Employment Standards TRIBUNAL

An appeal

- by -

Esquimalt Enterprises Ltd., operating as Country Grocer
("EE")

- 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: Lorne D. Collingwood

FILE No.: 2001/526

DATE OF DECISION: October 22, 2001

DECISION

OVERVIEW

The appeal is by Esquimalt Enterprises Ltd. operating as Country Grocer (which I will refer to as "EE", "the employer" and also "the Appellant") and pursuant to section 112 of the *Employment Standards Act* ("the *Act*"). EE appeals a Determination issued on June 26, 2001 by a delegate of the Director of Employment Standards ("the Director"). In that Determination, the employer is ordered to pay Caitlynn Crawford $528.64 in compensation for length of service, vacation pay and interest.

The Employer on appeal argues that the employee was terminated for just cause. It argues that her termination was justified by a rudeness to customers. It argues that, because such rudeness is completely unacceptable, no written warning is required and there is no need for an employer to give the employee reasonable time to meet a standard.

The case has been decided on the basis of written submissions.

ISSUES TO BE DECIDED

The issue is whether the employer did or did not have just cause. The employer argues that the employee's immediate dismissal was justified in that the employee was rude to customers on two occasions.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Caitlynn Crawford worked as a deli clerk for the employer from August 16, 1999 to August 18, 2000. She was terminated by the employer.

There are facts which are not in dispute. They are as follows:

- That the employee closed the deli early on August 2, 2000;
- that she was suspended for one day as a result of closing the deli early;
- that she was given a written warning for closing the deli early, and that
- termination is for reason of two instances of a what is said to have been a rudeness to customers, one on the 12th and the other on the 13th.

The above noted written warning is as follows:

> "Under no circumstances does the deli dept. close before 10:00 or even appear to be. If any other disciplinary action is needed towards your performance, your employment will be terminated with us. This is a very serious incident and should be taken as that."

I find that the employer has a handbook and that it stresses the importance of good customer relations. It states, "It is understood and agreed that all staff will greet each customer in a professional, courteous, friendly and efficient manner at all times. Your attitude when dealing with customers and co-workers should always be one of courtesy, respect and above all else friendliness. It is your responsibility to ensure that you maintain a high level of customer rapport and interaction. Customers are our Top Priority."

The Director's delegate, applying principles which are set out in *Kenneth Kruger*, BCEST No. D003/97, found that Crawford's termination could not be for just cause, no matter whether there was or was not rudeness as alleged. In his view, it is nothing more serious than minor misconduct which is alleged. The delegate has recognised that the employee was warned against closing the deli early, she was given a broad warning about her performance and told that she would be fired if her work performance was again unsatisfactory. The delegate has decided, however, that nothing was specifically said about rudeness and so the termination is not for just cause. His analysis of matters is as follows:

> "In this case, the substance of the incidents leading to termination was alleged rudeness to customers. Although there were two incidents, (on the evidence of the employer) there was no warning on the issue of rudeness to customers. The employee handbook does emphasise the importance the company places on customer service in a general way, and states that profane language and inappropriate gestures are unacceptable. However, it does not define or prohibit rudeness as such. In the first incident, the complainant is alleged to have not greeted or thanked the customer, nor to have asked what she wanted. In the second, the complainant is alleged to have given the wrong product, the wrong price, to have argued and to have been "very rude". The discipline letter [a second warning of sorts] talks about a bad attitude, rudeness, ignoring the customer, and slapping the food down without asking if the customer wanted anything further. It goes on to say that the prior warning was very clear ("if any other disciplinary action is needed ... your employment will be terminated"). However, the first warning was given for closing the deli early, not rudeness. This warning cannot be regarded as establishing a reasonable standard, communicating it to the employee, and giving the employee a reasonable time to meet the standard, with respect to rudeness.
>
> …

This finding is made on the basis of the employer's evidence. Because of the finding, I do not need to examine the conflicts of evidence between the complainant and the employer."

ANALYSIS

Section 63 of the *Act* establishes a statutory liability on the employer to pay length of service compensation to employees but that liability may be discharged.

> **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)

Just cause is not defined in the *Act*. The Tribunal recognizes, however, that a single act of misconduct may be of such a serious nature that it may justify an employee's immediate dismissal. Some examples of such misconduct are insubordination, theft, fraud and conflict of interest on the part of the employee.

Termination is usually for other reasons. Decisions like *Kruger*, cited above, recognise that there may also be just cause where there is misconduct of a less serious nature, and it is repeated, or the employee demonstrates a chronic inability to meet the requirements of his or her job. It has said, however, that, in such cases, a finding of just cause will require that the employer show the following:

1. That a reasonable standard of performance was established and communicated to the employee;

2. the employee was given plain, clear warning that his or her employment was in jeopardy if there was a continuing failure to meet the standard;

3. the employee was given sufficient time to improve; and

4. the employee continued to demonstrate an unwillingness or inability to meet the standard.

In this case, it is alleged that the employee was rude to customers on two successive days. The delegate has decided that it is not serious misconduct but a form of minor misconduct which is alleged and I agree with that conclusion. That being said I want to stress that I am not saying that the alleged rudeness is acceptable. It is not of course. I am merely distinguishing between conduct which may cause irreparable damage to the employment relationship and that which, while annoying to employers, is of a less serious nature. That latter is something which may be addressed though warnings and other corrective measures.

It being decided that nothing more serious than minor misconduct is alleged, the question is then, Does the employer show that the employee was made aware of what is a reasonable standard, plainly and clearly warned that her employment was in jeopardy because of a failure to meet the standard, given time to improve and, despite all of that, the employee again failed to meet the standard? I am satisfied that it does not.

The employer's handbook conveyed the need for courteous service and that is, no doubt, a reasonable standard. The problem is that Crawford was not told that she faced being fired because of a rudeness to customers, nor was she given any chance to improve.

Crawford was warned that she should not close the deli early. And, once warned against doing so, there was no further problem in that regard.

Crawford, on being warned that she should not close the deli early, was also told that if there was any further misconduct that she would be terminated. That is not, however, to serve Crawford with plain, clear warning that her employment was in jeopardy for reason of a rudeness to customers. The employer failed to be specific. It is insufficient to issue a blanket warning as it did.

The matter of whether Crawford was rude or not is immaterial. What is important, the employee having been terminated for reason of two instances of minor misconduct, is whether it was made clear to the employee her job was in jeopardy because of that misconduct and whether she was then given time to improve. She was not. It follows that the employer did not have just cause when it terminated the employee.

The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated June 26, 2001 be confirmed in the amount of $528.64 and to that amount I add what further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal