EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Bob Graham Ltd.
(" BGL " or the " employer ")

- of a Decision issued by -

The Employment Standards Tribunal
(the " Tribunal ")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/186

DATE OF DECISION: May 17, 2000

DECISION

OVERVIEW

This is an application by Bob Graham Ltd. ("BGL" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on February 22nd, 2000 (BC EST #D096/00).

BACKGROUND FACTS

The Determination

On October 14th, 1999 a delegate of the Director of Employment Standards issued a determination ordering BGL to pay its former employee, Ronna Pearson ("Pearson"), the sum of $3,964.05 representing 6 weeks' wages as compensation for length of service together with concomitant vacation pay and interest (the "Determination"). The delegate rejected the employer's assertion that it had just cause to terminate Ms. Pearson by reason of her theft of company monies. The delegate noted in the Determination that, during the relevant time frame, several employees had access to the cash drawer in question and that no one specifically observed Pearson take any cash from the cash box; Pearson, for her part, vigorously denied the theft allegation and the police refused to proceed with any criminal charges against her (not that this latter decision has any particular bearing on these civil proceedings).

In the Determination, the delegate set out–at some length–both parties' respective positions and evidence. The delegate's material findings, set out at page 6 of the Determination, are reproduced below:

> "Although the Employer's argument as noted in the preceding pages is that there is or there 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 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 all employees, the lack of or 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."

The Determination contained a notice, at page 9, indicating that any appeal of the Determination was required to be filed with the Tribunal by no later than November 8th, 1999; in addition, a 1-page memorandum describing the appeal process was also attached to the Determination.

The Appeal of the Determination

On November 4th, 1999, BGL's solicitors filed an appeal–consisting of the Tribunal's 1-page "standard form" notice of appeal and an attached 2-page letter dated November 1st, 1999–of the

Determination alleging, in essence, that the delegate placed too high an onus of proof on the employer and otherwise misconceived the evidence. The November 1st letter appended to employer's notice of appeal form is reproduced, in its entirety, at pages 2 and 3 of the adjudicator's decision. Of particular note are the final two paragraphs of the solicitors' letter:

> "I wish this letter to serve as the Notice of 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."

The Tribunal's standard form notice of appeal and Rule 5 of the Tribunal's Appeal Rules both clearly specify that a request to appeal a determination must include a recitation of the relevant facts (accompanied by all relevant documents as well as a copy of the determination being appealed) and a statement setting out the particular basis for appealing the determination. Accordingly, given the obvious deficiencies, both in form and substance, of the BGL appeal, upon receipt of BGL's notice of appeal–and following a telephone conversation between a member of the Tribunal's administrative staff and a legal secretary at the employer's solicitors' office–the Tribunal's Acting Chair wrote, on November 5th, 1999, to BGL's solicitors; this letter reads, in part:

> "Please be advised that the Tribunal may refuse to accept your appeal application where it is incomplete as of the deadline to appeal the Determination.
>
> The final date to file an appeal of the above Determination is November 8, 1999. The appeal form clearly states that you must give reasons for your appeal and if you do not comply, the Tribunal may reject your application. The Tribunal's Rules of Procedure also state that an appeal must include reasons and that the Tribunal may refuse to accept an appeal if it does not comply with these Rules.
>
> For your reference please see a recent Tribunal decision, D. Hall & Associates Ltd. (BC EST #D354/99), where the Adjudicator considers the sufficiency of appeal documents."

BGL's solicitors did not respond to the Acting Chair's November 5th letter and, accordingly, on November 22nd, 1999, the Acting Chair wrote to BGL's solicitors and advised that:

> "I have reviewed your reasons for appeal and have determined that the Tribunal will not proceed with your application....
>
> In particular, your reasons for appeal are inadequate in that they do not provide sufficient detail...

> The deadline to provide reasons for your appeal was November 8, 1999. As of this date your application was incomplete. As a result, your filed has been closed."

On December 6th, 1999, BGL's solicitors wrote to the Acting Chair in response to her November 22nd letter. BGL's solicitors, by way of this letter sought a "reconsideration", pursuant to section 116 of the *Act,* of the Tribunal's decision to dismiss BGL's appeal. The December 6th letter contains *no new evidence* (but does refer to certain documents that may be sought pursuant to the provisions of the province's freedom of information legislation) and simply reiterates the employer's position that Ms. Pearson stole certain monies. The first four paragraphs of the December 6th letter read as follows:

> "Further to your letter of November 22, 1999, wherein the Tribunal decided not to proceed with my client's application, I hereby request a review under section 116 of the *Employment Standards Act.*
>
> The Tribunal stated that the reasons for the appeal that we had provided in my letter of November 1, 1999, were inadequate and did not provide sufficient detail.
>
> *I knew that and had stated so in my letter.* I simply wanted to ensure that the Tribunal was aware of my client's intent to appeal the decision of [the delegate] and to briefly state some of the reasons to show that there is more than one significant reason for you to consider our appeal as having a meritorious and worthwhile chance of success.
>
> The date that was imposed in which further material was to be supplied was done unilaterally and without any prior input from ourselves."
>
> (my *italics*)

I have three principal concerns regarding the points raised by BGL's legal counsel in his December 6th letter. First, it must be remembered that an appeal to the Tribunal is not a hearing *de novo* (see *World Project Management Inc.,* BC EST #D134/97) and it is incumbent on an appellant to set out in its appeal documents, with some reasonable particularity, the reasons why the determination being appealed is incorrect. Second, and flowing from the fact that the Tribunal is an *appeal* body, evidence that was available and that ought to have been placed before the delegate during the investigation is generally not admissible before the Tribunal–an appeal to the Tribunal is not intended to allow a party to "shore up" the deficiencies in the case that was presented to the delegate (see *e.g., Kaiser Stables Ltd.,* BC EST #D058/97). Third, the Acting Chair never "unilaterally" set a date for further particulars to be provided to the Tribunal–the date in question, namely, November 8th, 1999, was simply the appeal deadline determined in accordance with the dictates of the Legislature as embodied in section 112(2) of the *Act*–a date, I might add, of which the employer had been given specific notice in the Determination itself.

BGL's solicitors filed a further written submission, dated December 14th, 1999, with the Tribunal on December 16th. In this latter submission, the 6 "reasons for appeal" set out in the original appeal documents are reproduced and some additional comments with respect to each reason are set out. This submission was before the adjudicator and is referred to in his reasons

for decision. I have carefully reviewed the solicitors' December 14th submission and having done so must conclude that it does not set out any proper basis for interfering with the delegate's determination that BGL failed to prove just cause. In essence, the December 14th submission amounts to nothing more than a a reiteration of the various arguments and assertions that were placed before the delegate. Further, I might add that the sufficiency of each and every one of the 6 "reasons for appeal" was addressed in detail in the adjudicator's decision and I entirely agree with the adjudicator's analysis and conclusions with respect to the sufficiency of each of these 6 "reasons".

The Adjudicator's Decision

In any event, upon receipt of BGL's solicitors' December 6th and 14th submissions, the Tribunal decided to revisit its earlier decision to refuse to consider the appeal and, thus, the matter of the sufficiency of the appeal was placed before an adjudicator for his independent consideration. All parties were so notified of this decision by way of a letter from the Acting Chair, dated December 29th, 1999, which requested that any further written submissions regarding the sufficiency of the employer's appeal be filed by no later than 4:00 P.M. on January 19th, 2000–no further submissions were received from, or on behalf of, BGL:

> "We are presently considering whether the Tribunal should exercise its discretion to hear this appeal. The Tribunal will allow submissions on the question of whether or not the reasons for appeal provided by the appellant in its November 2nd, 1999 appeal application comply with the requirements of the Act and the Tribunal Appeal Rules. Specifically, the Tribunal will consider whether the content of the appeal application provide sufficient details of the case put forward by the appellant. Furthermore, if the reasons provided are not sufficient, whether the Tribunal should exercise its discretion to permit the appeal to go forward in any event.
>
> If you wish to respond to this issue, please forward your written submission to me by **4:00 p.m. on January 19, 2000**"... (**boldface** in original)

The adjudicator reviewed the matter of the sufficiency of the appeal and issued the decision that is now the subject of this application for reconsideration. The adjudicator refused to accept the employer's appeal on the basis that it failed to comply with the *Act* and the Tribunal's Appeal Rules. In effect, the adjudicator's decision amounted to a confirmation–by way of reconsideration–of the Acting Chair's earlier decision regarding the sufficiency of BGL's appeal. Thus, in a technical sense, the present application for reconsideration is arguably not properly before me given section 116(3) of the *Act* which states that an application for reconsideration may only be made once with respect to the same decision. However, although I suppose it is open for me to do so, I do not propose to rest my decision on that narrow ground.

In the course of his decision, the adjudicator noted that section 112(1) of the *Act* directs an appellant to provide "reasons for the appeal", a requirement that is more fully explicated in Rule 5 of the Tribunal's Appeal Rules. Rule 5 states that, *inter alia*, an appellant must identify the particular determination being appealed, set out the relevant facts and the basis for the appeal. Rule 10 of the Appeal Rules states that: "The Tribunal may refuse to accept a written request that does not comply with these Rules." The adjudicator concluded that the notice of appeal filed by

BGL's solicitors did not comply with section 112(1) of the *Act* as well as Rule 5. Accordingly, the adjudicator exercised his discretion under Rule 10 and refused to accept the employer's appeal.

THE REQUEST FOR RECONSIDERTION

BGL's request for reconsideration is contained in a letter from its solicitors to the Tribunal dated March 19th, 2000. The March 19th letter, in turn, refers to written submissions dated December 6th and 14th, 1999 which "constituted our client's complete written submissions concerning this matter." BGL's solicitors' March 19th letter continues:

> **"**ARGUMENT
>
> We request and submit that the Tribunal should exercise discretion to consider the appeal, and render a decision based on all the materials we have submitted.
>
> In rendering his decision, the Adjudicator focuses solely on the materials which were submitted prior to the November 8th deadline. In so doing he addresses only the issue of whether such materials can be said to be complete enough so that the strict requirements regarding form and content can be relaxed on the grounds that the materials are nonetheless sufficiently informative.
>
> However the Adjudicator does not take into consideration section 109(1)(b) or the other materials submitted by this office. Thus he fetters his discretion, and neglects to turn his mind to the issue of whether formal requirements relating to time as well as content should be relaxed in the interests of fairness. Indeed, if all our client's materials were considered, it would not be necessary to relax the strict requirements concerning content...
>
> CONCLUSION
>
> As the Tribunal is now in possession of all our client's materials, I urge the Tribunal to conclude these proceedings in the manner which I submit way which [sic] would be most satisfying to everyone involved: on the merits of the case."

ANALYSIS

In my view, the adjudicator quite correctly focused on the sufficiency of the appeal; indeed, he was *obliged* to do so inasmuch as that was the very issue he was called on to address–see the Acting Chair's December 29th letter, *supra.* It should be recalled that BGL's solicitors were seeking a "reconsideration" of the Acting Chair's decision regarding the sufficiency of the appeal. It should also be remembered that, as noted above, BGL's solicitors clearly acknowledged that the initial appeal documents were, in fact, insufficiently particularized and thus the employer's present position that the adjudicator's decision was in some fashion misconceived strikes me as particularly disingenuous.

As for the matter of section 109(1)(b), I have reviewed the file and cannot find any application ever having been made for an extension of the appeal period. Further, and in any event, it is clear

that the adjudicator did consider at least the employer's December 14th submission which was, of course, filed after the November 8th, 1999 appeal deadline had passed.

Finally, given that BGL's solicitors take the position that their December 6th and 14th submissions constitute the employer's "complete written submissions concerning this matter", even if one was to consider the appeal "on its merits" I must conclude that the appeal is bound to fail. Simply put, the employer has not–even at this late stage–met its burden of proving just cause for termination. It is clear that the employer is satisfied that Ms. Pearson misappropriated certain funds. Nevertheless, there is simply no proof–at least not on a balance of probabilities–that Ms. Pearson is a thief.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal