Employment Standards TRIBUNAL

An Application for Reconsideration

\- by -

Provident Security Corp.
("Provident")

\- 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.: 2016A/130

DATE OF DECISION: November 9, 2016

BRITISH COLUMBIA

DECISION

SUBMISSIONS

Rodney W. Sieg	counsel for Provident Security Corp.

INTRODUCTION

1. This is an application for reconsideration, filed under section 116 of the *Employment Standards Act* (the "*Act*"), and it concerns BC EST # D109/16 issued by Tribunal Member Bhalloo on August 18, 2016 (the "Appeal Decision"). Member Bhalloo confirmed a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on June 8, 2016, pursuant to which the present applicant, Provident Security Corp. ("Provident"), was ordered to pay its former employee, Jason Mackay, a total sum of $10,982.09 on account of eight weeks' wages a compensation for length of service (see section 63).

2. The delegate concurrently issued "Reasons for the Determination" (the "delegate's reasons") and these reasons were appended to the Determination.

3. Further, and also by way of the Determination, the delegate levied a single $500 monetary penalty (see section 98) against Provident for having contravened section 63 of the *Act* thus bringing the total amount of the Determination to $11,482.09.

BACKGROUND FACTS

4. "Provident is a full-service security company, offering access control systems, alarm and surveillance system installation, alarm monitoring, and mobile response" (delegate's reasons, page R3). Mr. Mackay was formerly employed with Provident as a security technician. Mr. Mackay's employment commenced on March 27, 2006, and ended on February 26, 2016, when he was summarily dismissed, allegedly for cause. Mr. Mackay filed an unpaid wage complaint and this complaint was the subject of an oral hearing before the delegate on May 30, 2016. The only issue before the delegate – and the only issue that has been contested throughout these proceedings – was whether Provident had just cause for dismissal (the amount of the section 63 award is not in dispute, assuming Mr. Mackay is entitled to compensation for length of service).

5. On June 8, 2016 the delegate issued the Determination, and his accompanying reasons, upholding the complaint and awarding Mr. Mackay 8 weeks' wages under section 63 of the *Act*.

6. Provident appealed the Determination to the Tribunal on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *Act*). Tribunal Member Bhalloo held that there was "no basis whatsoever for the natural justice ground of appeal advanced by Provident" (para. 53). Provident does not challenge this finding.

7. As for the alleged error of law, Provident maintained that the delegate erred in finding that it did not have just cause for summarily dismissing Mr. Mackay. Tribunal Member Bhalloo held that the delegate did not misdirect himself regarding the proper legal framework for evaluating allegations of just cause and that his ultimate conclusion that there was no just cause did not amount to an error in law.

8. Provident is in the security business and Mr. Mackay was employed as one of its senior technicians. According to Provident, he held an "unofficial leadership role". "Because [Mackay] had reached a certain

level of seniority, Provident offered him some latitude in terms of vacation requests and the like" and "save for the incident that led to his termination, Mr. Mackay had never been subject to disciplinary actions, nor was he ever accused of dishonesty" (delegate's reasons, page R3).

9. As a security technician, Mr. Mackay's principal duties were to install and service alarm systems in residential and business premises. In order to carry out his employment duties, Mr. Mackay had access to "sensitive information, alarm codes, security protocols, or keys to client homes and businesses" (delegate's reasons, page R3). Provident's position before the delegate was that "Mr. Mackay worked within a sensitive sphere calling for the utmost integrity; dishonesty in any degree was intolerable and warranted termination because it struck at the heart of the employment relationship [and] in [Provident's principal's] view, dishonesty in such circumstances was a 'binary' issue" (delegate's reasons, page R3).

10. According to Mr. Mackay, the events that ultimately precipitated his summary dismissal may have commenced in October 2015 when he had a brief meeting with Mr. Jagger, Provident's sole director and officer. Mr. Mackay had apparently voiced some concerns about the manner in which the company was being managed "and this might have caused him to appear disillusioned" (delegate's reasons, page R5). Mr. Mackay's evidence continued:

> Mr. Jagger called Mr. Mackay in to an office and delivered a clear message, referencing a company value that "each employee is responsible for his or her own experience". Mr. Jagger said to Mr. Mackay: "You're not happy. Why not? If there is a way we can make things happy for you here, let's do it. If not, you need to leave."

11. Mr. Mackay testified that following this October 2015 meeting, he had some concerns regarding his security of tenure and he decided to upgrade his qualifications in an order to enhance his marketability if he were to lose his job. Security personnel in B.C. can obtain a Security Alarm Field Safety Representative ("FSR") certification through the provincial Ministry of Justice. In December 2015, Mr. Mackay completed an online course toward the FSR certification (personally paying the $500 course fee) and in early February 2016 he was advised that he had passed the online course and was scheduled to write his final FSR certification exam on February 25, 2016.

12. Mr. Mackay did not advise Provident that he had completed the online course or that he was scheduled to write the FSR final exam. Rather, he concocted an obviously ill-advised plan to book off February 25 using some sort of excuse. Mr. Mackay apparently told one or more co-workers that he intended to beg off work in order to write the exam, using illness as an excuse. He ultimately did not call in sick but, rather, took a different tack. In any event, Mr. Mackay made a premeditated decision to lie to his employer and take the day off work in order to write the FSR exam. At 5:47 AM on February 25, 2016, Mr. Mackay sent the following cursory e-mail to Mr. Jagger and three other Provident employees (Record, page 59): "Due to a family emergency I won't be at work today. Sorry for any inconvenience".

13. Mr. Jagger testified that the "family emergency" excuse was particularly concocted to avoid any question or suspicion about its *bona fides*. Mr. Jagger stated that the "family emergency excuse…struck a personal chord because Mr. Mackay's family had experienced a series of health-related misfortunes in the years and months prior to the events in question [and] Provident had worked diligently to accommodate Mr. Mackay's requests for time off to deal with legitimate emergencies". Mr. Jagger's position was that "in feigning an emergency to take the exam, Mr. Mackay had abused Provident's goodwill" (delegate's reasons, page R4). For his part, Mr. Mackay conceded that he deliberately played the "family emergency" card because "he wanted the reason for his request for time off not to be questioned" (delegate's reasons, page R6).

14. Mr. Jagger learned from another employee that Mr. Mackay had taken the day off to write the FSR exam. Mr. Jagger then made certain inquiries with the examining authority to verify that Mr. Mackay had, in fact, written the exam. Mr. Jagger was obviously not the least bit impressed with Mr. Mackay's subterfuge. He had a cheque prepared for Mr. Mackay's outstanding pay (not including compensation for length or service) and the very next morning, at about 6:30 AM, Mr. Jagger confronted Mr. Mackay and formally terminated his employment. This meeting, as recounted by the delegate proceeded as follows (page R2):

> The meeting began bluntly, with Mr. Jagger asking how Mr. Mackay fared at the exam. Mr. Mackay did not deny that he had attended the exam, and the two parties discussed how difficult it had been. The meeting then turned toward Mr. Mackay having lied about his absence from work. Tempers flared a bit, and Mr. Jagger terminated Mr. Mackay without notice, handing him the envelope containing his final wages. Compensation for length of service was not included.

THE DETERMINATION AND APPEAL DECISION

15. The delegate ultimately concluded that while Mr. Mackay had engaged in "deceitful conduct" (page R7), summary dismissal was not a proportional response in all the circumstances. In particular, the delegate held that in light of Mr. Mackay's 10-year unblemished work record as a "reliable, dependable and skilled employee" – who was motivated, at least in part, out of "fear for job security" – and because there was no "nexus between the dishonesty and the nature of [Provident's] business…the severity of Mr. Mackay's dishonesty did not warrant termination".

16. The delegate commenced his analysis with the following comment (at page R6): "This is a case where an employee's poor judgment damaged a working relationship beyond repair". In its reconsideration application, Provident places particular emphasis on this finding and its legal counsel submits that the delegate misapplied the law and/or misdirected himself with respect to whether it had just cause since "if a decision maker determines that an employee's misconduct has irrevocably damaged the employment relationship, just cause will be established". Counsel further submits that in light of the delegate's finding "the working relationship was damaged beyond repair…it was an error of law for the Delegate to find that just cause had not been established".

17. Returning to the delegate's analysis of the just cause issue, the delegate referred to the leading Supreme Court of Canada decision, *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, and the two-part test formulated by the court: 1. Whether the evidence established the employee's deceitful conduct on a balance of probabilities; and if deceit is established, 2. Whether the nature and degree of the individual's dishonesty warranted summary dismissal. As noted above, the delegate concluded (and correctly so, in my view) that Mr. Mackay engaged in deceitful conduct. However, the delegate concluded that the "nature and degree" of the deceit in question did not justify summary dismissal. In reaching this latter conclusion, the delegate noted:

- Mr. Mackay "had an unblemished record of employment for nearly 10 years" (page R7);
- Mr. Mackay's deceit "was truly motivated by fear of job loss or a related consequence" (page R8);
- Mr. Mackay's decision to lie to his employer regarding the FSR exam, while premeditated, was not necessarily a decision made well in advance of the date of the exam (page R8);
- Mr. Mackay's decision to rely on a "family emergency" excuse was not "predatory" or an "abuse of Provident's past goodwill" but rather "was simply the one most likely to generate no further inquiries" (page R8);

- Although Provident likely would have granted Mr. Mackay time off to write the FSR exam had he been honest about the matter in the first instance, his misconduct must be viewed "through a subjective lens" and, in particular, his fear about his ongoing job security (pages R8-R9);
- Mr. Mackay's apparent lack of remorse during his February 26 meeting with Mr. Jagger was attributable to his having been "ambushed" and, in any event, he "immediately confessed" when confronted and that it was "unrealistic" for Mr. Jagger "to expect an apology in the heat of the moment" (page R9);
- With respect to Provident's position that dishonesty is a "binary" issue in the security industry, the delegate agreed that the nature of the industry is a relevant factor, but relying on the *dissenting* judgment in *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 (leave to appeal to the Supreme Court of Canada refused: 2015 CanLII 58373), the delegate held "that for an employee's dishonesty to be aggravated by the nature of the business there ought to be a nexus between the dishonesty and the nature of the business [and] in this case, I can see no such nexus" (page R10). The delegate further noted that Mr. Mackay's dishonesty had "no bearing on the safety or security of Provident's clients; further, the lie has not been shown to have caused any harm to Provident's reputation as a provider of security services" (page R10).

18. The delegate's ultimate conclusion was that "the severity of Mr. Mackay's dishonesty did not warrant termination" (page R10).

19. Provident appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Tribunal Member Bhalloo rejected both grounds of appeal and, as previously noted, the only issue now before me on reconsideration concerns whether or not the delegate erred in law.

20. In the Appeal Decision, Tribunal Member Bhalloo addressed the delegate's comment about the employment relationship having been "damaged beyond repair" and while he found it "confusing" for the delegate to have made such a comment and then find that there was no just cause, Member Bhalloo ultimately concluded that the delegate did not err in law in finding that there was no just cause because termination, in this case, was not a proportional response (see Appeal Decision, para. 41).

21. On appeal, Provident also referred to the delegate's reliance on the dissenting judgment in *Steel*, *supra*, arguing that the delegate erred in relying on a dissenting opinion. Indeed, Provident's position was that the result in *Steel* (namely, that the employee was terminated for proper cause) should equally apply to Mr. Mackay's case. Tribunal Member Bhalloo rejected this position (at para. 45):

> Mr. Jagger, it appears, is arguing that the nature of the business of Provident in this case and Mr. Mackay's position warranted an elevated standard of trust and the delegate erred in heeding to Donald J's comments in *Steel*. While I find that the delegate in this case *did* take into consideration the nature of Provident's business and Mr. Mackay's position within that business, he did not give these factors disproportionate deference in the second part of test in *McKinley*. I find that the delegate's analysis was balanced and he did not err in his conclusion by simply referring to Donald J.'s [in dissent] comments.

22. Provident also submitted, on appeal, that the delegate should have found just cause based on our Court of Appeal's decision in *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1. Tribunal Member Bhalloo rejected this submission finding (at para. 47):

> Unlike [the trial judge] in *Roe*, I find that the delegate did apply the contextual approach in *McKinley* and unlike in *Roe*, based his decision on actual findings of fact. I also find that there are material differences

> between *Roe* and this case. *Roe* unlike Mr. Mackay was a senior management employee who knowingly violated a written policy of the employer for personal gain and tried to conceal it. *Roe* effectively involved a theft or misuse of the employer's assets which, in terms of the gravity of misconduct, is higher relative to Mr. Mackay's lie to Provident to obtain time off to take the FSR test. I find *Roe* distinguishable for all these reasons from this case.

23. Accordingly, Member Bhalloo dismissed the appeal and confirmed the Determination

THE APPLICATION FOR RECONSIDERATION

24. Provident's application for reconsideration is predicated on three arguments. First, Provident says that the delegate, by relying on the dissenting judgment in *Steel*, *supra*, created a "two-step consideration where the first question is whether the misconduct involved money or the affairs of the client [and] if this question is answered in the negative, the nature of the business is 'irrelevant' and is not considered in the contextual analysis". Provident says under this approach, the nature of the business can only be an aggravating factor if there is such a nexus. Finally, and with respect to this first argument, Provident says that "whether the dishonesty has breached the faith inherent in the work relationship, does not necessarily require that the dishonesty harmed the Employer's clients or harmed the Employer's reputation" and that the delegate, "having found there was no harm to clients or reputation" essentially "erected a barrier…[and] did not engage in a consideration of the nature of the Employer's business".

25. As noted above, the delegate commenced his analysis with the comment that Mr. Mackay's "poor judgment damaged [the] working relationship beyond repair" (page R6). Provident's second argument is that "in light of this conclusion…it was an error of law for the Delegate to find that just cause had not been established".

26. Third, Provident says that the delegate erred in failing to consider relevant evidence. More specifically, Provident says that the delegate "fail[ed] to consider evidence that Mr. Mackay had spoken to one or more other employees of the Employer and had indicated to these employees that he intended to call in sick the day of the exam".

FINDINGS AND ANALYSIS

27. The Tribunal evaluates reconsideration applications utilizing a two-stage approach (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98). The Tribunal first considers whether the application raises a sufficiently important issue of law, fact, principle or procedure so as to justify a review of the application on its merits (this latter review being the second stage).

28. In my view, while this application raises, at least in part, important legal issues, ultimately, I am not satisfied that the application is meritorious and, as such, I do not find it necessary to seek submissions from either Mr. Mackay or the Director of Employment Standards.

29. I shall address each of Provident's three arguments in turn.

Reliance on the **Steel** *Dissent*

30. The delegate's reference to the *Steel* decision is found at pages R9 – R10 of his reasons, and arose in the context of Provident's submission that just cause based on dishonesty was a "binary" issue for an employee working in the security industry. The relevant portion of the delegate's discussion of this point is as follows (page R9):

> …Mr. Jagger made a more nuanced point, namely that the nature of the business of security was incompatible with an employee who was capable of being dishonest in the course of his work. In other words, he argued that when employing the contextual approach, the nature of the business is a factor that should be considered in assessing the severity of an employee's dishonesty. I must agree, and the judgement of Donald J (in dissent) in *Steel v. Coast Capital Savings Credit Union* 2015 BCCA 127 *[Steel]* is instructive. (my underlining; *sic*)

31. The delegate very briefly summarized the facts in *Steel* and then referred to a portion of para. 13 of Justice Donald's dissenting judgment. He then continued (at page R10) "for an employee's dishonesty to be aggravated by the nature of the business there ought to be a nexus between the dishonesty and the nature of the business". The delegate concluded his analysis of this particular point as follows: "In this case, I see no such nexus".

32. Justice Donald's comments, referred to by the delegate, require some further context. Ms. Steel, a 21-year employee, worked as an "IT Helpdesk Analyst" for a credit union. Her job allowed her to work "unsupervised in her day-to-day functions and was one of only a handful of people that had complete access to the respondent's computer system [and] she had unfettered access to every document and file on the system, including the private and personal files of the respondent's employees" (para. 20). Although "employees were forbidden from accessing anyone else's emails or files without permission" (para. 21), Ms. Steel "improperly and intentionally accessed the personal file of a manager of the respondent for her own purpose" (para. 24). At paras. 12 and 13 of judgment, Justice Donald stated:

> What is absent from the trial judge's reasons is an explanation why a single instance of a breach of the privacy rules should end a 21-year career. The judge does not find this to be a case of dishonesty. The record does not show deceit, fraud, theft or stealth. The misconduct was serious, as the judge found, but her analysis of the proportionality of the penalty left out a vital factor.
>
> This leads me to the standard of trust *vis-à-vis* financial institutions. It would appear that the judge found the misconduct to be more egregious because of this element and so it affected the balance. In my view, unless the impugned behaviour involves money or the affairs of a client, the fact that an employer is a bank or a credit union is irrelevant. Every business organization large enough to have an IT department is entitled to impose reasonable rules for confidentiality and privacy. The standard of trust is not elevated simply because the business is financial in nature. In the instant case, the matter was an internal administrative issue: parking spots. The integrity and probity of the respondent as a credit union could not have been compromised by the appellant's actions.

The point that Justice Donald was making, it appears to me, was not that the nature of the employer's business was irrelevant but, rather, that the misconduct in question could have arisen in any enterprise that had a large IT department with the concomitant need for stringent confidentiality rules.

33. The *Steel* majority judgment, on the other hand, held that the trial judge correctly determined that Ms. Steel was dismissed for just cause following her unauthorized access of certain computer files (relating to parking place assignments) contrary to the employer's express confidentiality protocols. At paras. 33 to 35, the majority held:

> …[the trial judge] applied a contextual approach and considered whether the nature of the misconduct, which the appellant admitted was the result of a deliberate choice, was reconcilable with a continuing employment relationship. The trial judge expressly referenced para. 48 of *McKinley*, which set out the applicable test, at paras. 22 and 27 of her reasons.
>
> The trial judge was aware of the length of the appellant's service, which she noted at para. 3 of her reasons, and the seriousness of the transgression, all of which she considered in the circumstances of the

> employment relationship and the respondent's clear policy on privacy-related matters. The record established that accessing confidential documents only in accordance with the privacy policy of the respondent was a fundamental obligation of a Helpdesk employee. It was open to the trial judge to find that this fundamental obligation placed the appellant in a position of substantial trust, and made the continuing existence of that trust fundamental to the viability of the employment relationship. In addition, it was open to the trial judge to find that, in the circumstances of the case before her, breach of the confidentiality policy and failure to follow Helpdesk protocols resulted in a fundamental breakdown of the employment relationship.
>
> Absent a palpable or overriding error or an error in principle in applying *McKinley*, this Court cannot interfere with the trial judge's determination of just cause. In the circumstances of this case I find no such error.

34. In his reasons, the delegate appeared to first acknowledge that the nature of the employer's business is a relevant factor, but then held given the particular type of dishonesty in question in this case, it was not an "aggravated" (which I take to mean a "more severe") case of dishonesty simply because Provident was in the security business. In my view, the delegate's comments are somewhat problematic and I do not believe that his reference to, and apparent reliance on, the dissenting judgment in *Steel* was appropriate. Nevertheless, I am also of the view that the delegate ultimately applied the correct test, as dictated by the Supreme Court of Canada in *McKinley*, namely, that once dishonesty has been established, the decision-maker must then determine if the dishonesty warrants summary dismissal. The Supreme Court of Canada clearly rejected the notion that dishonesty, *per se*, and in all cases, constitutes just cause for dismissal. The court favoured an approach that balances the nature of the dishonesty against the employee's fundamental employment obligations. The court also acknowledged that there could be "lesser sanctions for less serious types of misconduct" (para. 52).

35. The delegate took into account a number of factors (outlined above) in deciding that, on balance, there was no just cause in this case. Tribunal Member Bhalloo similarly held that in the particular circumstances of this case, dismissal was a disproportionate response to the misconduct in question: "I find that the delegate's analysis was balanced and he did not err in his conclusion by simply referring to Donald, J.'s comments" (para. 45). Tribunal Member Bhalloo also held that "the delegate in this case *did* take into consideration the nature of Provident's business and Mr. Mackay's position within that business" [*italics* in original text] but that the delegate "did not give these factors disproportionate deference in the second part of [the] test in *McKinley*" (para. 45).

36. Provident says that Member Bhalloo erred in finding that the delegate "considered the nature of the Employer's business and Mr. Mackay's position" since "the Delegate clearly declined to consider the impact of the dishonesty on the nature of the business and Mr. Mackay's position, because the Delegate imposed the requirement that the dishonesty harm the Employer's clients or its reputation". Provident submits that the delegate "failed to consider whether dishonesty, in and of itself, had destroyed the employment relationship in accordance with the test from *McKinley*".

37. In *McKinley*, the Supreme Court of Canada did not, in fact, specifically identify the "nature of the employer's business" as a relevant factor when undertaking the contextual analysis that must be undertaken to determine if dismissal was a proportionate response to the misconduct in question. The closest the court came to adopting a "nature of the business" factor was a reference, at para. 33, and drawn from another decision (*Co-operators Life Insurance Co. v. Victory Credit Union Ltd.*, 1998 CanLII 6089 (N.S.C.A.)), to an employment law text (H. A. Levitt, *The Law of Dismissal in Canada*, 2nd ed., 1992) supporting the contextual approach and that identified the "nature of the employment" as being a relevant consideration. Justice Iacobucci, for the court, ultimately held (para. 57):

> 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.

38. While the nature of the employer's business is undoubtedly a factor to be taken into account – as a relevant fact concerning the overall nature of the employment relationship – the Supreme Court of Canada, in *McKinley*, did not elevate the "nature of the employer's business" to any sort of exalted superordinate status. Rather, it is a factor to be properly taken into account when determining if the "extent of the alleged dishonesty [has] undermined [the employee's] essential obligations to his employer" (para. 58).

39. The delegate acknowledged that the nature of the employer's business was a relevant factor (page R9) but, then having done so, and relying on the dissenting judgment in *Steel*, held that the dishonesty in question was not "aggravated" by the fact that Provident was in the security business because there was no "nexus between the dishonesty and the nature of the business" (page R10). In my view, the delegate clearly erred when he stated that the dishonesty was not "aggravated" by the nature of Provident's business because it related to "something with no bearing on the safety or security of Provident's clients" and because "the lie has not been shown to have caused any harm to Provident's reputation as a provider of security services" (page R10). However, it is also clear that the delegate took into account many factors in determining that dismissal was a disproportionate response to Mr. Mackay's single act of dishonesty relating to his writing the FSR exam. I should also add that I agree with the delegate that this latter act of dishonesty was not directly related to his duties (such as theft of a client's property) and that there was no evidence that Provident's business reputation was harmed by this particular incident.

40. In *Steel*, the majority observed (at paras. 28 and 30):

> The governing principle from *McKinley* is that a trial judge is tasked with determining whether, <u>in the totality of the circumstances</u>, the alleged misconduct was such that the employment relationship could no longer viably subsist: *McKinley* at paras. 56-57. However, the inherent value of the job to the employee need not be expressly considered in determining whether there was just cause to dismiss. Put differently, the trial judge is not obligated to formally balance the length and quality of service with the nature and severity of the misconduct in determining whether there was just cause to dismiss, <u>though it may be appropriate on the facts of a particular case to engage in just such an analysis</u>…
>
> …In a case where the employee admits to having engaged in the misconduct, the sole issue for the trial judge to consider is whether that conduct caused a breakdown in the employment relationship. Therefore, <u>whether the length of service or the quality of service is a relevant factor that mitigates the effect of the misconduct on the employment relationship is a question for the trial judge to determine based on the specific facts and circumstances of a particular case</u>.
>
> (my <u>underlining</u>)

41. Thus, the decision-maker at first instance is entitled to include in his or her analysis a consideration of the employee's tenure and overall employment history. The delegate unequivocally found that Mr. Mackay engaged in "deceitful" conduct but also considered the conduct to be rather less serious than other forms of dishonesty. For my part, I consider Mr. Mackay's dishonesty to be much less serious than that involved in *Steel*, particularly since there was no invasion of privacy or breach of confidentiality and privacy/confidentiality protection was a – perhaps even *the* – fundamental element of Ms. Steel's employment. Mr. Mackay's dishonesty, unlike Ms. Steel's misconduct, did not directly concern a core requirement of his job.

42. *Roe*, *supra*, concerned a B.C. Ferries terminal manager who was summarily dismissed because "on more than one occasion, [he] knowingly [gave] complimentary food and beverage vouchers to his daughter's sports teams without prior authorization, contrary to the Employer's policy" (para. 1). The trial judge, characterizing Mr. Roe's conduct as "bordering on trifling", held that he was wrongfully dismissed. The Court of Appeal held that the trial judge's apparent focus on the relatively small monetary value of vouchers, coupled with his failure to adequately weight Mr. Roe's senior position, constituted a palpable and overriding error and thus the court ordered a new trial (para. 37):

> In reaching his finding that Mr. Roe's actions were "bordering on trifling", the judge does not appear to have applied the contextual approach, mandated by *McKinley*, in assessing whether Mr. Roe's misconduct irreconcilably undermined the good faith obligations inherent in the employment relationship (paras. 8-11 of his reasons). That approach, in my view, would have required consideration of: (i) the high standard of conduct expected of Mr. Roe given the responsibilities and trust attached to his senior management position; (ii) the essential conditions (characterized as "core values") of integrity and honesty in his employment contract, including the requirement in the Code "to act in an honest and ethical manner at all times" (emphasis added); and (iii) his deliberate concealment of his actions which he later acknowledged to have been wrong and unethical. It was in this context the judge had to consider whether Mr. Roe's assumed misconduct justified his dismissal. In my respectful view, it was the judge's failure to apply this contextual approach that appears to have led him to commit a palpable and overriding error.

I entirely agree with Member Bhalloo (at para. 47) that there are significant factual distinctions between Mr. Roe and Mr. Mackay's situations, and that the former's misconduct was more serious. I further agree that, unlike the trial judge in *Roe*, the delegate did adequately apply the *McKinley* contextual approach in ultimately determining that dismissal was a disproportionate response to Mr. Mackay's misconduct.

43. The *Act* does not contain a provision akin to section 89(d) of the *Labour Relations Code* empowering the delegate or the Tribunal to substitute a lesser penalty where dismissal is "excessive in all circumstances of the case". In my view, and consistent with the direction in *McKinley* that employers can impose lesser sanctions for misconduct that does not give just cause for dismissal, I believe that a serious sanction, albeit one short of dismissal, would have been appropriate in this case. However, Provident chose to summarily dismiss Mr. Mackay and the delegate had no authority to substitute a lesser penalty. The only issue before the delegate was whether dismissal was a proportionate response to Mr. Mackay's misconduct in having deliberately lied about the reason why he was not reporting for work on February 25, 2016. The delegate considered many factors, including Mr. Mackay's prior work history, the nature of the dishonesty in question, its impact on Provident's business operations and reputation, as well as other contextual factors, and ultimately concluded that dismissal was a disproportionate response. I entirely agree with that ultimate conclusion, although I do not necessarily endorse the entirety of the delegate's analysis.

"The Working Relationship Was Damaged Beyond Repair"

44. As noted above, the delegate commenced his analysis with the comment: "This is a case where an employee's poor judgment damaged a working relationship beyond repair" (page R6). In *McKinley*, the Supreme Court of Canada stated that just cause is established where "the employee's dishonesty gave rise to a breakdown in the employment relationship" (para. 48) and "that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause" (para. 57).

45. On its face, the delegate's opening comment could be taken as suggesting that Provident had just cause for dismissal. Tribunal Member Bhalloo referred to this comment as "unfortunate as it is confusing" (para. 41) and I certainly agree with that characterization. However, Member Bhalloo ultimately concluded (para. 38) that "upon reviewing the balance of the delegate's analysis in the Reasons…which assesses Mr. Mackay's

misconduct through the lens of the two-part contextual approach in *McKinley*, it is clear that the delegate arrived at a conclusion that appears inconsistent with his earlier comment in the Reasons that the relationship of the parties was irreparably damaged or 'beyond repair'". I also entirely agree with Member Bhalloo's comment in this regard.

46. Counsel for Provident says "if a decision-maker determines that an employee's misconduct has irrevocably damaged the employment relationship, just cause will be established". Counsel further states that, far from being "unfortunate", the delegate's "beyond repair" comment was a "finding of fact" and a "conclusion" that "the employment relationship was damaged beyond repair".

47. As noted above, Member Bhalloo found that the delegate's comment to the effect that Mr. Mackay's "poor judgment damaged a working relationship beyond repair" was "unfortunate" as it could lead one to conclude the delegate determined Provident had just cause for dismissal. However, a fuller consideration of the delegate's entire reasons led Member Bhalloo to find "it is clear that the delegate arrived at a conclusion that appears inconsistent with his earlier comment…that the relationship …was irreparably damaged" (para. 38).

48. Counsel for Provident asserts that the effect of the Appeal Decision "is to say that the Delegate didn't mean to say what he said [about the working relationship being damaged beyond repair]". Counsel's argument continues:

> The Tribunal would have the parties read out the opening words to the Delegate's analysis. The Delegate's opening words are clear, they carry a special meaning in the just cause analysis, and they operate in a very specific manner in law. They are not "unfortunate" they are a finding of fact that when applying the proper legal test, the employer has proven just cause for termination. [*sic*] By failing to recognize this fact, the Tribunal erred in law and permitted a misapplication of the law to stand.

49. In my view, the delegate's comment must be placed within the factual context of this case. Mr. Jagger's testimony at the complaint hearing was that on the morning of February 25, 2016, he learned from one of his employees that Mr. Mackay did not have a "family emergency" (as he indicated in his e-mail sent at 5:47 AM) but "took the day off to write the FSR exam" (delegate's reasons, page R2). After verifying that Mr. Mackay did in fact write the exam, he made an immediate decision to terminate Mr. Mackay. Mr. Jagger directed that a cheque and wage statement be prepared for Mr. Mackay's final pay (excluding compensation for length of service). The next morning, at about 6:30 AM, Mr. Jagger confronted Mr. Mackay and called him into a short meeting that commenced with Mr. Jagger asking Mr. Mackay how he fared at the exam. Mr. Jagger expressed his displeasure about being lied to. Tempers flared and angry words were exchanged. Mr. Jagger told Mr. Mackay he was fired and handed him his final pay and wage statement.

50. The only reasonable inference to be drawn from the foregoing facts is that Mr. Jagger was extremely upset with Mr. Mackay for having lied about missing work due to a "family emergency" when, in fact, he was writing the FSR exam. Mr. Jagger made an immediate decision – without giving Mr. Mackay any opportunity to explain his situation – to terminate Mr. Mackay. As recounted in the delegate's reasons (page R4):

> I asked Mr. Jagger when he made the decision to terminate Mr. Mackay, and he replied that he decided that when he confirmed with the examination authority that Mr. Mackay had attended the FSR exam. The meeting he and Mr. Mackay had the following day was just to confirm the facts and make the termination official. This is why Mr. Jagger had an envelope containing final wages and a paystub ready at that meeting.

51. While the delegate did commence his analysis with the "working relationship damaged beyond repair" comment, I am unable to accept that the delegate, in making this comment, was passing any judgment on the

"just cause" issue. After making this comment, the delegate continued with an extensive *McKinley* analysis, turning his mind to the two principal issues that arise in dishonesty cases, namely, whether there was dishonesty in fact and, if so, whether dismissal was a proportionate response to the dishonesty. The facts of this case clearly demonstrate that Provident's principal, Mr. Jagger, was not the least bit interested in forgiving Mr. Mackay for his transgression and, in that sense, there was no path – at least in Mr. Jagger's mind – that would have allowed Mr. Mackay to return to work. In other words, there was no way to "repair" the damage that Mr. Mackay wrought by his dishonest behaviour.

52. Mr. Jagger believes – and he continues to assert – that there was just cause for dismissal; but even if there was no just cause, he is adamant that Mr. Mackay cannot continue in his firm's employ because, among other things, "it is anathema to a security company to retain an employee who has behaved dishonestly" and that Mr. Mackay's misconduct "struck at the heart of the employment relationship" (delegate's reasons, page R3). In my view, the delegate's comment was one relative to the factual, not the legal, situation with respect to whether this particular employment relationship could ever be rehabilitated.

Failure to Consider Relevant Evidence

53. Provident's position on this score is that the delegate did not properly weigh evidence to the effect that Mr. Mackay had previously spoken to one or more other Provident employees, telling them that he intended to "call in sick the day of the exam". In support of this particular challenge to the Determination and the Appeal Decision, Provident submitted a "statutory declaration" – simply an affidavit – from Mr. Jagger in which he provides further background relating to the events of February 25, 2016. For the most part, Mr. Jagger's affidavit merely summarizes his recollection of the evidence that was submitted to the delegate at the complaint hearing and this summary is consistent with the delegate's summary of the evidence set out in his reasons.

54. Provident says that Mr. Mackay would have been granted time off to write the FSR exam if he had only been honest and forthright about that matter. Provident rejects the delegate's finding that Mr. Mackay lied because he was "truly motivated by fear of job loss or a related consequence" (delegate's reasons, page R8). Provident's counsel submits:

> …the notion that Mr. Mackay was driven to lie out of fear for the security of his job, is a view of the facts that cannot be reasonably supported when considered in light of the evidence that Mr. Mackay had sought and been granted a significant number of days off after the Delegate found that Mr. Mackay no longer felt secure in his employment.

Counsel says that "the delegate erred by acting on a view of the facts which could not be reasonably entertained" and that he failed "to consider relevant facts that directly impacted the ultimate question of whether the employment relationship remained viable".

55. The delegate concluded that it was "probably true" Mr. Mackay would have been granted time off to write the FSR exam if had made such a request. Nevertheless, the delegate held that Mr. Mackay's behaviour had to be viewed through a "subjective lens" and that after his October 2015 meeting with Mr. Jagger, he "did not feel secure in his job, confident asking for time off or that Mr. Jagger was as open to discussion as he may once have been" (delegate's reasons, page R8). There was evidence before the delegate confirming that Mr. Mackay had been granted time off for vacation, because a child was hospitalized, and for other unspecified reasons after October 2015. However, and with particular reference to February 25, 2016, Mr. Mackay testified that he was untruthful about the reasons for his absence because if he told Provident he was writing the FSR exam, he believed that would be seen "as a message that he had decided to leave the company" (delegate's reasons, page R5).

56. The delegate *accepted* Provident's position that it would likely have granted Mr. Mackay time off had he made a truthful request regarding the FSR exam. However, the delegate also found that this particular request was qualitatively different from other prior requests for time off and, as such, he accepted Mr. Mackay's explanation as to why he was untruthful. Provident rejects the delegate's finding in this regard but it was nonetheless a finding open to the delegate on the evidence before him.

57. I am satisfied, as was Member Bhalloo (Appeal Decision, paras. 54 – 55), that the delegate's findings of fact – and his inferences from those factual findings – were reasonable, and that he did not err in law in making his findings.

ORDER

58. Pursuant to subsection 116(1)(b) of the *Act*, the application to reconsider the Appeal Decision is refused and the Appeal decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal