

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 -

Coast to Coast Video Sales Ltd.
("CTC")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 1999/241

DATE OF HEARING: July 26, 1999

DATE OF DECISION: August 18, 1999

DECISION

APPEARANCES

Roy Dickey	Counsel for Coast to Coast Video
Allan Desrocher	Witness
Anthony Perry	Witness
Dan Deresh	On his own behalf

OVERVIEW

Coast to Coast Video Sales Ltd. (“CTC”, also, “the employer”) appeals a Determination by a delegate of the Director of Employment Standards dated March 30, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination orders CTC to pay Dan Deresh compensation for length of service, with vacation pay and interest over and above that. The delegate accepted that Deresh ripped up a written reprimand in front of his supervisor and threw it in the garbage. But she concluded that whether it was that, or something else that led to the termination, it was not so serious as to warrant immediate dismissal. In explaining her decision, she notes that the employee received the reprimand on the 1st of May but was not terminated until the 6th of that month.

On appeal, the employer claims just cause for reason of wilful misconduct and also a failure to respond appropriately to progressive discipline. The employer submits that there is no greater act of insubordination than to flagrantly destroy a reprimand immediately upon receiving it and before the employer’s eyes. The employer goes on to argue that too much weight was placed on the fact that the employer did not fire the employee immediately.

ISSUES TO BE DECIDED

The matter of whether or not the employer had just cause to terminate Deresh is at issue. Given the appeal, I must decide whether there was or was not insubordination. Should insubordination not be found, I must then decide whether or not just cause existed for reason of repeated instances of minor misconduct or a failure to perform work to the satisfaction of the employer.

FACTS

CTC is in the business of renting and selling videos. It also sells adult magazines and various other products. That business is carried on through several outlets. The business is directed and managed by Tony Perry. Allan Desrocher is area sales manager.

Dan Deresh began working for CTC as a salesperson on April 30, 1996. At some point, Deresh was promoted to the position of manager. He managed store 3 (the "Surrey store" or simply "the store").

CTC was at one time critical of the look and appearance of the Surrey store. Deresh was repeatedly told to clean it up and improve the look of its displays. Desrocher paid regular visits to the store and, using what is called the "Visual Merchandising Check List", he for a time issued written reports on the store's appearance. I accept those reports as accurate. Those for the first part of March, 1998, indicate that magazine racks were not full, displays needed changing, and the store was dirty and untidy. But later reports show overall improvement. Deresh is at the end of March and in April advised to "keep up the good work". Desrocher in his report for April 14, 1998, indicates that the store's entrance, showroom and even its showcases all looked good and that the store was in all respects clean.

The employer addresses misconduct and other problems through use of what is called its "*Employee Reprimand Form*". Deresh was reprimanded on March 31, 1998 for failing to notice and report that the store's float was short. Apparently, one of his employees had taken money from the store's float, somewhere between \$100 to \$150, and the amount was outstanding for a few days. The written reprimand advises Deresh that the next step would be suspension, not dismissal.

The employees at the Surrey store were apparently lax in completing paperwork. Deresh was for that reason reprimanded on the 1st of May, 1998. Using the reprimand form, Desrocher again indicated that the next step would be suspension, not dismissal.

This second reprimand upset Deresh. He thought it most unfair and he was angry. He asked Desrocher to ask Perry to reconsider it on the basis of his hard work and two years of faithful service. It is not alleged that Deresh said anything disrespectful but it is what he did that is said to show insolence justifying termination. On asking Desrocher what he was to do with the reprimand, and on being told that the reprimand was his to do with what he wished, Deresh just crumpled it up and threw it in the garbage. [Deresh did not actually tear it up. Both Desrocher and Deresh agree on that.]

Deresh in a submission to the Tribunal refers to the reprimand as "garbage". But on being asked what he meant by that, Deresh without hesitation states that he meant only that it was not something to keep but to throw out as, having read it, it was not going to be of further use to him.

The reprimand in the garbage, Desrocher went on to discuss another matter. He suggested that Deresh change how magazines were displayed. Desrocher wanted Deresh to display sexually explicit gay magazines among magazines for heterosexuals. Deresh argued strongly against the idea. He thought that it would upset their heterosexual customers. There is no evidence that Deresh actually disobeyed whatever it was that Desrocher eventually decided to do.

On being told by Desrocher of Deresh's reaction to the reprimand and the disagreement over displaying gay magazines, Perry decided immediately that he would terminate Deresh. CTC did not actually fire Deresh at that point but it began to search for a new manager. A new manager was hired on the 5th and Deresh was fired the next day.

Desrocher, on a reprimand dated May 6, 1998, states that termination was not for reason of what is now said to be an act of insubordination but his "failure to adhere to company policies concerning cleanliness of store, staff supervision when it comes to paperwork, and direction of supervisor concerning visual merchandising (several warnings issued both oral & written for the above). Desrocher also quotes what is said to be a passage from *Employee/Employer Rights, A Guide for the British Columbia Workforce* by Leslie Baker. The quote is as follows:

An employee owes certain duties to the employer and can be dismissed or fired if these duties are breached. These duties ... require an employee to serve the employer faithfully, honestly and diligently.

In a letter to Employment Insurance which is dated June 4, 1998, Desrocher adds to the above claiming that Deresh also failed to re-price stock, return damaged stock, report problems with video equipment, demonstrated an argumentative attitude, and was reluctant to accept the new focus on supervision and changing company policy. Desrocher again states that Deresh failed keep the area behind the sales counter clean and tidy but in the letter he goes on to allege that Deresh himself appeared dirty and untidy. Once again, nothing at all is said about the alleged act of insubordination.

ANALYSIS

What I must decide is whether the appellant has or has not met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of what is either an error in fact or in law.

It is section 63 of the *Act* that provides for the payment of compensation for length of service in certain circumstances. Sub-section 3 is of particular importance. It is as follows:

63 (3) *The liability is deemed to be discharged if the employee*

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(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 may be so serious as to justify the termination of employment, as may misconduct of a minor sort, when it is repeated, or the chronic inability of an employee to meet the requirements of a job, even though it is not the fault of the employee. In all cases the onus for showing just cause lies with the employer.

Insubordination is claimed. I accept that a single act of insubordination is grounds for immediate dismissal.

The employer argues that the crumpling up and throwing out of a written warning, on being presented with it, is an act of insubordination. I am not able to accept that as while it may be true in certain circumstances, it is not in all. What is required in my view is that the employer show that the employee's conduct involves a resistance to, or defiance of, its authority.

I believe that Perry, on listening to Desrocher, fired Deresh for crumpling up his reprimand and/or throwing it in the garbage. But it simply does not follow from that act alone that Deresh was resisting or defying authority, or being in any way disrespectful. An employee may fully accept an employer's warning and authority and then decide, quite innocently, to throw out the warning. Or the employee may only be showing how very angry they are, in a momentary outburst of emotion. Either of those possibilities may be the case here. There is not evidence showing that, in acting as he did, Deresh was resisting or defying his employer's authority. As such, I find that gross misconduct is not shown. It follows that CTC did not have grounds for immediate dismissal.

Having found the above, I need not decide the matter of whether or not the delegate placed far too much weight on the time taken to dismiss Deresh.

What I must decide is whether or not the employer had just cause for reason of minor misconduct which was repeated, or general failure to meet standards. In that regard, it is the well established view of the Tribunal [*Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that the employer has just cause only where the employer shows the following:

- a) That reasonable standards of performance were established and communicated to the employee;

- b) the employee was clearly and unequivocally warned that his or her employment was in jeopardy unless such standards were met;
- c) the employee was given sufficient time to improve; and
- d) the employee did not meet those standards.

CTC does not show the above to me. Where it appears that reasonable standards of performance were established and communicated to the employee, there is no evidence that it gave Deresh plain, clear warning that his job was in jeopardy unless he met those standards, that he was given time to improve, and that he did not. Deresh was told to expect suspensions should he again fail to perform certain managerial duties.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination dated March 30, 1999 and awarding \$991.17 in compensation for length of service and other moneys to Dan Deresh, and I order the payment of whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal