Employment Standards TRIBUNAL

Citation: Costco Wholesale Canada Ltd. (Re)
2018 BCEST 13

An appeal

- by -

Costco Wholesale Canada Ltd.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE NO.: 2017A/39

DATE OF DECISION: February 7, 2018

DECISION

SUBMISSIONS

Ryley Mennie	counsel for Costco Wholesale Canada Ltd.
Jordan Hogeweide	on behalf of the Director of Employment Standards

OVERVIEW

1. Costco Wholesale Canada Ltd. (the "Appellant") terminated the employment of Jason Jeffrey (the "Complainant") on July 11, 2016.

2. Dismissal was warranted says the Appellant, because the Complainant, on July 6, 2016, was involved in an altercation with a customer during which, it was alleged, the Complainant was hostile, rude, disrespectful, and twice told that customer, within range of her children, to "fuck off" or to "go fuck yourself". In a subsequent discussion with his managers, the Complainant described the customer as a "bitch".

3. The Complainant acknowledged the altercation, but denied both the boorish behaviour and the use of profane language, instead blaming the customer for any conflict. He admitted to using the term noted above when referring to the customer, during a subsequent discussion with his managers.

4. The Appellant says that the altercation, and the comments subsequently made by the Complainant, constitute just cause for dismissal and, as such, any obligation that the Appellant might otherwise have had to pay compensation for length of service according to sections 63(1) and 63(2) of the *Employment Standards Act* (the "*ESA*") is deemed to be discharged by reason of section 63(3)(c).

5. A complaint was lodged with the Employment Standards Branch and, on December 6, 2016, a delegate of the Director of Employment Standards (the "Delegate") convened a complaint hearing to consider the Complainant's grievance.

6. In the resulting determination issued on February 27, 2017 (the "Determination"), the Delegate found that the Complainant failed to provide the level of courtesy required under the Appellant's policies, but generally accepted the Complainant's version of events. Not persuaded that dismissal was the appropriate outcome, the Delegate ordered the Appellant to pay to the Complainant the aggregate sum of $8,868.84, representing compensation for length of service, accrued vacation pay, and interest calculated according to section 88 of the *ESA.*

7. In doing so, the Delegate only considered whether or not the evidence in hand tended to prove or disprove the Appellant's allegations concerning the immediate confrontation between Complainant and customer. The Delegate did not consider evidence presented concerning the Complainant's past employment history.

8. The Appellant challenged the Determination on March 20, 2017, relying on decisions of the Supreme Court of Canada in *McKinley v. BC Tel,* 2001 SCC 38, and this Tribunal in *Silverline Security Locksmith Ltd.*, BC EST # D207/96. *McKinley* calls for an "assessment of the context of the alleged misconduct" where misconduct forms the basis for a "just cause" dismissal. *Silverline* confirms that repeated infractions of workplace rules or incidents of unsatisfactory conduct can amount to just cause, if:

(a) reasonable performance standards have been set and communicated to an employee;

(b) the employee knows that termination can result if those standards are not met;

(c) the employee is given time, but fails, to meet those standards.

9. In the decision now reported at BC EST # D084/17 (the "Preliminary Decision"), I accepted the Appellant's argument and concluded that the Delegate's failure to follow the approach described in *McKinley* and in *Silverline* amounted to an error in law.

10. I referred this matter back to the Delegate on August 2, 2017, for further consideration. Having done so, the Delegate has now presented his report to the Tribunal, dated November 7, 2017 (the "Report").

11. In short, the Delegate says that even in the light of a *McKinley*/*Silverline* analysis, the Appellant has not shown just cause warranting dismissal. The Delegate concludes that compensation for length of service is still payable to the Complainant.

12. Unsurprisingly, the Appellant does not agree with this outcome.

13. Recently noted by this Tribunal in *Zack Anthony*, BC EST # RD123/17, at paragraph 61:

> 61 In cases where a referral back and report order is made, the complaint and appeal processes preceding the referral back order are not rendered inoperative. The further investigation, or work reflected in the report resulting from a referral back, is an extension of the complaint process generated by the Tribunal exercising its authority in section 115 of the *ESA* to order that a determination be varied, cancelled or a matter arising from it be referred back to the Director. It "suspends" final disposition of the appeal until the report is processed and submitted to the Tribunal. It does not affect the provisions of the *ESA* governing appeals.

14. I have now considered the Report, together with fresh submissions received from counsel for the Appellant on December 4, 2017, and January 5, 2018, and from the Complainant on December 14, 2017. I have also reviewed again the Determination, and the Record previously disclosed by the Delegate.

15. What follows is my final decision concerning this appeal.

THE REPORT

16. At paragraph 18 of the Preliminary Decision, I outlined the framework within which the Delegate was to consider the evidence, and the questions he was to answer (<u>emphasis added</u>):

> 18 (b) Where there is misconduct, it is incumbent on the Director to determine if the transgression warrants summary dismissal. As I read both, *McKinley* and *Cornell* direct

a comprehensive inquiry and contextual assessment of the evidence. Contextual evidence must be considered whether the triggering event is a single act of misconduct or a series of incidents. To do otherwise risks injustice to both parties; to the employer where the employee's wrongdoing in and of itself does not justify dismissal but in context constitutes just cause, and to an employee where the transgression by itself supports firing but not when weighed against other factors.

(c) Where the misconduct does not, in and of itself, amount to fundamental breach of the employment relationship, the Director should undertake an assessment of the evidence based on the guidelines established in *Silverline*.

(d) In short, I would describe the approach as one in which the Director proceeds to examine the evidence with a view to answering the following questions:

(i) Does the evidence establish misconduct, on a balance of the probabilities ?

(ii) If yes, does the misconduct amount to a fundamental breach of the employment relationship ?

(iii) If no, does the misconduct relate to a standard, set and communicated to the employee, which the employee has failed to meet, having had a reasonable opportunity to do so and where the employee knows that failure to meet the standard could or would result in termination ?

Parts (ii) and (iii) – i.e. the *Silverline* approach - are really just a wordier restatement of the sort of analysis required by *McKinley* – a contemplation of whether the nature and degree of the misconduct warrants dismissal, taking into consideration the full context in which the misconduct occurred.

17. The Report addresses and I now consider each of these questions, in turn. In doing so, I am mindful of the Tribunal's comment at paragraph 65 of *Zack Anthony, supra:*

> 65 … findings of fact made by the Director on a referral back, and in a subsequent report, are entitled to the same deference as those made in the initial determination, and the authority of the Tribunal to review findings of fact under section 112 of the *ESA* remains unaltered.

Does the evidence establish misconduct, on a balance of the probabilities?

18. The Report echoes the same conclusions drawn in the Determination – the Complainant did not provide the customer with the level of courtesy required according to policies enforced by the Appellant.

19. Misconduct has been established, on a balance of the probabilities.

20. For the purpose of this analysis, however, I reiterate that the misconduct does not include the use of profanities when dealing with the customer, or behaviour towards the customer that might be construed as "overly aggressive". Those are findings of fact with which, as noted in the Preliminary Decision, I cannot interfere.

Does the misconduct amount to a fundamental breach of the employment relationship?

21. In the Report, the Delegate opines that:

(a) Customer courtesy, although important, did not "go to the core" of the Complainant's employment as a tire installer, who would not usually interact with customers.

(b) Discourtesy on the part of the Complainant is less serious than discourtesy on the part of, say, a sales person whose primary function is to deal with customers.

(c) Most of the Complainant's prior misconduct is unrelated to "customer courtesy", with the last relevant incident occurring four and one half years before the altercation resulting in his termination.

(d) The customer did not immediately complain about the Complainant's alleged behaviour.

(e) After his interaction with the customer, the Complainant reported to his managers, acknowledging that he was not as courteous as he could have been.

(f) In his dealings with the customer, the Complainant was not overly rude or aggressive.

(g) Calling her a "bitch" was the Complainant's "clumsy" way of explaining that the customer created an unpleasant situation "which he did not respond to very well."

22. According to the Delegate, none of this amounts to a fundamental breach of the employment relationship.

23. In submissions to the Tribunal, the Appellant says that the Delegate's assessment of the evidence, as set out in the Report, demonstrates errors of law by:

(a) failing to properly consider that the Complainant called the customer a "bitch" in front of two managers was itself an act of misconduct;

(b) minimizing the importance of customer service in the decision to terminate the Complainant's employment;

(c) failing to undertake a full contextual assessment of the circumstances underlying the termination.

24. I do not agree that the Delegate failed to consider the Complainant's use of the word "bitch". In the Determination, the Delegate concludes that the word was intended to trivialize the Complainant's responsibility for the customer's dissatisfaction. In the Report, the Delegate appears to say that it was the Complainant's "clumsy" way of blaming the customer for the altercation. The Appellant may not agree with that characterization, but it was considered.

25. I do agree that other aspects of the Delegate's reasoning are problematic:

(a) I do not accept that different jobs within the Appellant's organization have different levels of required courtesy or, put another way, that it is less serious if a janitor or a tire installer is rude to a customer than, say, a service representative or a manager. The evidence simply does not support that conclusion. Rather, the uncontroverted evidence disclosed in the Determination is

that, firstly, discourtesy is one of the "top 10" reasons for termination within the Appellant's organization and, secondly, it is "a condition of employment for every Costco employee to treat [customers] with respect". In my view, the question is not who is rude, so much as it is just how rude they are.

(b) How, when, or even if the customer lodged or lodges a complaint is entirely irrelevant. The Appellant's policy is not "don't be the subject of a complaint", it is "don't be impolite".

(c) While it is fair to say that most of the Complainant's prior misconduct (described in some detail in paragraph 9 of the Preliminary Decision and discussed again, below) does not relate to "customer courtesy", there is an underlying, somewhat pervasive, level of intemperate, petulant, and uncooperative behaviour – the Complainant appears to have periodic conflict with everyone, including customers, managers, and fellow employees.

(d) As disclosed in the Determination, the Complainant knew that he would be the subject of a complaint from the customer, because she told his as much, at the time. I do not see how self-reporting to the store's assistant manager before the customer complaint is lodged is evidence tending to minimize the severity of his behaviour.

26. That said, I am unable to say that the Delegate's final answer to the question is wrong.

27. The Complainant's use of the word "bitch", though crass and unnecessary, was made in a private conversation with his managers, not uttered in public or within earshot of other employees or any customers. According to the Delegate, it was intended to paint a picture for his supervisors.

28. The Appellant, the Delegate, and perhaps even the Complainant agree that he was discourteous in his dealings with the customer but I am bound by the Delegate's finding that the Complainant did not use profanities or otherwise act in an overly aggressive manner.

29. In that light, I cannot say that the Complainant's behaviour, though ill mannered, rose to the level of a fundamental breach of the employment relationship.

Does the misconduct relate to a standard, set and communicated to the employee, which the employee has failed to meet, having had a reasonable opportunity to do so and where the employee knows that failure to meet the standard could or would result in termination?

30. The Delegate says in his Report that "customer courtesy was a reasonable standard set and communicated to [the Complainant]". As I observed previously, it is "a condition of employment for every Costco employee to treat [customers] with respect", and the Determination confirms that the Complainant was "well aware" of the need to be courteous and helpful when dealing with customers.

31. Within the Determination, the Delegate confirms that the Complainant was discourteous, and "failed to provide the [customer] with the level of courtesy that Costco's policies required." According to the Report, the Complainant acknowledges that "he was not as courteous towards [the customer] as he should have been."

32. The Delegate accepts, and I am satisfied that, in the circumstances of the July 5, 2016, incident, the Complainant failed to meet the standard set for him.

33. However, the Delegate expresses doubt about whether or not the Complainant knew that that failure to meet the standard could result in his dismissal:

(a) The Delegate acknowledges a customer altercation occurring in 2011 resulting in a three-day suspension and a written warning, but says the lapse of time means that the Complainant may not have been aware that his failure on July 5, 2016, could result in termination.

(b) The Delegate says that the litany of other disciplinary events were not related directly to the issue of "customer courtesy" and so should not be construed as evidence of the requisite warning.

34. The Appellant argues that the 2011 incident resulted in a three day suspension, retraining with respect to relevant workplace policy, a formal written warning, and clear notice that a repeat occurrence could result in termination. It relies on *Re: Cornell Holdings Ltd.* BC EST # D027/13, in arguing that the Delegate was wrong to discount the 2011 event based solely on the effluxion of time.

35. In *Cornell*, this Tribunal held that the employer was entitled to rely on, and the delegate must consider, past misconduct as part of the overall context within which the most recent misconduct occurred. The Tribunal quoted with approval the following passage from *Grewal v. Khalsa Credit Union*, 2012 BCCA 56 at paragraph 110:

> While the prior matters in themselves may not have justified termination, [the employer] was entitled to consider her past misconduct in determining whether it had just cause for dismissal.

36. According to *Cornell*, the passage of time is not relevant to that consideration.

37. In my view, the Delegate erred in discounting the 2011 discipline event. It is relevant in the sense that it establishes, as it did in *Cornell*, that the Complainant was on a "short leash".

38. I also have some difficulty with the Delegate's failure to address other, similar, incidents in the Complainant's employment history, and I agree with the Appellant's argument that limiting a review to incidents of customer discourtesy is far too restrictive.

39. In the Preliminary Decision, I described in some detail the evidence, referred to in the Determination or otherwise included in the Record, concerning the Complainant's previous employment history. In addition to the 2011 suspension event, I note that:

(a) The Complainant appears to have demonstrated, since 2011, a relatively regular pattern of discourteous or contemptuous behaviour, or insubordination, in his dealings with other people – including incidents for which he received some sort of written notice or verbal reprimand on August 29, 2012, May 14, 2014, March 13, 2015, and August 29, 2015.

(b) There is evidence in the Record concerning the Complainant's periodic poor treatment of fellow staff, and other specific incidents of insubordination or in which the Complainant tells others to "fuck off".

(c) Each of the written warnings, labelled a "counselling notice", includes a caution that further violations could result in further disciplinary action, including termination.

40. In my view, the Delegate erred by failing to fully consider these incidents.

41. Taken as a whole, I am satisfied that the July 5, 2016, misconduct relates to a standard set and communicated to the Complainant, which the Complainant has failed to meet, having had a reasonable opportunity to do so, while knowing that such failure could or would result in termination.

42. I am equally satisfied that the same incident was ultimately prejudicial to the Appellant's interests in establishing and maintaining a specific standard of customer service (see *Jace Holdings Ltd.*, BC EST # D132/01, at page 5). The Delegate makes note of this but does not seem to give it any weight.

43. I conclude that the evidence as found by the Delegate, considered in a *McKinley/Silverline* analysis, confirms that dismissal was justified, given the context within which the most recent (minor) misconduct occurred. In my view, by dismissing out of hand rather than fully considering most of that background, the Delegate's conclusion to the contrary, amounts to an error of law.

ORDER

44. In the result, the Determination as supplemented by the Report, should be cancelled, and pursuant to section 115(1)(a) of the *ESA*, I make that order.

Rajiv K. Gandhi
Member
Employment Standards Tribunal