

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Bob Graham Ltd.  
("Graham")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE NO.:** 1999/657

**DATE OF DECISION:** February 22, 2000

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Bob Graham Ltd. (“Graham”) of a Determination which was issued on October 14, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Graham had contravened Section 63 of the *Act* in respect of the employment of Ronna Pearson (“Pearson”), ordered Graham to cease contravening and to comply with the *Act* and ordered Graham to pay \$3964.05.

On November 1, 1999, legal counsel for Graham delivered a letter (the “appeal letter”) to the Tribunal. For reference, I will set out the appeal letter in its entirety:

Dear Sir/Madam:

**Re: Director of Employment Standards and Bob Graham Ltd.  
Complainant: Ronna Pearson  
Appeal of Determination of Berhane Semere  
ER No. 51-056**

Please be advised that we intend to appeal the determination of Berhane Semere and, in doing so, I anticipate preparing Affidavit material. However, I need time to review the matter and speak with various individuals.

By way of brief explanation, it appears that Mr. Semere had:

1. created an onus of proof that the employer was to provide substantial evidence to suggest that the complainant was misappropriating any funds;
2. put too much weight on the fact that the RCMP were not willing to proceed with a charge against the complainant;
3. failed to appreciate and consider that, over a period of time, over \$13,000 was missing;
4. failed to properly explore and consider the evidence of the independent witnesses;
5. overemphasized the fact that employees cashed their personal cheques from the till without any explanation or proof or evidence as to the size, amounts and frequency that the cashing of Employee’s personal cheques occurred;
6. failed to consider who had responsibility to do bank deposits while Mr. Graham was away.

I wish this letter serve as the Notice of the Appeal and will provide our written submissions and/or any other Affidavit material upon my review and assessment of the witnesses and consideration of the various evidence.

I also wish to advise that I do not wish to be limited to the above grounds of appeal as there may be other grounds of appeal that I may become aware of through my investigation.

On November 5, 1999, the Tribunal advised counsel for Graham by letter, confirming a telephone conversation of November 4, 1999, that the Tribunal may refuse to accept the appeal if it is not complete as of the deadline, which was November 8, 1999. Counsel for Graham did not receive this letter. No further submission was received from Graham or his legal counsel until December 14, 1999.

On December 29, 1999, the Tribunal advised the parties and the Director that the Tribunal was considering whether the appeal complied with the requirements of the *Act* and the Tribunal Appeal Rules and, if not, whether the Tribunal would exercise its discretion to hear it in any event. The Tribunal invited submissions on that matter from the parties and the Director. No submissions were received.

### **ISSUES TO BE DECIDED**

There are three issues to be decided. The first issue is whether the appeal complies with the *Act* and the Tribunal Appeal Rules. The second issue is whether, if the appeal does not comply with the *Act* and the Tribunal Appeal Rules, the Tribunal will exercise its discretion to consider it. Finally, if the Tribunal considers the appeal, the third issue is whether Graham has shown that the Determination is wrong in fact or in law.

### **FACTS**

Graham operates a Petro-Canada bulk fuel plant in Quesnel. Pearson was employed as a secretary in the office for a period commencing November 1, 1992 and ending November 20, 1998 when she was terminated. Graham alleges that on or about September 25, 1998, Pearson misappropriated \$3436.56 from Graham and, accordingly, was dismissed for just cause.

The Determination concluded there was not sufficient evidence to substantiate the allegation of misappropriation and, as Graham had not established just cause, Pearson was entitled to receive length of service compensation on her dismissal.

The Determination lays out a comprehensive review of the positions of the respective parties, information collected from “witnesses” put forward by Graham and Pearson, the findings of fact made by the Director and an analysis.

## ANALYSIS

The *Act* allows any person served with a Determination of the Director to appeal that Determination subject to meeting certain statutory requirements respecting the timeliness and content of the appeal. The basic statutory requirement relating to the content of an appeal is found in subsection 112(1) of the *Act*, which states:

*112. (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*

In addition, under Section 109(1)(c), the Tribunal is given the authority to make rules about how appeals are to be conducted. The Tribunal has established, and the Minister has approved, Tribunal Appeal Rules. The relevant provision for the purpose of this aspect of the appeal is Rule 5, which states:

5. The Act requires the written request to include the reasons for the appeal. The reasons for the appeal must do all of the following:
  - (i) identify the specific Determination of the Director that you are appealing, and attach a copy of the Determination;
  - (ii) briefly outline the relevant facts;
  - (iii) describe why you are appealing the Director's Determination; and
  - (iv) describe the order or orders you wish the Tribunal to make.

From time to time an issue concerning the sufficiency of an appeal has arisen. This question has arisen almost exclusively in the context of whether the appellant has met the requirement to include the reasons for the appeal. There are two questions involved; whether there has been compliance with the requirement in the *Act* and the Rules to include the reasons for the appeal in the written request and, where the request does not comply, whether the Tribunal will accept it. Rule 10 states:

10. The Tribunal may refuse to accept a written request that does not comply with these Rules.

There are two things that should be noted about the above provision. First, it is discretionary. Second, while the provision does not indicate the tribunal may dismiss an appeal for failure to comply with the Rules, that may be the practical result if the refusal to accept the request places the appeal outside of the time limits in subsection 112(2) or leads the Tribunal to the conclusion that the appeal is "frivolous, vexatious or trivial, or not brought in good faith".

In *D. Hall & Associates Ltd.*, BC EST #D354/99 the Tribunal addressed the considerations that would be factored into an examination of these questions. The tension between a strict or liberal application of the *Act* and Rules was noted. A number of considerations supporting a stricter approach were identified:

- finality;
- the integrity of the administration of the *Act* and the appeal process under the *Act*;
- consistency with the purposes of the *Act*, specifically the statutory objective of providing fair and expeditious procedures to resolve disputes;
- efficiency; and
- certainty.

Counterbalancing a more strict approach, the Tribunal noted the importance of a public perception that the appeal process be fair, stating

. . . the process must be fair . . . it must be accessible to those who use it. In many cases, those who are expected to use the appeal process are unsophisticated employees and employers, unsophisticated at least in the language of the law.

The resulting approach taken by the Tribunal, and one which I adopt, sought to balance the competing interests and approaches by considering all of the material in the file before the expiry of the time limited for appeal - including the appeal materials, the Determination and any submissions made or documents filed prior to the Determination - and deciding whether the basis for appealing the Determination was clear from a reading of those materials as a whole. I would add the following: the consideration must be an objective one, such that the Tribunal should be able to say, with some degree of certainty, that the basis for the appeal was clear to any person reasonably informed of the details of the case. The rationale for this requirement finds its roots in a recognition that the statutory objective of providing a fair appeal process requires that the process to be fair to all of the parties involved. If the Tribunal cannot objectively conclude that the basis of the appeal is clear to all interested parties, the entire process may be compromised because of one of those parties' failure to appreciate the case they have to answer on the appeal.

It should also be noted that in appeals involving several substantive issues, it is possible for the appellant to meet the requirements of the *Act* and the Tribunal Appeal Rules on one or more issues while failing to do so on other issues. In this case, the appeal letter suggests there are two substantive issues, the first raising a question of law under the *Act* relating to the evidentiary burden in cases involving just cause for dismissal and the second raising a question about whether the Director erred on the facts in concluding Graham had not established just cause for dismissing Pearson.

Turning to the appeal letter filed by Graham, I have no difficulty concluding that it does not comply with the requirements of the *Act* and the Tribunal Appeal Rules. It does not attach a copy of the Determination, although it does identify the Determination, it does not provide any outline of the relevant facts nor does it describe the order or orders it wishes the Tribunal to make. On the other hand, while the appeal letter does not expressly state why Graham is appealing the Determination, I accept that it does, to some degree (which will be examined in more detail later in this decision), comply with that requirement. My conclusion is based on a common sense perspective of the context and content of the appeal letter, which quite strongly suggests that the six matters listed

identify areas where Graham feels an error has been made, even though they are not specifically listed in that way.

Having decided that the request does not comply with the *Act* and the Rules, the next question is whether I will exercise my discretion to accept it in any event. This requires a closer examination of the appeal letter.

The first statement describing why Graham is appealing the Determination contends that the Director “created an onus of proof that the Employer was to provide substantial evidence to suggest that the complainant was misappropriating any funds”. This statement appears to raise a question of law relating to the interpretation and application of the *Act*, which is the allocation of the burden of proof in considering a dismissal.

Generally speaking, it is a relatively easy task to craft an appeal based on a disagreement with the interpretation and application of the *Act*. That is because such an appeal often presumes the validity of the factual conclusions made in the Determination and asks only that the Tribunal consider whether the *Act* has been properly applied to those facts. As stated in *D. Hall & Associates Ltd., supra*:

Certainly an appellant would be hard pressed to identify disputed facts, as it was the legal finding arising from the facts rather than any disputes of fact which appear to have led to the officer’s conclusions. It might be equally difficult for an appellant to say much more about the officer’s finding than has in essence been said here, namely, “the Director’s delegate is wrong to have concluded that the complainant’s travel time forms part of his work day”. In the absence of more particularity in the reasons for decision, the appellant cannot be taken to know in fullness where the officer is alleged to have erred in his or her reasoning.

Notwithstanding the above comment, where the appeal raises a question of law under the *Act* the request must at least identify the question of law and outline how it arises on the facts. The request relating to this issue suffers from a singular, significant deficiency - there is no outline of relevant facts relating to this issue. I have thoroughly examined the material as a whole and, simply put, I can find nothing that would allow a person reasonably informed of the details of this case to know, with any degree of clarity, how this issue arises. The only reference I can find in the Determination to any notion of “substantial evidence” is in the findings of fact made by the Director, where it states:

Based on information provided by the Employer, Mr. Sinkinson, the Complainant and the Complainant’s co-workers, there is no dispute that

...

- the Employer’s decision to dismiss the Complainant was based on suspicion or “likelihood” (or as Mr. Sinkinson put it, “the most likely candidate”) as opposed to any substantial evidence to suggest the Complainant was misappropriating funds.

A reading of the Determination suggests that the reference to “substantial evidence” was unrelated to Graham’s burden of proof under the *Act*. Rather, it seems to have been an evidentiary conclusion

conveying the weakness of the Employer's evidence. That conclusion is supported by the following comment found later in the Determination:

Although the Employer's argument as noted in the preceding pages is that there is or was just cause for the dismissal of the Complainant, his conclusion is based on suspicion or likelihood. He did not provide any evidence, documented or otherwise, to substantiate his suspicion.

The request for appeal on the issue relating to the "onus of proof" is refused.

I will now consider the remaining five reasons for appeal contained in the appeal letter, as I perceive all of them to be addressing the same reason for appealing the Determination, which is that the Director failed to conduct a complete investigation, placed too much weight on some factors and ignored or gave insufficient weight to other factors and as a result erred in concluding Graham had not established just cause for dismissing Pearson.

The Determination sets out a comprehensive analysis, identifying the reason for dismissal, setting out the positions of the parties and the facts in some detail, making findings of fact and reaching a conclusion on just cause and providing the reasons for that conclusion. The penultimate paragraph of the Determination states:

Although the Employer's argument as noted in the preceding pages is that there is or there was a just cause for the dismissal of the Complainant, his conclusion is based on suspicion and likelihood. He did not provide any evidence, documented or otherwise, to substantiate his suspicion. The facts listed above simply indicate the possibility of any one of the people who had access to the till, including the Complainant, could have removed the said amounts. However, they in themselves, and standing alone do not pin point the Complainant specifically as the culprit. The unrestricted access to the till by various employees, the lack of absence of monitoring who cashed what value of a cheque, the lack of scrutiny of who is accessing the till and for what purpose, and above all, the lack of tangible evidence, all cumulatively go against singling out the Complainant as the perpetrator. It should also be pointed out that the dates given in the witnesses' letters (see Exhibit 2) and the time period within which the Employer suspects the Complainant may have removed the funds do not correspond (see Exhibit 1). Mr Sinkinson did not provide the writer with the evidence he suggested he might be able to produce; this evidence pertains to the documentation of cash amounts received by the Complainant and the amounts she herself deposited in the bank. There is also no evidence presented to refute or negate the Complainant's claims that she was winning various amounts from the casino.

No outline of relevant facts was provided with the appeal letter. In light of the detail provided in the Determination, the request for appeal should have done more than simply indicate disagreement with the investigation or allege that certain facts were inappropriately weighted or not considered. I will deal with each of the reasons given for appealing the decision and note the deficiency I perceive in each of them.

*put too much weight on the fact that the RCMP were not willing to proceed with a charge against the complainant;*

The request for appeal does not provide any factual basis that would indicate what weight, if any, the Director placed on the information that the RCMP had not proceeded with any charges against Pearson. The reference to this information appears in the Determination under a paragraph identifying matters about which there was no dispute. In the absence of facts, apparent on the face of the record, that the Director gave any weight to this factor the assertion supporting the appeal request has no foundation and consequently no merit.

*failed to appreciate and consider that, over a period of time, over \$13,000 was missing;*

There is no factual basis in the appeal request supporting any argument that the Director failed to appreciate that over \$13,000.00 was missing. What the Director concluded was that Graham had not been able to establish that Pearson was the person responsible for the disappearance of cash from the till.

*failed to properly explore and consider the evidence of the independent witnesses;*

There are no facts outlined in the request for appeal that would support this assertion as a reason for appealing the Determination. Specifically, Graham does not state, and it is not apparent from the appeal request or from the material on file, what the Director did or failed to do and how that constituted a failure to “properly explore and consider” the evidence. Nor does the appeal letter indicate what “evidence” existed that was not properly explored or considered.

*overemphasized the fact that employees cashed their personal cheques from the till without any explanation or proof or evidence as to the size, amounts and frequency that the cashing of Employee’s personal cheques occurred;*

If Graham felt that the size, amounts and frequency of the cashing of employee cheques was relevant to the validity of the conclusions reached by the Director in the Determination, then the appeal request should have contained facts relevant to those matters. The appeal request does not give any information relating to any of the factors identified that might show the size, amounts and frequency of employees cashing cheques from the till would affect the conclusion in the Determination that Graham had not proved that Pearson had misappropriated the funds.

*failed to consider who had responsibility to do bank deposits while Mr. Graham was away.*

Once more, there is no factual basis provided by Graham in support of the assertion that the Director “failed to consider” the above referred matter. On the face of the Determination, it appears that the Director was aware that Pearson had the responsibility to do bank deposits while Mr. Graham was away, but that information did not prove, in light of other factors, that Pearson had misappropriated the funds. Additionally, the appeal request does not provide facts or factors that would explain Graham’s failure to provide information it claimed was relevant to their position during the



investigation. That would certainly be a relevant and necessary consideration under this reason for appealing the Determination.

In respect of all the above points, one must wonder how any of the other parties could fully comprehend or rationally answer the appeal as it is framed. In the final analysis, I cannot confidently say that the basis of the appeal is sufficiently clear to any person reasonably informed of the details of the case.

## **CONCLUSION**

I conclude that the appeal request does not comply with the *Act* and the Tribunal Appeal Rules and exercise my discretion under Rule 10 of the Tribunal Appeal Rules to refuse to accept the appeal request.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**