EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Kenneth Kruger
("Kruger")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/638

DATE OF DECISION: December 30, 1996

DECISION

OVERVIEW

This is an Appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Kenneth Kruger ("Kruger") from a Determination, number CDET 004266, dated October 9, 1996, of a delegate of the Director of the Employment Standards Branch (the "director"). The director dismissed Kruger's claim for length of service compensation on the ground that he was dismissed for just cause and as a result his employer was discharged from their statutory liability to pay length of service compensation on termination without notice.

ISSUE TO BE DECIDED

The issue is whether Kruger has shown the director was wrong in concluding, on the basis of the facts, the employer had just cause to terminate Kruger.

FACTS

Kruger worked for Wal-Mart Canad Inc. ("Wal-Mart"). In May, 1996 he purchased four second hand tires from his employer. Part of the purchase price forthe tires included a $20.00 balancing fee. The fee is normally charged to the general public by Wal-Mart on tires it sells and mounts on tjeir customers' cars. The requirement for employees to pay this fee is contained in the Wal-Mart Tire & lube Express Center policy. Its says:

> Wal-Mart associates are only entitled to those "No Charge" services which are offered to the public at no charge. These should be approved bt Tire & Lube Management.

The work was done May 20. When the work order was prepared, Kruger told the sales associate there was no balancing charge as it was included in the price of the tires. He had no reason to believe this was the case. The day following the purchase, the work orders were reviewed by Stan Hirtle ("Hirtle"), the Automotive Manager. He noticed the balancing fee had not been charged to Kruger and raised the matter with him. Kruger said he did not pay it because he did not have the money at the time. Hirtle told him to clear it up. Kruger agreed. In the morning of May 23 Hirtle asked him whether he had the money to clear up the balancing charge. Kruger said he did not. In the afternoon Hirtle again asked Kruger for payment. At this point Kruger said the cashier was at fault for not charging the balancing fee at the time the work was paid for and he would not pay it now. Hirtle passed the issue on to Glenn Giesbrecht ("Giesbrecht"), the Store Manager.

Giesbrecht investigated and found Kruger had told both the Sales Associate who made the work order and the Sales Associate who rang in the work for payment the balancing fee was included in the price of the tire. Kruger denies he told either Associate the price of the balancing fee was included in the price of the tires. The delegate also obtained a statement from one of the two Sales Associates confirming the employer's information.

Kruger says the failure to put the charge on the work order and the failure to ring the charge up when he paid must have been mistakes by the two associates involved and he did not notice the fee was not charged

until later in the day on May 20. He made no attempt to correct the error, either on May 20 or at any time up to May 24.

Kruger was discharged May 24 for gross misconduct and breach of company policy.

ANALYSIS

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

The tribunal has addressed the question of dismissal for just cause on many occasions. The following principles may be gleaned from those decisions:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

The director found the facts of this case to be one of those exceptional circumstances in which the misconduct of Kruger was sufficiently serious to justify summary dismissal. The factual conclusions made by the investigating officer support the finding there was a serious breach of company policy and a

conscious refusal on the part of Kruger to either acknowledge it or correct it. Those facts support the legal conclusion the misconduct of Kruger was such as to undermine an essential aspect of the employment relationship and discharge was appropriate. Kruger has not overcome his burden in this appeal to show the factual conclusions were not correct or that the legal conclusion drawn from those facts was not correct. Even assuming he had no hand in the deletion of the service fee from the work order, his steadfast refusal to correct what he characterizes as an "error" demonstrates he has taken unauthorized advantage of his position and has placed his own self interest above his obligation as an employee.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, Number CDET 004266, dated October 9, 1996, be confirmed.

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Dave Stevenson
Adjudicator
Employment Standards Tribunal