Employment Standards TRIBUNAL

An appeal

- by -

Esquimalt Saanich Taxi Ltd.

- 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.: 2001/48

DATE OF DECISION: May 2, 2001

DECISION

OVERVIEW

This is an appeal by Esquimalt Saanich Taxi Ltd. ("the employer" or "the appellant") pursuant to section 112 of the *Employment Standards Act (*"the *Act")* from a determination dated December 22, 2000 (#ER 053670) by the Director of Employment Standards ("the Director").

Terry Willis ("Willis") worked for the appellant for about 4 ½ months from July 3, 1999 to November 27, 1999 as a call taker/dispatcher. He was dismissed after he swore at a customer. He was not paid compensation for length service as the employer claimed that he was dismissed for just cause.

The Director found that there was not just cause for dismissal. The employer appeals the Director's determination.

FACTS

The facts in this case are not complex and are mostly undisputed. Willis was on duty on a busy evening when a call came in from a regular customer who kept an account (referred to as an "account customer") with the employer. The account customer asked for a taxi to pick him up and apparently was told that a taxi would be there within a few minutes. Some 20 minutes later the account customer called back and was upset the taxi had not yet arrived. The account customer used some profanities at which point Willis told him to "fuck–off, asshole!".

Shortly afterwards Willis left his work saying that he was sick and went home. This left another employee as the only person staffing the call centre. In the meantime the account customer was somewhat irate and started to walk into town to confront the dispatcher. The account customer was picked up by another driver and through the diplomacy of this other driver the account customer was persuaded not to attend the call centre. This other driver assured the account customer that the matter would be reported to management and that he would receive an apology and the dispatcher would be disciplined.

The reason for Willis's sudden departure from the workplace was disputed. The employer believed that Willis knew, or had a reasonable suspicion, that the account customer was going to attend the call centre. Willis maintained that he had been suffering from the flu and was still feeling unwell.

When the matter was reported to the employer a letter of apology was sent to the account customer and Willis was dismissed. The dismissal letter stated, in part:

> This action is taken as a result of calls taken by yourself from the Pt. (*Point*) Hope Shipyard party in particular a (*customer*). The profane language used by yourself resulted in placing our taxi driver and dispatcher in a very real danger.
>
> This conduct can not and will not be tolerated.

THE ISSUE

The issue in this case is whether the employer had just cause to terminate the employment.

ANALYSIS

The Director's delegate states that:

> "using profanity in a situation like this might have called for discipline but is not serious (*enough)* to warrant immediate termination. The company has a statement that profanity could result in termination but has not produced any evidence to show that this statement is consistently applied."

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 uncontroverted evidence to establish that Willis had sworn at the customer. The delegate made much of the fact that the employer had stated in the termination letter that this put co-workers in danger and found that in fact danger did not take place. Whether or not danger actually materialized is not the issue. The fact is that swearing at the customer did create a dangerous situation that was only averted by the diplomacy of the driver.

Under the A*ct* there is a simple threshold test. 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. There is no requirement that such authority be exercised consistently: *Jace Holdings Ltd.*, BCEST #D132/01

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. 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 giving rise to a remedy under section 79(4).

Likewise, even if an employee's behaviour exceeded the threshold of "just cause" it is 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 substantial issue in this case is whether or not the behaviour of this employee crossed the threshold of giving the employer just cause to dismiss.

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 Willis swore at the customer. The question that needed to be asked was whether this behaviour was deliberate and intentional misconduct or a minor infraction of an employment rule or inadequate job performance. No one suggested that the behaviour was a job performance issue so the question to be asked is whether it was a minor infraction of a rule or deliberate and intentional misconduct.

The employer had established, prior to Willis's hiring, a policy that certain behaviors would give cause for instant dismissal. These behaviors included "Unprofessional behaviour (yelling, screaming or swearing at customers)". The employer says that these policies were brought home to Willis. He had received warnings for two minor matters unrelated to this incident.

The Director's delegate acknowledged that the policy was in place at the time of the incident but discounts the policy for two reasons. Firstly she says that the policy was not applied consistently and secondly because, as it turned out, co-workers were not endangered. In my opinion it was not appropriate to discount the policy in this manner. As pointed-out above the *Act* does not require consistency and the actual danger was not the issue.

The relevance of the policy is to give the employees notice that the employer considers such behaviors to be serious misconduct that may result in immediate dismissal. In this case, Willis was aware of the policy. He swore at a regular account customer. This was clearly more serious than a minor breach of employment rules. It was a significant breach of a workplace policy that prejudiced the employer's business interests and was inconsistent with the proper discharge of his duties. It was misconduct that gave just cause for dismissal.

As noted above, I may not have dismissed an employee under these circumstances but once just cause exists that choice is in the hands of the employer. There is no authority that would allow me to substitute my opinion for that of the employer. It was then solely within the discretion of the employer whether to dismiss or impose another form of discipline.

I am 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