard. CDC submits the onus was not on it to establish whether overtime was owed but on Ms. Winters to prove her claim to overtime wages. It further submits the Delegate and the Member erred

in relying on the fact that CDC had failed to keep required employee records, submitting that this failure to comply with section 28 of the *ESA* was “independent of the issue of overtime”. CDC submits Ms. Winters bore the onus of establishing she was entitled to overtime wages, and she “provided no such evidence”. It submits that her salary, which was “over minimum wage”, included overtime pay, and the Member and Delegate “errantly relied on the absence of s. 28 records to say the Employer failed to prove that the salary included overtime, thereby allowing Ms. Winters to establish her entitlement to overtime without adducing evidence to that effect”. CDC submits this was an error of law.

13. With respect to just cause for dismissal, CDC submits the Delegate “considered the law regarding just cause and acknowledged that a contextual approach was required, but then essentially found and applied a legal test for just cause where it may be established in only one of two ways: 1) through a single act of misconduct that is wilful and deliberate and inconsistent with the continuation of the contract of employment, and 2) through a series of minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary”. CDC asserts the Delegate erred by “rigidly applying a two-method construct for finding just cause (either a single act or successive ‘minor acts’) rather than applying the legally required contextual approach adopted by the Supreme Court of Canada in *McKinley*” [*McKinley v. BC Tel*, [2001] 2 S.C.R. 161]. CDC says that while a single sufficient infraction or cumulative minor infractions reflect “two possible ways” to find just cause, they are not the only ways and are therefore not the “correct or “entire” law with respect to just cause.
14. CDC submits the “correct legal test is a contextual approach which requires and allows for consideration of the impact of an employee’s prior work history and infractions to inform whether a final act may be sufficient cause for immediate dismissal”. CDC cites judicial decisions which it says demonstrate that the “proper legal test for determining just cause requires a contextual approach, which requires the decision maker to look back upon the employment record and assess the impact of a blameworthy and checkered history of an employee (whether those acts are condoned or not, and without the need of fictitiously and inaccurately declaring the past acts to be ‘minor acts’) and to determine whether the sanction of immediate dismissal is appropriate for the final incident”. It submits the Delegate did not apply this test and thereby committed an error of law.
15. CDC further submits the Member committed an error of law when she also failed to apply what it says is the correct legal test for just cause, “being the contextual approach”. CDC says the Member held the past conduct of Ms. Winters had been condoned and that she stopped after having been warned, and in those circumstances, CDC could not rely on that conduct to establish just cause for termination, citing paragraph 63 of the Appeal Decision. It says the Member was “wrong in law in holding that past acts that were condoned or that were not continued, cannot be used to substantiate just cause for termination”. CDC cites the “legal holding” in *Bois v. Majestech Corp. Canada*, [2001] O.J. No. 3759 (S.C.) at paragraph 132, that “conduct which has been condoned may nonetheless be taken into account in assessing whether there is ‘cumulative cause’ for dismissal”, and submits that it is “directly contrary to the holding of the Tribunal member in paragraph 63 of the Appeal Decision”. CDC submits that therefore the Delegate and the Member failed to apply the “appropriate contextual legal test for just cause”, an error in law.
16. CDC summarizes its grounds for reconsideration as being that the Delegate and the Member erred in law with respect to the legal test for just cause, and in classifying Ms. Winters’ past misconduct as “minor”. It further submits they erred with respect to “the legal onus of establishing entitlement to overtime pay”.

Finally, CDC says they breached principles of natural justice in failing to provide adequate reasons regarding just cause and in failing to provide the Delegate's notes as part of the subsection 112(5) record.

17. By way of remedy, CDC requests that the Tribunal on reconsideration vary the Determination and Appeal Decision "to incorporate the appropriate legal tests and associated findings regarding just cause and overtime, cancel the monetary orders set out in the Determination, and order that the delegate's notes be produced as part of the record". Alternatively, CDC requests the Tribunal "refer these matters back to the Director or Tribunal as appropriate".

## ANALYSIS

18. Under section 116 of the *ESA*, the Tribunal "may" reconsider a decision. The Tribunal exercises this discretionary power in a manner consistent with the purposes of the *ESA* as set out in section 2. Those purposes include providing "fair and efficient" dispute resolution procedures. Accordingly, as explained in the Tribunal's leading decision on reconsideration, *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97), an applicant must raise "an arguable case of sufficient merit to warrant the reconsideration" such as a "serious mistake in applying the law". The reconsideration process is not an opportunity for the applicant to have the Tribunal re-weigh evidence or review findings of fact unless they are manifestly unsupportable.
19. For the reasons which follow, I find CDC's grounds for reconsideration do not establish an arguable case of sufficient merit to warrant reconsidering the Appeal Decision.
20. With respect to CDC's natural justice grounds, I find the Member correctly concluded CDC was not denied natural justice or procedural fairness because the Delegate's hearing notes were not disclosed as part of the subsection 112(5) records. The Member properly relied on *Director of Employment Standards*, BC EST # RD100/15, which sets out the Tribunal's law and policy under the *ESA* with respect to disclosure of delegates' notes on appeal. In *Director of Employment Standards*, the Tribunal held that the "scope of the disclosure obligation under subsection 112(5) of the *Act* varies depending on whether the determination was issued following an oral complaint hearing or an investigation", and that "[a]bsent extraordinary circumstances, the delegate's notes taken during the course of an oral complaint hearing do not constitute a formal transcript of the hearing and are not required to be disclosed under subsection 112(5)" (para. 43). By contrast, where the determination is issued following an investigation, the delegate's notes "setting out the individual's evidence forms part of the record" (*ibid.*). Such notes of the evidence gathered through investigation are what the Tribunal directs delegates to disclose under section 112(5).
21. In the present case, the Delegate made the Determination after an oral evidentiary hearing of Ms. Winters' complaint. Accordingly, absent extraordinary circumstances, his hearing notes are not required to be disclosed. I find there are no such circumstances here. As noted by the Member in the Appeal Decision, the Determination was lengthy and detailed and provided CDC with "the delegate's explanation of how he arrived at his conclusion" (para. 7). I have reviewed the Determination and find it provides an adequate basis for CDC to understand the Delegate's determinations on the issues and to appeal those determinations. The hearing notes are not required for that purpose. Contrary to CDC's submission, the Delegate provided

adequate reasons, including with respect to his finding on the just cause issue. It follows that the Member correctly rejected CDC's natural justice arguments for overturning the Determination.

22. I turn next to CDC's arguments that the Member erred in upholding the Delegate's finding it owed Ms. Winters overtime wages. CDC says the onus should have been on Ms. Winters to establish her claim for overtime wages, and that she proffered no evidence in support of her claim. In fact, however, Ms. Winters did provide evidence in support of her claim: she testified as to her work schedule, which required her to work overtime hours, and the Delegate accepted her evidence. In these circumstances, where Ms. Winters had established that she had worked overtime hours, CDC had to establish that it had paid her the required overtime wages for those hours.
23. In that regard, CDC asserted that Ms. Winters' salary was inclusive of overtime wages. However, the *ESA* sets out specific requirements regarding the payment of overtime wages: subsection 40(1)(a) states that where an employee works over 8 hours a day, an employer must pay "1 ½ times the employee's regular wage for the time over 8 hours" and subsection 40(2) provides that where an employee works over 40 hours a week, an employer must be "1 ½ times the employee's regular wage for the time over 40 hours". In subsection 1(1) of the *ESA*, the definition of "regular wage" provides a means for determining an employee's regular wage where an employee is not paid by the hour but rather on another basis, such as a salary.
24. In the present case, Ms. Winters was paid a biweekly salary. While CDC claimed the salary was inclusive of overtime, it did not identify a regular hourly rate on which that salary was based, and for which it paid 1 ½ times that rate for the overtime hours she worked. Nor, as the Delegate noted, did CDC provide any evidence, such as an employment contract or payroll records, to support its claim that the salary compensated Ms. Winters at the required rate for the overtime hours she worked. Furthermore, as the Member noted, CDC did not comply with the requirement in section 28 of the *ESA* to keep a daily record of the hours Ms. Winters worked. Contrary to CDC's submission, this failure is relevant to the issue of overtime wages. CDC could not have ensured it was paying Ms. Winters the statutorily required rate for her overtime hours when it was not keeping track of the hours she worked, including overtime hours.
25. As there was no evidence to support CDC's assertion that the salary it paid Ms. Winters compensated her for her overtime hours in accordance with the requirements of the *ESA*, the Delegate properly rejected this assertion. Instead, he applied the formula set out in section 1(1) of the *ESA* to convert Ms. Winters' biweekly salary into a regular wage rate, and on that basis determined she was owed \$853.45 in overtime wages. I agree with the Member that there is "no legal error in his analysis" (para. 53).
26. I now turn to the issue of just cause for dismissal. CDC says the Delegate "considered the law regarding just cause and acknowledged that a contextual approach was required", but then applied a different approach. It also claims the Member failed to apply a contextual approach in upholding the Delegate on this issue. I find neither assertion is correct. Contrary to CDC's submission, the Delegate not only acknowledged that a contextual approach was required, but also he applied that approach to the facts before him. He did not, as CDC asserts, ignore Ms. Winters' prior work history and infractions in deciding whether she had given just cause for dismissal. Rather, he looked at the entire issue contextually, including by considering whether CDC had condoned her prior infractions and whether she had stopped the misbehaviour after being warned. He

did not refuse to take her past acts into consideration; rather, he considered them in the context of the evidence as a whole, consistent with the required contextual approach to just cause.

27. With respect to CDC's criticisms of paragraph 63 of the Appeal Decision, and its submission that the Member failed to apply the contextual approach, I note that in the impugned paragraph the Member was not applying the contextual approach to the issue of just cause. Rather, she was deciding CDC's appeal of the Delegate's determination of that issue, and in particular whether CDC had established a basis under section 112 for overturning that determination. I find she correctly concluded CDC had not established a basis for doing so. The Delegate applied the required contextual approach to the issue of whether CDC had proven just cause for dismissing Ms. Winters, and concluded on a proper basis that it had not. In particular, CDC did not establish – and does not establish on reconsideration – that the Delegate committed any error of law in reaching this determination.
28. To the extent CDC disagrees with the Delegate's assessment of the seriousness or significance of Ms. Winters' past acts, I find this disagreement does not provide a basis for reconsideration. The Delegate's assessment of the particular facts of this matter was based on the evidence before him. The Delegate heard the testimony of the witnesses called by the parties at the oral evidentiary hearing, and he considered the evidence in light of the arguments they presented to him. The Tribunal does not re-weigh the evidence or reviewing findings of fact unless they are “manifestly unsupportable”, which I find is not the case here.
29. In summary, I am satisfied the Member correctly concluded in the Appeal Decision that there was no error of law or breach of natural justice which justifies overturning the Determination.

## **ORDER**

30. For the reasons given, the application for reconsideration of the Appeal Decision is dismissed, and the Determination is affirmed.

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**Jacquie de Aguayo**  
**Chair**  
**Employment Standards Tribunal**