BC EST #D409/99
Reconsideration of BC EST #D189/99

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

J.R. Hair Design Ltd.
(the "Employer")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/344

DATE OF DECISION: October 4, 1999

DECISION

SUBMISSIONS

Mr. John Russel	on behalf of the Employer
Ms. Lynda Toth	on behalf of the herself
Ms. Julie Brassington	on behalf of the Director

OVERVIEW

This is an application by the Employer pursuant to Section 116 of *the Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on May 3, 1999 (#D189/99). Following a hearing on April 14, 1999, the Adjudicator concluded that he was not satisfied that the delegate had erred when he found that the Employer did not have just cause for the termination of an employee, Ms. Lynda Toth, and that she was entitled to compensation for length of service, for a total of $2,015.57 plus interest. The Employer is seeking to reconsider the decision of the Adjudicator.

ISSUES TO BE DECIDED

The Employer argues that the Adjudicator did not apply the "right" facts and misinterpreted the "facts". The Employer says that it has evidence that Toth "tried to destroy <its> business and <its> clients (sic.)" Specifically, the Employer argues that Toth made a serious error--"burning hair and scalp of customers"--for the second time, because of "carelessness and ignorance" despite being "noticed" about this. The Employer says that it has witnesses to this. The Employer also suggest that Toth attempted to lure business away from it to her new employer and that she treated "ethnic" customers differently. The Employer also takes issue with Toth's testimony a the hearing and suggests that she was not truthful. The Employer says it can produce witnesses to support these allegations. The issue is whether the Employer, in these circumstances, is entitled to have the Adjudicator's decision reconsidered?

ANALYSIS

Section 116 of the *Act* provides (in part):

> 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 decison may make an application under this section.

An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BC EST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system.

This matter came before the Tribunal as the result of the Employer's appeal of a Determination, dated January 11, 1999, which concluded that Toth, who had been employed at the beauty salon between April 15, 1991 and May 21, 1998, was entitled to 5 weeks compensation for length of service in addition to the two weeks working notice she had been given. The Determination noted that the onus is on the employer to establish, on a balance of probabilities, that there was just cause for the dismissal and found that the Employer had "failed to meet the onus" in the case of Toth.

The facts relied upon by the Adjudicator may be summarized as follows:

- Toth commenced employment at the Old Orchard Beauty Salon in April 1991 which, at the time of her termination, was operated by John Russell.

- On May 6, 1998, Toth was styling a customer's hair, using bleach to colour the hair. The bleach came into contact with the customer's scalp, causing chemical burns. At that time, Toth was attending to another customer and had asked the salon's manager to watch the first customer. A witness for the Employer explained that Toth should not have started another customer, but agreed--in cross examination--that most stylists did this.

- The evidence did not show that the product used to bleach the customer's hair was the cause of the problem.

- Russell terminated Toth's employment and gave her two weeks notice. During the notice period, she sought other employment and let her customers know her home number and invited them to call her. She called a number of her regular customers after she started at the new location. The Employer knew of this and did not tell her to stop.

- At the hearing the Employer introduced a number of other complaints against Toth, including alleging that she was "racist" in her treatment of "ethnic" customers. Toth denied this. The Employer also blamed Toth for "greatly reduced" work in the salon after she left.

The original panel identified the issue before it as whether the Employer had "established that the delegate's decision was incorrect". The decision may be summarized as follows:

- The Adjudicator found that the allegation of racism was an "afterthought", which had not been mentioned to the delegate, and--in any event--lacked foundation. Accordingly, he dismissed the allegation.

- The Adjudicator agreed that the incident with the customer was "serious" and that the Employer "had the right to discipline Toth". However, the evidence did not establish that Toth was "incapable or sloppy". Rather she "was successful at the shop". While the Employer had concerns about Toth's performance, there was no suggestion of progressive discipline. The Adjudicator accepted the delegate's conclusion that the Employer "did not establish just cause for termination".

- The Adjudicator did not find that the slow-down in business at the salon was caused by Toth.

The application for reconsideration is not clearly framed. It appears that one of the grounds for reconsideration is a mixed question of law and fact. The Employer argues that the Adjudicator ought to have found that an employee who has been warned and, yet a second time, commits the same act, is deserving of termination. In the appropriate circumstances, as a matter of law, where the conduct is a sufficiently serious, that may well be the case. The principles consistently applied by the Tribunal in termination cases has been summarized as follows (*Kruger* , BC EST #D003/97):

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

2. Most employment offenses 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 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 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."

In the absence of a fundamental breach of the employment contract, a warning must inform the employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the standard will result in dismissal (Chamberlin and Chamberlin, BCEST #D374/97). While it is preferable (because it is easier to prove) that a warning be in writing, it is not required (Sambuca Restaurants Ltd., BCEST #D322/97). While the Employer, in the application for reconsideration, asserts that Toth was warned about the "consequences", there are no particulars of any such warning. The Adjudicator agreed that the incident was a "serious". However, the Adjudicator found that there was "no suggestion of progressive discipline". I am not prepared to set aside the Adjudicator's findings in that regard. It is not clear from the application for reconsideration what evidence was--or was not--presented to the original panel. Moreover, there is no mention of this either in the Determination or in the original appeal submission to the Tribunal, which focusses on allegations of "conflict of interest" and "poor quality workmanship". If the chemical burns incident was as serious, as now suggested by the Employer, in all likelihood, it would have featured prominently in the appeal submission. While there are no express references to the legal principles set out above, it is clear from the decision that the Adjudicator applied these principles to the facts at hand. I do not conclude that the Adjudicator erred in law.

The Employer argues that the Adjudicator erred in a number of purely factual matters. Largely, these boils down to an allegation that Toth made a number of statements at the original hearing which the Employer now says it can prove were not truthful. Toth responds to--and denies--these factual allegations. The delegate says that the application for reconsideration does not contain any new information and evidence and opposes the application.

In my opinion, there is not merit to these grounds for reconsideration. The Adjudicator heard the testimony and had the opportunity to observe the witnesses and, therefore, is in a better position to evaluate the evidence. Moreover, as mentioned above, it is not clear from the application what evidence was presented by the Employer at the hearing, where the Employer had the opportunity to cross examine Toth, and witnesses appearing on her behalf, and make submissions in that regard. At the minimum, I would expect that the applicant would clearly identify the evidence presented at the original hearing and clearly identify where the Adjudicator misapprehended the evidence. While it is clear that the Employer disagrees with the findings, I am not satisfied that the Adjudicator misapprehended the evidence before him. For example, the Employer disputes the admission of its own witness on cross examination-referred to in the decision--that it was common practice for the stylists to start working with another customer while the bleaching takes effect. The Employer says that it has a number of witnesses, in addition to the two who testified at the hearing, who can testify in support of the allegation that this was the second time Toth caused chemical burns, and ignored the warnings, and to her other alleged misconduct. It appears that the Employer brought two witnesses to the hearing and it appears from the decision that the Adjudicator considered their evidence. Even if I accept that the Employer can present evidence to refute Toth's testimony at the hearing, I would not allow the application. The Employer had the opportunity to present this evidence at the original hearing. A reconsideration under Section 116 of the Act does not allow the parties an unfettered opportunity to re-argue their case. There is no explanation for the reason for failing to produce these witnesses, and I am not satisfied that this evidence was not available and could have been introduced at the original hearing. I conclude that the factual allegations are not proper grounds for reconsideration.

In my view, the Employer simply disagrees with the Adjudicator's findings and is now seeking to re-argue the case. I am not prepared to allow that. An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. That not being the case, in short, I am not persuaded that the Decision should be set aside.

ORDER

Pursuant to Section 116 of the *Act*, I order that the Decision (BC EST #D189/99), dated February 3, 1998 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal