

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

White Spot Restaurants, A Division of White Spot Limited  
("White Spot")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 97/741

**DATE OF HEARING:** December 19, 1997

**DATE OF DECISION:** January 14, 1998

**DECISION**

**APPEARANCES**

Roshan P. Danesh	Counsel for White Spot
Denise Buchanan	Director of Human Resources, White Spot
Amanda Augustine	Manager, Scott Rd. White Spot
Baljit Uppal	Witness
Chris Chapleski	Witness
Joginder Dhillon	On her own behalf
Pam Grewal	Daughter of Dhillon

**OVERVIEW**

The appeal is by White Spot Restaurants, A Division of White Spot Limited (“White Spot”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Appealed is a Determination by a delegate of the Director of Employment Standards (the “Director”) dated September 18, 1997. The Determination is that White Spot did not have just cause in terminating Joginder Dhillon and owes her compensation for length of service as a result.

**ISSUE TO BE DECIDED**

The sole issue is whether or not White Spot had just cause.

The Director’s delegate concluded that White Spot did not have just cause to dismiss Ms. Dhillon for several reasons:; policy was neither clear nor consistently enforced; that the employee had been warned in 1991 about the taking of expired food (food past its date for consumption) without a manager’s permission but that the warning could not “properly be linked (to the incident) in disciplinary terms”; that there was no consistent breaching of policy; and no fundamental breach of the employment relationship.

White Spot argues that it had just cause for reason of theft. It says that even though little of value was taken, the employee’s conduct was inconsistent with continuation of the employment contract.

In the alternative, White Spot argues that it had just cause for reason of a violation of a clear and reasonable rule, namely, that no food be taken from the restaurant without a manager's permission. In that regard, White Spot argues that Dhillon was fully aware of the policy, did not gain the necessary permission, had been warned that she faced termination if she ever breached the policy, and had demonstrated a clear unwillingness to work in accordance with the policy.

## FACTS

Joginder Dhillon began working for White Spot on August 25, 1989. Her job was that of prep cook for the restaurant at 72<sup>nd</sup> and Scott Road (the "Scott Road restaurant"). She was terminated on December 23, 1996 for taking home a bag of bread.

It has long been the policy of White Spot to terminate employees who are caught stealing food. Dhillon knew the policy. And she knew that Havinder Singh, a fellow worker, was fired for stealing food.

White Spots serve a variety of breads but they do not serve the end of the loaf, nor bread which is past date. And it is the stated policy of the Scott Road restaurant that waste food is not to be taken home without a manager's permission. Dhillon knew that. In September of 1991, she found a package of expired butterhorns and asked if she could take them home. She was told that she needed a manager's permission and that if she was caught taking food without such permission that she would be terminated.

On January 9, 1996, Dhillon was spotted eating a slice of the restaurant's cheese. Amanda Augustine, manager of the Scott Road restaurant, gave her written warning that her behaviour was totally unacceptable. The warning advised that "it is of the utmost importance that you understand and follow FOOD SAFE procedures". It then goes on to say that the cheese eating is upsetting to guests and "is stealing", in that order. It ends with statement that "all consumption of food or drink in the kitchen or prep area *must* be stopped immediately (and) failure to do so will result in further disciplinary action up to and including suspension".

A meeting of Scott Road restaurant employees was held on November 8, 1996 and the minutes of the meeting were circulated to employees, Dhillon included. The minutes state, at 13, "everyone was reminded that all expired or waste food products must be thrown out and cannot be consumed or taken home by staff". The minutes say nothing about penalties.

The bread that Dhillon took home on the 17<sup>th</sup> of December was carried in a clear plastic bag. And on leaving for the day, she stopped to chat with other employees while carrying her bag of bread in plain view. That allowed Chris Chapleski to see that the bag contained “mostly pieces from the mid section of the loaf”, “9 inches to a foot long”. Nothing allows me to determine whether that was good bread or bread destined for the garbage.

Dhillon was fired for the bread taking. The letter of termination states that Dhillon admitted that she took the bread without permission. But Dhillon denies having done so. And as the facts are presented to me, I believe it unlikely that there was ever an admission of theft. I find it most likely that she was merely misunderstood. Dhillon demonstrates a rather limited command of English. And other evidence shows that she has been saying all along that Baljit Uppal, head cook, gave permission for the bread taking.

Uppal denies having given permission to take the bread. But according to Dhillon, she did. And with that, she says, kitchen staff began bagging waste bread and setting it out for employees to take home. She says that for some time she had been taking the bread home to her mother who fed it to birds. She says that two bags of the bread had been set out on the 17<sup>th</sup> and that she took one of them believing it waste and okay to take.

## **ANALYSIS**

Section 63 of the *Act* sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. The liability for compensation for length of service can be discharged as set out in section 63 (3). That section of the *Act* is as follows:

- (3) *The liability is deemed to be discharged if the employee*
- (a) *is given written notice of termination as follows:*
    - (i) *one week's notice after 3 consecutive months of employment;*
    - (ii) *2 weeks' notice after 12 consecutive months of employment;*
    - (iii) *3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
  - (b) *is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
  - (c) *terminates the employment, retires from employment, or is dismissed for just cause.*

A single act may be of such a serious nature that it justifies termination. As may less serious misconduct when repeated, or the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

White Spot argues that it had just cause for reason of theft, the single act of bread taking on December 17. But there has not been an admission of guilt, nor is theft shown to me.

Dhillon took bread, she admits that. But White Spot has not established either that Dhillon took something of value to it or that there was a conniving to deprive it of its property. As matters are presented to me, the bread which Dhillon took may well have been nothing more than expired bread, in other words, worthless garbage. Moreover, and most importantly, I am satisfied that Dhillon at least thought that the bread was waste bread and okay to take home.

Uppal denies giving authorisation for the bread taking. But she may just not remember or want to remember having done so. According to Dhillon, the bread taking went on for some time. Moreover, as head cook, it is clear that Uppal was not in a position to authorise the bread taking and to have answered in the affirmative would be to admit to an overstepping of authority and to being somewhat of a part of the bread taking, as even admitting an awareness of it would seem to do. That leads me to give her testimony little weight. However, it is when I consider her testimony against the established facts that I am led to the conclusion that Dhillon believed that the bread taking was properly authorised. Only that explains with any measure of satisfaction why she would leave with the bread as she did, held in a clear plastic bag in a way that allowed all present to see. I find it highly improbable that she would take the bread, knowing it was unauthorised, and make no attempt to conceal it.

I should add that, if it had been established that the bread taking were unauthorised, it does not follow that White Spot would then have just cause. To establish unauthorised bread taking is still not to establish, even on the balance of probabilities, that there was a fraudulent attempt to deprive White Spot of something of value. And, in this case, while I accept that the same mental state is required to pilfer as to plunder, White Spot is not now in a position where it can argue with success that minor bread taking represents repudiation of the employment contract. The Scott Road restaurant has itself said that the taking of a minor amount of valuable food is considered to be something less than that, through its 1996 warning to Dhillon on minor cheese eating. In that warning it was made plainly clear to Dhillon that the taking of a minor amount of food was not thought to be grounds for discharge but suspension at the most. As it did so, and did nothing to correct it, White Spot is now prevented from arguing that the unauthorised taking of bread of little or no value is a fundamental breach of the condition of faithful service.

White Spot also argues that it has just cause for the repeated breaking of a reasonable rule. Where there are repeated examples of less serious misconduct, it is the well established view of the Tribunal [See, for example, *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas* BCEST No. D374/97.] that an employer will have just cause where it shows the following:

- a) A reasonable standard of performance was established and communicated to the employee;
- b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;
- c) the employee is given the time to meet the required standard; and
- d) the employee continued to demonstrate an unwillingness to meet the standard.

White Spot's stated policy on the taking of food for personal use, even waste food, appears entirely reasonable to me. But as Dhillon thought that it was okay to take what she did, it follows that there was no deliberate breaking of the policy and no demonstration of a clear unwillingness to meet that standard. It is also clear that White Spot never plainly and clearly gave notice to Dhillon that she was failing to work as expected and that her job was in jeopardy as a result. The policy was not broken in 1991. Dhillon merely asked if it was okay to take food home. There was a warning in 1996 for eating cheese without permission but Dhillon would hardly know from that that her job was in jeopardy, it setting out a penalty of suspension at the most.

White Spot fails to prove theft. White Spot also fails to show that Dhillon has repeatedly broken a rule despite having been warned that the consequence of any further breaking of the rules would be her termination. As such it must now pay compensation for length of service.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated September 18, 1997 be confirmed in the amount of \$2,601.60 together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since its date of issuance.

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

LDC:lc