

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 -

McCall Bros. Funeral Directors Ltd.
(the "Employer")

-of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

Reconsideration Panel: Mark Thompson

File No.: 98/648

Date of Decision: January 13, 1998

DECISION

OVERVIEW

This is an application by McCall Brothers funeral Directors Ltd. (the "Employer") under Section 116 of the *Employment Standards Act* (the "Act") against a Decision of the Employment Standards Tribunal (the "Tribunal"), BC EST #D403/98, dated September 18, 1998. The Original Decision confirmed a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 16, 1998. The Determination found that the Employer had violated Section 63 of the *Act* by failing to pay a former employee, Reid Pearce ("Pearce") compensation for length of service.

The bases of the Employer's appeal of the Original Decision are first that the Director's delegate did not conduct a proper investigation of the facts surrounding Pearce's dismissal. Secondly, the delegate possessed adequate information at the time he issued the Determination to support the Employer's action regarding Pearce. Moreover, the delegate violated Section 79 of the *Act* by not investigating the circumstances leading to Pearce's dismissal. Finally, the Adjudicator in the Original Decision erred by basing her decision on the Employer's alleged failure to provide proper documentation in support of its action.

ISSUE TO BE DECIDED

The issue in this case is whether the Employer has raised any of the established grounds on which the Tribunal should review the Original Decision.

FACTS

Most of the facts in this case were not in dispute. Pearce began work for the Employer on March 5, 1986 and was terminated on November 18, 1997. Subsequently, the Employer stated that it terminated Pearce because he had acted dishonestly in his custody of the treasury of a social club. At the time of his dismissal, Pearce was a funeral director. Pearce filed a complaint with the Employment Standards Branch on November 19, 1997.

On May 21, 1998, a delegate of the Director sent the Employer two documents, a certified letter informing it of the complaint and suggesting that the delegate meet with a representative to discuss the allegation against Pearce, and a Demand for Employer Records. The latter communication required the Employer to produce all documents relating to Pearce's termination, including any documents on which the Employer relied to establish just cause for terminating Pearce. The deadline for compliance with the Demand for Employer Records was June 11, 1998. On that date, the Branch received a

letter from the Employer stating that it had terminated Pearce's employment on the advice of its solicitors. It also provided the minutes of two meetings of the social club, November 4, 1997 and December 2, 1997. The minutes of the first meeting contained a statement that "Reid" had "admitted to having spent all of our money." It further noted that Reid had promised restitution, but could not provide any particulars. In the minutes of the December 2, 1997 meeting, the president of the club was reported to have stated that he had met with Reid. Reid had paid a portion of the funds owed to the club and transferred ownership of a car that the club could sell if the balance had not been repaid by May 31, 1998.

The Director's delegate wrote the Employer on June 12, 1998 requesting written reasons for the termination and informing the Employer that it bore the onus of proof of just cause for dismissal. On request of the Employer, the deadline for producing this information was extended from June 19 to June 26. On June 24, the delegate faxed a similar letter to the Employer's solicitor, requesting information by June 30, 1998. Counsel for the Employer replied on July 6, 1998, stating that the Employer had dismissed Pearce for cause, specifically for dishonesty. The delegate faxed both counsel for the Employer and an officer of the Employer on July 6, again requesting specific information on the grounds for Pearce's dismissal. The delegate did not receive a reply before issuing the Determination. The Determination found that the Employer did not establish that it had just cause to terminate Pearce. It further concluded that the Employer had violated Section 63 of the *Act* and was obligated to pay compensation for length of service and vacation pay of \$7,005.75, plus interest.

The Employer appealed the Determination on the grounds that the minutes submitted to the Director's delegate were sufficient to support Pearce's termination. The documents showed that Pearce was guilty of dishonesty and the trust relationship between employer and employee had been breached. When the delegate asked for further information to support Pearce's dismissal, the Employer repeated that the grounds were dishonesty and the minutes provided adequate support for its position.

The adjudicator in the Original Decision accepted the basis of the Determination. She noted that the burden for showing that a Determination is incorrect lies with the appellant. The *Act* gives the Director the power to inspect records relevant to an investigation and a person must produce records on request from the Director, which the Employer had not done. The Decision supported the Director's conclusion that the minutes submitted did not provide sufficient reasons for termination for cause. The Employer had ample opportunity to provide information in support of its actions, and it did not discharge its burden in the appeal.

In support of its request for reconsideration, counsel for the Employer submitted affidavits from a lawyer who had acted on behalf of the Employer in response to Pearce's complaint. The lawyer stated that she was absent from her office from the beginning of June to the end of July, 1998 for personal reasons, and the Employer's file was misplaced. Her secretary stated that she had left a voice mail message with the Director's delegate

stating that a reply would be submitted at the end of the week following the July 6 deadline, and asking him to call her if this proposal was unsatisfactory. David McCall ("McCall"), president of the Employer filed an affidavit stating that the president of the social club had informed him in November 1997 that Pearce had stolen over \$11,000. When confronted with this information, Pearce admitted that he had taken the money, but could not explain why he had acted as he did. McCall stated that a funeral director is in a position of trust, so he had dismissed Pearce in light of his dishonesty.

ANALYSIS

The thrust of the Employer's appeal is that the Director's delegate failed to conduct a proper investigation of Pearce's complaint. Counsel presented evidence of facts that could have been considered by the delegate prior to the Determination in this case, including the conversations between McCall and Pearce prior to the dismissal. Moreover, Counsel argued that the evidence before the delegate, i.e., the minutes of the two meetings, was sufficient to support termination for cause.

Secondly, the Employer argued that the delegate should have undertaken a more thorough investigation until he was satisfied that all the facts of the case were before him before issuing the Determination. In particular, the delegate should have asked Pearce if he had taken the money in question. Thus, the investigation was not complete as required by Section 79 of the *Act*. The delegate should not act as an agent for a complainant.

The Director argued that the Employer's request for reconsideration repeated the arguments presented to the adjudicator in the Original Decision. The Tribunal has established that it will not reconsider decisions when the party launching the request wishes to rehear evidence or re-examine arguments presented to the adjudicator. The *Director of Employment Standards*, BC EST #D131/98. A reconsideration should not constitute an opportunity for the Tribunal to inquire into the Director's delegate's investigation. The Director is obligated to conduct an investigation, pursuant to Section 76 of the *Act*, provide the person under investigation with an opportunity to reply (Section 77) and make a determination (Section 79) under appropriate circumstances. The Director is acting in a quasi-judicial capacity when making investigations and issuing determinations. *BWI Business World Incorporated*, BC EST #DOSO/96.

In a recent case, the Tribunal set out the appropriate conditions under which it should exercise its powers of reconsideration under Section 166 of the *Act*. In *Milan Holdings Ltd.*, (BC EST #D313/98, Reconsideration of BC EST #D559/97), cited in *The Director of Employment Standards*, (BC EST #D498/98, Reconsideration of BC EST #DO99/98), the Tribunal stated:

Consistent with the need for a principled and reasonable approach to the reconsideration power, the Tribunal has adopted an approach which 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: Re British Columbia (Director of Employment Standards), BC EST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay. ...
- b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re *Image House Inc.*, BC EST #DO75/98 (Reconsideration of BC EST #D418/97); *Alexander (C. O. b. Peregrine Consulting)* BC EST #DO95/98 (Reconsideration of BC EST #D574/97); *323573 BC Ltd. (C. O. b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97);
- c) Where the application arises out of a preliminary ruling made in the course of an appeal. ...

The preliminary 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal by requiring an applicant for reconsideration to raise "a serious mistake in applying the law" : Zoltan Kiss, supra. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BC EST #D 199/96, reconsideration of BC EST #D 114/96). ...

The case presented by the Employer falls within the framework cited above. The Employer's argument that the evidence before the delegate when he issued the Determination was sufficient to support the Employer's action was before the Adjudicator when she considered the Employer's appeal. As stated above, a reconsideration is not an opportunity for one party to re-argue points put before the original adjudicator, absent serious errors of law. I find no such errors of law, and indeed, the Employer did not allege a serious error existed on this point.

Secondly, the Employer argued in effect that the Director's delegate should have pursued his investigation of the facts of Pearce's dismissal in the absence of information that the

Employer was obligated to provide. Neither the statute nor the jurisprudence of this Tribunal supports that position. The Tribunal expects the parties to participate in the investigation process and should not become involved in the specifics of the process if the requirements of Sections 76, 77 and 79 of the *Act*. The Tribunal will not allow a party to withhold evidence during the investigation and then rely upon these facts in support of an appeal of a determination (*Kaiser Stables Ltd.*, BC EST #DO58/97).

Both of the Employer's arguments for reconsideration fall within the principles stated above. The Adjudicator in the Original Decision reached her conclusions on the basis of the evidence the parties provided. I conclude that the matters raised by the Employer do not warrant reconsideration. *Milan Holdings Ltd.*, *supra*.

ORDER

For these reasons, pursuant to Section 116 of the *Act*, the Employer's request for reconsideration is dismissed. The effect of this decision is that Pearce will be entitled to compensation of \$7,005.75, plus interest from the date of the Determination.

Mark Thompson, Adjudicator
Employment Standards Tribunal