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 -

Lil' Putian's Children's Fashions Ltd.
("Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Geoffrey Crampton
FILE NO.:	97/153
DATE OF HEARING:	June 20, 1997
DATE OF DECISION:	July 23, 1997

DECISION

APPEARANCES

Reginald E. Shum
Mary Shum — on behalf of Lil' Putian's Children's Fashions Ltd.

Jana D. Weir — on her own behalf

OVERVIEW

This is an appeal by Lil' Putian's Children's Fashions Ltd. ("the Employer"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued on February 21, 1997 by a delegate of the Director of Employment Standards (the "Director"). The Determination requires the Employer to pay $162.64 to Jana D. Weir as compensation for length of service because the Director's delegate concluded that there was not just cause to terminate Ms. Weir's employment. The Employer's initial submission to the Tribunal was that that Determination is wrong because Ms. Weir was "... terminated for misconduct and breach of duty, deception and breach of trust, disobedience, incompetence or performance amounting to incompetence and petty theft."

A hearing was held on June 20, 1997 at which time evidence was given under oath by Reginald Shum, Mary Shum, and Jana Weir. Mr. Shum's request to record the hearing on audio tape was denied.

ISSUE TO BE DECIDED

Was there just cause to terminate Ms. Weir's employment?

FACTS

Ms. Weir was employed as a part-time sales assistant in the Employer's retail stores from 27 June 1996 to 14 October 1996.

The Employer has a comprehensive, detailed written job description for its sales staff, which sets out its five "operating priorities" for customer service. Its five priorities are: atmosphere, service, store appearance, sales transactions, and administration. The job description sets out duties and responsibilities for sales staff under each of these five priorities. In addition, there are detailed written "staff policies", "customer policies", "minimum daily procedures" and "weekly procedures" which staff are required to follow. Ms. Weir acknowledged that she was familiar with these various policies and procedures and that she understood them.

The Employer provided a copy of notes of two discussions between Mr. Shum and Ms. Weir (20 July 1996; 1 September 1996) which identify her strengths and weaknesses in each of the five "priority areas": specific areas for improvement were also identified in both discussions. The July 20th notes conclude with the following "overall message":

> "Hours and responsibility have to be earned and will be given only to those who perform. Don't allow yourself to be bored. If you are, then you are in the wrong business."

The September 1st notes conclude with the following "overall message":

> "Behaviour and work ethic are not acceptable. Jana told on 30 Aug 96 that all areas mentioned above must be improved. We are going into slow season, and only those who perform can be offered continuing employment."

The cash reports for October 13, 1996 and October 14, 1996 show that there were no cash sales for either day at the store on Granville Island. Ms. Weir prepared the report for October 13th, while another employee (O'Neill) prepared the report for October 14th. The Employer was careful to make it clear that it was not accusing either employee of theft. However, in the Employer's submission, it is so unusual for no cash sales to be recorded over two consecutive days (both of them weekend days) that Mrs. Shum decided to review the videotape from the store's security system to see if any unusual events had been recorded and, possibly, explain the lack of cash sales.

Mrs. Shum testified that when she reviewed the videotape it revealed what she believed to be "gross misconduct" by Ms. Weir. That is, Mrs. Shum saw that Ms. Weir was sitting down, reading a book while there were customers in the store. At another point on the tape, Mrs. Shum testified, she saw Ms. Weir sitting on the cash counter (with her back to customers in the store) while talking on the telephone.

Mrs. Shum testified that the Director's delegate declined to review the videotape during his investigation of Ms. Weir's complaint, despite being urged to do so. At the hearing, I viewed certain portions of the videotape (approximately twenty minutes viewing time), having decided that the videotape was admissible as evidence and reserving any decision as to the weight which I would give it in deciding this appeal. The videotape evidence confirmed Mrs. Shum's oral evidence.

ANALYSIS

The Determination sets out the following reasons in support of the conclusion that Ms. Weir is entitled to compensation for length of service:

> The investigation revealed that the Employer does not have just cause for the termination of Ms. Weir's employment.
>
> That the Employer did not follow a program of progressive discipline leading to the termination of employment of Ms. Weir.
>
> That the Employer has not provided Ms. Weir with written working notice of termination of employment. That the Employer has not provided Ms. Weir with compensation for length of service.

This is the complete text of the reasons given by the Director's delegate. I note that these reasons do not indicate what consideration the Director's delegate gave to the question of whether there was a fundamental breach of the employment contract by Ms. Weir. However, the written reasons given by the Employer for its appeal make it clear that the Director's delegate and the Employer had some discussion about the meaning of "just cause" as the term is used in the *Act*. Also, prior to hearing evidence on June 17th I took several minutes to discuss the concept with the parties.

I note, again, that the Employer expressly does not accuse Ms. Weir of theft of funds and does not rely on the fact that there were two consecutive days with no cash sales as grounds for dismissing Ms. Weir.

The question of admissibility of videotape evidence was canvassed at length in a recent decision of the Tribunal (*Hudson's Bay Company* BC EST No. D192/97). I was guided by the reasons in that decision in deciding to admit the videotape evidence in this appeal, particularly since the tape was made available to the Director's delegate during his investigation and, therefore, is not "new" evidence.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*. The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

Just cause is not defined in the *Act*. However, the Tribunal has decided many appeals where the central issue was whether or not there was just cause to dismiss an employee. The following principles have been applied consistently by the Tribunal (see, for example, *Kenneth Kruger* BC EST No. D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

In *Grouse Mountain Resorts Ltd.* (BC EST No. D143/96), the Tribunal adopted the common law test for just cause as it was described by the BC Court of Appeal in *Stein v. British Columbia Housing Management Commission* [(1992) 65 BCLR (2d) 181]:

> Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

In the same case, the Court of Appeal adopted the following passage from *Laws v. London Chronicle Ltd.* [(1959) 2 All E.R. 285 (C.A.)] as a generally accepted statement of the law on this point:

> It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is so to speak, struck at fundamentally...
>
> I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) **that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions**; and for that reason, therefore, I think that one finds in the passages which I have read that disobedience must at least have the quality that it is "willful": it does (in other words) **connote a deliberate flouting of the essential contractual conditions**.

These passages make it clear that any disobedience by an employee must be willful and must connote a deliberate flouting of the essential contractual conditions of employment.

Since the Employer has not proven that it warned Ms. Weir clearly and unequivocally, it must prove that there was a fundamental breach of the employment relationship - a deliberate and willful flouting of the essential contractual conditions. Therefore, I am required to answer the following question: Was Ms. Weir's conduct on October 13th and 14th "willful" and did it breach the employment relationship fundamentally?

The onus rests with the Employer to show that Ms. Weir's conduct was willful. In my opinion, if I am to conclude that Ms. Weir's conduct was willful I must be persuaded that she was aware at that time, or would have been able to predict, that her conduct could result in her dismissal but, nevertheless, she engaged in the conduct. Thus, poor judgment or inexperience or unsatisfactory work habits or failure to follow policies do not, by themselves, always amount to willful disobedience.

Ms. Weir argues that her employer did not have just cause to dismiss her, did not give any notice of dismissal and did not take steps to inform her of any problems with her performance. She does not dispute that Mr. Shum discussed her work performance with her in July and at the end of August, 1996. However, she argues that she was never warned clearly that her employment would be terminated if she failed to meet her employer's expectations as set out in its job description, policies and procedures.

As noted above, the concept of just cause requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that his or her work performance is acceptable to the employer.

Mr. Shum's notes of his discussions with Ms. Weir show that she was not given a clear and unequivocal warning that she would be dismissed if she failed to meet her employer's expectations.

The Employer argues that the facts support a finding of willful misconduct. It argues that Ms. Weir knew and understood her job duties, its five "operating priorities", its staff policies, customer policies, and minimum daily procedures. It argues, further, that Ms. Weir knowingly conducted herself in a manner that was detrimental to her employer's interests and knowingly decided not to perform the duties for which she was employed.

Ms. Weir did not dispute the accuracy of the videotape evidence. In her defense, she argues that her actions were not detrimental to her employer, and that she did what two other, more experienced employees would do in similar circumstances.

When I review all of the evidence, I find that I am not persuaded that Ms. Weir's conduct on October 13th and 14th was willful. Further I am not persuaded that her conduct breached the employment relationship fundamentally.

ORDER

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

Geoffrey Crampton
Chair
Employment Standards Tribunal