

An Application for Reconsideration

- by -

Casey Petersen
("Petersen")

- 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: M. Gwendolynne Taylor
Paul E. Love
Carol L. Roberts

FILE No.: 2002/311

DATE OF DECISION: October 16, 2002

DECISION

OVERVIEW

By Determination dated January 9, 2002, a Delegate of the Director of Employment Standards (the “Delegate”) concluded that Casey Petersen’s (“Petersen”) employer, Remap Enterprises Ltd. (“Remap”) had dismissed him without just cause and owed him \$1,082.66 for compensation for length of service, and interest (the “Determination”). Remap appealed to the Employment Standards Tribunal (the “Tribunal”). In Decision No. D161/02 (the “Decision”), dated April 29, 2002, the Tribunal Adjudicator (the “Adjudicator”) cancelled the Determination.

This is an application by Petersen pursuant to section 116 of the *Employment Standards Act* (the “Act”), for reconsideration of that Decision. The grounds for the application are that the Adjudicator made mistakes in stating the facts and either misunderstood or overlooked a significant issue.

Reconsideration issues

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for reconsidering a decision:

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

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

BACKGROUND

Petersen worked as a clerk at Remap's video rental store from December 10, 1996 until September 23, 2001. The Delegate determined that Remap terminated Mr. Petersen's employment without written notice or compensation for length of service and the Director ordered Remap to pay compensation. Remap appealed on the grounds that there was ample history of significant warnings to the employee prior to the dismissal. It argued that the Director's Delegate was wrong to deal with the matter on the basis of a "single act". Remap also submitted that, after terminating his employment, it was discovered that Petersen had stolen some property from the business.

The Tribunal set out the Issues as follows::

Firstly, whether the Delegate was in error in treating the matter of dismissal as being based on a "single act" and did not give sufficient weight to the history of poor performance, unsatisfactory behaviour and specific warnings. Secondly, whether the subsequently discovered behaviour can be considered in considering whether the dismissal was justified.

The Determination

The Delegate set out the positions of both parties on the issue of whether Remap had just cause for dismissing Petersen. Remap's position was that, during the last year of employment, Petersen's work performance declined, he was confrontational and insubordinate, and he was frequently late. Remap claimed these shortcomings were discussed with Petersen and that he had been given a warning letter on March 15, 2001. Further, Remap contended that it had warned him each week that his tasks were not complete. Remap advised the Delegate that the incident that ultimately resulted in Petersen's termination occurred on August 31, 2001 when Remap gave him permission to be a few minutes late for work so he could attend a funeral. Remap alleged that Petersen had reported for work 3 ½ hours late. Although Remap submitted that this was cause for immediate dismissal, it allowed him to work until September 23, 2001 because of vacation schedules.

Petersen denied that his work performance had deteriorated or that he was confrontational or insubordinate. Further, he contended that he had asked for time off to attend the funeral and had been told to be at work no later than 7:00 p.m., which he was.

The Delegate considered case law around dismissal for both fundamental breach ("single act") and cumulative conduct and quoted from the Tribunal's decision in *Silverline Security Locksmith Ltd.*, BC EST #D207/96, at paragraphs 11, 12, and 15:

The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, willful misconduct or a significant breach of the workplace policy.

It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

...

The concept of "just cause" requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

Before the Delegate, Remap contended they had just cause for dismissal in the single act of being late on August 31, 2001, although they continued his employment for another three weeks. The Delegate stated:

In my opinion, the "fundamental breaches of the employment relationship" discussed in *Silverline* are so severe as to cause the immediate severing of the work relationship. These are not acts which would allow the employment relationship to continue for a period of three weeks.

I also have no evidence that the three part test stated above was met by Remap. In particular, I found the written warning letter to be complementary in some places and corrective in others but nowhere did it state that Mr. Petersen's continued employment was in jeopardy if he did not meet the standards that had been set.

The Appeal

The appeal was conducted by way of written submissions.

Remap submitted documentation in support of the appeal that had not been provided to the Delegate, including a chronology of events, numerous handwritten notes, and a copy of Policies and Procedures for the store. Remap states that they purposely kept their submissions to the Delegate short and offered, in written and oral communications, to provide additional information but were told by the Delegate that she did not require further information.

Remap also referred to an incident of 'subsequently discovered behaviour' that had been submitted to the Delegate, but which had not been referred to in the Determination. Remap submitted that Petersen admitted "taking" an item from the store on his last shift after his dismissal. Remap contended that Peterson in fact took many items during his last shift and that the taking amounted to theft.

Remap referred to the distinctions and requirements for termination noted the *Silverline* case and submitted that it was justified in dismissing Petersen under both requirements of proof.

The Decision

The Adjudicator agreed with the Delegate's reference to the *Silverline* case and the four part test applied by the Tribunal for determining whether conduct that falls short of fundamental breach amounts to just cause for termination. However, the Adjudicator found that the Delegate had not distinguished between issues of poor performance and issues of misconduct.

The Adjudicator stated:

It is important in applying the jurisprudence to distinguish between cases of misconduct or a fundamental breach of the employment relationship and cases dealing with poor performance. The four-part test set out above is only applicable in the latter case. The Delegate states that:

"In my opinion the 'fundamental breaches of the employment relationship' discussed in *Silverline* are so severe as to cause the immediate severing of the work relationship".

The Delegate did not distinguish between issues of poor performance and issues of misconduct. She continues to find that "I also have no evidence that the three part test stated above was met by Remap." This is quite clearly a misstatement of the presentations made to her by Remap. There was certainly some evidence provided to the Delegate in regards to both poor performance and misconduct. The Delegate did not analyse the material presented in a way to distinguish between issues of performance and issues of misconduct.

The culminating event, in which Peterson turned up for work 3 1/2 hours late, should have been considered misconduct. Peterson had requested a day off and his request had been denied. His failure to report to work as required was clearly insubordinate. The Tribunal has held that failure to attend work is fundamental to the employment contract, see e.g. *Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97 and *Re: Roberts*, BC EST # D375/97. Peterson had a pattern of insubordinate behaviour. He had been clearly warned both verbally and in writing even though the Tribunal has held that warnings or (sic) [are] not required to be in writing: *Re: Paul Creek Slicing Ltd.* BC EST # D132/99.

The employment history as set out by Remap is not seriously disputed by Peterson and was not given due consideration by the Delegate. I am satisfied that Remap has met the onus of establishing that Peterson's ongoing disregard for employment rules, his expressed attitude towards his employer, and his frequent insubordination amounted to a repudiation of the employment relationship. He could have had no reasonable expectation of continued employment following his total disregard for his employer's requirement for him to attend work on August 31, 2001.

The Adjudicator referred to the subsequently discovered behaviour as follows:

Subsequent to Peterson's dismissal the employer discovered that Peterson had stolen some property from the business. In his material submitted in response to this appeal Peterson admits the theft but appears to consider it minor or humorous. The Tribunal has previously held that subsequently discovered behaviour may be considered in deciding whether a dismissal is justified: *Re Empire International Investment Group*, BC EST # D076/99. In this case the theft is a further indication of Peterson's repudiation of the trust relationship between employer and employee.

The Application for Reconsideration

Petersen objects to the Adjudicator's "three significant reasons" for overturning the Determination.

First, he submits that his evidence before the Delegate and the Adjudicator was that "on the date of August 31, 2001 I was not late for work nor did I in any other way fail to report for work on time." In Mr. Petersen's submission, the Adjudicator either overlooked or misunderstood this evidence. He notes that the Adjudicator found his failure to report to work on August 31, 2001 "clearly insubordinate" and "misconduct". Petersen submits that the Tribunal's conclusion that he was 3 ½ hours late for work on August 31, 2001 demonstrates a serious mistake by the Adjudicator in accepting Remap's statement of facts over his. Mr. Petersen further argues that the Adjudicator gave this as a significant reason for overturning the Determination but it is apparent the Adjudicator misunderstood the information originally provided.

Petersen's second point is based on the Adjudicator's statement: "The employment history as set out by Remap is not seriously disputed by Peterson (sic) ..." Petersen submits that he had:

specifically challenged all comments made by Remap with regards to my behaviors, actions and attitudes. In all of my correspondence I have noted that my behaviour was not insubordinate nor was I demonstrating any willful misconduct. I have also stated that the warnings that [Remap] claims to have given did not occur; yet in the decision made by the adjudicator her claims are taken at face value. In his statement "He had been clearly warned both verbally and in writing ..." the adjudicator demonstrates that he has possibly overlooked my dispute of these warnings.

Petersen notes that, of the hand written notes provided in the appeal, only one, dated January 18, 2001, suggests any misconduct or warning. He submits that note appears to be a journal entry, but there is no proof when it was written, where it was written, or whether anyone other than the author saw it, and Remap did not include it in the original description of the events of that day. Petersen challenges the credibility of that note, suggesting it has been recently written.

Petersen maintains that Remap gave him no warnings. He submits that although he disagreed with and responded to each of Remap's allegations of misconduct, his submissions appear to have gone unnoticed by the Adjudicator. He states that he was unfamiliar with what was required to counter Remap's statements and specifically asked if further clarification was required.

Petersen's final submissions relate to the "taking" of property belonging to Remap. He submits that he considered this part of the case to be humorous because he had taken a cardboard pig from the recycling dumpster two days after being dismissed. He says this was not part of the original reason given for dismissal and was not raised until 2 months later. Petersen challenges the Adjudicator's conclusion that this incident constituted theft, and thus, provides any ground for the termination of his employment.

ANALYSIS

As discussed above, the Tribunal will reconsider a Decision only in exceptional circumstances. In this case, the Reconsideration Tribunal ("the panel") is satisfied that Petersen has raised significant issues of fact, principle and procedure that warrant exercising the discretion to grant reconsideration. These include the failure by either the Delegate or the Adjudicator to weigh competing evidence and make findings of fact, the Adjudicator's assumptions or conclusions about facts, the Adjudicator's

misstatement or misunderstanding that Petersen did not seriously dispute Remap's statement of the employment history, and the Adjudicator's acceptance of subsequently discovered behaviour as support for the termination.

In the panel's view, given the type of information presented on appeal, it would have been preferable to hold a face to face hearing to test the evidence of the parties, make assessments of credibility, and make findings of fact, or to send the case back to the Director for further investigation and determinations. For the reasons that follow, the Panel has decided that the appropriate remedy at this point is to refer the case back to the Adjudicator, with the recommendation that an oral hearing be conducted so that these issues can be adequately addressed.

The panel is particularly troubled by the number of factual disputes which raise issues of credibility that have not been 'heard' and clearly determined as findings of fact, by either the Delegate or the Adjudicator.

The Delegate did not make a finding of fact on whether Petersen was late for his shift following the funeral. This would require a finding as to what Remap had agreed to, a point which is at the heart of this dispute. The Delegate concluded, after setting out the position of the parties, that regardless of whether Petersen was late for his shift, Remap's position on fundamental breach could not be sustained because Remap allowed the employment to continue for 3 weeks after the event.

The Adjudicator stated "The culminating event, in which Peterson (sic) turned up for work 3 ½ hours late, ..." From this it is apparent that the Adjudicator assumed the Delegate had made a finding of fact. In our view, that assumption can not be supported on the face of the Determination. It is incumbent on the decision maker, after weighing the credibility of the parties, and after hearing from any witnesses, to arrive at a conclusion as to whether Petersen was 3 ½ hours late for his shift. If it is determined that Petersen was late, then the decision maker must undertake an analysis of the facts in light of the test set out by the Tribunal to determine whether this incident was, in and of itself, sufficient to end the employment relationship. After a conclusion is made on that issue, an analysis must be undertaken of whether the incident was condoned or forgiven by Remap by not dismissing Petersen immediately, rather than 23 days later. These steps have not been taken.

The Adjudicator also concluded that Petersen did not seriously dispute Remap's recounting of the employment history. The Adjudicator accepted Remap's statements of facts and finds it has "met the onus of establishing that Peterson's ongoing disregard for employment rules, his expressed attitude towards his employer, and his frequent insubordination amounted to a repudiation of the employment relationship." However, it is clear from the documents before the Delegate that Petersen did dispute the comments about his "attitude, actions, efforts and abilities" and, like Remap, was prepared to provide additional information. Petersen also disputed Remap's statements of alleged events presented to the Tribunal.

The Adjudicator may have misinterpreted the statements of the Delegate concerning fundamental breach or misconduct, and poor performance. One interpretation of the Delegate's determination is that she correctly distinguished between the two grounds for termination, found Remap had not make out a case for fundamental breach, which would permit immediate termination, and, therefore, had to consider whether Remap had satisfied the test for dismissal without notice.

The Adjudicator found the Delegate erred in concluding that Remap had not satisfied the test. However, it is also possible to read the Determination and conclude that the Delegate weighed the evidence and found Remap had not done sufficient to meet the test. For example, the Delegate seems to have rejected Remap's contention of warnings when she notes that "I found the written warning letter to be complementary in some places and corrective in others but nowhere did it state that Mr. Petersen's continued employment was in jeopardy if he did not meet the standards that had been set." It appears to the panel that this is a significant finding of fact that, in the absence of the additional evidence submitted on the appeal, supported the Delegate's conclusion.

The Adjudicator also accepted subsequently discovered behaviour as grounds to support Petersen's termination. The Tribunal has held that misconduct by an employee, although unknown to the employer at the time of dismissal, may be relied upon in defence of an action for wrongful dismissal (*Re Empire International Investment Group*, BCEST #D 076/99). However, it is not obvious to the panel that this case has any application to the issues before us.

The Adjudicator made a finding that Mr. Peterson had "admitted" a "theft". It appears to the panel that Mr. Peterson disputed Remap's allegations concerning this. He did acknowledge "stealing" a cardboard pig after he was terminated. Thus, in the panel's view, even if a theft had occurred, which is a matter in dispute, there is a question as to whether it occurred after the employment relationship had ended, in which case the "subsequently discovered behaviour" doctrine is inapplicable.

It is the panel's conclusion that the number of disputed findings of fact need to be addressed by an oral hearing, in order to ascertain the credibility of the parties and a testing of the evidence.

ORDER

The Panel grants the application for reconsideration, cancels Decision No. D161/02 , and refers this case back to the Adjudicator.

M. Gwendolynne Taylor
Adjudicator, Panel Chair
Employment Standards Tribunal

Paul E. Love
Adjudicator
Employment Standards Tribunal

Carol L. Roberts
Adjudicator
Employment Standards Tribunal