

An appeal

- by -

David Perritt operating as Grab-a-Java Espresso Stop
("the employer")

- 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.: 2002/551

DATE OF HEARING: February 6, 2003

DATE OF DECISION: February 26, 2003

DECISION

APPEARANCES:

David Perritt	On his own behalf
Vanessa Strilec	On her own behalf

OVERVIEW

David Perritt operating as Grab-a-Java Espresso Stop (“the employer” or “the Appellant”) appeals, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 18, 2002. The Determination is that Vanessa Strilec is entitled to compensation for length of service and other wages plus interest, a total of \$2,769.74.

The Appellant appeals only the order to pay length of service compensation. The Appellant claims just cause. It is said that Strilec was negligent and that she set a bad example for other employees.

I have decided to confirm the Determination. I am not shown that the employer had just cause.

An oral hearing was held in this case.

ISSUES

The issue is whether the employee is or is not entitled to compensation for length of service. Underlying that issue is one of just cause. Someone stole \$700 from the employer and employees were giving out discounts on coffee and other food items, much to the employer’s chagrin. The employer claims that, if Strilec did not take the missing \$700, it follows that she was negligent in the way that she handled the money or, at least, negligent in that she failed to keep an eye on it. The employer also claims just cause on the basis that the employee gave out discounts, thereby setting a bad example for other employees.

The appeal was filed before November 30, 2002. It is for me to decide whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

David Perritt operates three Grab-a-Java Espresso Stops. Vanessa Strilec was manager of his Mission operation.

Strilec was employed by Perritt from August 9, 1996 to May 2, 2002.

The employment appears to have been uneventful until a Monday in March of 2002. On that day, Strilec reported for work in the morning as usual and performed, at the outset of her workday, a reconciliation of payments received over the weekend. On doing so, she dropped two packets of money into the

employer's drop safe, one envelope which contained the take for Saturday (\$900) and another which contained the take for Sunday (\$700).

At about 11:00 a.m. on the Monday, Strilec went to the safe and she found that it contained only one of the two envelopes, that which contained \$900. Strilec searched high and low for the missing \$700, aided by two other employees, but she was unable to find the money and so police were called. No charges have been laid in the case even though the money is still missing.

The employer at the investigative stage accused Strilec of taking the missing \$700 and in a written submission to the Tribunal (that attached to the appeal form) the employer appears to make that claim again. He makes much of the missing money, he draws attention to the fact that the case is not closed insofar as RCMP are concerned, and he goes so far as to say that he gave "her one chance to come clean on the free stuff and the \$700 (which is) missing".

I was, at the appeal hearing, presented with an entirely different story. Perritt made no attempt to prove that Strilec took his \$700. I questioned him on this point and he said, under oath, that he was not accusing Strilec of theft. As matters have been presented to me by the employer, there is not evidence to show that Strilec took the employer's money.

At the time of the robbery, the drop safe was visible to customers. The design of the drop safe is such that it is possible to pluck things from the safe. The safe was placed where customers could reach the safe through a passage way: It is not as if they had to leap over anything.

The employer argues that, if Strilec did not take the missing \$700, it follows that she was negligent in the way that she deposited the money in a safe or, at least, negligent in that she failed to keep an eye on the safe at all times. I am satisfied that there is at least some reason to believe that the employee may have been, on the Monday, lax or careless in depositing money in the safe in that she failed to check whether the envelopes which contained the money had both fallen out of sight. I am, however, not persuaded that it follows from the fact that the robbery went unnoticed that the employee was lax or careless. It was not her job to keep a constant eye on the safe. She had a variety of tasks to perform. Her failure to witness the robbery may stem entirely from a need to attend to some other aspect of her job.

The employer after being robbed, discovered that Strilec and other employees were giving customers discounts on coffee and other items. Strilec admits that she gave a former employee a half price discount whenever she ordered a coffee (the "Mocha discounts") and discounts to people on their birthdays ("birthday discounts"). The employee claims that she was "very sticky" when it came to giving out discounts and persons claiming birthday discounts were asked to produce proof of age. The employer does not show me that Strilec gave out any discounts beyond Mocha discounts and birthday discounts. I found the employer showed no concern for the birthday discounts, only the Mocha discounts. The employer claims that the employee had no authority to give out the Mocha discounts. She is said to have set a bad example for other employees.

The employee explains that the Mocha discounts were good for business in that the former employee brought in friends and family to the coffee shop who then bought coffees and other items at full price. I am not shown that the Mocha discounts were strictly against policy or a clearly established rule on discounts.

The employee claims that it was night staff, not persons under her direct supervision, that were caught giving out free food and coffee. The employer did not argue otherwise, never mind produce evidence to the contrary.

ANALYSIS

Someone took \$700 from the employer and the employer found, much to his dismay, that his manager and employees were giving out discounts on coffee and other food items. The question that I must answer is, did that present the employer with just cause to fire Strilec?

Section 63 of the *Act* imposes a liability on employers to pay their employees compensation for length of service where their employment lasts for more than 3 consecutive months. That liability can be discharged, however.

- 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)

The Tribunal has said that it will be guided by the following principles in cases where it is argued that termination is for cause (*Kenneth Kruger*, BCEST No. 003/97).

- “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. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 - 3. The employee was adequately notified their 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 of 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.
- 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.”

I have not in this case been shown that there was serious misconduct which would justify immediate termination. The employer alleges minor misconduct and I have found some evidence of misconduct, a single instance of minor misconduct, in that it does appear that the employee may have been lax or careless in depositing envelopes in the drop safe on the day that the \$700 went missing. But that is the extent of the misconduct as I see it. As noted above, it does not follow from the fact that the robbery went unnoticed that the employee was in some other way lax or careless. I have found that the employee gave out Mocha discounts but it is not shown that the Mocha discounts were against policy or a clearly established rule on discounts. And I have not been shown that the employee set a bad example.

Just cause for reason of minor misconduct requires that the employer show that the misconduct is despite communication of a reasonable standard of performance and repeated despite adequate warning that the employee stood to lose her job if there was any further to meet the standard, and despite time to improve. In this case, only a single instance of minor misconduct is established. This is not a case where misconduct is repeated even though the employee was given plain, clear warning that she might lose her job if there was any more of the misconduct.

I realize that the employer believes that his manager had no business giving out the Mocha discounts that she did, that he was most upset to find other employees giving out discounts as well, and that he believes that discounts are not a way to run a successful business. It is, however, not obviously wrong to give out discounts. It is reasonable to believe, as Strilec believes, that discounts are rather good for business, indeed, a necessary part of conducting business. And it is not shown that it was not within a manager's prerogative to give out discounts or that the Strilec was giving out discounts against a clearly established rule or policy.

I am not shown that the Determination is wrong, that the employer did have just cause. The Determination is therefore confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 18, 2002 be confirmed in the amount of \$2,769.74 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal