

**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 -

The Governor and Company of Adventures of England Trading into  
Hudson's Bay Operating Hudson's Bay Company

("The Bay")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 97/070

**DATE OF HEARING:** November 21, 1997

**DATE OF DECISION:** January 7, 1998

**DECISION**

**APPEARANCES**

Lorene Novakowski                      for The Bay  
Susan Manning                              on her own behalf

**OVERVIEW**

This is an appeal by The Bay pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination dated January 14, 1997 by the Director of Employment Standards (“the Director”). The Bay claims that it had just cause to dismiss Susan Manning from her position as a sales associate.

**ISSUE TO BE DECIDED**

Whether the Bay had just cause to dismiss Susan Manning for breach of store policy.

**FACTS**

On August 19, 1996, Manning was advised by the Bay that her services were no longer required. She had been employed as a sales associate since September 8, 1994, most recently at the Shiseido cosmetics counter. Manning filed a complaint under the *Act* alleging termination without cause or compensation for length of service. On August 15, 1996 Manning was suspended for three days for having breached company policy; her services were terminated as of August 19, 1996. They maintained that she had taken items and had not paid for them in accordance with company policy.

The Director's delegate conducted an investigation into the complaint and concluded there was no just cause. It was decided that while the employer had just cause for discipline, the Bay did not follow progressive disciplinary procedures and did thus not have grounds for termination. The Bay was ordered to pay Manning \$1,102.64.

In the oral hearing on November 21, 1997, Maureen McCarthy, Human Resources Manager at the store where Manning was employed, testified that at the initial orientation session each new employee is given a copy of the Code of Ethics. She pointed out that the Code of Ethics warns employees that theft is just cause for dismissal. She said that while each new employee is usually sent to a 2 day cash training session, Manning did not receive that training. She said that stock shortages are of great concern to the store and that extensive attempts are made to emphasize this point to all employees. The company posts relevant information on a Loss Prevention Bulletin Board; McCarthy identified a Bay pamphlet on internal (i.e. employee) theft. The board also displays a "Ripoff Report" which, among other things, advises of employees about former co-workers who have been dismissed for theft and charged criminally. The Western Region Store Rules outlines the security procedures to be followed in various parts of the store; McCarthy pointed out that Item10 prohibits store employees from ringing up their own purchases and that

purchases within one's own department are to be initialed by a designated signature. Item 18 requires the package to be sealed at the point of sale with a receipt, and to be stored in a secure area of the store. Store employees are also required to leave the store through the staff door. (Security is not posted at this door at all times.) McCarthy identified a pamphlet entitled The Bay Langley "Security Procedures" which states: "Anyone not adhering to rules #1 and #2 will have their short term agreement cancelled". (Rule 1 requires all employee entrance and exit to be through a staff door and Rule 2 requires employee purchases to be in sealed bags and placed in the staff cloakroom.)

McCarthy said that she met with Manning and Patricia Likness of store security on August 15 and as a result of that meeting suspended Manning without pay. Following a discussion with a senior manager, she terminated Manning for policy violations. She has the discretion to enforce breaches of policy and that an employee would be advised of the type of breach was being enforced. She said that frequently, violations will be discussed and warnings issued.

Likness testified that she has been a Loss Prevention Officer with the Bay since June of 1993 and is one of three internal investigators. She described a number of measures taken by the store to prevent theft and Loss Prevention Week which focuses on both internal (employee) and external (customer) theft. She described Rip off Reports which deal with a number of internal matters, including termination for policy violations.

Likness responded to a tip that Manning was taking items without paying for them by placing a camera above the cosmetics areas. (The camera was fully visible.) Normally Likness carries out camera surveillance for a three week period, or longer where there is suspicious activity. She took a honeymoon in the midst of the three weeks surveillance of Manning and someone else reviewed the tapes in her absence. Upon her return Likness viewed the videotapes of the Shiseido counter and met with her boss. The meeting with Manning and McCarthy followed that.

Likness edited the tapes to show several incidents that were used to show a breach of store policy. (The admissibility of those tapes is the subject of an earlier decision, *B.C.E.S.T. D#192/97.*) First shows Manning bringing a tote bag into the staff area behind the counter and placing a tester into it. Second shows Manning placing an unidentifiable item into a black tote bag. Third shows her placing a basket into a purse. Fourth was an incident where Manning purchased nylons and did not pay for them in accordance with store policy; indeed, it was several days before she did pay. (She was taped removing the nylons from that part of the store, stopping to speak for quite a while to Sylvia, a co-worker and then returning to her station with the merchandise.) Fifth was the failure to leave through the right exit at the end of a shift. Sixth was the purchase of a pair of earrings before store opening and failure to pay for the item until several days later. Likness testified that when she and McCarthy met with Manning, Manning admitted that her actions looked bad, but maintained that she did not intend to steal the earrings or nylons.

Manning admits that she was aware that employees would be terminated for theft but was not aware that this was a potential penalty for breach of policy. She acknowledged that a special receipt was required for employee purchases but denies ever hearing of a short term agreement. She also indicated that in the cosmetics area every employee had a

drawer for personal items and this is where she deposited purchased merchandise and her purse (the tote bag referred to in other testimony). She said that the basket item placed in her purse was probably something given to her by a cosmetics representative at a cosmetics fair the night before. She said that the item which could not be clearly identified was probably white editing liquid for paperwork.

Manning did not recall why she had left through the mall doors rather than through the employee exit but speculated that she must have been in a hurry. She also noted that for a large part of the day, there is no one posted at the employee door. She knew her actions were being videotaped. She said that she knew about the policy to staple bags but says it was not strictly enforced at the time. She says it was not a practice to pay so late for items but she placed the packaging on the register so that she would not forget to pay for it. She also testified that she had phoned co-workers to tell them not to throw out the packaging. She was unable to use her Bay card for the purchases as it was at her credit limit. Manning acknowledges that she should have returned to the store when she realized the items were not paid for and now realizes it was a serious mistake not to have done so. She says that while her actions were serious and called for discipline, she feels she should have been warned. She said that during the interview on August 15 with McCarthy and Likness, she was in shock after hearing the allegations. She said that her last job appraisal was excellent and that she was not expecting to be taken to task in the meeting. She also said that what she did was not uncommon amongst employees. She said that if she had taken items without paying for the, she would have expected to be fired, but insists she did not intend to steal these items.

Ms Novakowski argues that the revelation of poor character gives the Bay just cause for dismissal. Manning failed to appreciate the seriousness of her actions and repeatedly forgot or neglected to pay for items despite leaving the packaging at the cash register. If she had followed store procedures, this would not have happened. Ms Manning was aware that unauthorized removal of unpaid goods was reason for discipline and that taking things meant termination for theft. She executed the Code of Ethics on two separate occasions. The proper test is that at common law and contrary to the Determination, a warning or other progressive discipline is not necessary. Manning's actions were not condoned and the employer conducted a proper investigation over time. With Likness away, others in the store handled it.

## **ANALYSIS**

Manning's attitude towards store policy was, at times, lax; she demonstrated a disregard for the store's concerns which clearly justified some action on the part of management. I also find that the investigation into Manning's termination proceeded reasonably and that the decision to terminate Manning's employment was not made lightly. However, I find that the evidence does not establish just cause for termination under section 63 of the *Act*.

In *Black & Lee Formal Wear Rentals Ltd. v. British Columbia (Director of Employment Standards) D226/97*, this Tribunal described the requirements for termination for breach of policy:

If an employer wishes to rely on company policy to support a discharge it must show that the policy is reasonable, has been clearly brought to the employee's attention, has been consistently applied and that the employee was put on notice that breach of the policy could lead to serious disciplinary consequences.

Policy lacks a clear and unequivocal statement that a breach could result in dismissal. While the Code of Ethics and other documents and pamphlets, warn that dismissal will result from employee theft, the employer is not alleging theft in this case. Rather, it is breach of policy. For example, a pamphlet entitled The Bay Langley "Security Procedures" states: "Anyone not adhering to rules #1 and #2 will have their short term agreement cancelled". (Rule 1 requires all employee entrance and exit to be through a staff door and Rule 2 requires employee purchases to be in sealed bags and placed in the staff cloakroom.) Manning denied knowing what was meant by "short term agreement" and I found her evidence on this point to be credible and reasonable. The employer cannot rely on such an obscure reference to warn about consequences as serious as dismissal. The store newsletter is one of several sources of information on the procedures to be followed by employees when purchasing items from the store; it also fails to provide adequate warning. A system of staff discounts encourages staff to shop at the Bay but they are warned to do so on their own time. The "Staff Discount" portion of the Store Policy (page 15) states: "Using your staff discount for purchases for non-dependent family member or friends is a violation of Company Policy and may RESULT IN DISMISSAL." (emphasis in original) Where this specific breach of policy is singled out for dismissal, it would be reasonable to infer that other breaches would not necessarily result in dismissal. The reference to penalties in the Code of Ethics also fails in its clarity: "The Company views dishonest or unethical behaviour as unacceptable and will take disciplinary action, up to and including termination of employment, to correct such behaviour." Precisely what is meant by "dishonest or unethical behavior" is unclear. It is also insufficient to identify the "13 MOST COMMON POLICY VIOLATIONS" as serious but to not identify termination is a possible response.

While it is clear that "stock shortages" are a very serious concern to a department store such as the Bay, I also find that Manning's actions, while foolhardy, do not justify termination as a reasonable response. I specifically decline to say whether the policies were brought to Manning's attention with sufficient clarity. But I find that consistent application of the policy is at question. For example, personnel in the cosmetics department have their purses near their work site, in direct contravention of store policy. It was Manning's testimony that each employee was assigned a drawer for personal items including purses.

Ms Novakowski identified case law to support the argument that Manning's actions had not been condoned by the Bay. (*Duguay v. Maritime Welding & Rental Ltd.* 28 C.C.E.L. 126 (N.B.Q.B.) and *Murrell v. Simon Fraser University et al* [1996] B.C.J. No. 935) But condonation would be an issue only if the policy was reasonable, clear and unequivocal and had been brought to the employee's attention. I also find that *Jewitt v Prism Resources Limited* (1981) 30 B.C.L.R 43 (C.A.); *Durand v. Quaker Oats Co. of Canada* (1991) 32 C.C.E.L. 63 (B.C.C.A.); and *McEwan v. Irving Pulp & Paper Ltd.* (1995) 10 C.C.E.L. 227 are distinguishable as dealing with much more serious actions by the employees. *Kruger B.C.E.S.T. No. D 003/97* dealt with an employee who repeatedly refused to follow explicit instructions by the employer to comply with certain aspects of policy. This is not the case at hand as this question had never been discussed with Manning prior to the August 15 meeting.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination dated January 14, 1997.

**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**