BC EST #D173/98
Reconsideration of BC EST #D035/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of a reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Beaver Landscape Ltd.

("Beaver")

- of a Decision issued by -

Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/101

DATE OF DECISION: April 29, 1998

DECISION

OVERVIEW

This is an application for reconsideration of a decision of the Tribunal, wherein the Tribunal dismissed the employer's appeal of a Determination. The Tribunal upheld the Determination and found that the employer had not discharged its burden to establish that it dismissed an employee with "just cause". The Tribunal also varied the Determination, disallowing an amount determined for "special clothing". On reconsideration the sole issue was with regard to the issue of "just cause". This reconsideration was decided on the basis of written submissions made by the employer and the employee, without an oral hearing.

ISSUE TO BE DECIDED

Did the Adjudicator err in determining that the employer failed to discharge its burden to establish "just cause" for the dismissal of an employee?

FACTS

Glen Teager, an employee of Beaver, was discharged from his position as a landscaper on April 1, 1997. The employee had been employed with the employer since October 5, 1992 and supervised two employees. The employer claimed that it had just cause to terminate Mr. Teager. The reasons for termination included "lack of initiative, negative attitude and difficulties in following instructions" among others. The Director's delegate found that the employer failed to establish just cause for the discharge, in particular that the employer failed to warn Mr. Teager that his job was in jeopardy. The employer appealed and the Adjudicator considered the evidence adduced at an oral hearing on December 19, 1997. The Adjudicator agreed with the Director's delegate that the employer failed to discharge the burden of proving just cause and in particular found that the employer failed to prove that it told the employee in a clear and unequivocal manner that his job was in jeopardy. The Adjudicator varied the Determination by reducing the amount owing by $20.00. The Adjudicator found that the Director's delegate erred in determining that a sweatshirt with the company logo was special clothing. The latter issue was not in dispute in this reconsideration application.

The employer disagrees with the findings of fact made by both the Director's delegate and the Adjudicator and continues to assert that it had "just cause" to dismiss Mr. Teager.

ANALYSIS

I have considered the Determination, and the Tribunal Decision and the submissions of the parties.

In this case the employer asks that "this case be reviewed again and a number of concerns addressed". The employer raises a number of issues that relate to findings of fact made by the Adjudicator at the hearing. In my view this reconsideration application by the employer fails because the employer has failed to meet the test required for reconsideration. That test is set out in the case of *Bicchieri Enterprises Ltd.*, BC EST #D 335/96. A reconsideration will only be granted where there is a demonstrable breach of the rules of natural justice, where there is compelling new evidence that was not available at the first hearing or where the adjudicator made a fundamental error of law.

In my view the employer has not introduced compelling new evidence and there is no breach of the rules of natural justice. The only issue is whether the Adjudicator made a fundamental error of law. If the Adjudicator applies the "wrong test" in the assessment of "just cause" this may be a fundamental error of law. Likewise if there is "no evidence" to support a finding of fact, this may also be a fundamental error of law. These points will be addressed below.

The Wrong Test?

In my view the Adjudicator properly set out that the burden was on the employer to prove an error in the Determination. The burden to prove "just cause" is clearly a burden that falls to an employer. The Adjudicator clearly set out the applicable law related to discharge of employees and in particular cited the following decisions of the Tribunal:

Kruger, BCEST # D003/97
Chamberlain and Chamberlin, BCEST #D374/97
Sambuca Restaurants Ltd, BCEST #D322/97

The Adjudicator appears to have applied the proper tests both with regard to the burden of proof and the law applicable to discharge for "just cause".

Lack of Evidence to Support a Finding of Fact?

The employer has alleged that the Adjudicator was wrong in the determination of facts. In my view the finding of facts is squarely within the jurisdiction of the Adjudicator, and findings will not be disturbed on a reconsideration unless there is no evidence for a finding. As long as there is some evidence to support a finding of fact an Adjudicator will not err in law.

The Adjudicator found that the circumstances surrounding the termination were in dispute, and that he had two equally probable explanations before him at the hearing. If this was the case, than clearly the Adjudicator was correct in determining that the employer had not met the onus of proving on a balance of probabilities that just cause was established.

This also appears to be a case where the Adjudicator found as a fact that there were two acts of the employer, which were inconsistent with "just cause".

In particular the Adjudicator appears to have been concerned that the employer's treatment of the employee in giving a raise was inconsistent with an allegation that an employee was not meeting clearly communicated standards of performance. The Tribunal appears to have considered the argument that the employer gave the raise in an attempt to motivate the employee. This appears to be a "hollow" explanation, which the Adjudicator was entitled to reject.

Secondly, the Adjudicator appears to have found that the employer failed to provide written warnings to the employee. The employer advanced as a reason for failing to give written warnings the lack of capacity of the employee to understand written warnings. The Adjudicator found that this explanation was inconsistent with the fact that the employer was giving instructions to the employee in writing. There was some evidence therefore to support the findings made that the employer gave no clear warning to Mr. Teager that his job was in jeopardy.

The employer in his submissions on reconsideration indicates that written warnings would have served no purpose in dealing with this employee. The employer also argues that the Tribunal did not determine whether Mr. Teager was literate. The burden of proof at the Tribunal level is on the appellant to show that the Determination ought to be varied or cancelled. The burden of proving that Teager was illiterate and could not comprehend written instructions clearly falls on the employer. The Tribunal did not err in law on this point.

The employer argues that the employee failed to provide evidence to the Tribunal other than a bare denial. It is up to the employer to persuade the Tribunal that an error was made. Mr. Teager did attend and apparently did give evidence, and therefore there was some evidence for the Tribunal to weigh and consider, and the weight of the employee's evidence was obviously sufficient for the Adjudicator to be persuaded that the employer did not discharge its burden. The Adjudicator did not err in law on this point.

There is some evidence that supports the findings of fact made by the Director's Delegate and by the Adjudicator. There is therefore no error of law. There is no allegation of a breach of natural justice. There is no fresh evidence provided which was not provided to the Tribunal. This application for reconsideration therefore fails.

ORDER

The application for reconsideration is dismissed, and the decision of Adjudicator made January 22, 1998 is affirmed.

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Paul E. Love
Adjudicator
Employment Standards Tribunal