Employment Standards TRIBUNAL

An appeal

- by -

Jace Holdings Ltd. Operating as Thrifty Foods

- 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

ADJUDICATOR: John M. Orr

FILE No.: 2000/732

DATE OF HEARING: February 2, 2001

DATE OF DECISION: March 22, 2001

DECISION

APPEARANCES:

Robert T.C. Johnston, Q.C.	Counsel for Jace Holdings Ltd.
Steve McNaughton	On his own behalf
Drew Eriksen	On his own behalf
Gerry Omstead	On behalf of the Director

OVERVIEW

This is an appeal by Jace Holdings Ltd. Operating as Thrifty Foods (" Thriftys" or "the employer") pursuant to section 112 of the *Employment Standards Act (*"the *Act")* from a determination dated October 16, 2000 (#ER 030156) by the Director of Employment Standards ("the Director").

Steve McNaughton ("McNaughton") and Drew Eriksen ("Eriksen") (or collectively "the employees") both worked for Thriftys for more than 8 years until they were dismissed on December 01, 1999. They were not paid compensation for length service as the employer claimed that they were dismissed for just cause. The reason for dismissal was that McNaughton and Eriksen were caught, along with some other employees, smoking marijuana on their break during their working shift.

The Director found that this did not constitute just cause for dismissal. Thriftys appeals the Director's determination.

FACTS

The facts in this case are not complex. The employees smoked marijuana on their break and returned to work. The supplying and sharing of drugs falls within the legal definition of trafficking. They were dismissed. At the hearing, and indeed during the Director's investigation, Thriftys led significant evidence gathered by a private investigator to establish that the employees were smoking marijuana on their break during their work shift and returned to work having consumed the marijuana. The two employees, McNaughton and Eriksen, did not lead any evidence to contradict the evidence given by the employer. To their credit neither of these employees has ever denied the allegations. Under these circumstances, the evidence on behalf of the employer should have been and is accepted.

In short the evidence establishes that McNaughton and Eriksen were working on the night shift and on their break left the store and went to take their break outside a sidewalk café adjacent to the Thrifty store. There they shared marijuana cigarettes with some other employees. This occurred on several occasions. It was observed and video taped by a private investigator.

Thriftys had an employee handbook that contained policy relating to employee conduct. The handbook provided that "using illicit drugs is prohibited and will result in dismissal". While there was some issue about which policy was in place at the time and whether these employees knew of the policy, I am satisfied and find as a fact, that having worked for the company for over eight years, these two employees were well aware of the policy and the possible consequences.

ANALYSIS

The Director's delegate engaged in an extensive and very thorough investigation but unfortunately made several errors in his reasoning that lead me to conclude that the determination must be cancelled.

The delegate raises many concerns about the nature of the investigation and the options open to the employer to act sooner on the findings of the investigator. These matters were not significant issues in this case. The employees at no time denied that they smoked marijuana. Their position from the beginning was simply that dismissal was too harsh a penalty. The employer had clear and convincing evidence that should have been accepted that the marijuana smoking took place. It was up to the employer to decide at what point they felt there was sufficient evidence to act on their findings.

The onus is certainly on the employer to establish just cause for dismissal but where there is clear evidence that is uncontradicted it should generally be accepted. In this case there was a substantial body of evidence to establish the facts on any civil standard of proof. It is ridiculous to suggest that the fact that the investigator videotaped several transactions before these employees were terminated it amounted to condonation. There is absolutely no evidence to suggest that the employer condoned this behaviour.

A significant error in the determination is the delegate's application of the principles of progressive discipline. In his submission before me the delegate referred me to a number of decisions that were based on labour relations principles in which the principles of progressive discipline have long been established. However these principles derive from the powers granted to arbitrators under the Labour Relations Code and similar legislation in other jurisdictions.

Section 89 of our Labour Relations Code grants significant powers to arbitrators including the power to reinstate an employee or to determine that a dismissal or discipline is excessive and to substitute other measures that appear just and equitable. Such similar powers in the *Employment Standards Act* have very limited application. Section 79(4) grants fairly broad remedial powers but such authority is limited to cases where there is a contravention of section 8 (false

representations), Part 6 (leaves), or section 83 (retaliation). None of these provisions have application in this case.

Under the A*ct* there is a simple threshold test. If there is "just cause" for dismissal there is no power for the Director or the Tribunal to reinstate an employee or to substitute some other discipline. Once "just cause" exists, it is completely in the discretion of the employer whether to dismiss or not. There is no requirement for progressive discipline once "just cause" exists.

While I may not have dismissed an employee in these circumstances without warning it is not appropriate for me to substitute my opinion for that of the employer. Nor was it appropriate for the delegate to substitute his opinion as to what "punishment matched the crime". It was inappropriate for the delegate to consider what penalties might be imposed in a criminal court or in collective agreement jurisprudence. It was also inappropriate for the delegate to question the validity or reasonableness of the employer's workplace policies. The employer has the right to determine how its business shall be conducted. It may lay down any policies considered advisable so long as they are not contrary to law or workplace regulation, *Stein v. B.C. Housing Management Commission*, (1992) 65 BCLR (2d) 181, (BCCA).

The *Act* does not regulate the employer's right to discipline. There is no requirement for "progressive discipline". If an employee's behaviour falls short of the threshold of "just cause" then an employer may impose whatever discipline the employer considers fair, short of dismissal. The only restriction would be if the discipline amounted to a substantial alteration in a condition of employment *(section 66*) in which case the Director may determine that the employment has been terminated or those matters referred to previously as giving rise to a rememdy under section 79(4).

Likewise, even if an employee's behaviour exceeded the threshold of "just cause" it is still within the employer's discretion to dismiss or impose some other form of discipline. This decision is not reviewable by the Director (unless it also involved a matter triggering section 79(4)). It is completely within the discretion of the employer whether to dismiss or not. Even in the case where several employees have behaved in a manner that gives the employer just cause for dismissal, it is within the discretion of the employer whether to dismiss one, some, or all of such employees. There is no requirement in the *Act* that each employee be treated equally.

As there is no power in the *Act* to re-instate the only remedy for a dismissed employee, under the legislation, is compensation pursuant to *Section 63.*

The substantial issue in this case is whether or not the behaviour of these employees crossed the threshold of giving the employer just cause to dismiss. In my opinion it did.

It is important to distinguish between acts of misconduct and minor infractions of employment rules or unsatisfactory job performance. In the case of unsatisfactory job performance, incompetence, or minor infractions of workplace rules the Tribunal has setout a very clear basis

for the establishment of just cause. In cases not involving misconduct the employer will need to show:

1. reasonable standards of performance have been set and communicated with the employee;

2. the employee had actual notice that continued employment was in jeopardy if such standards were not met;

3. the employee was given a reasonable opportunity to meet such standards; and

4. the employee did not meet those standards.

(see*: Re: Hall Pontiac Buick Ltd*, BCEST#D073/96*; Re: Cook*, BCEST#D322/96*; Re*: *Justason*, BCEST#D109/97*; Re: Sambuca*, BCEST#D322/97; *Re: Chamberlain*, BCEST#D374/97; et al)

Even in such cases there is no requirement for "progressive discipline". Once this test is complied with the "threshold" of "just cause" is met. Discipline or dismissal is within the discretion of the employer.

However in cases of deliberate and intentional misconduct the Tribunal has found that just cause can exist as a result of a single act where the act is willful and deliberate and is inconsistent with the continuation of the contract of employment, or inconsistent with the proper discharge of the employee's duties, prejudicial to the employer's interests, is breach of trust, or is such as to repudiate the employment relationship. In these cases there is no requirement for warnings and certainly no requirement for progressive discipline.

Just cause in cases of misconduct can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, breach of trust, insubordination, or a significant breach of workplace policy, *Re: Silverline Security Locksmith Ltd.*, BCEST#D207/96.

In this case there was no doubt that criminal acts occurred during the employees' shifts and on company time. Trafficking in drugs while on company time and while conducting company business is a serious criminal offence which gives just cause for dismissal, *Re: Craigdallie*, BCEST#D 313/97. Similarly, a criminal act of assault on a co-worker is just cause for dismissal, *Re: Downie Timber*, BCEST #D023/98; *Broadcam Holdings Ltd*, BCEST #D241/98. Possession of marijuana is an offence that carries a sentence of up to six months in prison. Trafficking in a small amount of marijuana is an indictable offence with a penalty of up to 5 years in prison. Despite any popular wishful thinking to the contrary, or the leniency that may be perceived in the courts, the possession and trafficking in marijuana remain serious criminal offences.

The behaviour of the employees in this case clearly exceeded any objective and reasonable threshold of "just cause". It was then solely within the discretion of the employer whether to dismiss or impose another form of discipline.

I am more than satisfied that the employer has met the burden of persuading me that the determination was in error and therefore I conclude that the determination should be cancelled.

ORDER:

Pursuant to section 115 of the Act I order that the determination is cancelled.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal