Employment Standards TRIBUNAL

An appeal

- by -

Pacific Coast Fire Equipment (1976) 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.: 2001/225

DATE OF DECISION: June 13, 2001

DECISION

OVERVIEW

This is an appeal by Pacific Coast Fire Equipment (1976) Ltd. ("Pacific" or "the employer") pursuant to section 112 of the *Employment Standards Act (*"the *Act")* from a determination dated February 22, 2001 (#ER 046456) by the Director of Employment Standards ("the Director").

Pranil Singh ("Singh") worked for Pacific from October 1997 until he was dismissed on August 12, 1999. He was not paid compensation for length service as the employer claimed that he was dismissed for just cause. The reason for dismissal was that Singh had used a company vehicle for personal use. He was a problem employee who had received a number of warnings in the past. The Director found that Singh was "on call" and was allowed by his supervisor to use the vehicle personally whilst on call and that the employer did not have just cause for dismissal.

There was a significant difference in the evidence about whether or not Singh was "on call". The Director found that as the onus was on the employer to prove just cause for dismissal the employer also had the onus of proving that Singh was not on call. The Director rejected the evidence provided by the employer. The employer appeals on the grounds that there was a clear policy about the use of the company vehicles and that misuse would result in dismissal and that the Director was wrong to conclude that Singh was "on call". The employer includes some new grounds to support the dismissal.

FACTS AND ANALYSIS

The facts in this case are not complex. Singh admits that on the day in question he used the company vehicle to drive his girlfriend to the airport. He does not dispute the company policy but claims that he was "on call" and therefore authorized to use the vehicle for personal matters. The matter came to the employer's attention because the vehicle was impounded by the police due to a complete misunderstanding and through no fault of Singh's. Although, if he had not been at the airport with his girlfriend the issue would not have arisen.

The determination sets out the evidence fairly clearly. Singh's usual supervisor gave evidence that Singh was not on call. On the date in question there was another supervisor in place who also says that Singh was not on call. The office manager said that she was very clear that Singh was not on call. She said that Singh alternated weekends and was on call the previous weekend. She remembered a conversation with Singh after he was fired and telling him that he shouldn't have used the vehicle when he was not on call. The only evidence that Singh was on call was his own statement to that effect.

The Director's delegate who wrote the determination discounted the evidence of the employer as follows:

> The person in the best position to know whether Singh was on call that weekend, other than Singh himself, was (*the office manager*), who was responsible for the scheduling of technicians for on call service. (*She*), who is still employed by Pacific, expressed certainty in a telephone conversation that Singh was not on call on the weekend in question. When I asked how she could be so certain about which of two alternating technicians was on call over a year ago, her explanation was her memory was simply that good. I have difficulty with this explanation as nothing short of a photographic memory would suffice for such a detail. (*She)* later added that she remembered saying to Singh after he was fired that he was not supposed to take the vehicle is not on call. This explanation seemed ad hoc for the purpose of reinforcing her earlier expressed certainty.

The delegate preferred to rely upon the simple uncorroborated word of the employee. I find this conclusion to be unreasonable. To dismiss all of the evidence of the employer because it seemed too credible is an error in law. There was a substantial body of evidence given on behalf of the employer that Singh was not on call on the day in question and there was no evidence that supported Singh's allegations that he was. The employer clearly met the civil burden on the balance of probabilities that Singh was not on call and was not entitled to the use of the vehicle on that occasion.

It was clear, and accepted by the Director's delegate, that the employer had a firm policy that unauthorized use of a company vehicle could result in dismissal. In this case the employee used a company vehicle to drive his girlfriend to the airport and stayed there with her for some time. There is little doubt that this gave the employer cause for dismissal. Once the behaviour of the employee exceeds 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. The substantial issue in this case is whether or not the behaviour of the employee crossed the threshold of giving the employer just cause to dismiss. In my opinion it did.

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 the employee breached a clear employment policy that carried with it the potential for dismissal. 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 more than 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
Adjudicator
Employment Standards Tribunal