

An appeal

- by -

Remap Enterprises Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2002/22

DATE OF DECISION: April 29, 2002

DECISION

OVERVIEW

This is an appeal by Remap Enterprises Ltd. (“Remap”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated January 9, 2002 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Remap employed Casey Peterson in a clerical position at their video store in Victoria. He was employed from December 10, 1996 until September 23, 2001 when he was summarily dismissed. Peterson claimed that he was unjustly dismissed and was therefore entitled to compensation for length of service. A delegate of the Director investigated the matter and determined that the dismissal was unjustified and that Peterson was entitled to \$1,082.66 compensation.

Remap has appealed and submits that there was an ample history of significant warnings to the employee prior to the dismissal and that the Director's delegate was wrong to deal with the matter on the basis of a "single act". Remap also points to subsequently discovered behaviour by Peterson inconsistent with his employment.

ISSUES

There were two issues in this case: firstly, whether the delegate was in error in treating the matter of dismissal as being based on a "single act" and did not give sufficient weight to the history of poor performance, unsatisfactory behaviour and specific warnings. Secondly, whether the subsequently discovered behaviour can be considered in considering whether the dismissal was justified.

ANALYSIS

The Director's delegate correctly identified that the onus is on the employer to show that there was just cause for termination. The delegate referred to the case of *Silverline Security Locksmith Ltd.*, BCEST #D207/96 as authority for the four-part test that this Tribunal has applied in cases of unsatisfactory performance. In the absence of misconduct or a fundamental breach of the employment relationship the employer must be able to demonstrate that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

It is important in applying the jurisprudence to distinguish between cases of misconduct or a fundamental breach of the employment relationship and cases dealing with poor performance. The four-part test set out above is only applicable in the latter case. The delegate states that:

“In my opinion the ‘fundamental breaches of the employment relationship’ discussed in Silverline are so severe as to cause the immediate severing of the work relationship”.

The delegate did not distinguish between issues of poor performance and issues of misconduct. She continues to find that “I also have **no evidence** that the three part test stated above was met by Remap.”(Emphasis added). This is quite clearly a misstatement of the presentations made to her by Remap. There was certainly **some evidence** provided to the delegate in regards to both poor performance and misconduct. The delegate did not analyse the material presented in a way to distinguish between issues of performance and issues of misconduct.

The culminating event, in which Peterson turned up for work 3 1/2 hours late, should have been considered misconduct. Peterson had requested a day off and his request had been denied. His failure to report to work as required was clearly insubordinate. The Tribunal has held that failure to attend work is fundamental to the employment contract, see e.g. *Re: Glenwood Label and Box Manufacturing*, BCEST #D079/97 and *Re: Roberts*, BCEST #D375/97. Peterson had a pattern of insubordinate behaviour. He had been clearly warned both verbally and in writing even though the Tribunal has held that warnings or not required to be in writing: *Re: Paul Creek Slicing Ltd.* BCEST #D132/99.

The employment history as set out by Remap is not seriously disputed by Peterson and was not given due consideration by the delegate. I am satisfied that Remap has met the onus of establishing that Pearson's ongoing disregard for employment rules, his expressed attitude towards his employer, and his frequent insubordination amounted to a repudiation of the employment relationship. He could have had no reasonable expectation of continued employment following his total disregard for his employer's requirement for him to attend work on August 31, 2001.

Subsequent to Peterson's dismissal the employer discovered that Peterson had stolen some property from the business. In his material submitted in response to this appeal Peterson admits the theft but appears to consider it minor or humorous. The Tribunal has previously held that subsequently discovered behaviour may be considered in deciding whether a dismissal is justified: *Re Empire International Investment Group*, BCEST #D 076/99. In this case the theft is a further indication of Peterson's repudiation of the trust relationship between employer and employee.

In conclusion, I am more than satisfied that the employer has met the onus of establishing that Peterson was dismissed for just cause and therefore the employer's liability for compensation for length of service is deemed to be discharged. The Determination will be cancelled.

I assume that the Director will cancel any associated penalty.

ORDER

I order, under section 115 of the *Act*, that the Determination dated January 9, 2002 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal