

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 -

L. J. B. Foods Ltd. operating as McDonalds
("L.J.B.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NOS.: 98/020 & 98/021
DATE OF HEARING: March 4, 1998
DATE OF DECISION: April 7, 1998

DECISION

APPEARANCES

Mr. Les Baart

on behalf of L.J.B.

OVERVIEW

This is an appeal by L. J. B. Foods Ltd. operating as McDonald's ("L. J. B."), under Section 112 of the *Employment Standards Act* (the "Act"), against two Determinations which were issued on December 17, 1997 by delegates of the Director of Employment Standards.

The Director's delegate found that L. J. B. had terminated the employment of a former employee, Judith Hanson, without just cause; had paid vacation pay incorrectly during her final year of employment; had made an improper deduction from Ms. Hanson's wages; and was required to pay compensation for length of service. The other Determination (PDET #000745) imposed a penalty of \$0.00 for having "... contravened a specific provision of a Part of the *Employment Standards Act* or of a Part of the *Employment Standards Regulation*.

The Tribunal scheduled a hearing into this appeal on March 4, 1998 and notified each of the parties in writing on February 5, 1998. The parties' written submissions were disclosed to the other parties prior to the hearing. One of the Director's delegates (Ms. Ip) advised the Tribunal on February 26, 1998 that she would not be attending the hearing. The other delegate did not notify the Tribunal and did not appear. Ms. Hanson did not appear and when contacted by telephone at the time of the hearing informed the Tribunal of her inability to attend and of her willingness to rely solely on her written submission as her reply to L. J. B.'s appeal.

Ms. Doris Vong was sworn in as a certified interpreter.

All witnesses gave evidence under oath or affirmation.

At the beginning of the hearing, Mr. Baart informed the Tribunal that L. J. B. does not dispute the findings in the Determination with respect to the payment of vacation pay to Ms. Hanson nor the finding concerning the deduction from her wages. Thus, the only issues under appeal are:

- (i) the finding that L. J. B. terminated Ms. Hanson's employment without just cause and
- (ii) the imposition of a \$0.00 penalty (PDET #000745).

ISSUES TO BE DECIDED

1. Did L. J. B. have "just cause" to terminate Ms. Hanson's employment?

2. Did the Director's delegate err in imposing a \$0.00 penalty on L. J. B.?

FACTS

Judith Hanson was employed by L. J. B. from January 21, 1990. L. J. B. operates a fast food restaurant in Vancouver where Ms. Hanson's position was a "breakfast manager" prior to her dismissal. Ms. Hanson was suspended on December 17, 1996 and L. J. B. terminated her employment on January 3, 1997.

The Director's delegate sets out the following reasons for her finding that L. J. B. owed compensation for length of services to Ms. Hanson:

Compensation for Length of Service

I have determined that the complainant is entitled to compensation for length of service. The reasons for my determination are as follows:

1. During the course of my investigation, the employer advised that the complainant was terminated for stealing toys from the store. The employer also advised that three employees of the store had witnessed the complainant taking toys away and that these employees had provided written statements to the employer. However, despite my request for written statements, the employer has not provided the documents.
2. The employer advised that during the meeting on December 17, 1996, the complainant admitted that she had taken toys from the store without paying for them. The complainant denied that she admitted to the alleged theft during the meeting. She told the employer that she had put away some toys earlier that day and would pay for them at the end of the shift, which she had done many times before. She was never questioned about it, nor did the employer bring it to her attention that it was against company policy.
3. I have interviewed Mr. Paul Earl over the phone. Mr. Earl advised me that he had given the complainant 15 to 20 toys to be exchanged with some of her customers. He is prepared to testify on behalf of the complainant.
4. The reasons for termination as indicated on the complainant's Record of Employment was "violation of company policy". The complainant has worked for the company for almost seven years and has not been given any warnings for misconduct or violation company policy.

In view of the above information, there is insufficient evidence to prove that the complainant was terminated for just cause.

The total retail value of the toys in question is approximately \$25.00

L. J. B.'s primary ground of the appeal is that the Director's delegate "... did not have all the evidence to make a proper determination." In support of that submission, L. J. B. relies on a letter dated January 5, 1998 to the Director's delegate, which states in part:

I have just returned from vacation to learn you have found in favor of Judith Hanson regarding her complaint. After reading through your decision it appears that you did not receive the information you required from me through Canada Post. Why I do not know. However, I am resubmitting the information you requested, i.e. witness letters. As these are originals I would ask that they be returned to me at our convenience. I am asking that you re-evaluate your decision based on this information. If you decide not to, please inform me so I can proceed with the appeal procedure.

L. J. B.'s appeal was submitted to the Tribunal on January 7, 1998.

Mr. Les Baart testified at the hearing that in "... early December, 1997" he mailed to the Director's delegate a copy of "witness statements" and a copy of notes taken during a meeting with Ms. Hanson on December 17, 1996. He also testified that he submitted the same materials to the Director's delegate on January 5, 1998.

Wayne Seeto, one of L. J. B.'s managers, testified that prior to closing the restaurant on December 15, 1996 he brought a half-case of toys from the basement office to the customer service counter and placed them on display. The display cabinet was full when he locked the restaurant at 1:00 a.m. on December 16, 1996. He returned to the restaurant at approximately 10:00 a.m. on December 16, 1996 and was surprised to see only 2 toys in the display cabinet. As a result, he testified, he asked an employee, Farida, about the number of toys sold that morning and she told him that the toy display was as he saw it when she began working at 8:30 a.m. Mr. Seeto also testified that at approximately 11:00 a.m. Mei-Wah (Frances) Sezeto, a "crew chief" told him that she had seen two bags full of toys in Ms. Hanson's purse in the office.

Mr. Seeto asked Farida to produce a cash-register report on the number of toys sold since the restaurant had opened that morning. He testified that we then went to the office and saw three bags of toys in Ms. Hanson's purse. The cash register record showed that only six toys had been sold that morning. Mr. Seeto testified that it was at that point that he contacted Mr. Baart by telephone to report the incident.

Mei-Wah (Frances) Sezeto is a "crew chief" at the restaurant. She testified that shortly after she began her shift at 10:30 a.m. on December 16, 1996 she went to the main-floor office to put some equipment away. At that time, she testified, a large women's handbag/purse fell onto the filing cabinet and she noticed that it had three paper bags with 7 or 8 toys in each. One of the bags contained 7 or 8 unwrapped toys (101 dalmatian characters) and the other two bags each contained a similar quantity of toys (some wrapped, some unwrapped). Ms. Sezeto then asked Florida if Ms. Hanson had purchased the toys and was told that she had not seen Ms. Hanson make any purchases. According to Ms. Sezeto, she then spoke to Wayne Seeto about the matter.

Mr. Les Baart, L. J. B.'s President, testified that when Wayne Seeto informed him about the bag/purse of toys he asked Wayne Seeto to prepare a written statement. Mr. Baart then arranged to meet with Mr. Tam and Ms. Hanson at approximately 10:00 a.m. on December 17, 1996. A copy of notes of that meeting were submitted into evidence. The text of those notes reads as follows:

Les asked Judy, "How many toys did you take out of the restaurant yesterday?"

Judy replied, "None"

Les: "There were toys in your bag yesterday. So, how many did you take?"

Judy: "There were about 15."

Les said, "There were about 25 in your bag that were counted by Wayne and Francis."

Judy said, "Well, I will pay for them now"

Les said, "That's not the point. You took them yesterday, and never paid for them."

Judy said, "I was going to pay them today."

Les said, "Judy, by not paying for them yesterday and removing them from the restaurant constitute THEFT."

Judy said, "If your are accusing me of stealing, fine. Here are my keys. I quit. I am leaving."

Stan said,, "Hold on, we are not done here yet. How many more have you taken from us?"

Judy said, "I have some in my locker."

Stan said, "Go get them."

Judy went to her locker and returned with 14 additional toys. Some of which were unwrapped.

Les asked Judy, "When were you planning to pay for these?"

Judy answered, "Today."

Les stated, "Why did you take the toys again without paying?"

Judy answered, "I'm going to pay for them all right now. I'm going to get my money."

Judy then paid for 39 toys.

Les repeated, "Why did you take them without paying?"

Judy answered, "I don't know."

Les stated, "I'm very disappointed that you would take advantage of myself in this manner and Helen would be very hurt when she finds out."

Judy said, "I'm sorry, it won't happen again. I can't afford to lose my job. Please give me a second chance."

Les said, "I'm suspending you for two weeks pending on further investigation of this matter. At the mean time, I would like you to write myself a letter stating, 'why you should still be employed by this company?'"

Judy said, "Fine."

Then she left the premises.

After further investigation, the decision was made to terminate Judy Hanson on January 2, 1997. Subsequently, Judy Hanson was informed of this decision by Les Baart on January 3, 1997, and was told that if she didn't think this was justifiable, she should seek legal counsel.

"Les Baart"
Les Baart

"Stan Tam"
Stan Tam

Mr. Baart testified that when he asked Ms. Hanson to meet with him in early January, she declined to do so.

As a McDonald's franchisee, L.J.B. adopts and implements McDonald's corporate policies. McDonald's "Crew Handbook" contains within it several pages under the heading of "Rules of Conduct" and states that "...Corrective action may take the form of reprimands, suspensions or finally discharge from employment" (sic) within the following guidelines:

- Every type of corrective action taken against an employee will be based upon just cause fully attributable to the employee

- Corrective action will be proportioned to the severity and gravity of the rule violations
- More severe action will be taken for repeated violations
- The employee's work record, including length of service and all corrective action records of the employee, will be considered in determining the action to be taken
- Where unusual circumstances exist, judgment and discretion will be exercised accordingly.

Approximately ten examples of misconduct are set out, including the following text:

Stealing. Misappropriation of cash, cash equivalents, raw products, materials that are confidential, and properties such as parts or tools. This includes giving away or under-charging for food and beverage products and consuming food which was not purchased or given to you by the Restaurant Management.

Cathy Yu, a "swing manager" testified that L.J.B. has a well-established procedure which employees must follow when they purchase products while at work. The procedure is as follows:

- Employee requests product from a cashier who enters the sale into the cash register.
- Cashier places product into a bag and staples the bag closed with the cash register receipt attached.
- A manager must write the employee's name on the receipt.
- Product must be place in the office until employees complete their shift and leaves the premises.

Ms. Yu also testified that this procedure is explained to all employees during their orientation period and is followed consistently at all times.

In her written submission (dated January 20, 1998) to the Tribunal, Ms. Hanson states that the first time she saw the written statements by her former co-workers was when they were disclosed to her by the Tribunal. She also provided to the Tribunal a copy of her letter (dated December 20, 1996) to Mr. Baart which she prepared as requested by him during their meeting on December 17th. Her letter states, in part:

Les:

I am writing this letter, not to ask you for my job back, but to tell you what happened. First of all the toys that were in my bag on Monday some were my doubles from home, and some were doubles from a man I was trading with another customer for, the man I was trading for said he would talk to you if you want him to, as for the lady I was trading with I do not know her name, she was going to come back to see me on Wed. ask who

ever opened if a heavy set blond lady came in and asked for me. The lady comes in around 7am, so any toys that would have been exchanged was done at that time, so even if I did steal the toys, Wayne and Frances would have had no idea how or why those toys were in my bag. If Wayne had only asked me I could have told him myself, I know your next question is so why didn't I just tell you and Stan that on Tuesday, when you asked me why I was stealing toys from you, I said that I didn't, you didn't believe me and I was scared, I thought it would be easier to just pay for the toys and leave. You asked me how upset I thought Helen would be, I know because I am very upset myself. If I was stealing from you, I would not do it in front of anyone, nor would I be stupid enough to leave my bag out in the open where anyone could find it. One more thing when I came in on Monday there were hardly any toys left, not enough for me to have stolen 25 toys.

Ms. Hanson's submission also challenges the accuracy of the notes of the December 17th meeting.

ANALYSIS

Compensation for Length of Service

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 (see, for example, *Kenneth Kreuger* BC EST #D003/97):

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 and in such circumstances the Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

In this appeal, L.J.B. submits that Ms. Hanson's actions gave it "just cause" to terminate her employment and, therefore, it is not liable to pay her compensation for length of service.

In *Stein v. British Columbia Housing Management Commission* [(1992) 65 BCLR (2d) 181] the BC Court of Appeal described the common law test for just cause in the following terms at p.183:

Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

In the same case, the Court of Appeal case adopted the following passage from *Laws v. London Chronicle Ltd.* [(1959) 2 All E.R. 285 (C.A.)] as a generally accepted statement of the law on this point:

It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is so to speak, struck at fundamentally...

I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that disobedience must at least have the quality that it is "willful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.

L.J.B.'s policies (as set out in its "Crew (employee) Handbook") does not assist it in this appeal. Its "Rules of Conduct" do not contain a clear and unequivocal statement that certain kinds of misconduct **will** result in termination of employment. Rather, its rules state that "...corrective action **may** take the form of reprimands, suspensions or finally discharge from employment" (emphasis added).

This same policy states that "...corrective action will be proportioned to the severity and gravity of the rule violations."

It is trite law that the appellant (L.J.B.) bears the onus of proving, on the balance of probabilities, that its appeal should succeed.

I find it significant that L.J.B. did not terminate Ms. Hanson's employment on December 17, 1996. Rather, it requested written statements from two managers and an employee. L.J.B. does not offer any explanation for the delay of approximately two weeks (which, I note, included the Christmas and New Year holidays) before deciding to terminate Ms. Hanson's employment. There is also no explanation why the notes of the meeting were not prepared and signed by Mr. Baart and Mr. Tam until January 3, 1997 or later.

While I note that Mr. Baart's evidence is uncontroverted on this point, I find it significant that L.J.B. offers no explanation for its failure to provide to the Director's delegate copies of the employees' written statements until early-December, 1997 despite several requests to do so during the previous months.

The Director's delegate determined, based on the evidence made available to her during her investigation, that there was insufficient evidence to prove that Ms. Hanson's employment was terminated for "just cause".

When I review the various written statements which were available to L.J.B. when it decided to terminate Ms. Hanson's employment, I am unable to conclude that there was "just cause". That is, the facts as I have found them do not support a conclusion that Ms. Hanson's actions constituted a willful and deliberate flouting of the essential conditions of her employment contract and she did not conduct herself in a manner that was inconsistent with the continuation of her employment. Ms. Hanson's letter of December 20,

1996 sets out a plausible explanation for why there were toys in her purse. It also explains why she responded as she did during the meeting on December 17, 1996. (Her initial response on December 17th was to acknowledge that there were about 15 toys in her bag the previous day.) Her explanation was corroborated by Mr. Earl (her neighbour) during the Director's delegate's investigation. There is no evidence of L.J.B. having made inquiries of the "heavy-set blonde" female customer whom Ms. Hanson described in her letter.

As noted above, to justify dismissal on the basis of a single act, the employee must have acted willfully or deliberately. Thus, an employee who honestly believes that he or she was acting within acceptable or permissible limits cannot be dismissed for "just cause" [*Petit v. I.C.B.C.* (1995), 13 ccel (2d) 62 (B.C.S.C.)].

In *Black & Lee Formal Wear Rentals Ltd.* (BC EST #D226/97) this Tribunal described the requirements for termination for breach of policy:

If an employer wishes to rely on company policy to support a discharge it must show that the policy is reasonable, has been clearly brought to the employee's attention, has been consistently applied and that the employee was put on notice that breach of the policy could lead to serious disciplinary consequences.

L.J.B.'s policy ("Rules of Conduct") do not contain a clear and unequivocal statement that certain acts which breach those Rules of Conduct **will** result in dismissal for "just cause".

In summary, I find that the Director's delegate determined correctly that there was insufficient evidence to prove that Ms. Hanson's employment was terminated for "just cause" because the evidence did not establish, unequivocally, the element of willfulness was present in the one act of misconduct on which L.J.B. sought to justify dismissing Ms. Hanson.

In a recent judgement, the Supreme Court of Canada made a clear statement of law when it said "we do not accept any argument relating to near cause." [*Dowling v. Halifax (City)* [1998] S.C.J. No. 1 (S.C.C.)]

The Determination (PDET #00745) which imposed a penalty of \$0.00 did so on the ground that L.J.B. had contravened Sections 21(3), 58(3) and 63(2) of the *Act*.

L.J.B.'s appeal to the Tribunal does not set out any reasons why this Determination should be cancelled or varied. Section 21 of the *Act* prohibits any unauthorized withholdings or deductions from an employee's wages. Section 58 of the *Act* requires an employer to pay vacation pay to employees (4% of total wages after 5 calendar days of employment; 6% of total wages after 5 consecutive years of employment). As noted at the outset of this Decision, L.J.B. does not dispute the findings made by the Director's delegate vis-à-vis vacation pay and deductions made from Ms. Hanson's wages.

The Director's delegate imposed a penalty of \$0.00 under authority given to her by Section 98 of the *Act* and Section 29 of the *Regulation*. Section 29(2) of the *Regulation* sets out the penalty for contravening a provision or requirement listed in Appendix 2 of the *Regulation*. In particular, Section 29(2)(a) of the *Regulation* imposes a \$0 penalty for contravening a "specified provision" for the first time. Section 21, Section 58 and Section 63 are "specified provisions" in Appendix 2 of the *Regulation*. Given L.J.B.'s acknowledgment that it contravened Sections 21 and 58 as well as my finding that the Director's delegate did not err in determining L.J.B.'s liability under Section 63 of the *Act*, I find that there are no grounds on which to cancel or vary the penalty determination (PDET #00745).

ORDER

I order, under Section 115 of the *Act*, that the two Determinations dated December 17, 1998 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal