Employment Standards TRIBUNAL

An appeal

- by -

J.M. Schneider Inc.

- and by -

Brian Ruckledge

- 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: April Katz

FILE No.: 2003A/33 and 2003A/41

DATE OF DECISION: May 6, 2003

DECISION

OVERVIEW

Brian Ruckledge ("Ruckledge") filed a complaint with the Director of Employment Standards ("Director") when J. M. Schneider Inc. ("Schneiders"), a specialty meat manufacturer fired him after 12 years of employment. Ruckledge engaged in horseplay with another employee who was injured. The other employee was unable to resume his regular duties for 8 weeks. Ruckledge did not intend to hurt anyone and claimed compensation for length of service. The Director rejected Schneiders argument that it had just cause for ending Ruckledge's employment and found Schneiders owed Ruckledge for length of service and vacation pay.

Schneiders filed an appeal of the finding that Ruckledge was not fired for just cause. If Schneiders is unsuccessful on the merits of the appeal on just cause, they also appealed the wage calculation based on Ruckledge's actual earnings in the 8 weeks preceding the end of his employment. Ruckledge did not dispute Schneiders appeal on the wage calculation.

Ruckledge filed an appeal based on an error in calculating the vacation pay. The appeal states the proper rate for calculating his vacation pay was 8 % not the 4% used in the Determination. Schneiders did not dispute this appeal.

The Director agreed with Schneider's appeal on the wage calculation and adjusted the wage calculation based on new wage information provided in the appeal. The Director agreed with Ruckledge's appeal that 8% was the correct rate for the vacation pay calculation. The Director's delegate recalculated the amount Schneiders owed Ruckledge for wages and vacation pay without interest to be $5476.69. Ruckledge and Schneiders did not dispute the new calculation.

The Director's submissions confirmed the finding that Schneiders did not have just cause to end Ruckledge's employment and therefore owed Ruckledge for length of service and vacation pay.

The Appeals proceeded on the basis of written submissions from all parties.

ISSUE

The parties have agreed on the wage and vacation pay calculation if Schneiders' owes Ruckledge for length of service. The sole remaining issue is whether Schneiders' had 'just cause' within the meaning of the *Employment Standards Act ("Act")* to terminate Ruckledge's employment on April 30, 2002.

ARGUMENT

Schneiders argues that they had just cause within the meaning of the *Act* to end Ruckledge's employment. In their submission Schneiders argues that Ruckledge's conduct was in violation of Schneiders' established policy and prodedures and the Workers' Compensation Act ("WCB"). Schneiders submits that Ruckledge knew that his conduct was unacceptable from the Employee Handbook, which is provided to all new employees. Pursuant to the established progressive steps of disciplinary in the Handbook Ruckledge had received 10 demerits in less than 12 months and the consequences were immediate

dismissal. Ruckledge had received 3 demerits for chewing gum in a prohibited area on December 6, 2001 and received 7 demerits for the horseplay incident on April 2, 2002.

Schneiders argues that they are committed to protection and promoting the health and safety for all employees and that Ruckledge's conduct caused concern amongst other workers. He injured another employee who was unable to work at his regular duties for 8 weeks. Schneiders argues that although Ruckledge states that the injury was unintentional that the doctor's report suggests otherwise.

Schneiders submits that they had no alternative as a responsible employer but to end Ruckledge's employment when his conduct breached the *Workers' Compensation Act* requirement of ensuring the health and safety of all workers. WCB directs an employer to remedy any workplace conditions that are hazardous to the health or safety of the employer's workers. Specifically Schneiders states that WCB requires an employee to carry out his work in accordance with established safe work procedures as required and not engage in horseplay or similar conduct that may endanger the worker or any other person.

Ruckledge argues that he was singled out for special treatment under the Employment Handbook as a result of filing a harassment complaint against his supervisor. He argues that other workers would not have received demerits for chewing gum in the area he was found with gum. He believes Schneiders treated him in this way because he turned down a promotion and complained about harassment. He argues that he had no intention of hurting anyone when he engaged his colleague in horseplay on April 2, 2002. The incident was a total accident and he regrets any harm.

The Director agreed with the appeals with respect to the wage and vacation pay calculation and confirmed the finding on the issue of just cause.

FACTS

Ruckledge commenced his employment with Schneiders on June 15, 1991. He worked a 40 hour week at $18.34 per hour. His employment was terminated on April 30, 2002.

Schneiders considered Ruckedge a good employee. Ruckledge was offered a supervisory position in 2001 and declined the opportunity. Ruckledge earned more with overtime than he would earn in the new position. After turning down the promotion Ruckledge's overtime hours were reduced.

Schneiders has an Employee Handbook, which sets out its values, employee expectations, employee benefits and human resource management policies. The Handbook includes a section called "Resolving Problems" which sets out conduct expectations for employees.

> "The process is designed to resolve performance problems and encourage good performance. It emphasizes consultation and focuses on communicating an expectation of change and improvement rather than on communicating an expectation of future problems and eventual termination."

The Handbook sets out three progressive steps for a discipline process which operate on a demerit system. The three steps are an Oral Reminder, a Written Reminder and a Decision Making Leave. The problems are categorized as minor, serious or major in nature. The consequences of conduct with weighted demerits is based on the accumulative effect of the demerits. Minor matters have a 1 demerit weighting, Serious matters have a range of 3 to 7 demerits, and Major will result in immediate dismissal.

On December 6, 2001 Ruckledge was assessed three demerits for chewing gum in an area where it was prohibited. Ruckledge disputes that he was in the restricted area. Ruckledge submits that people were permitted to eat in the area he was chewing gum.

On April 2, 2002 employees were returning from a stretching exercise when Ruckledge took the arm of the person in front of him and swung it around behind the person's back. The movement resulted in "2nd degree (moderate) rolator cuff tendon strain in the left shoulder" as determined by the examining doctor. The other employee was unable to return to his regular duties at work for 8 weeks. He worked on 'light duties' during the period of recovery. Ruckledge was surprised that the other employee was injured. Ruckledge did not intend to hurt anyone with his spontaneous horseplay. He regretted his actions.

Ruckledged continued to work until April 30, 2002, when he was given a letter following a meeting with his supervisor. The letter stated that Ruckledge's employment was terminated for "cause".

ANALYSIS

In an appeal the evidentiary burden in on the appellant to show that the Director's Determination was in error. The Determination found that Schneiders did not have just cause within the meaning of the *Act* to end Rucklege's employment.

An employer is free to end an employee's employment for any reason under the *Act.* There is no power in the Director or the Tribunal to reinstate an employee where just cause is not established. The *Act* does provide for compensation for length of service to allow the employee to adjust to their sudden change of status from an employee with an income stream to a person without income.

An employer is free to end an employee's employment at any time. It is not open to the Director or the Tribunal to change that decision or make a finding of wrongful dismissal.

When an employer decides to end the employment, however, the employer is obligated to comply with the *Act.* Section 63 of the *Act* sets out an employer's obligations.

> **Liability resulting from length of service**
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> 63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) **The employer's liability for compensation for length of service increases as follows:**
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
> (b) **after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.**
>
> (3) **The liability is deemed to be discharged if the employee . . .**
> (c**) terminates the employment, retires from employment, or is dismissed for just cause.**
>
> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
> (b) dividing the total by 8, and
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

This Tribunal has considered the question of just cause in previous appeals. The Director set out the law in the Determination. The Determination draws from the leading Tribunal decision on just cause is Silverline Security Locksmith Ltd., BCEST #D207/96 where the Tribunal set out a four part test for determining whether just cause exists. In Silverline the Tribunal stated the test as follows:

> The burden of proof for establishing that there is "just cause" to terminate .. . .employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
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> It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an Employer must be able to demonstrate "just cause" by proving that:
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> 1) reasonable standards of performance have been set and communicated to the Employee;
> 2) the Employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
> 3) a reasonable period of time was given to the Employee to meet such standards; and
> 4) the Employee did not meet those standards.
>
> The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally that his or her performance is unacceptable and that failure to meet the Employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an Employee a false sense of security that their work performance is acceptable to the Employer. . . .
>
> Under the Act 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.
>
> 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.
>
> 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.

The Tribunal has found that ‘just cause’ can exist where the employee’s conduct was

a) willful and deliberate;

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

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

d) prejudicial to the employer's interests, is breach of trust, or is such as to repudiate the employment relationship. Re:Jace Holdings Ltd. BC EST # D132/01.

The wilful misconduct can include such things as assault of another employee, drug use or trafficking while at work or the deliberate and willful disobedience of a direct instruction from a supervisor.

The evidence submitted by Schneiders in support of the termination is documented in a letter to Ruckledge dated April 30, 2002 and a letter to the Director's Delegate on October 10, 1002. The April 30, 2002 letter Schneiders indicates that as a result of the investigation of the incident on April 2, 2002 Schneders has concluded that Ruchledge provided "false information". No specifics are provided about what was stated that was false.

The letter states that Ruckledge caused harm to another employee and that the conduct is unacceptable and that 7 demerits is assessed for this 'infraction'. The letter then states that these 7 demerits added to the previous 3 demerits results "in termination of employment".

The evidence in this situation was that Ruckledge chewed gum in an unauthorized area in December 2001. Ruckledge disputed this allegation but the demerits were included in his personnel file. The conduct was not considered to be the basis for just cause. It was minor in nature and was not repeated. The Director's Delegate concluded that this incident was completely unrelated to the conduct on April 2, 2002. There is no evidence provided in Schneiders appeal that would support a different conclusion.

The letter dated October 10, 2002 states that since July 2000 Ruckledge had been given written and verbal warnings regarding his attendance, unsatisfactory work habits, conduct and HACCP violations. No specific information is provided about whether any conduct that was noted was repeated. There is no evidence in this appeal that would support any previous related conduct that Ruckledge repeated on April 2, 2002. I cannot conclude that any of the allegations contained are supported by documented evidence as none of that evidence was submitted with this appeal.

The letter also states that Schneiders found "inconsistencies in Brian's version of the event and that he was giving us false information." No evidence of what was false or what was inconsistent was provided for independent assessment or for Ruckledge to be able tor respond to during the investigation. If there were inconsistencies, then those inconsistencies were not brought forward to the Delegate or on this appeal for consideration.

Just cause may arise out of a singe incident. The only conduct that is left for assessment is the incident on April 2, 2002 which is The incident on April 2, 2002 is referred to by both Schneiders and Ruckledge as 'horseplay'.

Ruckledge argues that he had no intention of hurting anyone. The injury to the other employee he describes as accidental and that he regrets it. Schneiders argues that the examining doctor concluded that Ruckledge had an intention to harm his colleague. The doctor's letter was submitted as evidence. The doctor says the symptoms described by the patient and the physical findings in the examination are consistent with a sudden traumatic abduction and external rotation of the left upper arm at the shoulder involving the application of a significant amount of force. This sounds like a single motion, not a fight. The doctor's inferences or findings do not go to 'intent'. I cannot find any evidence in the letter from the doctor that speaks to Ruckledge's mental condition. Even if the doctor had an opinion, without speaking with Ruckledge, it would not carry much weight.

From the evidence presented on the appeal I cannot conclude that there was any deliberate or wilful intent involved Ruckledge's conduct on April 2, 2002. I cannot find that the conduct repudiated Ruckledge's employment or was inconsistent with his ability to do his job. The conduct was inappropriate in the work

environment and was certainly worthy of corrective discipline. Schneiders had the means to discipline Ruckledge. There was no evidence that Ruckledge had been spoken to specifically about not engaging in 'horseplay'.

In fact from the evidence provided this conduct was out of character for Ruckledge. Physical interaction of a violent nature with his peers does not appear to have arisen at any time in the past.

The Director concluded that Schneiders could end Ruckledge's employment but the decision was not made on the basis of 'just cause' within the meaning of the *Act*. None of the evidence submitted with the appeal leads me to a different conclusion.

Based on the evidence provided I find that Schneiders has failed to meet the onus of proof that an error was made in the Determination. I find on the merits of the issue that there was no evidence of just cause for ending Ruckledge's employment.

CONCLUSION

Schneiders has not discharged the onus on it to demonstrate an error in the Determination that just cause did not exist. I deny the appeal with respect to the issued of just cause.

Based on the evidence presented I conclude that the parties agree to vary the Determination with respect to the wage and vacation pay calculation.

ORDER

Pursuant to section 115 (1)(a) the Determination dated January 3, 2003 is varied to provide that the total wages and vacation pay payable is $5476.69 plus interest pursuant to section 88 of the *Employment Standards Act.*

April Katz
Adjudicator
Employment Standards Tribunal