

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 -

Broadcam Holdings Limited
operating
Thrifty Foods

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO: 98/186

DATE OF HEARING: May 15, 1998

DATE OF DECISION: June 9, 1998
DECISION

APPEARANCES:

John Alexander, Esq.	Counsel for Broadcam Holdings Limited
Greg Tupman	On his own behalf
Maureen Savoy	Director Human Resources, Broadcam Holdings Limited
Gerry Omstead, I.R.O.	On behalf of the Director

OVERVIEW

This is an appeal by Broadcam Holdings Limited operating Thrifty Foods ("Thriftys" or "the Employer") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination (File No. 062175) dated March 03, 1998 by the Director of Employment Standards (the "Director").

Greg Tupman ("Tupman") was employed as a maintenance person by Thriftys for the period March 22, 1993 to March 21, 1997 when he was dismissed for striking another employee. The Director's Delegate found that there was not "just cause" for the dismissal and that the Company should pay three weeks earnings as compensation.

The Company appeals on the grounds that there was "just cause" for the dismissal and that therefore the liability for compensation is discharged.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether, bearing in mind the high onus on the employer to ensure safety in the workplace for all employees, the Company had just cause to dismiss an employee who committed an unprovoked assault on another employee. Implicit in this primary issue is the question of whether the employer gave sufficient warning that Tupman's employment was in jeopardy prior to dismissing him. .

PRELIMINARY ISSUE

The Company gave notice that it wished to tender at the appeal certain evidence and documents not previously given to the Director but which are relevant to the issues of progressive discipline and the sufficiency of warnings. The Director's delegate referred me to decisions made by the Tribunal, in a number of cases, that the employer will not generally be permitted to bring forward evidence at an appeal which was not disclosed to the Director at the time of the investigation.

This generally held principle is intended to encourage employers to participate fully at the investigative stage of the proceedings and produce and disclose all relevant material, evidence and documents to the Director prior to any Determination being made. It is intended also to discourage employers from ignoring the investigation and then filing an appeal if the Determination is against them.

I heard from the Employer in this case that the investigation took some considerable time to complete because of change in personnel at the Director's office. The investigators apparently contacted the Company's head office who pulled the personnel records for Tupman but the manager of the particular store was not contacted. The manager kept records of employee incidents filed by department and not in the personnel files. It was not until after the Determination that the Manager was contacted by Counsel for the Company and was able to locate the relevant documents and to recount certain incidents to Counsel.

I decided that, in this case, to provide a fair and efficient procedure for resolving the dispute, it was important to have all the relevant evidence available to the Tribunal. It would not be fair to decide this case on the lack of warnings and previous discipline if such evidence existed unless it was apparent on the evidence during the hearing that such evidence was withheld deliberately from the investigator.

I am satisfied, after hearing all of the evidence in this hearing, that the "new" evidence was not deliberately withheld or withheld through negligence or lack of diligence by the Employer. It was missed because of the nature of safekeeping of the records and the people interviewed during the investigation.

FACTS

Thrifty Foods is a chain of family owned grocery stores located on Vancouver Island. One of the stores is located at the Broadmead Shopping Centre in Victoria. The Broadmead store is operated by a Company called Broadcam Holdings Limited and the store is managed by Kenneth Fowler ("Fowler").

Fowler interviewed and hired Tupman to work at the Broadmead Thriftys Store in March of 1993 as a maintenance person. Tupman went through an orientation program which included advice and direction on behaviour and deportment in the workplace. Tupman agreed that he had been given a booklet on Company policy and rules of behaviour. The orientation did not specifically say that one employee should not assault another. Fowler says that he felt that it would be a given that such behaviour would be unacceptable in any workplace.

It is accepted that, generally, Tupman performed his work in a satisfactory manner.

In May 1993 several incidents of inappropriate sexual interactions between Tupman and three female employees were brought to management's attention. The grocery manager, Frank Biehl, discussed the complaints with Tupman and explained Company policy about

appropriate personal boundaries and sexual harassment. Tupman agreed that such activities would cease and according

to the evidence they did cease. The evidence of these complaints is not tendered by the Employer as part of any discipline or warnings but is submitted to show that Tupman understood Company policy and the importance of following warnings given.

In May, 1994 an incident occurred when Tupman was working in the loading bay area of the store. Another employee told Tupman that he was unloading certain product into the wrong place. Tupman turned round and swatted a case of product out of the hands of the other employee and struck the other employee in the mouth. Tupman described it saying that " the other employee was flipping out at me, that's when I gave him a smack".

Fowler spoke to Tupman and suspended him. Fowler told Tupman that if he ever hit anyone again he would be fired. This warning was recorded in a memo written at the time and filed in the manager's departmental file. Fowler's evidence about this incident and this memo were not available to the Director's Delegate during the investigation.

Another incident occurred in August, 1996 in which Tupman went into the staff lunchroom and for some reason lost his temper and smashed the photocopier. Tupman testified that he was feeling pressure at work and was getting frustrated. He says he took it out on the photocopier. He admitted on cross examination that when he gets frustrated his reaction is to lash out. There was a female staff member present in the lunchroom who was quite scared by the sudden violent outburst.

Mr. Fowler discussed the matter with Tupman who said that he had had to let off some steam. Fowler told him that it was not proper to let off steam in the staff room in front of other staff members. He was told that he must not vent his frustrations in the store . The next day Fowler discovered that the glass in the photocopier was shattered and he showed it to Tupman. He told Tupman that such conduct was unacceptable and suspended him for two days. Fowler also advised Tupman of the free counselling available to all employees. Although it was not made mandatory apparently Tupman took advantage of the counselling services.

Arthur Curkovic, a grocery clerk at the Broadmead store, testified that he and Tupman worked together and that they usually got along fine. He says that on March 18, 1997 at about 8:30 p.m. he went to the staff room on a break. He says he saw Tupman who seemed to be grumpy. Tupman testified that he was upset about a change in shifts and job assignments.

Curkovic says that he greeted Tupman saying "What's up, bud ?" Tupman replied "they've got me working graveyard." At this point Curkovic responded with a colloquial expression that apparently was misunderstood by Tupman. Curkovic said "shut up, they do ?" Tupman then struck Curkovic once on the shoulder and punched him in the stomach.

Christine Illsley, a cashier store employee, was present with another female employee in the staff room and testified that Tupman hit Curkovic twice with his fist "quite hard". She was shocked and surprised by Tupman's temper. She described his demeanour as being sheer temper. She felt fearful and very concerned at the violent outburst because there seemed to be no reason for it. She said that she would be very concerned about working alongside Tupman. On cross examination Tupman asked her if she thought he was a violent person and she testified that after the incident she did. She felt that the attack could have occurred to anyone.

Curkovic testified that he and Tupman later discussed the incident and the apparent misunderstanding. They resolved the matter between them but Christine Illsley reported the incident to her supervisor. Fowler was not at work at the time and Frank Biehl, who was acting manager, told Tupman that he would be terminated and not to come in to work on the Monday. Fowler returned to work on that Monday and Tupman also came in to talk to him.

Fowler says that he felt he had no option but to terminate Tupman's employment because of the previous incidents of violence in the workplace. In his opinion termination was necessary to ensure a safe workplace for the rest of the employees. He felt that Tupman's violent outbursts were serious and unpredictable.

In cross examination Tupman agreed that he had gone to the free counselling because he recognised that he had a problem controlling his anger and that despite the counselling he still struck-out at Curkovic. He agreed that Fowler had made it clear that personal violence was unacceptable at the store and that it would result in dismissal.

ANALYSIS

The onus is on the Employer to show that there was just cause for the termination of employment. In this case the facts upon which the decision to terminate was made are not in issue. As set out above, Tupman punched a fellow employee twice without any justification or provocation. The assault was witnessed by two female employees who were distressed and scared by the outburst of violence.

The Director's Delegate found that the question to be answered was whether or not the incident alone or coupled with other incidents warrant immediate termination without the payment of compensation. The Delegate found that there was insufficient evidence of prior discipline or specific warnings that such actions would result in termination and that the Employer had not established just cause. The Delegate also took into consideration that Tupman and the victim of the assault shook hands and apologised.

As referred to earlier in this decision the Delegate did not have access to all of the evidence and records of earlier incidents and the specific warnings given to Tupman. In my opinion, on the evidence at this hearing, the Employer did have just cause. In 1994, Tupman struck a fellow employee. The matter was treated seriously. He was suspended

and given a very specific warning that if he ever hit anyone again he would be fired. Tupman admitted that the Employer's evidence about this discipline and warning was accurate. He agreed that he knew he faced dismissal if it occurred again.

In August, 1996 Tupman damaged property of the Employer in a similar violent outburst. He was again suspended and warned and he admitted that he knew such behaviour was not acceptable. He was told about the free counselling services available to employees and he says that he did attend such counselling. Then, despite such warnings and counselling, in March 1997 Tupman punched another employee in a third violent outburst.

There were clear and unequivocal warnings given and there was previous discipline applied and counselling provided. The Employer has an obligation to all other employees to ensure a workplace that is safe and free from the risk of such violent behaviour. Tupman's conduct, a serious criminal offence, goes to the root of the employment relationship and was inconsistent with the continuation of the employment relationship.

The Director's delegate took into consideration that the two employees shook hands and apologised but there was no suggestion that the conduct at any time was condoned by the Employer. Tupman's incidents of violence were dealt with seriously by suspensions and warnings. The forgiveness by the victim of the assault is not a relevant consideration if the Employer considers the matter serious enough to warrant dismissal.

I conclude that Mr. Tupman was dismissed for just cause and that therefore pursuant to section 63(3) of the *Act* the Employer's liability for compensation for length of service is discharged.

ORDER

I order, under Section 115 of the *Act*, that the Determination be cancelled.

JOHN M. ORR
Adjudicator,
Employment Standards Tribunal