Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Williams Lake Cedar Products Ltd.
("WCLP")

- 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

ADJUDICATOR: Fern Jeffries

FILE No.: 2001/729

DATE OF DECISION: February 11, 2002

DECISION

OVERVIEW

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") that provides: (1) On application under subsection (2) or on its own motion, the tribunal may (a) reconsider any order or decision of the tribunal, and (b) cancel or vary the order or decision or refer the matter back to the original panel.

The employer, Williams Lake Cedar Products Ltd. ("WCLP") requests reconsideration of a decision that confirmed the Determination dated February 15, 2001 in favour of the employee's claim for compensation for length of service. The employer's position was that the employee was dismissed for "just cause" as the employee had claimed for time that the employer maintains was not worked. Following an oral hearing, the adjudicator confirmed the delegate's judgment that the employee's story was to be preferred and that there was no basis in the *Employment Standards Act* for using reasons acquired after the dismissal as a justification for the dismissal without notice or compensation.

The employer's request for reconsideraton is based on allegations that the Adjudicator failed to comply with the principles of natural justice, that there was a serious error in law in the decision, and that there was a finding of fact made without a rationale basis.

In order to meet the objectives of the *Act*, the Tribunal exercises its discretion to reconsider with considerable restraint. After careful consideration, I conclude that this application fails to meet the threshold established for reconsideration in that this application merely re-argues the case that was before the original adjudicator.

FACTS

The employee worked from January 7, 1997 to December 22, 1999 as a loader operator. He was dismissed on December 22, 1999 without notice. The employer alleges that there was just cause for this dismissal thus removing any obligation to serve notice or to compensate the employee in lieu of notice. The contention that there was "just cause" is based on an allegation that the employee falsely claimed for 8½ hours pay on December 22nd, i.e. 8 hours straight time and half an hour overtime. At issue was whether the employee left work at 3:45 p.m. or closer to 3:20 p.m. and whether the half hour overtime was falsely claimed by the employee on his time card. Subsequently the employer also claimed that the just cause allegation was based on the fact that on December 23, 1999 the employee was absent without notifying the employer, and that the employee "had a history of misconduct".

The complaint to the Employment Standards Branch was filed on time in February 2000. The delegate reports in the Determination that response from the employer was received through its legal counsel in July 2000. The Determination was issued on February 15, 2001.

ISSUES

Does this application meet the threshold established for reconsideration? Did the adjudicator fail to comply with the principles of natural justice by finding that the delegate met his obligations under Section 77 to "make reasonable efforts to give a person under investigation an opportunity to respond"? Did the adjudicator commit a serious error in law by finding that grounds for termination not relied upon at the time of the termination cannot be used later to justify dismissal on the basis of just case? Did the adjudicator fail to consider relevant evidence with respect to whether the employee acted dishonestly?

ARGUMENT AND ANALYSIS

The *Act* intends that the Adjudicator's Appeal Decision be "final and conclusive". Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This reflects the purposes of the *Act* detailed in Section 2.

As established in *Milan Holdings* (BCEST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favour of reconsideration is 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.

Reasons the Tribunal may agree to reconsider a Decision are detailed in previous Tribunal cases. For example, BC EST#D122/96 describes these as:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case. As outlined in the above-cited case:

> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

In deciding whether this application meets the threshold, I will first consider whether this application was brought in a timely manner. The delegate submits that the request is not timely. The Decision was issued July 31, 2001; the reconsideration request was filed October 18, 2001. While it may be preferable to have reconsideration requests filed within a shorter period, this 2½ period is not unusual and I consider that it is made in a timely manner.

I now turn to the issues raised by the employer.

Disclosure of Documents

With respect to the issue of disclosure of documents during the investigation, the adjudicator deals with this issue as a grounds of appeal and concludes that:

> "On June 29, 2000, counsel requested a copy of the complaint. That request was denied, but counsel was advised that the issues raised by the complaint would be communicated to her. In a letter date June 29, 2000, the Director provided particulars of the complaint made by Woods. The requests fro counsel for WLCP came at the early stages of the investigation. In the circumstances, the statutory obligation in Section 77 of the Act was met. There was sufficient information provided by the Director to allow WLCP to make a reply to the complaint, which counsel for WLCP did, in a comprehensive submission, dated July 12, 2000. There is nothing in the context to suggest there was any obligation on the Director to provide WLCP with a copy of the complaint or the documents requested (see generally, the discussion in Re Jack Verburg operating Sicamous Bobcat, BC EST #D417/98)."

The employer submits that this decision is at odds with the case of *Cineplex Odeon Corp* (BCEST #D557/97). In that case, the adjudicator found that there was a failure to comply with Section 77. In this case, the adjudicator makes no such finding. Further, the employer is not able to provide any reason why sending this matter back for reinvestigation would be appropriate in this case. The adjudicator found that the delegate had complied with Section 77 and I see no reason to disagree.

Just Cause

The employer submits that unexplained absence always formed part of its basis for a 'just cause' dismissal. Further, the employer submits that the adjudicator has erred in failing to apply the Supreme Court of Canada decision in Lake Ontario Portland Cement Co. v. Groner (1961), 28 D.L.R. (2d) 589 which confirmed that "it was settled law that if cause for dismissal exists, it is immaterial that at the time of dismissal, the employer did not act or rely upon it or did not know of its existence, or that it acted on some other cause which is in itself insufficient". The

employer submits that the adjudicator erred in applying Re *Wendy Benoit and Ed Benoit operating as Academy of Learning*, BC EST # D138/001, or alternatively, that this decision is incorrect.

These issues are thoroughly considered by the adjudicator. The adjudicator notes that:

> "Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. Developments in the common law in this area have expanded the remedial authority of the Courts, but the basic objective remains unaltered. …
>
> The objective of Section 63 of the *Act* is different. It is intended to provide an employee with brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. This period can be provided by giving notice, by paying compensation equivalent to the required notice or by some combination of those two….
>
> Grammatically, paragraph 63(3)(c) of the Act, as well as in Section 63 generally, are cast in the present tense: "terminates the employment, retires from employment, or is dismissed for just cause". That structure suggests the legislature intended the statutory liability for length of service compensation or its deemed discharge, is to be determinable on termination…."

The delegate submits that the employer is merely re-arguing its case:

> "The adjudicator considered all of the arguments now being raised by the appellant during the appeal hearing and this request for reconsideration is merely an attempt by the appellant to reargue their case. We submit that permitting this reconsideration request to proceed would be contrary to the "final and conclusive' nature of the Tribunal's decisions. We note the comments of the reconsideration panel in BCEST #RD 046/01 at page 4 where the panel stated:
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> > 'There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at the first instance. Another is to ensure that in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour or persons with greater resources, who are best able to fund litigation, and whose

> applications will necessarily create further delay in the final resolution of a dispute'.

I agree with the delegate. The employer is putting forward at reconsideration essentially the same case made at appeal and ably addressed by the original adjudicator in his decision. However, even reviewing this on the standard of "correctness", there is nothing in the employer's argument that would cause me to decide that the adjudicator's interpretation of the law was incorrect.

Failure to consider relevant evidence adduced at the hearing and a finding of fact made without rational basis.

The employer submits that the adjudicator did not consider whether the nature and degree of dishonesty justified dismissal, a test established in *McKinley v B.C. Tel* (2001), 2000 D.L.R. (4th). The first step in this test is to determine whether the evidence established the alleged dishonesty. The adjudicator had the benefit of hearing directly from witnesses. The decision fully describes the viva voce and written testimony. Based on this testimony and on his analysis, the adjudicator concludes that:

> "I did not hear any evidence that might have diminished or nullified the validity or efficacy of the information they provided during the investigation. Like the Director, I prefer that evidence over the evidence given by Mr. Campbell and Ms. Preeper.
>
> None of the witnesses presented by either WLCP or Woods was of any value on the central factual issue in dispute.
>
> WLCP has not met the burden of showing the Determination was wrong and the appeal is dismissed.
>
> It is not necessary for me to address the effect of the Supreme Court's decision in *McKinley v. B.C. Tel*, supra."

The employer submits that the employee exhibited such "egregious and deceitful conduct" that was "clearly so serious in nature and degree that it justified summary dismissal." Both the delegate who investigated the matter and the adjudicator who heard oral testimony disagreed with that perception. The purpose of reconsideration is not to 'second guess' a finding of credibility or a finding of fact.

In summary, the employer has not met the threshold for reconsideration. I find that this request is essentially an attempt to re-argue a case that was not successful at appeal. I find that there is no error in law nor has there been any failure to follow the principles of natural justice.

ORDER

The request for reconsideration is denied; the decision is confirmed.

Fern Jeffires, Chair
Adjudicator
Employment Standards Tribunal