An application for Reconsideration

- by -

Wallace & Carey Inc.
(the "Employer")

- 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 MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/204

DATE OF DECISION: January 12, 2006

DECISION

SUBMISSIONS

Keith J. Murray — Legal Counsel for Wallace & Carey Inc.

INTRODUCTION

1. This is an application filed by Wallace & Carey Inc. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision issued on November 1st, 2005 (B.C.E.S.T. Decision No. D167/05). The Tribunal Member confirmed a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on July 11th, 2005 pursuant to which the Employer was ordered to pay its former employee, Peter B. Sherry ("Sherry"), the sum of $7,652.90 together with a further $500 on account of an administrative penalty.

2. This is a case about whether the Employer had just cause to terminate Mr. Sherry's employment. The delegate determined that Mr. Sherry's employment was terminated without just cause and, accordingly, he was entitled to 8 weeks' wages as compensation for length of service (section 63). The Employer asserts that it had just cause for termination and that the Tribunal Member should have cancelled the Determination; the Employer says that both the delegate and the Tribunal Member erred in law. If Mr. Sherry is entitled to compensation for length of service, the Employer does not contest the amount it was ordered to pay.

3. The Employer's application, filed on November 29th, 2005 is timely, however, in my view it is not a meritorious application.

4. I have before me the following materials:

- The Determination and accompanying "Reasons for the Determination";
- The Tribunal's appeal file including the Employer's appeal documents, the respondents' submissions and the section 112(5) record; and
- The Employer's application for reconsideration and supporting materials.

5. Despite being invited to file submissions, neither the delegate nor Mr. Sherry filed submissions regarding this application. The delegate advised the Tribunal that "he has nothing further to add" to the materials that have been submitted to date.

PREVIOUS PROCEEDINGS

The Determination

6. Mr. Sherry filed a timely complaint alleging that he was dismissed without cause or written notice and thus entitled to 8 weeks' wages as compensation for length of service. Mr. Sherry's complaint was the subject of a "Complaint Hearing" held on May 11th, 2005. On July 11th, 2005, the delegate issued the

Determination and accompanying "Reasons for the Determination", upholding Mr. Sherry's complaint and ordering the Employer to pay compensation for length of service and a $500 administrative penalty.

7. The relevant facts, set out below, have been taken from the delegate's reasons and from the section 112(5) record.

8. The Employer operates a food distribution business; its clients are retail outlets including the "7-Eleven" store chain. Mr. Sherry commenced his employment on August 1st, 1995 and he was terminated on December 2nd, 2004. At the point of termination, Mr. Sherry was employed as a "CDC and Order Assembly Manager" at a $22 per hour wage rate. Mr. Sherry supervised some 30 employees and his duties including attending occasional "out-of-town" management meetings.

9. Mr. Sherry's termination was precipitated by events that occurred on November 28th and 29th, 2004 at a management meeting (including managers from across the country) held in Calgary, Alberta. This latter meeting was devoted to dealing with the Employer's relationship with its principal client, the "7-Eleven" retail chain. On the evening of November 28th, Mr. Sherry attended a dinner with other employees that ended somewhere between 10:15 and 10:30 PM. The group was advised to meet in the hotel lobby the next morning at 7 AM so that they might travel together to the meeting location; the meeting was scheduled to begin at 8 AM. Mr. Sherry and another co-worker failed to meet their colleagues and the group travelled without them to the meeting location. Representatives of the Employer attempted to reach the two absent employees by telephone calls to their hotel rooms but those calls were not answered. Mr. Sherry subsequently arrived at the meeting between 11:15 and 11:45 AM; the other co-worker arrived at the meeting sometime even later.

10. On November 29th, and during a morning break, Mr. Sherry spoke with the Employer's Vancouver Branch Manager and explained that he suffered a severe asthma attack and had been unable to get to sleep until 5 A.M. Mr. Sherry stated that he must have been asleep when a telephone call was placed to his room and that he also unsuccessfully attempted to contact the Branch Manger via cell phone sometime between 10:30 and 10:45 to explain that he was late and now on his way. The Branch Manager also apparently noted a "strong smell of alcohol" on Mr. Sherry. Mr. Sherry's explanation on this account was that he and another employee had been drinking after the dinner ended and in his rush to get to the morning meeting failed to brush his teeth (thus explaining the alcohol smell on his person).

11. On December 2nd, 2004 Mr. Sherry met with two representatives of the Employer and was told he was being terminated for just cause. The Employer's December 2nd, 2004 termination letter, on the letterhead of "Wallace and Carey (B.C.) Ltd.", is reproduced, in full, below:

> December 2, 2004
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> To: Peter Sherry,
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> On Monday, November 29th, 2004, you failed to show up for the 8:00 am CDC National Managers meeting in Calgary as scheduled, instead you showed up 3 hours late. We do not accept your reason for your lateness to be truthful and even if this reason was truthful, it would not justify your failure to contact us to advise of your lateness.
>
> After reviewing this incident and your entire employee history, we have decided to terminate your employment effective immediately. All benefits will cease immediately and we would ask that you return any property in your possession belonging to Wallace and Carey to

> Wayne Boudreau. Your Record of Employment, any money and vacation owing to will be mailed to you within 5 days.
>
> Regards,
>
> [signed]
>
> Richard Parkinson
> Vancouver Branch Manager
> Wallace & Carey Inc.

12. The relevant portions of the delegate's findings ("Reasons for Determination", at pages 11-12) are set out below:

> While the employer submitted evidence by way of copies of e-mails that certain job-related concerns were raised with Sherry on two particular occasions, there was no evidence the employer unequivocally informed Sherry that specific behaviours would guarantee termination of employment. Simple dissatisfaction with performance is not just cause and, further, the employer did not dispute Sherry's assertion that he responded positively to concerns raised by the employer. Indeed, the employer did not dispute Sherry's assertion that he had received commendations for his performance and had been promoted during the course of his more than nine years of service to the employer.
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> There is no dispute that Sherry was late for the meeting. It is principally on the basis of the employer's suspicion that Sherry's explanation for being late is untruthful that it purports to have just cause…
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> The employer noted that both Sherry and [his co-worker] spent time together after the dinner ended and that alcohol was consumed during the evening of November 28, 2004. Additionally, the employer noted that [the co-worker] arrived even later to the meeting on the following morning than Sherry. These facts notwithstanding, the employer has not established on a balance of probabilities that Sherry lied about the reason for his own lateness. Sherry had a documented history of asthma. While he stated he understood the importance of attending the meeting, there is no evidence that he deliberately did not attend on time or that he knew late attendance to employer meetings was frowned upon and set out to attend late anyway. In the absence of any evidence to demonstrate the employer's suspicions are founded in fact, I find it is a credible proposition that Sherry was troubled by an asthma attack sometime following the dinner on November 28, 2004 such that he slept in and was subsequently late in his attendance to the subject meeting. Furthermore, no evidence was presented that Sherry's lateness prejudiced the employer in its dealings with 7-Eleven representatives during the afternoon portion of the meeting.
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> In summary, the evidence submitted by the employer is insufficiently conclusive to support a case for termination with just cause. In the result, I find the employer contravened s. 63 of the *Act* and Sherry is entitled to compensation for length of service in the amount of eight week's [sic] wages.

13. As noted above, the delegate also levied a separate $500 administrative penalty based on the Employer's contravention of section 63 of the *Act.*

The Tribunal Member's Decision (B.C.E.S.T. Decision No. D167/05)

14. The Employer appealed the Determination on the ground that the delegate erred in law [section 112(1)(a)] in finding that there was no just cause for dismissal. The appeal was dismissed. The Tribunal Member essentially adopted the delegate's reasons and concluded, among other things:

- evidence relating to Mr. Sherry's alleged performance deficiencies was "dated" and, in any event, on balance, Mr. Sherry's performance was quite good; and
- Mr. Sherry's explanation that he was late for the meeting because he suffered an asthma attack could not be affirmatively rejected and his tardiness did not prejudice the Employer's business relationship with 7-Eleven or "put the company's personnel, business or assets at risk" (page 7).

FINDINGS ON THE RECONSIDERATION APPLICATION

15. As noted above, counsel for the Employer submits that both the delegate and the Tribunal Member erred in finding that the Employer did not have just cause to terminate Mr. Sherry's employment.

16. As I read the Employer's December 2nd, 2004 termination letter (reproduced above), the Employer advanced three somewhat interrelated reasons to justify Mr. Sherry's summary termination:

1. Late attendance at the November 29th meeting purportedly supported by an "untruthful" explanation;
2. Alternatively, even if the explanation was truthful, Mr. Sherry "fail[ed] to contact us to advise of your lateness"; and
3. The late attendance was a culminating incident justifying termination in light of Mr. Sherry's "entire employee history".

17. There are a number of points to be noted regarding the above justifications. First, there is no doubt that Mr. Sherry arrived over 3 hours after the November 29th management commenced. Second, the evidentiary record before the delegate indicated Mr. Sherry had a rather good, not a rather poor, "employment history". In any event, the Employer does not now seek to justify the termination based on Mr. Sherry's "entire employee history". Third, there was a dispute in the evidence regarding the reason why Mr. Sherry arrived late; thus the delegate had to make certain findings of fact. Fourth, Mr. Sherry's evidence (apparently not rejected by the delegate) was that he did attempt to contact the Employer to advise that he would be late for the meeting.

18. Counsel for the Employer asserts, at pages 6-7 of his Reconsideration Application, that Mr. Sherry's alleged asthma attack "is critical to the determination of this case" and "there was no evidence before [the delegate] in this respect other than [Mr. Sherry's] bare assertions". Accordingly, counsel submits "the Delegate acted without evidence in deciding a matter of vital importance to the outcome of this case". Mr. Sherry had a documented history of asthma. The delegate apparently accepted Mr. Sherry's "asthma story" as credible. While it might be accurate to suggest that Mr. Sherry's explanation was not much more than a bare assertion, the same could be said of the Employer's assertion that Mr. Sherry *did not* suffer an asthma attack sometime during the late hours of November 28 or the early hours of November

29th, 2004. It must be remembered that the burden of proving just cause lies with the Employer—if Mr. Sherry's story was a "sham" it was up to the Employer to so demonstrate on a balance of probabilities. It was certainly within the delegate's factfinding purview to determine, based on the evidentiary record before him, that Mr. Sherry actually suffered an asthma attack. Mr. Sherry had a demonstrated history of asthma and the Employer had been specifically so advised. I am not persuaded that the delegate "erred in law by acting *without* evidence" (my *italics*) as has been asserted by counsel for the Employer.

19. Further, even if Mr. Sherry lied about the reason for his tardiness, I am not satisfied that such untruthfulness justified summary termination without compensation or notice in lieu of compensation. Dishonesty as a ground justifying summary termination must now be viewed through the prism of the Supreme Court of Canada's decision in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161. In *McKinley*, Iacobucci, J. (for the court) rejected the strict notion that dishonesty in and of itself is always just cause for termination in favour of a "contextual and proportional approach" (at paras. 48-49, 51 and 53-57):

> 48. In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
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> 49. In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake…
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> 51. …Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice...
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> 53. Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313…
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> 54. Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace,* both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places

> employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal…
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> 55. In light of these considerations, I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.
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> 56. Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.
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> 57. Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

20. As I indicated above, the delegate could have reasonably concluded, based on the evidence before him, that Mr. Sherry was late for the management meeting because he suffered an asthma attack. Of course, the Employer's position was that the "asthma attack" was an excuse concocted to hide the true reason for Mr. Sherry's absence, namely, over-consumption of alcohol the previous evening. Counsel for the Employer submits: "[Mr. Sherry's] dishonesty in providing a false explanation for the incident provides just cause for the termination of his employment" (November 29th, 2005 submission, page 8).

21. Mr. Sherry had an apparently good work record; he was a long-serving employee. Although he was late, he did attend the meeting and also apparently made an effort to contact his supervisor by telephone to apprise the latter of the situation. There is no evidence that Mr. Sherry's tardiness had any detrimental effect on the Employer's business operations or its relationship with 7-Eleven. In my view, and taking into account the foregoing facts, termination was not a proportional response to the misconduct in question (assuming there was some misconduct). I am not suggesting that an employee who lies about the reason for being late for a management meeting might not be properly disciplined, however, I am of the view that termination will rarely, if ever, amount to a proportional response to the situation.

22. There is no evidence in the record that Mr. Sherry had a habit of missing or otherwise arriving late for meetings. If he was "hung-over" perhaps he was embarrassed about the situation and thus concocted a more acceptable excuse; perhaps the asthma attack actually occurred. However, either way, the Employer did not have just cause for termination.

23. It follows that I am not persuaded this application is meritorious and I do not intend to overturn either the delegate's or the Tribunal Member's decision. If the Employer wished to terminate Mr. Sherry's employment, it could have done so in accordance with the *Act* by either giving Mr. Sherry's eight weeks'

written notice of termination or by paying an equivalent amount as compensation for length of service (if it wished to terminate without any written notice). Since it did neither, the Employer was obliged to pay compensation and was properly penalized for its failure to do so.

24. I also wish to make one further observation. The Employer was penalized for it failure to pay compensation for length of service. However, in its termination letter, the Employer indicated that it planned to pay any monies due Mr. Sherry "within 5 days". Section 18(1) of the *Act* provides:

> **If employment is terminated**
> **18** (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

25. The Employer should be cognizant of this provision. If monies were due Mr. Sherry and paid outside the 48-hour statutory window, the Employer might well have faced a second $500 penalty.

ORDER

26. The application to vary or cancel the decision of the Member in this matter is **refused.** Pursuant to Section 116 of the *Act*, the decision of the Member is confirmed

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal