Employment Standards TRIBUNAL

An appeal

- by -

Sears Canada Inc.
("Sears")

- 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.: 2002/157

DATE OF DECISION: May 23, 2002

DECISION

OVERVIEW

This is an appeal by Sears Canada Inc. ("Sears") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated March 7, 2002 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act*, the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Sears terminated the employment of Alexander Corbett ("Corbett") as a result of an argument he had with a co-worker during which Corbett threatened the co-worker with a crowbar. A Delegate of the Director investigated the matter and determined that the dismissal was unjustified and that Corbett was entitled to $345.95 compensation for length of service.

Sears appeals the Determination on the basis that the Delegate misapplied the law regarding "just cause" by not clearly distinguishing between cases of misconduct and cases of poor job performance.

ISSUES

The issue in this case is whether it is necessary for the employer to have established notice of a policy and warnings in cases of serious misconduct.

ANALYSIS

The Director's Delegate correctly identified that the onus is on the employer to show that there was just cause for termination. The Delegate referred to the case of *Silverline Security Locksmith Ltd*., BC EST # D207/96 as authority for the four-part test that this Tribunal has applied in cases of unsatisfactory performance. In the absence of misconduct or a fundamental breach of the employment relationship the employer must be able to demonstrate that:

1. Reasonable standards of performance have been set and communicated to the employee;

2. The employee was warned clearly that his 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.

It is important in applying the jurisprudence to distinguish between cases of misconduct or a fundamental breach of the employment relationship and cases dealing with poor performance. The four-part test set out above is only applicable in the latter case. The Delegate states that:

> In its workplace policies, Sears establishes that violence in the workplace, which includes threats to other employees, is cause for discipline ranging from a warning to dismissal. The policies concerning violence in the workplace are extensive, well set out, and provide for the completion of a compliance form by each employee.
>
> However, in this particular case, Sears could not provide any evidence that Mr Corbett was provided with the workplace policies nor that he was aware that arguing with another employee was cause for dismissal therefore the test above has not been met.

The Delegate did not properly distinguish between issues of poor performance and issues of misconduct. The Silverline case and others like it address issues of poor job performance. They are not referring to issues of misconduct. As the cases state the four-part test applies "in the absence of misconduct or a fundamental breach of the employment relationship".

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. For example, a single act of insubordination can justify termination (Re: *Evans* BC EST # D069/97). Trafficking in drugs on company time is a serious criminal offence that gives just cause for immediate dismissal (Re: *Craigdallie*, BC EST # D313/97). Similarly, a criminal act of assault on a co-worker is just cause for dismissal (Re: *Downie Timber*, BC EST # D023/98; *Broadcam Holdings Ltd*, BC EST # D241/98). Verbal insults and profanity (Re: *Justason* BC EST # D109/97; Re: *Bodycraft* BC EST # D112/01), or swearing at the customer (Re: *Esquimalt Taxi* BC EST # D203/01) are cause for dismissal. Employee theft (Re: *Oram* BC EST # D040/98), or smoking marijuana on shift (Re: *Jace Holdings Ltd*. BC EST # D132/01) is misconduct that may result in termination. None of theses cases depended upon policy being in place to proscribe the impugned behaviour. In fact, it would be redundant and unreasonable to expect an employer to have a policy that employees shouldn't engage in criminal, abusive or insubordinate behaviour.

In such 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 criminal, 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.

In this case the Delegate set out the facts in the Determination by firstly noting the employer's position that during the argument Mr. Corbett threatened the co-worker with a crowbar. She then says that Mr. Corbett does not dispute the information provided by Sears that confirms he threatened the co-worker with a crowbar during an argument. Such a threat is a criminal act and a serious act of misconduct. The existence of a workplace policy or the employee's knowledge of such a policy is completely irrelevant.

The behaviour of the employee 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 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

I order, under section 115 of the *Act*, that the Determination dated March 7, 2002 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal