Employment Standards TRIBUNAL

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.: 2002/521

DATE OF HEARING: November 8, 2002

DATE OF DECISION: December 2, 2002

DECISION

APPEARANCES:

April McKenna and Renni Michelot	On behalf of Remap Enterprises Ltd
Casey Petersen	On his own behalf

OVERVIEW

This is an appeal by Remap Enterprises Ltd. ("Remap" or "the employer") 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").

Pursuant to a reconsideration decision the Tribunal ordered that this matter be decided by way of an oral hearing.

Remap employed Casey Peterson ("Petersen ") 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. Petersen 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 appealed and submitted 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".

ISSUES

There were two issues in this case: firstly, whether there was a single act of misconduct that was sufficient to justify summary dismissal and secondly whether the history of poor performance, unsatisfactory behaviour and warnings were sufficient grounds to justify dismissal.

FACTS:

In accordance with the directions of the reconsideration panel an oral hearing was held in order to hold a "face-to-face hearing to test the evidence of the parties, make assessments of credibility, and make findings of fact". Such a hearing was conducted and having assessed the credibility of the parties and the evidence given by them I find the following facts.

Petersen was employed by Remap as a clerk in their video store. He was initially considered a reasonably good employee but in the year leading up to his dismissal the quality of his work performance had deteriorated. His work habits had become slovenly and he was often rude to his employers and behind their backs. He started to ignore direct instructions and his attitude was insolent. He was told on several occasions that he must "pull up his socks". He was often tardy. He often had to be reminded to complete his work assignments, as he seemed to prefer socialising with other staff or customers.

The culminating event for the employer occurred when Petersen turned up for work 3 1/2 hours late. Despite the comments of the reconsideration panel this fact was never in dispute. Petersen had requested a day off and his request had been denied. The issue was whether his failure to report to work as required was insubordinate.

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 (a fundamental breach of the employment relationship) and cases dealing with poor work performance. The four-part test set out above is only applicable in the latter case.

Although Petersen was 3 ½ hours late for work it became clear during the hearing that he may have been given some leeway by the employer. It was admitted during the evidence of Ms McKenna that she had given him some permission to be a little bit late. She says that she meant a few minutes but she was not specific about that exactly with Petersen. I do not accept Petersen's claim that he was told he "could be absolutely no later than seven pm". It is simply inconsistent with all of the probabilities given that the employer had twice refused him the time off. It is amply consistent with Petersen's work performance during the past 12 months that he would take advantage of the opportunity to take more than was ever intended.

In light of the lack of clarity in Ms McKenna's evidence it would not be appropriate to find that Petersen's opportunism amounted to a sufficient degree of misconduct to justify summary dismissal. Therefore it is necessary to consider the four-part test as set out in *Silverline* (above).

On the evidence before me it was clear that the employer set reasonable standards of performance and monitored that performance daily. Petersen testified that it was a normal occurrence for instructions to be left in writing for the employees to direct or correct their performance. It is also clear that the employer gave Petersen ample time and opportunity to correct his employment. He was cautioned over many months prior to his dismissal and yet he did not seem to be willing to correct his performance. He testified that he was given lots of correction in writing and during personal "walks" with the employer. The culminating event was simply another example of his attitude towards his job and his employers.

The reconsideration panel seems to have read the file that Petersen disputed the comments about his "attitude, actions, efforts and abilities". While there may have been some such comment in early submissions Petersen admits to most of the allegations in one form or another throughout his submissions and a reading of all of the representations leaves little doubt about his poor performance during the final year of his employment. In his evidence it was clear that he acknowledged many of the alleged problems although he tended to minimize them.

The only "grey area" in this case is whether the employee was warned clearly that his continued employment was in jeopardy if such standards were not met. Mr. Michelot testified that he spoke to Petersen several time over the summer and at least half a dozen times in the two months before his dismissal. He would take Petersen on a walk and talk to him specifically about his performance including that he was putting his job on the line. Petersen confirms that these walks occurred but denies that he was told that continued employment was in jeopardy. However, he testified that he knew he was on thin ice. He knew there was tension. He knew something was going on. He admits that the employer asked him if he was trying to get himself fired.

I did not find Petersen's evidence to be credible on this point. He tended to minimize his own behaviour and minimize the extent of the warnings given to him. I accept Mr. Michelot's evidence that he made it clear to Petersen that his continued employment was in jeopardy.

In light of the above, I find that the four part test as set out in *Silverline* has been met and that there just cause for dismissal when Petersen was late for work again. The employment history as set out by Remap was not given due consideration by the delegate. I am satisfied that Remap has met the onus of establishing that Petersen's ongoing disregard for employment rules, his expressed attitude towards his employer, and his frequent insubordination amounted to a reputation 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.

According to the direction of the reconsideration panel "analysis must be undertaken of whether the incident was condoned or forgiven by Remap by not dismissing him immediately, rather that 23 days later." The delegate mentioned possible condonation but no finding of condonation was made and the delegate's failure to so find was not appealed by the appellant nor was it submitted as part of the reconsideration application. While the appellant did not advance this argument it must now be addressed in light of the direction of the reconsideration panel.

On the evidence before me I am satisfied and find as a fact that Remap did not condone Petersen 's behaviour. He admitted that he knew right away that he had overstepped the mark. The delay in dealing with his dismissal was that the managing partner left for Europe on a business trip and did not have the opportunity to address the issue until her return. Immediately upon her return she spoke to Petersen and advised him of the termination of employment. There is no evidence, or even submission by Petersen, that he believed his behaviour had been forgiven. I am satisfied that his poor performance was not at any time condoned by the employer to the extent that would mitigate against dismissal.

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.

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