An Application for Reconsideration

- by -

Allan T. Cox
("Cox")

- 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
Norma Edelman
Kenneth Wm. Thornicroft

FILE No.: 2002/453

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

Allan T. Cox ("Cox") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D264/02 (the "original decision"), dated June 17, 2002. The original decision considered an appeal of a Determination issued on March 22, 2002, which had concluded Cox's employer, North Road Enterprises Ltd. operating as Nakusp Esso ("North Road") had contravened Section 63 of the *Act* and that Cox was entitled to an amount of $1,128.03 as length of service compensation.

The original decision cancelled the Determination.

Cox says there has been a serious misunderstanding in the original decision concerning essential findings of fact that were made in the Determination.

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 issues raised in this application is whether the original decision was correct in rejecting the Director's conclusion that Cox was terminated for just cause.

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 be 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 warrants reconsideration.

FACTS

North Road operates a gas station/convenience store/laundromat in Nakusp, BC. Cox worked for North Road from October 1996 to September 16, 2001, when he was terminated for performance related issues.

The Determination found North Road had not proved just cause for terminating Cox. It is worth setting out the essential parts of the Determination relating to that conclusion:

> Both the common law courts and the Employment Standards Tribunal have provided comprehensive tests regarding just cause. The applicable test in this case is the Employment Standards Tribunal test for just cause is clearly enunciated in BC EST #D073/96 Hall Pontiac Buick Ltd. (Hall):
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> > *The burden of proof for [sic] established [sic] that there is just cause rests with Hall, the employer. It is generally accepted in common law that for an employer to establish that there is just cause to dismiss an employee, it must meet the following test:*
> >
> > 1. *That reasonable standards of performance have been set and communicated to the employee;*
> > 2. *That an employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;*
> > 3. *That a reasonable period of time was given to the employee to meet such standards; and*
> > 4. *That the employee did not meet those standards.*
>
> This test means that an employer must be able to *prove* that it took all the steps required, and then terminated the employee.

> In the current case, the employer can prove it has set the reasonable standards of performance as stated in Attachment 1. In this document, the employer set out various standards, and in some cases indicated the consequences if the standard was not met. For example, if a debit transaction was approved when in fact it was not approved, then the employee would be immediately dismissed. Shortages and counter coverage failure were subject to dismissal following two warnings. Release of any confidential information was subject to discipline up to and including dismissal.
>
> The related attachments document the complainant's inept performance in several areas - selling product at the wrong price, till shortages, improper refunding of customer's money in the laundromat, unwilling to perform certain tasks, poor personal hygiene, and mistakenly reporting a theft of gasoline. The documentation clearly identifies a poorly performing employee.
>
> However, to successfully terminate this employee, the employer must prove that it warned the employee about the consequences of not meeting the standards as set out by the employer. *The employer has not provided any evidence which would prove the complainant was warned about a specific offense and the consequences of repeating the same offence.* The employer states it issued verbal warnings in private in order not to embarrass the complainant. Presumably the final events in this unfortunate situation occurred on September 15 and 16 when the complainant exceeded the $2.00 limit on shortages at the end of the day. Once again. *There is no evidence of warnings regarding further occurrences and furthermore, since more than one employee had access to the cash register during the shift, it is doubtful that the shortages could be attributed directly to the complainant.*
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> The employer cannot prove just cause and therefore the complainant is owed compensation for length of service.
>
> (emphasis added)

It is apparent from the Determination and the material attached to it, that the delegate was troubled by at least two matters: first, the absence of any evidence showing that Cox was specifically warned about the shortages that North Road attributed to him and the consequences of repeating the offence; and second, the absence of any evidence that Cox was responsible for the shortages. Documents provided by North Road indicated there were at least 2 employees on the counter 90% of the time. Cox claimed there were up to 4 people on shift at one time, all with access to the till.

In the appeal of the Determination, the reasons given by North Road for its appeal are set out in their entirety:

> As outlined in the attached letter I believe I was following Mr. Wall's instructions as he had given them to me when I phoned and asked for advice. I made notes when talking to him and was "extreme" in being specific. I did not want any more problems. If I had understood from his advice that I could give Allan [Cox] notice I definitely would have.

North Road also provided the following 'additional' information with the appeal:

> I am also enclosing 2 copies of a letter I faxed to Ed Wall. He said it was too light so we went through it word for word but I did have a darkened copy done.
>
> I believe employment standards was satisfied that Allan was just a troublemaker and thought it was settled and then because of a letter to the MLA it is now in Allan's favor [sic].

The letter being referred to was North Road's response to the complaint made by Cox. It was sent to the delegate before the Determination was made. Apart from the above two statements, there was no additional information provided by North Road with the appeal. There was no oral hearing on the appeal.

In the original decision, the issue in the appeal is stated as follows:

> Was the Director's Delegate correct in finding that the Appellant did not have just cause for termination of the Respondent without notice or compensation for length of service?

In referring to North Road's position in the appeal, the original decision contains the following:

> In her appeal form the Appellant further states that she "made notes when talking to (the Employee) and was 'extreme' in being specific".

The finding that North Road had provided no evidence that Cox was warned about the specific offence or the consequences of repeating the same offence was rejected in the original decision:

> The Appellant's assertion that the Respondent was verbally warned that he would be terminated following documented shortages in his cash out on August 13 and 18 and September 15, 2001 is consistent with the earlier presentation of written conditions of employment to the Respondent on July 20, 2001 which clearly did notify the Respondent that three shortages "shall be cause for dismissal". There is no evidence of a specific denial of such verbal warning by the Respondent. The Respondent simply denies that the Appellant was discreet or that he was cautioned about body odour.
>
> . . . although it would have been preferable for each warning to have been in writing, it is not required. I find on a balance of probabilities that the Appellant has established that the Respondent was verbally warned on each occasion after these shortfalls that he would be terminated if the problem persisted . . . .

The original decision makes no reference to the finding made in the Determination that, "since more than one employee had access to the cash register during the shift, it is doubtful that the shortages could be attributed directly to the complainant".

ARGUMENT AND ANALYSIS

In this application, Cox says:

> . . . the appeal decision . . . was based solely on the grounds that I had 3 warnings about shortages and failed to deny that.
>
> First of all, Ed Wall had the information that there are "4" people on shift, 4 hands in the till. Plus the first person on at 7 am - 9 am is out doing propane, etc., quite a distance from the building while some customers pump their own gas. The cashouts were never right on as it was.

The Director has filed a submission on the application, citing what the Director sees as two errors by the Adjudicator in the original decision: the first arising from an apparent misreading of the statement (reproduced above) made by North Road in the appeal form and the second relating to the absence of a finding that the Director was wrong in concluding North Road had not proven Cox had failed to meet the standard set by the employer. In respect of the first matter, the Director submits:

> In his decision, the adjudicator writes:
>
> > *In her appeal form the Appellant further states that she "made notes when talking to (the Employee) and was 'extreme' in being specific".*
>
> The parenthetic insertion made by the adjudicator ostensibly to clarify who was being spoken to is simply wrong. In reviewing the appeal form the adjudicator refers to it is clear that the context is a conversation with the Director's delegate and not the respondent.

In the appeal, North Road had the burden of showing the Determination was incorrect. In the context of the particular matter under appeal, that required North Road to show the delegate's conclusion that there was "no evidence of any warnings regarding further occurrences" and his conclusion that "it is doubtful that the shortages could be attributed directly to the complainant" were both wrong.

As this appeal was decided on the basis of the written material on file, we are in as good a position as the Adjudicator of the original decision to assess its merits.

We have carefully reviewed the material in this case. We can find nothing in that material, or in the appeal, that justified the Adjudicator of the original decision rejecting the delegate's finding that there was no evidence of warnings regarding further occurrences. We agree with the submission of the delegate on this application that the Adjudicator of the original decision may have mistakenly construed the comment made by North Road in the appeal form, about making notes when talking to 'him', as referring to warnings given to Cox. We agree that taken in context, the object of the reference "talking to him" is the delegate, not Cox.

But even putting aside that concern, in order for the Determination to be set aside, the Adjudicator not only had to reject the conclusion that Cox had not been warned, but also the conclusion that North Road had failed to show Cox had not 'met the required standard'. The burden on North Road on the latter point required them to show that Cox was responsible for the cash shortages. In other words, that he failed to meet the standard. There is no reference at all in the original decision to the finding made in the Determination that "since more than one employee had access to the cash register during the shift, it is doubtful the shortages could be attributed to the complainant". Once again, we have reviewed the material on file relating to that matter and can find no reason for concluding the Determination was incorrect on that point. North Road has provided nothing that would show Cox was responsible for the shortages and the delegate was wrong to apply a different conclusion.

In sum, we are of the view that North Road did not meet its burden on the appeal and the Adjudicator of the original decision was wrong to find they had.

The reconsideration is granted and the original decision is set aside.

ORDER

Pursuant to Section 116 of the *Act*, we order the original decision, BC EST #D264/02, be cancelled and the Determination dated March 22, 2002 be confirmed.

David B. Stevenson **Adjudicator, Panel Chair** **Employment Standards Tribunal**	**Norma Edelman** **Vice-Chair** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Adjudicator** **Employment Standards Tribunal**