Employment Standards TRIBUNAL

An appeal

- by -

J. C. Creations operating as Heavenly Bodies
("HB")

- 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: Lorne D. Collingwood

FILE No.: 2002/119

DATE OF HEARING: June 18, 2002

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

J.C. Creations operating as Heavenly Bodies (I will use "HB" and "the Appellant" for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 28, 2002. The Determination orders HB to pay Chuan Hsin Eng compensation for length of service, $1,664.12, vacation pay and interest included.

The Determination is that there is not evidence to show just cause. HB, on appeal, argues that Eng did steal some of its fabric. I have concluded that there are not facts to show that the employee is in fact guilty of theft and that it seems unlikely that the employee acted to deprive the employer of its property. The Determination is therefore confirmed.

An oral hearing was conducted in this case with the aid of an interpreter.

APPEARANCES:

Jane Cotter	On behalf of HB
Chuan Hsin "Lisa" Eng	On her own behalf

ISSUES

The issue is the matter of whether the employer did or did not have just cause when it terminated the employee. What I must decide is whether it is or is not shown by the Appellant that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

The employer is a garment manufacturer. The employer has been in business for 20 years.

The employee worked for the employer as a cutter and sewing machine operator.

The employer imports a certain fabric from Taiwan via a California wholesaler. The fabric is a lycra which is called "Tactel Supplex". HB has been told by its California supplier that it does not sell to any other person or company in Canada. I am told that the California wholesaler is the sole importer for North America but the employer has not produced evidence which shows that.

In 2001, the employer realised that some of its fabric was going missing. Not long after that, a male employee whose job it was to take out the garbage was seen taking some fabric. It is believed by the employer that he was placing perfectly good fabric in bags containing garbage and, once he had taken out the garbage, removing the fabric from the garbage bags and handing the fabric out to friends.

It was the employer's longstanding practice to check purses and handbags as the employees left work. But the employer decided that it had not been doing enough to prevent theft and on the 20th of August, 2001, a Monday, the employer started checking purses and handbags as never before, which is to say, far more thoroughly. Not only did the employees have to open their purses and handbags but the employer was demanding to see their contents. The employee was at work in the week of the 20th. She was aware of the new practice.

On the 23rd of August, 2001, Eng's bag was searched and she was found to possess fabric that is very, very similar, if not identical to the fabric that the employer buys from its California supplier. The fabric had been cut and it was ready to sew. It was not cut according to one of the employer's patterns but another pattern.

Eng was asked to explain how it was that she was in possession of the employer's fabric. Eng said that she had bought the fabric on Fraser street. The supervisor at that point seized the fabric. That really upset Eng. It is the employer's recollection of matters that Eng began to scream "Give me fabric back! Give me fabric back!" Eventually the employee was told to leave.

It is important to understand that Eng speaks almost no English and that she is unable to read English.

The employer complains that Eng has given three different names for that store. First, it was "House of Fabrics", then "SEW 4 LESS" and, finally, "Textile Clearing House". I find that the employee appears to be sure of nothing but the store's location: She tells me that it was at 39th and Fraser and that it moved to 49th and Fraser. It is the employee's testimony that the fabric was in a clearance bin.

The employer contacted SEW 4 LESS and Textile Clearing House with a view to determining whether either of the stores carried the fabric which had been found to be in Eng's possession. The employer was told that they did not. The employer concluded that Eng must have taken some of its fabric and, when Eng reported for work on the following Monday, she was asked to leave once again and the employment was terminated.

The employer has contacted its California supplier for the purpose of determining whether it has been selling to anyone else in Canada. The supplier said it has not.

It is not known whether the employee brought fabric with her on reporting for work on the 23rd. The employer only checks employees as they leave work.

ANALYSIS

Section 63 of the *Act* imposes a liability on employers to pay length of service compensation once a person's employment reaches 3 consecutive months. Subsection 63(3) of the *Act* provides, however, that the liability to pay compensation for length of service is discharged where the employee is dismissed for just cause.

> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> (i) one week's notice after 3 consecutive months of employment;
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> (ii) 2 weeks' notice after 12 consecutive months of employment;

> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
>
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
>
> (c) terminates the employment, retires from employment, or is **dismissed for just cause**.
>
> (my emphasis)

A single act of misconduct may be so serious that it justifies termination. The Tribunal has also said that just cause may exist where there is less serious misconduct which is repeated or the chronic inability of an employee to meet the requirements of his or her job. In all cases the onus is on the employer to show just cause.

In this case it is argued that there was theft. A single act of theft is sufficient to justify termination.

There is, in this case, no admission of guilt, nor is it the case that the employee was caught red-handed in an act to deprive the employer of its property. This is a case where theft is a possibility and I must decide what is likely and credible.

It is seldom an easy task to decide credibility. There are many factors to consider. The manner of the witness is to be considered (Is the witness clear, forthright and convincing or evasive and uncertain?) but also factors such as the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know.

The essential task is to decide what is likely to be true in all of the circumstances. As the Court of Appeal noted in *Farnya v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A.,

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions."

I do not know how it is that the employee came by the fabric that was found to be in her possession but there are only three possibilities. One, she stole it, the employer's claim. Two, someone else stole the fabric and she obtained the fabric from that person. Three, she did buy it, the employee's claim. I cannot rule out the latter on the basis of the evidence before me. It may be that remnants of fabric were available in 1998. Persons employed in 2001 may have no knowledge of the fabric that was sold in 1998 or they may not remember such a thing.

I realise that it appears that the employee has changed her story on the store in which it is alleged that she bought her fabric but that may reflect nothing more than her limited command of English. The name of a store is of almost no importance to such a person and, as such, not something that she can be expected to remember.

I may be wrong but I must say that the employee does not strike me as a thief at all. I am even less inclined to believe that the employee is a thief when I consider what is likely to be true in light of what is

known about this case. It does not seem likely that a person would steal something from their employer and, when caught, demand as the employee did, which is to say rather vociferously, that the employer give her back the goods. I believe that such a response is most likely consistent with ownership of the fabric. It is also unlikely that the employee would steal fabric and then just stuff it in her handbag. That is because she knew that the handbag would be searched as she left for the day.

The evidence before me falls well short of establishing that the employer had just cause. The Determination is accordingly confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is against J.C. Creations operating as Heavenly Bodies, in favour of Chuan Hsin Eng, and dated February 28, 2001, be confirmed in the amount of $1,664.12 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal