Employment Standards TRIBUNAL

An appeal

- by -

John Fuggle
("Fuggle")

- 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.: 2002/185

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

This is an appeal by John Fuggle ("Fuggle") pursuant to Section 112 of the E*mployment Standards Act* (the "*Act*") from a Determination dated March 12, 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.

Fuggle was employed by Airgas Canada Inc. ("Airgas") ("the employer") as a delivery person for bottled medical and industrial gases. A customer complained that Fuggle had been defacing the elevator in the customer's building with obscene graffiti. Fuggle was dismissed. He applied for compensation for length of service but his claim was rejected by the Director on the basis that there was just cause for the dismissal.

Fuggle has appealed on several grounds referred to as breaches of long established rules of administrative law and of fundamental justice. These include that a single act of defacing a customer's property with obscene graffiti would not be sufficient grounds to trigger dismissal. It is submitted that there should have been a full disclosure to Fuggle of all the surrounding circumstances and that a warning should have preceded dismissal. It is also submitted that there was insufficient evidence to establish that Fuggle drew the graffiti or that it was obscene. It is further submitted that the Director applied an incorrect standard of proof by use of the term "likely". It is submitted that the employer has an obligation to conduct a comprehensive inquiry.

ISSUES

The fundamental issue in this case is whether the employer had just cause to dismiss Mr. Fuggle.

FACTS

The basic facts as found by the Director are not disputed. Fuggle was employed by Airgas from April 17th 1995 until he was dismissed on October 2nd 2001.

On October 01, 2001 the office manager at Airgas received a telephone call from a regular customer advising that Fuggle had been defacing the elevator in their office building. Airgas met with the customer to discuss the issue and listen to the evidence the customer had to provide. As summarised by the Director the evidence presented was that Fuggle made deliveries every two to three weeks to the building. The building manager, the janitor and the staff of two doctors' offices had noted that following Fuggle's deliveries obscene graffiti was found on the wall of the elevator.

The customer stated that the building is a small, low traffic, two-storey building and that the building manager and janitor had noticed the same distinctive graffiti in other buildings that Fuggle serviced. In order to confirm that Fuggle was responsible, the customer twice ordered a delivery, checked in the

elevator minutes before both deliveries to confirm it was clean and again immediately after the deliveries. In both incidences the elevator was again defaced with the same graffiti.

In a letter dated January 23rd 2002 to the Director Airgas provided further details. It was noted that the customer was a family dentist and many of his clients were children. The graffiti represented an ejaculating penis. The elevator was checked before and after other delivery people and found to be undamaged.

On October 2nd 2001 Fuggle was asked to meet with his supervisors. He was told about the complaint of obscene graffiti. It is reported, and not subsequently denied, that Fuggle's only response was "so they are firing me just for this". Fuggle told the Director that he knew the decision to fire him was made before the meeting and he saw no reason to stay and argue when it was a done deal. Counsel for Fuggle submits that the comment was not an admission of responsibility.

In the determination there is no indication that Fuggle clearly denied drawing the graffiti. It is reported that he offered an alternative possibility that the graffiti may have been drawn by some youth that hung out near the building.

In the appeal documentation there is also no direct denial by Fuggle of drawing the graffiti or making the comment attributed to him. However, counsel for Fuggle submits that Fuggle was disappointed, even disgusted, by the actions of his long-standing employer. It is submitted that the "This" referred to in what should have been an entirely innocuous statement is the "allegation" against him. It is submitted in the appeal that, "To this day he does not know what the image in question was. He does not know how big it was. He does not know what colour it was. He does not know whether it was sprayed painted across the elevator or pencilled in a corner. He has no idea. Mr. Fuggle does not know when the graffiti was drawn (painted? Etched?) Or who did it." Although there is no direct denial by Fuggle, for the purposes of this decision, I will accept counsel's submission as constituting his client's instructions that he denies drawing the graffiti.

ANALYSIS

Section 63 of the *Act* creates a liability for employers:

> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

This liability is deemed to be discharged if an employee is given written notice or is "dismissed for just cause" [see Section 63(3)(c)].

The burden of proof for establishing that there is "just cause" to terminate Fuggle's employment rests with Airgas.

The leading case in British Columbia's employment standards jurisprudence on the interpretation of "just cause" for the purpose of Section 63 of the Act is *Re: Silverline Security Locksmith Ltd.* BC EST # D207/96. In that case the Tribunal held that "just cause" could include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.

It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary. In the absence of a criminal act, gross incompetence, wilful misconduct or a significant breach of the workplace policy an employer must be able to demonstrate 'just cause' by proving that:

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

2. The employee was warned clearly that his/her 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.

Therefore 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 the four-part process set out above in the Silverline case. It is worth noting that even in such cases there is no requirement for "progressive discipline". Once this four-part test is complied with the "threshold" of "just cause" is met. Discipline or dismissal thereafter 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, *Re: Jace Holdings Ltd. [2001]* BC EST # D132/01.

As noted above 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*., BC EST # D207/96. It can also include such things as assault of another employee, drug use or trafficking while at work or the deliberate and willful disobedience of a direct instruction from a supervisor.

The next question then is, if the burden of establishing just cause is on the employer, what is the standard of proof required to meet that onus? The Director noted that a federal Board of Referees had applied a "reasonable doubt" standard but the Director concluded that the correct standard under the Act is to determine the matter on the civil standard of a "balance of probabilities". In my opinion, the standard of proof required is the civil standard of balance of probabilities even if the allegations are of a criminal or quasi-criminal nature and not the criminal standard of proof "beyond a reasonable doubt': Hanes vs.

Wawanesa Insurance Company, (1963) S.C.R. 154. The civil standard may be met by the preponderance of the evidence.

A concern is raised in the appeal that in the determination the Director juxtaposes this standard with a quote from the B.C. Court of Appeal in *Faryna v. Chorney [1952] 2 D.L.R. 354*:

> "… the real test of the truth of the story of a witness… must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

It is submitted that in the next paragraph of the determination the Director confused the Faryna v. Chorney quotation with the standard of proof. The paragraph reads as follows:

> Having considered the evidence carefully, I am of the view that Airgas did have just cause for the dismissal of Mr. Fuggle. In my view, Airgas had sufficient facts at the date of dismissal to confirm that Mr. Fuggle likely did the act in question on the evidentiary balance of probabilities.

Counsel for the appellant submits that the use of the term "likely" connotes only mere suspicion and does not meet even the civil standard of a balance of probabilities.

I agree with counsel for the appellant that there may have been some misapplication of the language in *Faryna v. Chorney*. It must be remembered that the Court of Appeal was addressing the, sometimes difficult, task of assessing credibility of witnesses. The assessment of the credibility of the evidence is a preliminary step in establishing a factual base for the ultimate task of deciding whether those accepted facts meet the burden of establishing that there was just cause for dismissal on a balance of probabilities.

The word "likely" or the phrase "more than likely" have appeared in a number of decisions relating to the balance of probabilities test and in my opinion only connote that the evidence meets that test. The employer quotes the Tribunal's decision in *Re: Tumbleweed Transport Ltd. [2001]* BC EST #D301/01:

The critical point is that if an employer "suspects" - in the layperson's commonly understood sense of that word - that the employee has committed theft or fraud, and the facts at the date of dismissal confirm that the employee likely did the acts in question on the evidentiary balance of probabilities, summary dismissal will be ruled for "just cause".

In my opinion the use of the term "likely" in that context is meant to indicate that the evidentiary balance of probabilities has been met and does not suggest any lesser standard.

While the use of the word "likely" by the Director in the context in which it is used in the determination may gives the impression of some confusion between the test for credibility and the standard of proof it is very evident on the totality of the determination that the Director applied the proper balance of probabilities standard. The Director was clearly satisfied on the preponderance of the evidence that the acts alleged by the employer had been committed by Fuggle. Having concluded that the acts had been committed by Fuggle the Director then found that such conduct gave just cause for dismissal.

While the onus is on the employer to establish just cause for dismissal the onus on an appeal to this Tribunal is on the appellant to show that the determination is wrong. I am not persuaded that the Director misapplied the standard of proof or made any substantial error in applying that standard to the facts of the case.

The evidence upon which the employer acted was substantial. Before the customer lodged a complaint the suspicion was carefully checked and corroborated. The information was then shared with the employer and the employer attended the customer's business to verify the information. There was credible and reliable evidence that Fuggle was the person who drew the graffiti in the elevator on at least two specific occasions. There is nothing in the appeal material that would persuade me that the conclusion of the employer and the Director was unfounded.

On all of the file material there is a preponderance of evidence upon which any finder of fact could reasonably be satisfied beyond a balance of probabilities that it was Fuggle who drew the ejaculating penises in the elevators.

The ultimate question then is whether such behaviour gave just cause for dismissal. It is clear that Fuggle engaged in a course of deliberate and intentional misconduct that was distasteful, probably criminal, and extremely embarrassing to his employer. As noted earlier, 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.

It is not necessary to decide whether or not the drawings were "obscene". They were clearly an act of vandalism on the property of a valued customer and they were a serious act of misconduct. The acts were incompatible with the employment relationship and inconsistent with his duties: *McKinley v. B.C. Tel [2001] 2 S.C.R. 161*. The acts were serious enough on any objective and reasonable standard to give the employer just cause for dismissal.

Once such cause is established the employer may dismiss the employee without compensation for length of service. Of course, the employer may decide not to dismiss an employee and to give a warning instead but once just cause is established there is no requirement for warnings and certainly no requirement under the *Act* for progressive discipline.

I do not agree with the submission that a single act of defacing a customer's property should not result in dismissal. There is substantial evidence that it was not a single act but rather a series of willful and deliberate acts that amounted to gross misconduct.

Fuggle's counsel submits that the employer was in breach of a fundamental principle of natural justice, audi alterim (*sic*) partem, in failing to give Fuggle an opportunity to respond. In my opinion this principle is not applicable in cases of summary dismissal but, in any case, Fuggle was given an opportunity to respond to the allegations but he declined to do so because he assumed that the final decision had already been made. Even if it were true that Fuggle was not given the opportunity to respond he certainly had that opportunity during the investigation conducted by the Director.

In conclusion I am not satisfied that Fuggle has met the onus of establishing the determination was wrong in fact or law. I am satisfied that the employer had a preponderance of credible evidence upon which to base a decision to dismiss Mr. Fuggle. I agree with the Director that the behaviour was inconsistent with Fuggle's duties and incompatible with a continuation of the employment relationship. I conclude that the determination should be confirmed.

ORDER

I order, under section 115 of the *Act*, that the determination dated March 12, 2002 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal