EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

by

Marathon Natural Foods Ltd.
("Marathon")

of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO.: 96/546

HEARING DATE: December 6, 1996

DATE OF DECISION: December 12, 1996

DECISION

OVERVIEW

This is an appeal by Marathon , pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on August 26, 1996. In this appeal the employer claims that pay in lieu of notice is not owed to Roger Ash ("Ash") since it had just cause for his dismissal.

A hearing was held in Penticton, British Columbia. Richard Hunt ("Hunt") appeared on behalf of Marathon. Ash appeared on his own behalf. Donna Miller ("Miller") appeared representing the Director.

FACTS

Marathon is in the business of the distribution of health foods. Ash was employed by Marathon in March of 1995 and performed both warehouse and relief truck driving duties.

Ash was dismissed from his employment on November 22, 1995. Ash says he was dismissed due to the alleged use of abusive language with customers. Marathon's position is that he was dismissed due to abusive language with customers and others. The abusive language consisted primarily of the use of the word "fucking" as an adjective in reference to a pallet and a truck..

When (or shortly after) Ash was hired by Marathon he was provided with a written policy, which provided in part that "abusive language and behaviour would not be tolerated". The term "abusive" is not defined by the policy. The rest of the paragraph in which the prohibition of abusive conduct and language is contained deals primarily with Human Rights issues.

On or about July 11,` 1995 Ash was delivering goods on a COD basis to a business on Vancouver Island. The customer was not prepared to pay for the goods and accordingly Ash refused to leave them. He checked with his office which confirmed that he was not to leave the goods. The customer became upset and there was an argument about whether Ash should leave the goods. At the hearing there was no evidence from the customer in question but Hunt testified that that customer had complained about profane language used by Hunt in the course of the argument.

Ash denies that any profane language was used with the customer. In the circumstances, I have no option but to accept Ash's evidence as to this incident.

Whether or not profanity was used by Ash, he agrees that he had a conversation with Hunt after the incident in which he was cautioned not to use profane language with customers.

After this incident Hunt says that Ash was responsible for his truck hitting and downing a cable and telephone line He was warned about this. Ash admits that he did by accident down a cable and telephone line and that he reported the incident to his dispatcher when he returned to the warehouse. He denied that he was any way disciplined in respect to this incident.

Hunt testified that on or about October 28, 1995, Ash used profane language with a fellow employee "Ann". Ash says that on the day in question he had arrived at a customer's place of business and was missing a pallet of goods. He telephoned Marathon's office in Penticton and spoke to Ann about the situation. In the course of the conversation he said "Can you believe they forgot to load the fucking pallet". Ash testified that he was in the customer's warehouse alone when he had this conversation with Ann. There is no evidence that Ann felt offended in any fashion by the use of the words in question although there is some evidence that she felt that those words should not have been used in the presence of a customer. I accept Ash's evidence that the customer was not present when these words were spoken. Hunt testified that Ash was disciplined as a result of this incident by Gerry Johnson ("Johnson"), who was the Traffic Manager. Johnson did not give evidence. Ash denies that he was disciplined due to this incident.

The final incident upon which the employer relies occurred on November 3, 1995. Mr. Ash was delivering goods in Prince George at that time. Hunt says he received a complaint from a customer to the effect that Ash had used profanity with the customer's neighbour. The customer did not give evidence at the hearing.

Ash testified that he did issue some profane words while in Prince George delivering goods on behalf of Marathon. His evidence was that he had parked his truck in an alleyway in order to unload goods. A neighbouring businessperson was parked behind him and came to him to ask if he would be long. He said he would be 5 to 10 minutes. Apparently this person then returned to her vehicle and waited. It was cold in Prince George and the windows of her car were closed according to Ash. Ash was then confronted by a garbage truck driver who wished to get by Ash's truck. He testified that the garbage truck driver said to him "when are you going to move your fucking truck" or words to that effect. Ash's response was "I'll move my fucking truck when I'm finished

unloading". He testified that was the extent of the altercation and the extent of the profanity used by him. Ash testified that when he returned to Penticton he mentioned the incident to his immediate supervisor in the warehouse. He says that this conversation was overheard by Johnson. He says that he was not disciplined in any fashion concerning this incident.

Hunt testified that after he had received the telephone call from Prince George he asked Johnson to verify the complaint he had received and that if he wished to dismiss Ash he had his support.

Ash worked most of the next 10 days leading up to the date of his dismissal. On November 22, 1995 Johnson called Ash into his office and advised him that he was terminated. I have previously dealt with the somewhat different versions of the reasons offered and understood to have been offered for the termination. Ash was never allowed the opportunity to explain the incident of November 3, 1995 or to deal with Marathon's position that his conduct on that occasion was inappropriate and abusive and constituted cause for dismissal.

ISSUE TO BE DECIDED

The facts raise more than the simple issue as to whether or not just cause existed for dismissal. In order to answer this issue, two subsidiary issues need to be addressed:

1. Did the incident of November 3, 1995 alone justify dismissal without notice;

2. Was Marathon entitled to dismiss Ash as a result of a combination of any of the four incidents it referred to.

ANALYSIS

The November 3, 1995 Incident

In order for one incident to constitute cause for dismissal, the impugned conduct must be such that it amounts to a repudiation of the employment contract in the sense that the employer can no longer put any faith or trust in the employee to carry out his duties in a reasonable fashion.

A single, deliberate or clear violation of a company policy or rule may also justify immediate termination.

I have decided that the November 3, 1995 incident was not sufficient to justify the dismissal of Ash. My reasons are as follows:

1. Marathon knew of this incident at least 10 days before it dismissed Ash. If the conduct was a serious as Marathon now alleges, surely something should have been done prior to November 22, 1995;

2. I accept the evidence of Ash that the exchange was with a garbage truck driver and not the neighbour of the customer, although the neighbour may have overheard the conversation between Ash and the garbage truck driver. Ash was provoked by the garbage truck driver who initiated the use of the word "fucking". I cannot categorize the exchange between these two truck drivers as being abusive.

Abusive is defined as:

> 1 using or containing insulting language. 2 (of language) insulting.(The Concise Oxford Dictoinary, Eight Edition)

The words spoken by Ash must be interpreted in the context in which they were spoken and having done so, I do not find them to have been insulting to the recipient or intended to be taken as insults. If there was clear and direct evidence that Ash had by issuing the words in question insulted the neighbour I would be more inclined to agree that the language was abusive.

Cumulative Effect of Incidents

I am not satisfied that the incident regarding the cable and telephone lines is relevant or ought to be taken into account in determining whether just cause for dismissal existed. I do not accept that Ash was warned about this incident or that it otherwise weighed on the mind of the employer making the decision to terminate the contract of employment.

I find that the other three incidents are the basis upon which the employer chose to terminate the contract of employment and I will deal with those only. As I have already indicated the Prince George (last) incident is not in and of itself sufficient to justify dismissal without warning or notice.

A question which often arises is whether or not there is an obligation on the part of an employer to employ a rigorous form of progressive discipline prior to dismissing an employee for conduct that is not serious enough to warrant immediate dismissal.

The theory is that the employee ought to have the opportunity to correct the deficient behaviour. Progressive discipline in its purest form requires oral warnings initially, progressing to written warnings if the behaviour or conduct does not improve. The warnings must be such that the employee has a reasonable opportunity to correct the behaviour complained of.

An employer need not use written warnings in progressively disciplining an employee. The difficulty in not using written warnings is that it is more difficult to prove that the warnings and discussions have taken place.

The present case is an example of a situation where it is difficult to conclude that the warnings the employer says it gave were in fact given. There is insufficient evidence that there was any warning given in respect to the conversation concerning Ann and in respect to the Prince George incident.

I am not satisfied on the evidence that Ash was sufficiently warned about using profane language in the course of his duties with staff members and others to warrant dismissal. There is no evidence that Ash was advised that Marathon was of the view that all profane language was abusive and therefore contravened its policy.

In summary, I am not satisfied that any warning was given to Ash other than the warning given in July of 1995. While I agree with Marathon that the words used by Ash to Ann and to the garbage truck driver are not appropriate, I do not consider them to be abusive, and therefore in contravention of the policy. I cannot accept that the cumulative effect of the incidents, to the extent they have been proven and absent adequate warnings, were serious enough to justify Ash's dismissal without notice.

ORDER

In summary, I order under Section 115 of the Act, that the Determination #CDET 003797 be confirmed.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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