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 -

Smart Cars Company Inc.
("Smart Cars")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 1999/465

DATE OF DECISION: September 23, 1999

DECISION

OVERVIEW

This is an appeal by Smart Cars Company Inc. ("Smart Cars" or "employer") of a Determination dated July 5, 1999, where the Director's delegate found that the sum of $6,401.68 was due and owing to Ronald Brigley as compensation for length of service. The employer claimed that it had just cause to dismiss Mr. Brigley, and relied on a culminating incident to establish cause. In applying the principles relating to culminating incident, the adjudicator must first be satisfied that there has been a disciplinary event. The adjudicator was not satisfied that the conduct of the employee amounted to a disciplinary event. The employer did not demonstrate any error in principle, or in calculation of the amounts owing, and the Determination was confirmed.

ISSUES TO BE DECIDED

Did the Director's delegate err in his determination that Mr. Brigley was dismissed without just cause?

FACTS

Mr. Brigley was employed as an automotive technician with Smart Cars Company Inc. and its predecessor between July 3, 1990 and December 29, 1998 at its location in Salmon Arm, British Columbia. Mr. Brigley was dismissed on December 29, 1998. The Delegate found that there was no cause for dismissal and calculated that the amount due and owing to Mr. Brigley as compensation for length of service as follows:

8 weeks x 40 hours/week x $18.25/hr	$5,840.00
6 % vacation pay x $5840.00	350.40
Sub-total	6,190.40
Interest	211.28
Total	$6,401.68

The employer has raised no issue with regard to the correctness of the calculation.

The employer says that it had cause to dismiss Mr. Brigley, and it relies on the following points:

1. The employer issued a disciplinary letter dated June 21, 1996 to the employee for swearing, throwing tools, and general lack of cooperation. The letter warned that the conduct must stop at once, and if it did not stop further disciplinary action would be taken.

2. The business records of the employer contain a memo dated September 26, 1996, which relates 5 incidents where customers brought back their vehicles complaining of poor workmanship, and one further incident of swearing and complaining with regard to the assignment of work.

3. The employer issued a written warning to the employee dated August 13, 1998 relating to the failure to remove an old oil filter ring, which resulted in the need to tow a customer's vehicle. This was a final warning that "any further comebacks" will result in dismissal.

4. A culminating incident on December 21, 1998 where Mr. Brigley is alleged to have wilfully damaged two vehicles as a result of a collision with a customers vehicle, and a new vehicle on the lot. There was $356.64 damage. The sales staff were not prepared to work any longer with Mr. Brigley given his conduct.

The employer criticizes the investigation conducted by the Director's delegate indicating that the Delegate failed to interview key witnesses relating to the non-accidental nature of the accident. Mr. Brigley points out at the time of the collision there were no witnesses in attendance, and he had to look for his supervisor to report the damage.

The Delegate filed a written submission indicating that he asked the employer if it could prove negligence or provide evidence of wilful misconduct. The Delegate says that no proof or evidence was offered. Further the employee indicates that there were no witnesses to the accident.

The employee's answer to the employer's complaint is as follows:

1. He admits the problems in 1996, and indicates that he learned from the experience or "cleaned up his act".

2. There is a learning curve working on newer model vehicles and he learned that he was required to replace oil filter rings as a result of the problem which resulted in the August 13, 1998 warning. He indicated other employees had made similar mistakes and were not terminated.

3. With regard to the accident he admits that the accident occurs, and indicates that it occurred as a result of him misjudging the distances, while looking in the rear view mirror. He indicates that this was an accident, it was not wilful and it was reported to his supervisor. He points out that other employees had accidents and were not terminated as a result of the accident.

4. He was unaware that sales staff were not prepared to work any longer with him, as this was never related to him, nor was he given an opportunity to address this point. He indicates that working with the sales staff was a minor portion of his job as a technician.

5. The work for the shop was slow during 1998, and the employer was looking for a way to downsize its work force, and the employer settled on him.

The Delegate found that for the employer "straw that broke the camel's back" was the accident. The Delegate also noted that while the letters may have prompted the employer to consider termination of the employee, the facts were not sufficient to establish just cause, and the employer should have given notice or compensation for length of service.

I have reviewed a further written submission made by the employer, which was received by me on September 10, 1999 after I had prepared an initial draft of this decision. The submissions made, do not in my view, add to the previous submissions made by the employer.

I am satisfied that the employee did damage the property of the employer. I am not satisfied that this was intentional or wilful. I find that the damage was caused by an accident.

ANALYSIS

In an appeal before the Tribunal the burden rests with the appellant to demonstrate that an error was made such that I should vary, or cancel the Determination.

The employer, upon terminating an employee is bound to pay compensation to an employee for length of service, unless the employer can prove just cause. This obligation is set out in section 63 of the *Act* which reads as follows:

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:

(b) after 3 consecutive years of employment, to an amount equal to 3 week's

wages plus one additional week's wages for each additional year of employment, to a maximum of 8 week's wages.

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

(c) terminates the employment, retires from employment, or is dismissed for just cause.

Just cause is not defined in the *Act*, but it is conduct of an employee which is incompatible with a continuation of the employment relationship.

In the first instance, before the Delegate, the burden of proving just cause rests with an employer. Absent allegations of theft or insubordination which might justify summary termination, where the employer is relying on a ground such as incompetence, negligence or poor work performance it is incumbent on an employer to prove:

(a) a reasonable standard of performance was communicated to the employee;

(b) that the employee was given sufficient time to demonstrate performance of the standard and was incapable or unwilling to do so;

(c) that the employee was warned that his job was in jeopardy;

(d) that despite the warning the employee was incapable or unwilling to meet the standard.

Kruger, BC EST #D003/97, *Westburne Industries Ltd*, BC EST #D379/98

In this case the employer's argument seems to rest on the "final straw" or culminating incident. The doctrine of culminating incident is one that arises in the context of disciplinary grievances in the grievance arbitration process. An arbitrator in a grievance arbitration may review the past conduct of the employee to determine if the employer imposed a penalty which fits the circumstances of the case. In the grievance arbitration context, the employer must prove an event which merited some discipline before the arbitrator is entitled to review the record of the grievor. The employer may not rely on the record where no event is proven. The record may be used to support the sanction imposed by the employer : Brown & Beatty, Canadian Labour Arbitration, (Aurora: Canada Law Book Inc., 1999) (7:4310 - 7:4312).

There is somewhat of a parallel in cases under the *Act*. The employer has a burden to demonstrate just cause. A seemingly innocuous event may not in itself amount to just cause, but when seen in context of the employee's overall job performance, and the employment relationship including the past disciplinary history, the "innocuous" may in fact be the "final straw" justifying termination.

Applying this concept to the case before me, I have considerable concern that the final act complained of by the employer was not an act which merited discipline. It was an accident. It does not appear to be an event involving gross negligence. It was an event for which the employer had not disciplined other employees. In my view given this finding, it is unnecessary to review the past disciplinary record to determine whether cause was established on the whole of the evidence. In my view this case does not get past the hurdle of the employer proving that there was an event which merited discipline. One does not get to the Kruger test because there was no disciplinary event or workplace misconduct.

I note that even if I were to have found that this was a wilful act, I do not think that the record of "misconduct" by the employee justifies a summary termination. I note that the employee's explanation for the "oil ring" problem, appears to be a reasonable explanation. It was an error. It does not appear to me to be the case that the employer has established that there was a clearly communicated standard of performance, which the employee failed to meet, despite repeated warning.

Further, I note the significant hiatus or gap between the disciplinary conduct in 1996, and the lack of complaints with regard to the employee's attitude, or taking instructions. I accept the submission of the employee that he learned from the complaints made against him in 1996.

I am concerned that the timing of the dismissal was in a period of time when work was slow for the employer. There was no evidence before me that indicated that the employer replaced the employee. There was a submission from the employee, not contradicted by the employer, that there was a work slow down, and the employer downsized its operation.

For all the above reasons, I am not satisfied that the employer has established that the Director's delegate erred. Based on the material before me, I have no hesitation in concluding that this employer did not have just cause to dismiss Mr. Brigley.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated July 5, 1999 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal