An Application for Reconsideration

- by -

The Director of Employment Standards (the “Director”)

- and by -

Adam Ellison (“Ellison”)

- 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: David B. Stevenson
Ian Lawson
Kenneth Wm. Thornicroft

FILE No.: 2002/579 and 2002/580

DATE OF DECISION: April 8, 2003

DECISION

OVERVIEW

Adam Ellison ("Ellison") and the Director of Employment Standards (the "Director"), seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D463/02, dated October 17, 2002 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director on July 5, 2002 and which had found Ellison's former employer, Carmel Upholstery (1993) Ltd. operating as Carmel Furniture Designs ("Carmel Upholstery"), had contravened Section 63 of the *Act* in respect of the termination of his employment and ordered Carmel Upholstery to cease contravening, and to comply with, the *Act* and to pay Ellison an amount of $2,905.07. The original decision allowed the appeal and cancelled the Determination.

In his application for a reconsideration, Ellison says the original decision, was unfair and overlooked many of the key points from the case.

The application from the Director submits that the Adjudicator of the original decision made two serious errors of law: the first demonstrated in the conclusion that the delegate of the Director who investigated the complaint and issued the Determination had no authority to decide whether there was just cause for Ellison's termination; and the second in the contention that only the employer had any discretion to decide whether to accept "the excuses and rationale" given by Ellison "for his breaches" and decide whether those ought to mitigate against his termination.

ISSUE

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 satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is whether the Adjudicator of the original decision unfairly overlooked many key points of fact, as asserted by Ellison, or erred in law in applying just cause principles in the *Act* to the circumstances of the case, as asserted by the Director.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

> *116.(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.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

After reviewing the original decision, the Determination and the material on file, we are satisfied this is a case that raises a serious question regarding the original decision that warrants reconsideration.

FACTS

Carmel Upholstery builds custom furniture. Ellison commenced employment with Carmel Upholstery on August 12, 1996 and was terminated without notice on July 18, 2001. At the time of his termination Allison was the frame shop manager.

Ellison claimed he was owed compensation for length of service. Carmel Upholstery took the position that no compensation for length of service was owed as Ellison was dismissed for just cause.

THE DETERMINATION

The Determination noted that Carmel Upholstery set out its position on cause in two submissions, the first dated January 7, 2002 and the other dated January 29, 2002. Ellison responded to the submissions of Carmel Upholstery on March 20, 2002. The Determination identified the issue as being whether Ellison

was terminated for just cause or was terminated without notice and, consequently, entitled to compensation for length of service. The position of Carmel Upholstery and Ellison were set out in the Determination as follows:

> **EMPLOYER'S POSITION**
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> Carmel says that as a result of work attendance and other performance problems, on June 11, 2001, it gave Ellison a document called "Conditions of Employment - Adam Ellison" (see Attachment 2). The document set out 9 conditions for employment, and then stated the following:
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> - all conditions must be met immediately and with no exceptions
> - weekly review of these conditions will be done
> - if any of these conditions are unacceptable or breached, immediate termination will occur.
>
> According to Carmel, breaches of the first seven conditions did occur. These breaches are detailed in Attachment 4. In this attachment, the principal of Carmel, Jack Zuccaro ("Zuccaro") says these breaches became evident on July 16 and 17 when Zuccaro had to fill in for Ellison because Ellison was absent due to illness. In conversation with Michael Taylor ("Taylor") Industrial Relations Officer, on February 7, 2002, Zuccaro acknowledged he had not reviewed the conditions weekly as he indicated he would in the document, but only when Ellison was absent on the 16th and 17th. When Ellison returned on July 18, Zuccaro terminated him.
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> **COMPLAINANT'S POSITION**
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> Ellison acknowledges that there were some "issues" between himself and Zuccaro, and that he had been given a document dated June 11, 2001, outlining his conditions of employment. Ellison has also responded to Carmel's allegations regarding his apparent breaching of the conditions in the document (see Attachment 5).

The Determination attached the June 11 document. It is entitled "CONDITIONS OF EMPLOYMENT - ADAM ELLISON" and contained the following:

> 1) MINIMUM OF 40 HOURS WORKED PER WEEK, NO EXCEPTIONS OR EXCUSES. (NO OVERTIME UNTIL 40 HOURS WORKED)
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> 2) FRAME SHOP EMPLOYEES MUST BE SUPERVISED AND THEY MUST ALSO WORK 40 HOURS, NO EXCEPTIONS OR EXCUSES.
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> 3) LEGS MUST BE READY FOR FURNITURE BY THE TIME IT IS FINISHED BY UPHOLSTERERS. THIS MEANS THEY SHOULD BE STAINED AND READY TO INSTALL.
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> 4) ALL FRAMES TO BE READY WITHIN A REASONABLE TIME DETERMINED AT PRODUCTION MEETING.
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> 5) ALL FRAMES TO BE COMPLETED BEFORE MOVED TO FRAME STORAGE AREA. (STUFFING RAILS, SKIRT RAILS, ETC.) IF ADDITIONAL PIECES ARE REQUIRED THEY MUST BE DONE IMMEDIATELY.

6) ALL EQUIPMENT MUST BE SET UP AND IN USE BY THE END OF THE WEEK (JUNE 15TH.)

7) FRAME SHOP AND YOUR AREA MUST BE ORGANIZED AND CLEAN BY THE END OF WEEK (JUNE 15TH) AND MUST STAY THIS WAY.

8) ALL REPORTS MUST BE READY FOR PRODUCTION MEETING (NUMBER OF FRAMES PRODUCED AND AMOUNT OF HOURS WORKED. THIS INCLUDES YOUR HOURS)

9) VEHICLE MUST BE PARKED ON STREET WITH EVERYONE ELSE UNLESS LATE START OCCURS.

ALL THESE CONDITIONS MUST BE MET IMMEDIATELY WITH NO EXCEPTIONS.

WEEKLY REVIEW OF THESE CONDITIONS WILL BE DONE

IF ANY OF THESE CONDITIONS ARE UNACCEPTABLE OR BREACHED, IMMEDIATE TERMINATION WILL OCCUR.

Ellison did not dispute that he had been late for work on July 18th - his reason for that was explained - and there was also an acknowledgement by him that the frame and work shop areas could have been untidy on July 16th and 17th. It is fair to say, however, there was considerable difference of opinion between Carmel Upholstery and Ellison on whether any of the conditions had been 'breached' and, if so, whether termination for those 'breaches' was justified.

After identifying the principles and the test applicable to the circumstances, the Determination set out its conclusions on the issue of just cause:

> Having reviewed the evidence and arguments offered by Carmel in support of its contention of just cause, particularly as set out in Attachment 4, I find that it has not met the burden of proof required to establish just cause. My reasons are:
>
> 1) Carmel did not act in accordance with its stated intention to conduct a weekly review of Ellison's compliance with his conditions of employment. By not doing so, I find Ellison could have believed that his performance after June 11 was in compliance with the conditions established by Carmel.
>
> 2) The fact Allison was one hour late in returning to work after an illness, and the lateness being related to an issue of family responsibility (taking child to daycare) is not a reasonable excuse for termination.
>
> 3) The conditions of employment did not specify that Ellison had to train his staff to take over in his absence.
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> 4) Ellison's absence on June 6, 2001 happened prior to the conditions being set; in fact, this incident seemed to be one reason why the conditions were established in the first place.
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> 5) The printout in Attachment 4 of the hours worked by Ellison does not indicate he was not complying with condition 1; in fact, it indicates that Ellison was in compliance after June 11 when the conditions were established.

6) There is no evidence to suggest that Ellison was not available to his staff for the standard work week, and further it is not specified as a condition in the June 11 document that Ellison be on the premises for each and every hour worked by the employees under his direction. This would apparently be very difficult if Ellison were sent out to do installations as he claims. The document simply says that the staff must be supervised, and that they must work 40 hours.

7) It was not a condition that Ellison's staff not make production errors.

8) Ellison disputes Carmel's claim that the shop layout was not completed as required by June 15, 2001. In my view, Carmel has simply asserted this point but has not demonstrated that it is true.

9) Ellison does not dispute that the frame and wood shop areas could have been untidy but says these areas were being used by employees from June 14th through June 17th while he was off[1]. I also find that the conditions of employment were non-specific as to what constituted being "organized and clean", and further that it is not reasonable to expect that a shop would be organized and clean at all times.

THE APPEAL

The appeal filed by Carmel Upholstery responded point by point to the above reasoning, but did little more than re-state the same allegations made in the submissions filed during the investigation. As noted by Ellison in his application for reconsideration, the appeal consisted of nothing more than a letter just over one page in length. In its response to the point about the weekly review, Carmel Upholstery stated:

> We conducted weekly production meetings with Respondent - Andrew and Adam Smayda (shop foreman) and discussed shop procedures. It seemed everything was fine and you would not expect the Respondent to say it was not. The deficiencies were not fully realized until I worked at his position for 2 days while he was off.

As with many of the allegations made during the investigation, the appeal contained no specific information identifying what the 'deficiencies' were. No additional documentation or evidence was added. Neither the Director nor Ellison filed a reply on the appeal.

In its appeal, Carmel Upholstery requested an oral hearing, "to further explain our reasons". The Tribunal decided, and the original decision noted, that an oral hearing was not required. The appeal was conducted on written submissions alone.

THE ORIGINAL DECISION

The original decision stated the 'substantive' issue as being "whether or not the behaviour of the employee crossed the threshold of giving the employer just cause to dismiss."

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[1]The dates appear to be in error and more likely meant to refer to the period from July 14th to July 17th. An examination of Ellison's attendance calendar shows he was not off work on June 14th and 15th, and June 16th and 17th fell on a weekend. July 14th and 15th fell on a weekend and he was off work from July 16th and 17th. As well, there is no indication in the submissions of Carmel Upholstery that the period of time relevant to the dismissal was other than Ellison's last few days of employment (July 16th and 17th), when Zuccaro assumed his job.

The Adjudicator rejected the reasoning of the delegate relating to the failure of Carmel Upholstery to conduct a weekly review of Ellison's compliance with the conditions, stating:

> . . . Ellison did not claim his performance was in compliance with the conditions. But, secondly, the weekly review is not a condition precedent to dismissal; it is simply a means of establishing whether or not the conditions have been met. The failure of the employee to meet the conditions is a clear indication that he did not meet the standards required for his position, whether or not inspections occurred.

Based on his conclusion that the analysis in the Determination was "faulty", the Adjudicator re-examined the elements for establishing just cause to dismiss in circumstances where the employer is relying on unsatisfactory job performance, incompetence or minor infractions of workplace rules and said:

> There is no doubt that standards of performance were established and communicated to the employee. It has not been suggested these standards were not reasonable. The employee was warned clearly and unequivocally that it is [sic] continued employment was in jeopardy if such standards were not met. The standards were set and communicated on June the 11th 2001 and dismissal did not occur until July 18th 2001. There is no submission that this time frame was inadequate for the employee to meet the standards required. The only question remaining was whether or not the employee did meet the standards,

The Adjudicator found that, as some of the conditions in the June 11 document were breached, the "threshold for dismissal" was met. The Adjudicator rejected the notion that the delegate could consider the reasonableness of the explanations given by Ellison where Ellison had acknowledged a 'breach' of the conditions set in deciding whether there was just cause:

> . . . the delegate accepts some of the excuses and rationale for the breaches and finds that just cause was not established. But it is not up to the delegate to decide whether these excuses are reasonable, it is up to the employer. Once it is established that the employee has failed to meet the standards that were set then the threshold for dismissal has been met. There may be cases where an employer will take into consideration the mitigating factors and choose not to dismiss an employee despite the fact that the threshold has been met but that is within the discretion of the employer.

PRELIMINARY OBSERVATIONS

Initially, we make the following observation concerning the Determination: of the several allegations of fact made by Carmel Upholstery in support of just cause, the delegate found only two matters were established - that Ellison was one hour late for work on July 18th and that the shop area could have been untidy on July 18th. Of those two matters, only the latter was included in the conditions listed in the June 11 document:

> 7) FRAME SHOP AND YOUR AREA TO BE ORGANIZED AND CLEANED BY THE END OF THE WEEK (JUNE 15TH) AND MUST REMAIN THIS WAY.

On that matter, the Determination found the document was non-specific about what constituted being "organized and clean" and, in any event, that it was not reasonable to expect the shop to be organized and clean at all times.

The above observation raises three concerns with comments made in the original decision.

First, the original decision notes that Carmel Upholstery "alleged that Ellison was in breach of seven of the nine conditions". There seems to be a suggestion that the delegate had acknowledged those allegations were 'facts'. Such a suggestion would be incorrect.

The delegate noted Carmel Upholstery had alleged that Ellison had not worked a minimum of 40 hours a week, did not supervise his staff, that his staff had made errors during his absence, that furniture 'legs' were "continually a problem", that 'frames' were "often incorrect", that the shop layout and set up was not completed by June 15th, as required, and that the frame shop was 'disorganized'. The Determination, however, specifically rejected most of those allegations, based primarily on the absence of any proof supporting the allegations. In respect of the acknowledgement by Ellison that the shop could have been untidy on July 16th and 17th, the delegate reached no conclusion about whether that condition had been 'breached'. We also note that the same allegations were made in the appeal. No additional evidence or detail was provided with the appeal. The original decision did not reject the findings of fact made by the delegate.

Second, there is a comment in the original decision that, "it has not been suggested those standards were not reasonable". That comment seems to fly in the face of the conclusion reached by the delegate that, ". . . it is not reasonable to expect that a work shop be organized and clean at all times". The original decision does not address that aspect of the Determination and leaves the impression that the Adjudicator is drawing conclusions of fact quite different from findings of fact made in the Determination.

Third, the original decision says, "the delegate does find that Ellison was in breach of some of the conditions". There was no such finding in the Determination.

In light of the above, there appears to be some merit in Ellison's contention that the original decision overlooked many of the key points of the case. Rather than continue the analysis along the lines suggested by Ellison, however, we choose to address the reconsideration from the perspective of the submission made by the Director.

TRIBUNAL PRINCIPLES RELATING TO JUST CAUSE

The Tribunal has consistently applied several principles to questions of just cause for dismissal. These principles were identified in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
    1. A reasonable standard of performance was established and communicated to the employee;
    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

The term 'misconduct' typically refers to conduct that is blameworthy; it is ordinarily thought of as conduct which an employee can control. The above principles recognize that misconduct, even minor instances of misconduct, can provide just cause for dismissal. The requirement to set and communicate standards and give employees the appropriate notices and opportunities in cases involving misconduct is premised on the concept that an employee, properly apprised of the unacceptable nature of their conduct and the consequences of persisting in such conduct, will alter their conduct to conform to an acceptable standard. If an employee is not advised their conduct is unacceptable, they may be lulled into a false sense of security. The above principles also recognize that conduct which is not blameworthy, and can be attributed to factors beyond the employee's control, can also provide just cause for dismissal. The Tribunal has generally referred to this conduct as 'an inability to meet the requirements of the job'. In other contexts such conduct has been described as "involuntary misfeasance" or "non-culpable conduct". The Tribunal recognizes that even conduct which is said to be involuntary may be capable of improvement and thus to be within the control of the employee to some extent. For that reason, the Tribunal has required employers, in most circumstances, to use a graduated response that includes advising employees of what is expected of them, and warning them that their employment might be in jeopardy. Employees are thereby given the opportunity to chose to improve their workplace performance where that is possible. Finally, it may not be presumed there is any rigid line between what is misconduct and "involuntary misfeasance". In reality, it can be difficult to distinguish conduct which is blameworthy from that which is not. Many cases involve conduct that has both elements. In other cases, it may not be immediately apparent to the parties whether the conduct was one or the other or a combination of the two.

Recognizing that where the dismissal of an employee is exclusively related to the inability of that employee to meet the requirements of the job, and not to any misconduct, the Tribunal has said it is also appropriate to look at "the efforts made by the employer to train and instruct the employee and whether the employer has considered other options" (*cf. Veeken's Poultry Farm Ltd.*, BC EST #D165/97). That comment suggests additional considerations are appropriate in the case where an employee's dismissal is exclusively related to his or her inability to meet the requirements of the job and not to any misconduct, a consideration not included in the analysis in the original decision.

The original decision says:

> It is important to distinguish between acts of misconduct and minor infractions of workplaces rules or unsatisfactory job performance. In the case of unsatisfactory job performance, incompetence, or minor infractions of workplace rules the Tribunal has set out very clear basis for the establishment of just cause. In cases not involving misconduct the employer will need to show:
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> 1. reasonable standards of performance have been set and communicated with the employee;

2. the employee had actual notice that continued employment was in jeopardy if such standards were not met;

3. the employee was given a reasonable period of time to meet such standards; and the employee did not meet those standards.

The above statement, read with other comments in the original decision, suggests an employer's decision to dismiss an employee for misconduct, even though reasonable standards were set and all the appropriate notices and opportunities were given, would be reviewable on a just cause standard, but dismissal for unsatisfactory job performance, incompetence, or minor infractions of workplace rules, in the same context, would not. We confess to some confusion about this statement, since the principles identified in *Chamberlin* do not make any such distinction and such a distinction is, in fact, inconsistent with the principles applied by the Tribunal when considering questions of just cause for dismissal.

The original decision says nothing about this apparent inconsistency.

Nor does the original decision explain why the conduct of Ellison should, in any event, have been viewed exclusively as a failure by Ellison to meet the requirements of the job as opposed to a 'misconduct', or at a minimum, a combination of blameworthy and involuntary conduct. It is quite apparent both from the contents of the June 11 document and the nature of allegations relating to Ellison's termination that the concerns of Carmel Upholstery were not exclusively performance related, but included elements of 'misconduct'. We raise this point to demonstrate the potential difficulty in attempting to develop principles that dictate different approaches to cases that involve misconduct and those that do not. We commend an approach to just cause under the *Act* that does not require a preliminary consideration of whether the dismissal was based on misconduct, conduct demonstrating an inability to meet the requirements of the job, or some combination of the two.

ARGUMENT AND ANALYSIS

The Director argues the original decision contains two serious errors of law: first, in the finding that in some cases of dismissal, the Director has no authority under the *Act* to determine whether just cause for the dismissal existed; and second, in the statement that it is completely and exclusively within the employer's discretion to decide whether an employee's "excuses and rationale" for the conduct should mitigate against dismissal.

From our reading of the original decision, both errors identified by the Director arise from a conclusion that, in the context of a dismissal not involving misconduct, once a "threshold of just cause" is established, an employer has complete and exclusive discretion to dismiss the 'offending' employee and that decision may not be reviewed by the Director on just cause standards. The "threshold of just cause" in such cases is established when the employer shows:

1. reasonable standards of performance have been set and communicated with the employee;

2. the employee had actual notice that continued employment was in jeopardy if such standards were not met;

3. the employee was given a reasonable period of time to meet such standards; and the employee did not meet those standards.

In our view, there is no such principle either expressed or implied in the *Act*; it is out of step with the approach taken by the courts on questions of just cause for dismissal at common law, by other administrative tribunals, including Labour Relations Boards, Human Rights Tribunals and arbitrators, on questions of culpable and non-culpable cause for dismissal and discipline, and it is inconsistent with the overwhelming majority of the previous decisions of the Tribunal. Such a principle ignores that the objective of any analysis of dismissal for just cause under the *Act* is to decide whether the conduct of the employee has undermined the employment relationship, effectively depriving the employer of its part of the bargain. That objective holds whether the basis for the dismissal is grounded in misconduct, conduct demonstrating an inability to meet the requirements of the job, or some combination of the two. We agree with the following statement from Sproat, John R., *Employment Law Manual: Wrongful Dismissal, Human Rights and Employment Standards*, 1990 (Carswell):

> . . . In order to constitute just cause for dismissal, the acts of the employee must constitute a repudiation of the employment relationship which the employer may accept by terminating the contract.

The above statement does not distinguish between misconduct, on the one hand, and an inability to meet the requirements of the job on the other, when deciding if the acts of the employee amount to a repudiation of the employment relationship. Conduct that goes to the root of the contract and gives an employer just cause to dismiss an employee may consist of any type or combination of work related conduct or misconduct, but there is no logical or rationale for making one and not the other reviewable on an objective standard. Any objective standard would necessarily involve a consideration of any factors that might mitigate against dismissal.

We confirm that in cases where the termination of an employee is grounded in minor instances of misconduct or an inability to meet the requirements of the job, the requirement for an employer to show reasonable standards have been set and all the appropriate notices and opportunities have been given is a necessary element to the employer proving the conduct of an employee justifies dismissal. It should be emphasized that this requirement is grounded in considerations of reasonableness and fairness, which is a fundamental principle underpinning all of the provisions of the *Act*. Showing the requirement has been met is necessary to establish just cause. The failure of an employer to show this requirement has been met, is a fact or circumstance that will almost invariably mitigate against a finding of just cause. Showing this requirement has been met, however, does not, in and of itself, establish just cause and, more particularly, does not preclude a consideration of other facts or circumstances that might also mitigate against a finding of just cause for dismissal.

The approach taken in the original decision could foster results that are unfair, unreasonable and unjust. Applying the reasoning in the original decision, an employer would be entitled to dismiss an employee for just cause for just a single instance of unsatisfactory job performance, incompetence, or a minor infraction of work place rules, however insignificant, provided the employer gave the proper notices and opportunities. As a result, the consequences of unsatisfactory job performance, incompetence, or minor infractions of work place rules could always be the same, irrespective of how significantly the employee's conduct in those areas impacted on and undermined the employment relationship. It is inappropriate to assume an employee's conduct automatically mandates a dismissal, just as it would be inappropriate to assume an employee's conduct automatically precludes dismissal. Absent an analysis of the surrounding circumstances of the alleged conduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal for unsatisfactory job performance, incompetence, or minor infractions of work place rules might be an overly harsh response. In addition, allowing termination for

cause wherever an employee's conduct manifests unsatisfactory job performance, incompetence, or minor infractions of work place rules would further unjustly augment the power employers wield within the employment relationship.

The concept of just cause in the *Act* arises in subsection 63(3). Section 63 establishes a statutory liability on an employer for length of service compensation to a qualifying employee. In a sense length of service compensation is an earned statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may be deemed to be discharged from this statutory liability by establishing the employee claiming entitlement was dismissed for just cause. It would not be consistent with the remedial nature of the *Act* or with its purposes to allow an employer the exclusive and unassailable right to remove a statutory entitlement in the context of dismissal for unsatisfactory job performance, incompetence, or minor infractions of work place rules. The principle of proportionality and fairness to employers and employees, expressed in Section 2(b), must be respected. An effective balance must be struck between the impact of an employee's conduct on the employment relationship and the sanction imposed.

Based on the foregoing considerations, the *Act* directs an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the conduct 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 unsatisfactory job performance, incompetence, or minor infractions of work place rules with just cause for dismissal. At the same time, it would properly emphasize that such conduct going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

In the first instance, the analysis and initial judgement on whether the employer has established just cause must be made by the Director. It follows that we accept the argument made by the Director that the Adjudicator of the original decision erred in finding the Director had no authority to consider whether Ellison was dismissed for just cause, including the authority to consider any facts or circumstances that might mitigate the consequences of the employee's conduct.

We noted at the outset of this decision that the appeal was conducted on written submissions alone. This panel is therefore in as good a position as the Adjudicator of the original decision to assess the merits of the appeal.

In our view, nothing in the appeal filed by Carmel Upholstery compels a finding that the Director erred in concluding Carmel Upholstery had not proved just cause for Ellison's dismissal. As indicated earlier in this decision, the appeal consisted of a letter, a little over one page in length, challenging findings of fact made by the Director, without providing any supporting material or evidence, and re-stating allegations that were rejected by the Director during the investigation. We agree with the conclusion of the Director about the reasonableness of some of the conditions imposed on Ellison specifically the requirement that the shop area be organized and clean at all times and the assertion that Ellison was required to be available to his staff during the standard working hours. We also question the validity of a requirement to work a minimum of 40 hours a week, with no overtime until 40 hours worked. During the relevant period, the *Act* provided for daily overtime, statutory holiday time pay and time off, overtime for working on a statutory holiday, a day off in lieu of working a statutory holiday, annual vacation pay and time off. This condition, if applied according to its terms, would have contravened several provisions of the *Act*. We also accept that the failure of Carmel Upholstery to conduct a weekly review with Ellison, as they

said would happen, was correctly considered by the Director to be a mitigating factor. While we agree with the Adjudicator of the original decision that such meetings was not a condition precedent to dismissal, the failure to hold such meetings may well have lulled Ellison into believing his organization of the frame shop (which was to have been completed June 15th) and its organization and cleanliness from that date until mid-July met the standard contemplated by Zuccaro.

The Determination should not have been disturbed.

The reconsiderations are granted and original decision is set aside.

ORDER

Pursuant to Section 116 of the *Act*, we order the original decision, BC EST #D463/02, be cancelled and the Determination dated July 5, 2002 be confirmed.

David B. Stevenson Adjudicator, Panel Chair Employment Standards Tribunal	Ian Lawson Adjudicator Employment Standards Tribunal	Kenneth Wm. Thornicroft Adjudicator Employment Standards Tribunal