Employment Standards TRIBUNAL

An appeal

- by -

Costco Wholesale Canada Ltd.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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: August 2, 2017

DECISION

SUBMISSIONS

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

OVERVIEW

1. An employer may, as of right, terminate the services of an employee for any reason and at any time, but on doing so is compelled by sections 63(1) and 63(2) of the *Employment Standards Act* (the "*Act*") to pay compensation for length of service, unless relieved of that obligation under section 63(3). Relevant to this appeal is section 63(3)(c) of the *Act*, which provides in part that liability under sections 63(1) and 63(2) is deemed to be discharged when the employee "… is dismissed for just cause."

2. In a determination issued on February 8, 2017, under section 79 of the *Act* (the "Determination"), a delegate of the Director of Employment Standards (the "Director") concluded that the appellant, Costco Wholesale Canada Ltd. (the "Appellant") terminated the employment of Jason Jeffrey (the "Complainant") without cause. The Appellant was ordered to pay the aggregate sum of $9,004.31, representing compensation for length of service and accrued vacation pay, together with interest calculated according to section 88 of the *Act*.

3. Before this Tribunal, the Appellant says that, in making the Determination, the Director:

   (a) erred in law; and

   (b) failed to observe the principles of natural justice,

   both grounds for appeal under section 112(1) of the *Act*. As a result, says the Appellant, the Determination ought to be cancelled.

4. My decision in this matter follows a thorough review of:

   (a) the Determination;

   (b) the Record, submitted by the Director on March 24, 2017;

   (c) submissions from Appellant's counsel, received on March 20, 2017, and June 5, 2017;

   (d) submissions on behalf of the Director, received on May 18, 2017; and

   (e) submissions from the Complainant, received on May 15, 2017.

FACTS

5. The Complainant's employment with the Appellant started on November 2, 2011. It ended with his dismissal on July 11, 2016, resulting from an altercation between the Complainant and a customer, occurring on July 5, 2016, in which it was alleged that the Complainant was hostile, rude, disrespectful, and twice told the customer, in view of her children, to "fuck off" or to "go fuck yourself".

6. Before the Director, the Complainant acknowledged familiarity with the Appellant's policy of courteous and helpful dealings with customers, but denied using profane language or acting discourteously towards the customer. He admitted to confronting the customer when she was taking his picture, and subsequently describing her as a "bitch" to his managers.

7. It is fair to say that much of the Appellant's evidence concerning this pivotal incident amounts to hearsay, and the Director in my estimation properly accorded greater weight to the Complainant's version of events. Even so, the Director found as fact that the Complainant, in his dealings with the customer, failed to provide that level of courtesy required under the Appellant's employment policy.

8. Ultimately, the Director agreed that disciplinary action was appropriate, but rejected the Appellant's argument that termination was justified. In reaching that conclusion, the Director did not consider the Complainant's previous misconduct, ostensibly because the Appellant did not argue historical behaviour as a basis for termination. Rather, the Director considered only whether or not the evidence in hand tended to prove or disprove specifics of the confrontation between Complainant and customer.

9. A summary of the Complainant's employment history, addressed by the Appellant and the Complainant during the complaint hearing, is detailed in documents included in the Record, and summarized in the Determination. Of note:

(a) The Complainant received written warning on June 6, 2003, for incompetence in completing a work task, resulting in potential risk to a customer.

(b) On December 8, 2011, the Complainant received a written warning and a three-day unpaid suspension relating to two incidents. In the first, occurring on March 29, 2011, the Complainant used obscene language when dealing with his co-workers, acting in a manner contrary to the Company's anti-harassment policy. In the second, on November 25, 2011, the Complainant was rude to a customer, refused to follow instruction from his manager, and used obscene language in the presence of customers and fellow employees.

(c) The Complainant received written warning on November 5, 2014, relating to an instance of poor customer service in which the Complainant damaged the property of a customer, and failed to disclose that damage to the customer or to the Company.

(d) The Complainant received written warning on January 6, 2015, for "insubordination" resulting from two incidents occurring on December 16, 2014, and December 18, 2014, in which the Complainant refused to follow instruction from his manager. (The Complainant disagrees with the warning, and blames his manager for these incidents.)

(e) The Complainant received written warning on March 13, 2015, for "contemptuous behaviour" and "insubordination". It is noted that in dealing with his manager, the Complainant became angry, and used a tone characterized both as "disrespectful" and "hostile".

(f) The Complainant received written warning on November 24, 2015, when it was discovered that he had stored derogatory material on a Company computer workstation. (Again, the Complainant blames his manager for this.)

(g) The Complainant received a verbal warning on May 13, 2016, for his failure to follow safety protocols.

(h) The Complainant also received written warnings on February 6, 2004, July 19, 2006, May 28, 2009, and December 9, 2014, relating to eleven separate instances in which he reported to work outside the window permitted by Company policy. (The July 19, 2006, warning is included in the

Record, but not mentioned in the Determination. The December 9, 2014, warning appears to be dated in the Determination as December 12, 2014.)

(i) There are notes in the Record concerning incidents of insubordination or difficulties in dealing with fellow co-workers, occurring on August 29, 2012, May 14, 2014 (for which the Complainant blames his manager), and August 29, 2015. It is unclear what disciplinary action, if any, resulted.

(j) The Record contains a staff meeting summary, dated September 3, 2015. Of interest are references to discussions with the Complainant concerning his poor treatment of fellow staff, specific incidents of insubordination or in which the Complainant tells others to "fuck off", and removal of the Complainant from a supervisory role.

(k) Each of the written warnings, labelled a "counselling notice", includes a caution that further violations could result in further disciplinary action, including termination. So too does the formal letter, issued concurrently with the Complainant's previous suspension.

(l) Although the Complainant regularly refused to acknowledge receipt of written warnings, materials included in the Record and the Complainant's own testimony described in the Determination confirm that he received each such notice, even if he did not agree with or accept the contents.

ANALYSIS

Just Cause

10. It is the Appellant's burden to show that the Complainant was dismissed for just cause in order to rely on the saving provisions in section 63(3)(c) of the *Act*.

11. Just cause exists where there is a fundamental breach of the relationship between employer and employee, or where there are repeated infractions of workplace rules or incidents of unsatisfactory conduct. Just cause is shown, in cases of the latter, where:

(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.

(*Silverline Security Locksmith Ltd.*, BC EST # D207/96, at page 5).

12. Just cause may be shown in instances where an employee's conduct is:

(a) willful and deliberate;

(b) inconsistent with the continuation of the contract of employment;

(c) inconsistent with the proper discharge of the employee's duties; or

(d) prejudicial to the employer's interests, a breach of trust, or such as to repudiate the employment relationship.

(*J.M. Schneider Inc. and Brian Ruckledge*, BC EST # D154/03, at page 5; see also *Jace Holdings Ltd.*, BC EST # D132/01, at page 5).

13. Where employee misconduct forms the basis for a "just cause" dismissal, the Supreme Court of Canada has called for an "assessment of the context of the alleged misconduct". In the case of a proceeding under the *Act*, the Director must:

(a) determine if the evidence proves misconduct, on a balance of the probabilities; and

(b) consider whether the nature and degree of that misconduct warrants dismissal.

(*McKinley v. BC Tel,* 2001 SCC 38, at paragraphs 48 and 49).

14. Subsequent rulings in both the British Columbia Court of Appeal and by this Tribunal have confirmed the *McKinley* approach as the "road map for addressing all forms of employee misconduct." (*Cornell Holdings Ltd.*, BC EST # D027/13, at paragraph 34).

15. In lengthy submissions to the Tribunal, counsel for the Appellant submits that in making the Determination, the Director failed to set out or engage in the contextual analysis required by *McKinley*.

16. The Director, in turn, says, firstly, that the test need not be expressed when considering a single act of misconduct and, secondly, that contextual analysis is unnecessary where there is a finding that the impugned conduct, *as alleged by the Appellant*, did not occur.

17. I am not convinced that it was necessary to expressly set out the test to be followed, so long as it was followed.

18. That said, I am of the view that the approach adopted by the Director was, in this instance, flawed:

(a) I agree that contextual analysis is pointless where there is no misconduct. Certainly, it would have been open to the Director to find that the Appellant had failed to prove misconduct on a balance of the probabilities, considering the relative weight of the evidence and the Complainant's denial of wrongdoing. That, however, is not what happened. Having rejected, in part, the version of events alleged by the Appellant, the Director went on to find that the Complainant, firstly, was discourteous in his dealings with the customer, and secondly, failed to abide by the Appellant's established policy, the existence and importance of which the Complainant was fully aware. That is clearly misconduct, satisfying the first prong of the *McKinley* test.

(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.

(e) I do not suggest that the Director is required to seek out evidence; that onus rests with the employer. However, where evidence has been presented, it is the Director's obligation to consider it, or to otherwise establish a reasonable basis for discounting it.

19. In their respective submissions, the Appellant argues and the Director agrees that evidence of:

(a) the Complainant's employment history;

(b) the nature of the Complainant's position;

(c) the impact of the altercation on the Appellant's business; and

(d) the Complainant's use of the word "bitch" to describe the customer when speaking to his managers,

was not considered in the context of justification for dismissal. The Director says that this evidence was considered only with respect to whether it established the truth of the Appellant's allegations concerning the July 6, 2016, altercation between the Complainant and the customer.

20. This is because, according to the Director, the Appellant did not argue and the Appellant's witnesses did not explain the impact of these factors on termination of the Complainant's employment.

21. The Director acknowledges that the Appellant's arguments concerning "minor misconduct" are "compelling". Both the Director and the Complainant say that it is irrelevant, because it was not argued at the time of the hearing. The Appellant disagrees and says that there was no reason to tender the employment history other than to establish a pattern of "minor misconduct".

22. "[A]ssessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced" (*McKinley*, supra, at paragraph 49). Misconduct must not be examined in isolation (*3 Sees Holdings Ltd.*, BC EST # D041/13, at paragraph 25).

23. I do not think that a failure, on the part of the Appellant's Director of Human Resources and the Appellant's store manager, to clearly articulate the undisputed legal test relieves the Director of Employment Standards of the responsibility to consider the evidence and to apply that test. *McKinley* does not call for the test to be applied only where it is argued; it is the analysis to be undertaken whenever misconduct forms the basis for dismissal.

Did the Director err in law?

24. Where it is alleged that the Director erred in law, it is the Appellant's burden to convince the Tribunal that the Director:

(a) has misinterpreted or misapplied a section of the *Act*;

(b) has been misapplied an applicable principle of general law;

(c) has acted in the absence of evidence;

(d) has acted on a view of the facts that cannot reasonably be entertained; or

(e) has adopted a method of assessment that is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

25. The parties agree that the evidence was not analyzed, in context, as required by *McKinley*, nor fully considered in the manner contemplated by *Silverside*.

26. The Director argues in several ways that these steps were unnecessary. For the reasons set out previously, I disagree.

27. I find that the Director has adopted a method of assessment that is wrong in principle. The Appellant has satisfied the onus imposed by *Gemex*.

28. In that I find in favour of the Appellant with respect to the first ground of appeal, I do not find it necessary to consider the second, concerning the alleged breach of the principles of natural justice.

Remedy

29. I have found that the Director has adopted a method of assessment that was wrong, in principle. However, I have not found a palpable and overriding error in, and I see no basis on which I should interfere with, the Director's findings of fact. The question in my mind is whether those facts, considered in an appropriate context, support a conclusion that the Appellant acted with just cause.

30. Whether an employee has been dismissed for cause is a question of mixed fact and law (3 Sees Holdings Ltd., BC EST # D041/13, at paragraph 26).

31. I have set the legal test, but it is for the Director, not this Tribunal, to make findings of fact in the first instance. While I am tempted to do so, I believe that, ultimately, it would be improper for me to draw factual conclusions concerning "just cause" and "minor misconduct" when the Director has not yet done so. This is true, I think, even where the Director now concedes that the Appellant's arguments are "compelling".

32. The Appellant asks the Tribunal to cancel the Determination under section 115(1)(a) of the *Act*. Although the stated ground for appeal has been met, I do not agree in these circumstances that outright cancellation is the correct result.

33. In my view, this matter should be returned to the Director, and the Director should consider evidence received at the complaint hearing in the context of a *McKinley/Silverside* analysis.

ORDER

34. I allow the appeal, and refer this matter back to the Director, pursuant to section 115(1)(b) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal