An Application for Reconsideration

- by -

David House
("Mr. House")

- 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: Shafik Bhalloo

FILE No.: 2010A/171

DATE OF DECISION: February 3, 2011

DECISION

SUBMISSIONS

David House	on his own behalf
Douglas Seal	on behalf of Willowbrook Motors Ltd.
Marc Hale	on behalf of the Director of Employment Standards

OVERVIEW

1. David House ("Mr. House") seeks reconsideration under section 116 of the *Employment Standards Act* (the "*Act*") of a decision of a Member of the Tribunal, BC EST #D112/10, made on October 22, 2010 (the "Original Decision").

2. The Original Decision considered an appeal by Mr. House's employer, Willowbrook Motors Ltd. ("the Employer"), of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 9, 2010, wherein the Director determined that the Employer, having not provided an advance warning to Mr. House that his employment was in jeopardy, failed to discharge its onus of establishing just cause for terminating Mr. House's employment and ordered the Employer to pay Mr. House compensation for length of service, including vacation pay thereon, and interest under section 88 of the *Act* for a total amount of $8,704.29. The Determination also imposed an administrative penalty of $500.00 on the Employer.

3. The Employer appealed the Determination on the ground that the Director had failed to observe the principles of natural justice in making the Determination. The Member, in the Original Decision, allowed the appeal and cancelled the Determination on the basis that the Director, on the facts of the case, erred in law in imposing or requiring the Employer to provide an advance warning to Mr. House that his employment was in jeopardy to establish just cause for the termination of his employment.

4. There is no issue as to the timeliness of the application for reconsideration.

5. Pursuant to section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated in the *Act* (s. 103) and Rule 26 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary. I will adjudicate this application based on the contents of the Tribunal file relating to the Employer's original appeal, the Original Decision, and the submissions of Mr. House, the Employer, and the Director.

FACTS

6. The Member, in the Original Decision, succinctly summarizes Mr. House's complaint, the delegate's Determination and the parties submissions or arguments on appeal of the Determination as follows:

> The essential factual findings of the delegate are not in dispute. They may be summarized as follows:
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> 9. Mr. House and another employee, Mr. Santos, were involved in a physical altercation on March 14, 2010. The employer terminated their employment on March 17, 2010. The employer contended that

he had just cause to terminate Mr. House's employment without compensation for length of service based on the fact that Mr. House had been suspended on two prior occasions for aggressive behaviour towards other employees as well as a clause in his Salesperson's Employment Agreement which provided that "the salesperson shall exhibit conduct at all times which is business-like and a credit to the Dealership".

10. The delegate heard the evidence of the parties and two witnesses for the employer. The delegate found that Mr. House followed Mr. Santos out of the dealership and was screaming, yelling and swearing loudly at him. The delegate found that there was a physical altercation between Mr. Santos and Mr. House and that Mr. Santos sustained injuries that resulted in a loss of blood.

11. The delegate noted that the employer had the burden of establishing just cause and referred to the Tribunal's decision in *Super Save Gas* (BC EST # D374/97) in his analysis.

12. The delegate found that Mr. House had verbal heated arguments with co-workers on two separate occasions before the incident on March 14, 2010, which resulted in Mr. House being suspended from work for one week and one weekend, respectively. He found that the employer had not documented Mr. House's behaviour leading up to the suspension and that Mr. House had not received any written or verbal warning that his employment was in jeopardy.

13. The delegate noted that there was no workplace policy about workplace suspensions and that the employer tried to encourage salesmen to solve their own problems. He wrote that "there was no written policy in place making it clear to the complainant that his employment was in jeopardy as a result of being suspended from work".

14. The delegate found Mr. House's behaviour to be inappropriate and determined that Mr. House would have known that it was inappropriate given his previous suspensions for verbal aggression towards other employees. However, the delegate found that because Mr. Seal had not warned Mr. House that his employment was in jeopardy as a result of his repeated inappropriate behaviour, he could not rely on those suspensions to support Mr. House's termination for "just cause".

15. The delegate then considered whether Mr. House's behaviour on March 14, 2010, was sufficiently serious to justify summary dismissal without the need for a warning. The delegate noted that Mr. House had been involved in two prior incidents involving shouting at co-workers that had resulted in him being suspended from work, and that Mr. House continued that inappropriate behaviour on March 14, 2010. He said:

> The difference between the events is that the latest episode of inappropriate behaviour directly contributed to a physical altercation at work. There is no place for fighting in any work place and my decision does not question the employer's decision to terminate the employment of the two salespersons.

16. The delegate then found that the employer had failed to meet the burden of showing just cause because he had failed to warn Mr. House that his employment was in jeopardy:

> I have found the employer did not warn Mr. House his employment was in jeopardy as a result of his repeated inappropriate behaviour. As a result, Mr. House would not have known that his verbal aggressive behaviour on March 14th would lead to the termination of his employment. The act of fighting at work, although reprehensible, was mitigated by the fact the employer was aware the complainant's inappropriate behaviour could lead to a physical confrontation and chose not to warn the complainant that his employment was in jeopardy.

17. The delegate concluded that WML had not met the burden of establishing that Mr. House's employment had been terminated for just cause and as a result, was obliged to pay Mr. House compensation for length of service.

18. WML disagrees with the Determination. It says that the delegate's statement that "there is no place for fighting in any workplace and my decision does not question the employer's decision to terminate the employment of the two salespersons" is inconsistent with the delegate's conclusion that WML had not met the burden of establishing just cause.

19. WML also says that its warnings to Mr. House about the consequences of his aggressive behaviour were sufficient to communicate to him that his employment was in jeopardy. Finally, WML contends that any reasonable person would realize that the events of March 14, 2010, would lead to termination for cause.

20. The delegate submits that his comments regarding the employer's decision to terminate the employment of the two salespersons referred to the inappropriate behaviour, not whether the employer had just cause. The delegate contends that WML is attempting to re-argue the case that was before him and that the appeal should be dismissed.

21. Mr. House's submissions do not address any of the grounds of appeal.

7. The Member, based on the parties appeal submissions, concluded that while the Employer did not expressly state so in its written submissions on appeal, the essence of the Employer's appeal is that the delegate erred in law in making the Determination, particularly in concluding that the Employer did not have just cause to terminate Mr. House's employment.

8. The Member then considered the principles relating to just cause articulated by the Tribunal in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST # D374/97, and went on to conclude:

30. Thus, generally employers are obliged to warn employees if their continued employment is in danger because of a pattern of minor misconduct or because of a failure to meet a required standard of performance. However, as stated in *Super Save Gas*, *supra*, there are exceptional circumstances where a single act of misconduct by an employee is sufficiently serious to justify summary dismissal without the requirement of a warning.

31. On the undisputed facts of this case, I find the misconduct for which Mr. House"s employment was terminated to be such an incident. Mr. House was not the victim of an unprovoked attack or even a reluctant participant in the physical altercation. The facts found by the delegate were that Mr. House followed Mr. Santos out of the dealership screaming, yelling and swearing loudly at him, and there was then a physical altercation between them in which Mr. Santos sustained injuries that resulted in a loss of blood.

32. In these circumstances, I find the delegate was correct when he stated that he did not question the employer's decision to terminate the employment of Mr. House for this misconduct, but that he fell into legal error when he went on to apply a warning requirement. As *Super Save Gas* indicates, certain kinds of serious misconduct, such as voluntarily and aggressively engaging in a physical altercation with a co-worker while at work as a salesperson in a car dealership, are so obviously inconsistent with the employment relationship that the employer is not required to establish that it warned its employees not to engage in such conduct before dismissing them if they do.

33. On the undisputed facts, Mr. House's misconduct constituted just cause for summary dismissal with no requirement for a warning. Accordingly, the delegate erred in finding the employer had not established just cause for dismissal. Just cause was established on the facts, and the determination that WML must pay Mr. House compensation for length of service is accordingly wrong in law and must be cancelled.

ISSUE

9. In any application for reconsideration, there is a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the Original Decision. If the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issues raised in the reconsideration application will be considered. In this case, the substantive issue is whether the Member, in the Original Decision, wrongly determined that the Delegate, on the facts in this case, erred in law in concluding that the Employer did not

have just cause to terminate Mr. House's employment because the Employer failed to warn Mr. House in advance that his employment was in jeopardy due to his repeated inappropriate behaviour.

ANALYSIS OF THE PRELIMINARY ISSUE

10. Section 116 of the *Act* delineates the statutory authority of the Tribunal to reconsider any order or decision of the Tribunal:

> **Reconsideration of orders and decisions**
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> **116** (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
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> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
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> (3) An application may be made only once with respect to the same order or decision.

11. Reconsideration is not an automatic right of any party dissatisfied with an order or a decision of the Tribunal. Instead, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *Act* in exercising its discretion (see *Re Eckman Land Surveying Ltd.*, BC EST # RD413/02).

12. Also noteworthy in the context of reconsideration applications is the decision of the Tribunal in *Re British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.)*, BC EST # D313/98, which delineates a two-stage approach for the exercise of its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

13. Having set out the parameters, both statutory and in the Tribunal's own decisions, governing reconsideration applications, in my view, this is not a case warranting the exercise of the Tribunal's decision in favour of reconsideration of the Original Decision, as Mr. House's application fails on the preliminary issue for the reasons that follow.

14. First, although the reconsideration application is filed in a timely fashion in this case, my review of the ten-page written submissions of Mr. House leads me, unequivocally, to conclude that Mr. House's primary focus is to have the reconsideration panel effectively reweigh the evidence. The written submissions of Mr. House, which I do not find necessary to reiterate here, largely, if not wholly, dispute findings of facts made by the Delegate in the Determination or challenge the evidence adduced by witnesses of the Employer and question their credibility.

15. The submissions also do not address or focus on any error on the part of the Tribunal Member in the Original Decision nor raise any questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties.

16. I also note that the Director has not made any substantive submissions in the reconsideration application to challenge the Original Decision. The Director has simply stated that the Determination "was an accurate and fulsome description of the events leading to the dismissal of Mr. House and as such no further submissions will be made with respect to the application for reconsideration".

17. The Employer, in its submissions, simply confirms that the Original Decision should stand and that Mr. House's submissions "do not address any grounds of appeal".

18. While I find that Mr. House's reconsideration application fails on the preliminary issue as reconsideration is not a forum for rearguing his complaint or challenging findings of facts or disputing credibility of witnesses, I feel compelled to go further in this application (although not required to do so) to point out that I agree with the analysis and conclusions of the Member in the Original Decision leading to her decision to cancel the Determination. More particularly, I agree with the Member that this case, based on the findings of facts made by the delegate in the Determination, falls into the category of cases referred to in *Super Save Gas, supra*, as "exceptional circumstances, [where] a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning". Mr. House's conduct, in engaging in physical altercation with Mr. Santos, was admittedly inappropriate as found by the delegate in the Determination and it is the sort of conduct, in my view, that goes to the "core of the employment relationship" and warrants dismissal without prior notice.

19. I also add, perhaps gratuitously given my conclusion that the physical altercation alone was sufficient basis for the Employer to dismiss Mr. House for cause without advance warning, the delegate's finding that Mr. House's aggressive (although not physical) behaviour in the work place on two occasions prior to the physical altercation in question was also inappropriate, serves only to further strengthen and support the case for his dismissal without advance notice.

20. I deny Mr. House's reconsideration application.

ORDER

21. Pursuant to Section 116 of the *Act*, I order the Original Decision, BC EST # D112/10, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal