EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeals pursuant to section 112
of the *Employment Standards Act*, R.S.B.C. 1996, c. 113

- by-

Jace Holdings Ltd., operating as Thrifty Foods
("the Appellant")

- against a Determination issued by -

The Director Of Employment Standards
("the Director")

ADJUDICATOR: Frank A.V. Falzon

TRIBUNAL FILE NO.: 98/028

DATE OF DECISION: April 23, 1998

DECISION

OVERVIEW

Mr. John Lane is a former employee of Jace Holdings Ltd. operating as Thrifty Foods ("Thrifty Foods"). He worked at Thrifty Foods for nearly two years, from July 17, 1995 to June 12, 1997. On the latter date, Thrifty Foods terminated Mr. Lane's employment for theft. The specific allegation is that, during his shift, Mr. Lane took and consumed one bottle of water from a store cooler without paying for it.

On June 20, 1997, Mr. Lane filed a complaint with the Director of Employment Standards ("the Director"). The complaint was investigated by Mr. Gerry Omstead, a delegate of the Director. The Director's Delegate interviewed all relevant participants and on December 23, 1997, issued a Determination against Thrifty Foods in the amount of $403.27. This amount represents Thrifty Foods' liability under the s. 63 of the *Employment Standards Act* for two weeks' wages based on Mr. Lane's length of service. On the evidence before him, the Director's Delegate considered but rejected the suggestion that this liability was discharged based on just cause for dismissal: *Act*, s. 63(3)(c).

ISSUE

The issue before me is whether the Determination should be canceled as disclosing reversible error. For the reasons given below, I find that the Determination is valid and that no adequate case has been presented before me to justify cancelling or varying that Determination.

ANALYSIS

A The Determination

Thrifty Foods' Employee Handbook, dated March, 1997, contains two provisions which were considered in the Determination under appeal:

> **Section 2 CONDUCT**
>
> **Thrifty Foods employees are expected to conduct themselves in a professional manner. Breach of any of these policies will result in disciplinary action, up to and including dismissal without notice**

2.02 Employee purchases

B. Employee purchases must be rung into the cash register at the time of the purchase, whether the item is being consumed in the store or is to be taken home.

C Cashiers must not ring up their own purchases.

These policies illustrate some examples of behaviors that are specifically unacceptable and, if found to exist, will result in corrective action up to and including termination. This list of sample situations cannot possibly anticipate all situations. Some of the more serious infractions that are subject to disciplinary action including termination can include, but are not limited to:

2.18 Theft and pilferage: Theft, pilferage or the unauthorized possession of Thrifty Foods property, the property of other employees, customers or visitors.

The evidence given to the Director's delegate made clear that Mr. Lane was terminated for breach of the latter provision. A Thrifty Foods Staff Administration Form, submitted by the Appellant with his notice of appeal, specifically states that "John took a bottle of water off the shelf and drank it and did not pay for it. Theft!" This is consistent with the evidence given to the Director's Delegate, as reported in the Determination letter, to the effect that Mr. Lane was terminated because he did not pay for the drink. The store manager specifically advised the Director's Delegate that Mr. Lane was "terminated for theft".

The Director's Delegate, who had the benefit of interviewing all relevant persons, concluded that the employer had not demonstrated theft.

Mr. Lane admitted to having walked to the cooler, taken the water and taken a drink from it before paying for it, but there was evidence that the company policy regarding prior payment (Article 2.02 above) was not uniformly practiced. The store manager in fact advised the Director's Delegate that if Mr. Lane had later paid for the water, the matter would have been overlooked and only a warning given. Thrifty Foods confirmed to the Director's Delegate that "the issue is theft and not violating the policies of the company".

Mr. Lane's evidence to the Director's Delegate was that he obtained the water when working as a cashier during a brief hiatus while a customer, whose order he was ringing through, had gone back to the produce department for another item. He said he openly walked to the cooler with the security guard, took the water, took a drink and, before finishing the water, put it down to complete the customer's purchase. After the purchase was completed, he was called up to the office and, in the presence of three Thrifty's officials, was asked for a receipt for the water. This upset Mr. Lane, who was told to take

a 10 minute break and go back to work. He said that before doing so, he paid Laura Wilson, another cashier, for the water. He then finished his shift and went home. Two days later he was terminated. The evidence given by the cashier, Laura Wilson, is significant:

> Ms. Laura Wilson, cashier, stated that she can't remember what happened on that day. She cannot remember whether Mr. Lane came through the till that night or not. She said that John Lane would often go to the cooler and take a water and come and pay for it through her till. She said that the staff regularly take things and go to the till to pay for it and on the way drink or eat parts of it.

On all the information before him, the Director's Delegate concluded as follows:

> ...there is no dispute that Mr. Lane was a fairly good worker and that there was no evidence that Mr. Lane had not paid for the water or other products during the period of his employment. Mr. Lane claims to have paid for the product. He finished his shift that night and was terminated within the next few days. I think that past practice ways [sic] in favour of the employee in this particular case. Mr. Lane indicated that he had no intention of stealing the water and prior to completing his shift did pay for the water. No evidence was provided to establish that he did not pay for it and I believe the onus of proof falls on the employer.

Having received a Lane's complaint claiming compensation relating to his termination, the Director was obliged to investigate unless the matter fell within the exceptions in s. 76(2) of the *Act*. In this case, having conducted a thorough investigation of the matter, the Director was entitled to issue a Determination: s. 79. Section 79(3)(a) provides as follows:

> 79 (3) If satisfied that a person has contravened a requirement of this *Act* or the regulations, the director may do one or more of the following:
>
> (a) require a person to comply with the requirement.

The key issue for the Director's delegate was whether, on the facts of this case, Thrifty Foods had contravened s. 63 of the *Act*. Section63 establishes that, upon termination of an employee's employment, the employer is liable to pay that employee 2 weeks' wages after 12 consecutive months of employment. In the absence of proper notice or some combination of notice and money (neither of which were given here) that statutory liability is deemed to be discharged only if the employee " ... is dismissed for just cause": *Act*, s. 63(3)(c). Thus, contrary to points 8 and 9 in the Employer's "reasons for appeal", the Director's Delegate is obliged to consider the question of "cause" in a case such as this in order to properly carry out his statutory function. Manifestly, before he can be "satisfied that a person has contravened" s. 63 in a case such as this, he must necessarily address the question of "cause". As such, the presence or absence of "cause" is an issue that is

properly appealable to this Tribunal, as has been recognized in many previous Tribunal decisions: e.g., *Re Lil' Putian's Children's Fashions Ltd.* BCEST #D320/97 (G. Crampton); *Re White Spot Restaurants*, BCEST #D017/97.

In the circumstances of this case, the "cause" by Thrifty Foods to the Director's Delegate was explicitly stated to be theft. On that basis, the Director's Delegate considered the facts and concluded, based on the evidence before him, that he satisfied that the employer's liability was in effect and that the facts did not fall within s. 63(3)(c).

B The Appeal

On January 13, 1998, Thrifty Foods, through legal counsel, appealed to this Tribunal. The appeal documents consist of the Notice of Appeal Form, a one page Thrifty Foods Payroll Department record, the one page Thrifty Foods Staff Administration form referred to above, two pages from the Thrifty Foods Employee Policy Handbook and a one page Schedule drafted by legal counsel listing the "Reasons for Appeal". Items 8 and 9 of that document, which challenge the authority of the Director and this Tribunal even to address issues such as cause, have been disposed of above.

The "Reasons for Appeal" document emphasizes Thrifty Foods' strict policy regarding employee theft, Mr. Lane's employee orientation in September, and the advice he received that these policies formed terms and conditions of his employment (Items 1-3). The document then goes on to assert a number of arguments regarding the fashion in which the Director's Delegate allegedly misinterpreted and misapprehended the evidence before him: Items 4-7. Significantly, none of those evidentiary arguments is supported by witness statements or affidavits. They are mere assertions by legal counsel attached to a notice of appeal.

On January 20, 1998, the Director's Delegate filed a submission letter with the Tribunal. That letter emphasized that the issue before him was Mr. Lane's termination for theft, and that insofar as Thrifty Foods might now be suggesting that termination was based on failure to comply with the policy regarding payment before opening the beverage, Ms. Wilson "informed myself that all the staff takes drinks from their beverages prior to paying for the product. That statement indicates that this policy is not strictly adhered to by the employees and obviously not enforced by the management." He emphasized that, based on the evidence which he had the advantage of hearing, "the company did not establish that a theft had occurred".

On January 30, 1998, Mr. Lane filed a handwritten letter, advising that he had only recently been advised of the appeal, and tendering the following information:

- contrary to the Appellant's "reason for appeal #7", Mr. Lane did in fact show the purchase receipt when requested;
- contrary to the Appellant's "reason for appeal #5", no eyewitness observed Mr. Lane drink and dispose of the bottle in the trash because he had the bottle for at least one hour after he paid for it

> - contrary to the information given by the Cashier Supervisor and the Security Guard to the Director's Delegate, Mr. Lane took the water, opened it, took and drink, closed the lid and then put it under the counter in order to finish ringing in his customer's order, not in the garbage. He reiterates that he did pay for the drink.

The submissions of the Director's Delegate and Mr. Lane were forwarded to counsel for the Appellant for response. On February 20, 1998, counsel responded to those submissions as follows:

> The employer has nothing further to add to its position as set out in the appeal filed January 12, 1998.
>
> It is the employer's position that the tribunal has sufficient information in front of it to make a determination in this matter on the written material available to it.
>
> It is the employer's position that no oral appeal hearing is necessary and that a determination can be made on the basis of the written material provided.

C. Discussion

In order to reverse a Determination, this Tribunal must be satisfied, based on the record as supplemented by any additional information placed before the Tribunal, that the Director has committed some error in fact or law which warrants the remedy of reversal. It naturally falls upon the Appellant, which in this case is represented by legal counsel, to demonstrate such error.

For the reasons given above, I find that the Director's Delegate instructed himself correctly on the law and made proper inquiries regarding "cause" which the statute required of him. As a matter of law, he properly addressed his mind to the issue of "cause" in determining what, if any, liability fell upon the employer under s. 63 of the *Act*. Those same questions also properly arise before this Tribunal on appeal.

The Appellant has demonstrated no factual error on the part of the Director's delegate in concluding that the employer had failed to establish theft, a matter in respect of which I agree that the employer bears the onus of proof: see also *Re White Spot Restaurants, supra*. On this appeal, the Appellant offered little more than bare assertions challenging the Director's Delegate's interpretation and apprehension of the evidence. When these assertions were contested by the Director's Delegate and by Mr. Lane, the Appellant chose to make no further submissions. Based on the material filed before me, the Appellant has not satisfied me that the Director's Delegate committed any error of fact.

Even if I were to regard this appeal as requiring me to make fresh determinations of fact based on the information contained in the Determination letter and the appeal record and without imposing a formal "burden of proof" on the Appellant, I would still dismiss the appeal. The balance of the evidence on this appeal satisfies me that Mr. Lane did not pilfer the bottle of water, and consequently that Thrifty Foods cannot rely on "theft" as

constituting "just cause" which would discharge its liability for wages owing under s. 63 of the *Act*. Insofar as Thrifty Foods might now seek to argue that dismissal was justified based merely on the breach of policy regarding prior payment, I am satisfied on the balance of the evidence that this admitted breach of policy did not constitute just cause for dismissal. Against the wording of the policy statement which identifies dismissal as one possible consequence of breach of this policy were the evidence of the Store Manager regarding his approach to that policy in this case, and the cashier Ms. Wilson's evidence regarding the store's general practice in connection with this policy. In view of the practical realities of the situation, I am satisfied that termination would not have been the consequence had this been the only issue, and would not have constituted just cause for termination.

ORDER

In the result, I would dismiss the appeal. Pursuant to s. 115 of the *Act*, I order that the Determination dated December 23, 1997 be confirmed in the amount of $403.27, together with whatever interest has accrued since the date of issuance pursuant to s. 88 of the *Act*.

____

Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal