BC EST #D580/97
Reconsideration of BC EST #D282/97

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 -

Wescan Glass Industries (VAN) Inc.

("Wescan")

- of a Decision issued by -

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Alfred Kempf

FILE NO.: 97/618

DATE OF DECISION: January 5, 1998

DECISION

OVERVIEW

This is a request for reconsideration under Section 116 of the Employment Standards Act (the "Act") against Decision No. D282/97 (the "Original Decision") issued by the Tribunal, which cancelled Determination No. T97-171 issued by the Director of Employment Standards.

The reconsideration proceeded by way of written submissions.

ISSUES TO BE DECIDED

There are two issues: whether the appellants have raised grounds upon which the Tribunal will reconsider a decision or order: and second, if the Tribunal concludes this is an appropriate case for reconsideration, whether, under the grounds for appeal, the Adjudicator erred in concluding that Wescan did not have just cause for the dismissal of Shawne Martinson ("Martinson").

FACTS

The relevant facts are summarized as follows:

1. Wescan employed Martinson as an edger which involved the operation of machinery.

2. Wescan was unhappy with the failure on the part of Martinson to confine his hair.

3. Wescan expressed displeasure to Martinson about his hair "on several occasions".

4. Wescan notified Martinson that his failure to properly confine his hair was contrary to a company rule.

5. Martinson "clearly disliked and defied the rule".

6. Martinson had not been specifically warned that failure to confine his hair would result in dismissal. Nor had he received any discipline about his hair.

7. Martinson had received a warning letter approximately three months before his dismissal for other alleged unsatisfactory conduct (the "March letter"). The March letter indicated that any further breach of company policy would result in immediate dismissal.

8. Martinson was dismissed for failing to confine his hair in June of 1996.

9. At the hearing Wescan's representative, according to the adjudicator, advised that the problems addressed in the written warning were not being put forth by Wescan to justify its decision to terminate Martinson. The record does not disclose any evidence at the hearing as to whether the discipline given in March was justified. Martinson and Wescan in written submissions to the Tribunal prior to the hearing disagreed as to whether such discipline was warranted. As a result of Wescan's position on the March letter at the hearing, the parties and the adjudicator did not dwell on the conduct leading to the discipline in March of 1996. The matters leading to the March letter where not related to the confinement of Martinson's hair.

ANALYSIS

Wescan in its able submission does raise grounds for appeal recognized as valid by the Tribunal in previous decisions. It is necessary to review the grounds of appeal put forward:

Error in Stating the Facts

It is argued that the Tribunal was in error for stating "that the complainant had not been advised that his continued disobedience of Company Policy would result in his dismissal."

The Tribunal cannot on reconsideration disturb findings of fact made by the original Tribunal. There was a clear finding, as well as an admission by Wescan, that Martinson had not been told that he would be dismissed if he did not properly confine his hair.

The submission really is that the part of the March letter that refers in general to further breaches of Company Policy is of the same effect as a specific warning about the Martinson's hair. This is really a question of legal interpretation and not an error in stating the facts. I will come back to this issue below.

It is also argued that the Tribunal erred in stating that Wescan did not rely on "evidence lead about another problem with Martinson's job performance" to justify its actions. Here again the submission is that the finding of fact is wrong. Wescan points out that it's dismissal letter referred to the March letter and therefore it should be inferred that Wescan must have relied on that previous misconduct notwithstanding what it said at the hearing.

Parties to appeals heard by the Tribunal routinely make allegations against each other that are abandoned at hearing. The abandonment of unnecessary or irrelevant allegations is to be encouraged since the whole point of the process is to resolve the relevant issues. If a party at a hearing indicates it is not relying on an incident to justify a dismissal it cannot on appeal of a Tribunal decision complain that the Tribunal did not look beyond the position stated at the hearing. In other words the Tribunal is not compelled to second guess an admission that certain conduct or incidents are not being relied upon to justify a termination.

There is no error in stating the facts.

Failure to Comply With Principles of Natural Justice

It is alleged that that the Tribunal refused to hear relevant evidence regarding the alleged misconduct referred to in the March letter.

I cannot accept this submission since the March letter was introduced as an exhibit and Wescan was allowed to lead evidence about the job performance referred to therein. The Tribunal did not find the evidence relevant to the decision since the employer was not relying on that conduct to justify the dismissal. This does not amount to a refusal to hear relevant evidence.

Error of Law

The reconsideration decision in *Kiss*, BC EST No. D1222/96, sets out that a "serious mistake in applying the law" is a ground for reconsideration.

It is argued that due to the seriousness of the failure to confine his hair it was not necessary to warn Martinson that his job was in jeopardy prior to summarily dismissing him.

It is also argued that Martinson could be dismissed due to his willful disobedience of a lawful and reasonable order. The case Candy v. CHE Pharmacy Inc. (1997) 31 BCLR (3d) 12 (BCCA) is referred to. An essential element of the test stated in the case is that the order being defied must involve a matter of some importance.

It is the importance of the order, or the seriousness of the failure, to Wescan that is not evident in this case. The evidence is that Martinson was repeatedly asked by Wescan to confine his hair between March and June of 1996. This means that Martinson on several occasions was asked to confine his hair without compliance - yet he was never given a warning or clear notice that Wescan had had enough and that he would be disciplined or dismissed if it happened again.

If the conduct was so serious why was Martinson not disciplined for it on some occasion prior to June of 1996? Why was he not clearly warned that he would be dismissed? It was

open for the Tribunal to conclude that the conduct was not viewed by Wescan (and consequently Martinson) as being as serious as Wescan now argues it was.

While progressive discipline is not necessary in every case its absence in this case makes it difficult for Wescan to justify the dismissal. Had Wescan been able to prove that it had brought home the seriousness of Martinson's defiance of the hair rule by some prior discipline I am certain the result would have been different in this case. There is no doubt that Wescan was entitled to require Martinson to comply with the policy. By allowing him to continue to defy the policy after several discussions it undermined the seriousness of the conduct and demonstrated a lack of consistency.

Martinson's conduct regarding the hair policy was insubordinate. Insubordination can in some instances justify summary dismissal. In this case, however, given the history of breach of the policy he was entitled to notice that he was being insubordinate and that dismissal would be a consequence of further insubordination.

Another issue that should be addressed is the effect of the statement in Wescan's March letter that: "this notice shall serve as a final notice to him, that any further violations of company policy will result in immediate termination".

If Martinson was provided with this clear notice why should Wescan not have the right to terminate Martinson's employment for a breach of the hair policy which occurred two and a half months later?

There are two reasons. Firstly, the evidence indicates that there was some dispute about whether the March letter was justified and secondly (and more importantly) the letter says any violation would result in immediate termination. As discussed above the company did not act on the warning even though Martinson appears to have violated the hair policy on several occasions. It would have been reasonable for Martinson, or any other observer, to conclude that the notice was waived, or would not apply, with respect to Martinson's violations of the hair policy.

The Tribunal did not make a serious mistake in applying the law.

ORDER

I order under Section 116 of the Act, that the request for reconsideration is denied.

ALFRED C. KEMPF
Adjudicator
Employment Standards Tribunal

ACK/cef