Employment Standards TRIBUNAL

An appeal

- by -

Chaytor Holdings Ltd. op/as Tim Hortons
("Chaytor")

- 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: David B. Stevenson

FILE No.: 2002/495

DATE OF HEARING: December 11, 2002

DATE OF DECISION: December 17, 2002

DECISION

APPEARANCES:

on behalf of Chaytor Holdings Ltd.	Constance Ladell, Esq. W. Allan Chaytor
on behalf of the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Chaytor Holdings Ltd. operating as Tim Hortons ("Chaytor") of a Determination that was issued on August 30, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Chaytor had contravened Section 63 of the *Act* in respect of the employment of Angela Fawkes ("Fawkes") and ordered Chaytor to cease contravening and to comply with the *Act* and to pay an amount of $718.39.

Chaytor says the Director erred in concluding they did not have just cause to terminate Fawkes.

ISSUE

The issue in this appeal is whether Chaytor has shown the conclusion of the Director, that Chaytor did not have just cause to terminate Fawkes, was wrong.

THE FACTS

Chaytor operates two Tim Hortons franchises in Kamloops under a franchise agreement with Tim Hortons Corporation. Fawkes worked for Chaytor from October 6, 1999 to April 12, 2002 as an assistant manager/server at a rate of $8.50 an hour. She was terminated on April 12, 2002 by Mr. W. Allan Chaytor, one of the principals of Chaytor, as a result of Mr. Chaytor seeing a customer comment card indicating that, in the opinion of the customer, Fawkes had been "most disrespectful . . . (Rude)" while serving the customer.

During the investigation of Fawkes' complaint, Chaytor took the position that prior to the incident in question, Fawkes had previously been disciplined for her rudeness to customers. In support of that position, the Director was given a copy of an Assistant Manager/Supervisor Performance Appraisal and Development Form for Fawkes which is shown as having been done on or about December 27, 2001 and a copy of an employee disciplinary record for Fawkes relating to an incident that had occurred on March 28, 2002.

The Determination notes that in addition to the above, Chaytor asserted that Fawkes had been given warnings relating to rudeness. No record of any such warnings were provided during the investigation.

In the appeal hearing, I heard evidence from Mr. Chaytor and from Tracey Livingstone, who had held a position as Chaytor's business manager from September or October 1999 until very recently.

Mr. Chaytor confirmed that he had terminated Fawkes on April 12, 2002 after reading the customer comment card which was critical of Fawkes. He said that while it is practice to contact the customer in such circumstances, he could not get hold of the person whose name and telephone number appears on the comment card.

Mrs. Livingstone gave evidence of the conduct of Fawkes during a staff meeting on March 28, 2002 that led to the recorded discipline referred to above. The meeting was a training session for employees. Mrs. Livingstone testified that on more than one occasion Fawkes made comments that both she felt were disrespectful and demonstrative of a poor attitude. Mrs. Livingstone said that both she and Debbie Berube, Fawkes' manager, asked Fawkes to be quiet and to keep her comments to herself. The employee discipline record was made out by Mrs. Livingstone and issued to Fawkes by Ms. Berube sometime after March 28 (the appeal says it was April 1, 2002 that Fawkes received this recorded discipline but that was not confirmed by any evidence). The following comments, which are attributable to Mrs. Livingstone, are found on the document:

> Current Situation: Attitude with Employees & Attitude at the meeting Mar 28/02
>
> Expectations & Timelines:
> 1 week to perform better with employees and to see a major improvement in attitude towards them.
>
> This is a: _____ record of a verbal warning; _____ a written warning; __ü__ a final written warning.
>
> Prior Incidents and Discipline (if any): Have received many written & verbal notices. Will receive no more.

Notwithstanding the indication from the above document that it was a "final" written warning and Fawkes had received "many" written and verbal notices, Chaytor has never established that Fawkes had received any prior written discipline.

Mrs. Livingstone testified that she had, "probably three or four times", pulled Fawkes aside to deal with customer complaints. She said that she would tell Fawkes exactly what the customer had said and explain to her the need to focus and to be pleasant.

The Director found there had been no progressive discipline, adding:

> In particular it has not been demonstrated that the complainant was made clearly aware that if her conduct persisted that her employment would be terminated. It is clear that the complainant did not receive a written warning relating to rudeness to customers, rather a warning as related to joking comments made with the business owners daughter during a staff meeting. while the customer comment card dated March 29, 2002, upon investigation, may have been deserving of some strong form of discipline, I find the timing of an the decision to terminate, to be excessive in light of the absence of prior progressive discipline

ARGUMENT AND ANALYSIS

The burden is on Chaytor the persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97

(Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation. In this appeal, Chaytor argues that the Director made three errors, leading to the wrong conclusion on just cause:

(a) that Fawkes was disciplined following the staff meeting for rudeness only to Mrs. Livingstone;

(b) that Mrs. Livingstone's familial relationship to Chaytor's principals was a factor in the final warning given to Fawkes; and

(c) that Fawkes was not subject to progressive discipline as required.

In this appeal, Chaytor continues to bear the burden of proving there was just cause to terminate Fawkes. I reinforce that point because it is possible for Chaytor to succeed on one or more of their arguments, yet not succeed in proving just cause for Fawkes' dismissal.

The Tribunal has addressed the question of dismissal for just cause on many occasions (*cf.*, among others: *Hall Pontiac Buick Ltd.*, BC EST #D073/96; *Cook*, BC EST #D322/96; *Justason*, BC EST #D109/97; *Kruger*, BC EST #D003/97; *Sambuca*, BC EST #D322/97; *Chamberlain*, BC EST #D374/97). The following principles may be gleaned from those decisions:

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

2. Most employment offences 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. A reasonable period of time was given to the employee to meet such standard and had demonstrated they were unwilling to do so;

    3. The employee was adequately notified that their continued 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 if 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; and

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 this case, Chaytor is seeking to rely on minor instances of misconduct by Fawkes.

I have some difficulty accepting the argument that the Director found Fawkes to have been disciplined following the March 28 staff meeting 'only' for being rude to Mrs. Livingstone during that meeting. That conclusion is not contained anywhere in the findings of fact or the analysis. I read the reference in the Determination to " . . . a written warning as related to her joking comments made to the business owners daughter . . ." as being an attempt by the Director to distinguish the nature of the conduct which led to the written discipline from the nature of the conduct for which she was terminated - which was described by a customer as being "disrespectful . . . (Rude)". I agree with counsel for Chaytor, however, that both instances manifest conduct that can generally be traced to what the employer perceived to be Fawkes' poor attitude and in that sense cannot be distinguished.

On the other hand, I am not satisfied that conclusion significantly advances the issue of whether Chaytor had just cause to terminate Fawkes. At best, that leaves Chaytor with a written disciplinary warning, received and acknowledged by Fawkes, identifying a problem with her attitude and warning her of the consequences if she did not improve her attitude, and an allegation from a customer that she was disrespectful (rude), which is potentially a manifestation of a bad attitude. I will return to this point later, following a review of the other arguments made in this appeal.

I do not agree with the argument that the Director placed an inappropriate emphasis on the familial relationship between Mrs. Livingstone and the principals of Chaytor. There is no indication in the Determination that the Director did not accept the recorded discipline on its face, failed to give it effect as discipline or found the recorded discipline was 'less' important because it was based, in part, on comments made to Mrs. Livingstone. Even if I agreed with the argument, it was never clearly explained to me what consequence should flow from that relative to the conclusion that Chaytor had not proven there was just cause to terminate Fawkes. Would it make Fawkes' conduct more blameworthy? Would it make the recorded discipline more important? The answer is, no. The recorded discipline stands for what it is - a minor instance of misconduct by the Fawkes not sufficient on its own to justify dismissal. No more and no less.

Before turning to the argument relating to the Director's conclusion on "progressive discipline", I need to address whether the Director was correct to make reference to "progressive discipline" at all. The appeal has challenged the conclusion of the Director on "progressive discipline, but there is a line of authority which goes past that and says "progressive discipline" is not a required element in the concept of "just cause" in the *Act* (*cf., Jace Holdings Ltd. (c.o.b. Thrifty Foods)*, BC EST #D132/01). There is some validity in that authority if the term "progressive discipline" is being used simply to describe a series of progressively increasingly severe disciplinary responses by an employer for persistent misconduct by an employee. There is no such requirement in the *Act*.

On the other hand, if the term is only being applied in a theoretical sense to describe the duty of an employer to warn an employee of the seriousness with which the employer views their disciplinary record, the *Act* does require "progressive discipline". Those decisions which conclude that "progressive discipline" is not a required element of just cause under the *Act* also acknowledge the Tribunal's decision *Silverline Security Locksmith Ltd.*, BC EST #D207/96, as the leading authority on just cause under the *Act*. In that decision, the Tribunal said:

> The concept of "just cause" requires the 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 their 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 their work performance is acceptable to the employer.

I read the Determination as using the term 'progressive discipline" in the theoretical sense, as described in *Silverline Security Locksmith Ltd., supra*. The issue then becomes whether the Determination correctly concluded Chaytor had failed to show it had met that requirement.

The appeal points to a comment in the Determination attributed to Ms. Berube:

> Ms. Berube advised that the complainant had a tendency to be rude to customers on occasion, but that she could handle the complainant in her own way.

Counsel for Chaytor also relied on the evidence of Mrs. Livingstone, who said that 3 or 4 times she had pulled Fawkes aside and told her of the complaint and to "focus and be pleasant. None of these discussions were recorded. I accept that Fawkes' attitude and demeanor had been raised with her by Ms. Berube and Mrs. Livingstone. That is indisputable on the evidence, and Fawkes has acknowledged that throughout. But none of the evidence showed these instances were brought home to Fawkes in a way that could be characterized as 'disciplinary'.

Finally, counsel referred to the performance appraisal and development form as constituting some form of warning to Fawkes that her performance was unacceptable. I have three problems with allowing the performance appraisal being used to prop up the termination: first, the document itself is not disciplinary in any sense; second, there is not evidence it was ever shown to or reviewed with Fawkes; and third, on its face, it does not inform the employee of potentially adverse consequences.

On the evidence that was before the Director, I can find no error in the conclusion relating to "progressive discipline". There was no evidence that other than the recorded discipline arising from the March 28 meeting Fawkes was told that her performance was unacceptable and a continuing failure to meet the standard of conduct expected of her would lead to her dismissal. The evidence received in the hearing of this appeal does not affect that conclusion. I heard nothing in the evidence that indicated any discussions Mrs. Livingstone had with Fawkes were for the purpose of informing her that her conduct was unacceptable and to put her on notice that a failure on her part to conform to an acceptable standard put her continued employment in jeopardy.

In summary, I agree that the Director erred by taking too narrow a view of the misconduct demonstrated in the March 28 meeting and in the allegation made by the customer. I do not agree the Director placed 'inappropriate emphasis' on the familial relationships and I do not agree there is any error in the conclusion that Chaytor had not proven Fawkes was clearly made aware that her employment was in jeopardy if her attitude did not change.

Returning to the point I made above, my conclusions on this appeal do open the question of whether the written disciplinary warning, received and acknowledged by Fawkes, identifying a problem with her attitude and warning her of the consequences if she did not improve her attitude, and an allegation from a customer that she was disrespectful (rude) justified Fawkes' dismissal.

Where a bad, or un-cooperative, attitude is being advanced as justification for the termination of an employee, there is a need to be very cautious. "Attitude" is a subjective factor. Its existence can only be determined from its outward manifestation in objective behaviour. The employer must show that the *proven* behaviour of the employee does indeed manifest the purported attitude. The employer must also show that the attitude is essentially one which disables, or is likely to disable, the employee from the proper performance of their job and that termination is the appropriate response. An employer is required

to investigate incidents raising allegations of bad attitude when they occur, particularly where the incidents involve relationships between employees. The other employee involved may as much or more to blame for the poor relationship. There is some element of that in Fawkes' response to the recorded discipline. Part of her response indicated that another employee, ". . . has been talking behind my back and [another employee's] back . . ." and suggested that, "maybe someone should talk to her". There was no indication that Chaytor made any attempt to investigate whether their instruction to Fawkes to "perform better with employees and [improve her] attitude towards them" also required some attention to the other side of the equation. It is manifestly unfair if Fawkes was being disciplined when other employees, equally or more responsible, were not.

My comments about 'attitude' being subjective and the requirement for employers to properly investigate incidents raising allegations of bad attitude apply as well to the incident involving the customer comment card. Mr. Chaytor said that while it is the company's usual practice to call the complaining customer and discuss the comments made on the card, he was unable to contact the customer in this case. The customer was not called as a witness. As such, I have no idea what conduct was perceived by the customer to be 'disrespectful', whether that conclusion was reasonable, what effect it had on the customer or what impact it had on the business interests of the company. On this point, it is well settled, in the context of adjudications on just cause, that hearsay evidence may not be used to establish a crucial issue unless it is corroborated by direct sworn evidence.

I find the Director made no error in concluding Chaytor did not have just cause for terminating Fawkes. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 30, 2002 be confirmed in the amount of $718.39, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal