

Archer #1

IN THE MATTER OF ARBITRATION

Between

EMPLOYER

And

EMPLOYEE 1

Arbitration Hearing May 17, 2002

Employee 1 Discharge Case

ISSUE:

This arbitration is under the Employer Termination Appeal Procedure and involves the discharge of Team Leader Employee 1.

CHRONOLOGY:

Hearing: May 17, 2001

Award: July 29, 2002

ARBITRATOR: Edward P. Archer

DECISION AND AWARD

Edward P. Archer, Arbitrator. This arbitration is under the Employer Termination Appeal Procedure and involves the discharge of Team Leader Employee 1. At the outset of the hearing the parties stipulated that Mr. Employee 1's discharge was arbitrable and was properly before me as the sole arbitration for resolution. They also stipulated that the issues to be resolved in this case are: Whether Employer had just cause to discharge Mr. Employee 1, and, if not, what shall the remedy be?

I. Factual Background

Employee 1 was first hired by Employer on February 19, 2001 as a service line trainee in a City A, State A store headed by Store Director Person 1. Ms. Person 1 became Store Director at an Employer store in City B, State A in May 2001 and recruited Employee 1 to come to the City B store beginning July 16, 2001 as team leader of the deli department. Approximately two months later, on September 14, 2001, the circumstances which resulted in his discharge occurred.

Person 2 was a clerk in the deli working the 9:00 p.m. to 5:30 a.m. shift. Toward the end of her shift on Friday, September 14th Employee 1 telephoned her to ask if the store was busy and she told him she wanted to talk to him. He told her he would be in a few minutes.

Shortly thereafter he met with her and they talked of a concern she had about her work assignment and personal concerns she had about her husband's health which had caused her stress and depression which may have affected her work. She left to clock out and discovered her conversation with Employee 1 had resulted in her clocking out at 5:35 a.m. and that extra five minutes, coupled with early clock-ins at the outset of her shift and at lunch for a total of an extra three minutes, resulted in her receiving fifteen minutes of overtime. It was undisputed that Employer places emphasis in weekly meetings on not incurring unnecessary overtime and so she went back to Employee 1 and told him that their conversation had caused her to receive the fifteen minutes of overtime.

There was some confusion about whether she asked Employee 1 to correct it. However, it was undisputed that she did not feel that she earned the overtime and felt that it would be all right if Employee 1 could remove it from her record.

The payroll records close for the week at 12:00 noon on Sunday. At about 11:50 a.m. on

Sunday, September 16, 2001, just before the payroll records for that week closed, Employee 1 went into the computer records and attempted to change Person 2's clock-out time on Saturday morning from 5:35 a.m. to 5:30 a.m. to eliminate the fifteen minutes of overtime. In doing so he mistakenly changed her clock-in time for that shift and eliminated some of her straight time hours for that shift. There was some confusion in the record as to whether he knew at that time that he had eliminated those straight-time hours.

At about 12:30 p.m. that Sunday, Employee 1 spoke with Home Improvement Area Team Leader Person 3. Person 3 was acting Store Director on that day. According to Person 3, Employee 1 came to him and asked him how to go about deleting a team member's overtime. Employee 1 explained he had been having a conversation with a team member which extended past her time out for the day and she punched out fifteen minutes or some time past her scheduled shift time. Person 3 said he told Employee 1 that that was Employer business and she should be paid for it and that was the end of the conversation. He said Employee 1 made no intimation that he had already deleted the fifteen minutes of overtime. Employee 1 was not certain but he thought he had told Person 3 that he had already deleted the overtime in question.

In any event, Employee 1 said after he talked to Person 3 he realized it may have been wrong to delete the overtime so he consulted his Handbook which he had been given when he began working at Employer. On pages 58 and 59 the Handbook addresses "Attendance and Payroll Reporting" and provides in most pertinent part:

We also rely on you (team members) to accurately record all work time on the payroll reporting system. Team members should observe the following guidelines and understand that violation of these will result in termination of their employment.

- Overrides cannot be performed to eliminate overtime, whether by changing lunch periods, deleting the overtime and paying at the straight time equivalent on another day, or by allowing time off and paying the equivalent time on a different day or week.

- Overrides to the payroll reporting system should be done only when absolutely necessary and for legitimate reasons. Changing the time a team member actually works is a violation of federal wage and hour laws.

Employee 1 testified that he felt this Handbook language "allowed some room in there to maneuver" "for a legitimate reason." He couldn't recall examples being given in his initial employee training at City A of what were legitimate reasons.

On Monday, September 17, 2001, Employee 1 went to Retail Administrative Assistant Person 4 (to Store Director Person 1) and, according to Ms. Person 4, told her that he thought he had messed up Person 2's punches. He told her that he and Person 2 were speaking and when Person 2 punched out she realized she had fifteen minutes of overtime. Person 4 told him that if Person 2 had been there working and talking, she was entitled to the fifteen minutes of overtime. He stated that Person 2 had asked him to fix the card and correct it and he was sorry. She repeated, "If Person 2 had worked it, she was entitled to it." He told her he tried to punch Person 2 out at 5:30 a.m. rather than 5:35 a.m. and he thought he messed up something. She told him she would have to take a look at the timecard to see what actually occurred and she would get back to him. Instead she checked the time and found that Employee 1 had attempted to clock out Person 2 at 5:30 a.m. but instead had punched her in for the day at 5:30 a.m. and she (Person 4) reported this to Lines Leader Person 5 (Employee 1's direct supervisor).

Person 5 apparently reported this to Store Director Person 1 who spoke with Employee 1 in her office later that Monday. Consistent with the Store's usual practice for such occasions, notes were taken at that meeting by Loss Prevention Team Leader Person 6. According to Person 1, Employee 1 told her that he and Person 2 had been talking and Person 2 realized she had overtime and asked him if he could take care of it for her. He said he tried to delete the overtime. Person 1 said she asked Employee 1 if he knew it was wrong to delete the overtime. He said he

didn't know that. She asked him again and he repeated he did not know. She asked him if he was telling her he didn't know it was wrong after attending her meetings in City A. He then said, "Yes, I knew it was wrong."

Person 1 had been Store Director when Employee 1 was hired at the City A store and she had conducted Traditions (orientation training) for Employee 1 there. The Employer policy regarding Payroll Reporting (set forth hereinabove) is presented in the Handbook, in Guidelines which summarize the handbook and on the computer Network A. The Network A also adds the following language:

Team Leaders who perform overrides will be responsible for showing cause for the override.

Anyone using an override for other than legitimate business reasons will be terminated. People who violate the policy of accurately reporting their time worked or another person's time worked, will be terminated.

Copies of the Handbook and Guidelines were given to Employee 1 and as a Team Leader he had access to the Network A.

Person 1 testified Employee 1 went through computer-based training at the City A store which included a test at the end and a requirement to print out and sign the most important policies, including the Attendance and Payroll Reporting policy.

Employee 1 testified that he did not remember his City A training and that when Person 1 asked him if, based on his City A training, he did not know that deletion of overtime was wrong, he told her he didn't remember everything discussed in those City A training meetings, but he then said he had screwed up. He explained this latter statement was his conclusion based on Person 3's statement to him, his review of the Handbook and his discussion with Person 4. He

was not admitting that he knew it was wrong at the time he attempted to delete the overtime.¹

Person 1 reported these facts to Team Relations Specialist Person 7 who reviewed statements from the various witnesses and recommended that Employee 1 be discharged for deleting Person 2's fifteen minutes of overtime and for dishonesty. Person 1 testified that the dishonesty charge related to Employee 1's initial denial that he knew deletion of the overtime was wrong. She said that dishonesty ruined her trust in him and, as such, it was serious.

The Employer Handbook reference to Honesty provides as follows:

Honesty. In order to be a strong and healthy Employer we depend on you to be totally honest. The Employer believes strongly that there can be no exception to this rule in light of the nature of our operation.

Based on this, we require you to be totally honest with guests, the Employer, fellow team members, vendors, suppliers, etc. If you should become aware of anyone who is dishonest, it is your responsibility to notify your first assistant or Loss Prevention.

Team members who are not totally honest with the Employer, or have knowledge of other individuals' dishonesty and fail to report this information, will be subject to discipline up to and including termination.

Theft and unauthorized possession of Employer property. Team members involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow team members, vendors, or suppliers will be terminated, regardless of the amount or value of the merchandise, their work record or length of service.

Employer records. Falsification of Employer records, vendor records, guest records, personal records, medical information or any other documents submitted to the Employer in the course of any team member's employment is strictly forbidden. Any team member who knowingly submits false information to the Employer violates this rule and subjects himself/herself to discipline up to and including termination.

Unauthorized markdowns. During the course of business, you may find merchandise or products that may require a price markdown. Under no circumstances are any team members authorized to take a markdown for themselves, other team members, or friends and family without first obtaining a team leader's authorization. The amount of the markdown allowed must be within previously authorized limits or authorized at the time

¹ Person 6's notes were consistent with Person 1's testimony. Employee 1 testified those notes were a good summary but contained only about 70 percent by his estimate of the conversation. Person 6 testified he attempted to record verbatim the conversation at the meeting.

the markdown is taken by their team leader or the store director-in-charge. Violation of the markdown procedure will result in discipline up to and including termination of employment.

Personal checks. A team member who has a personal check returned to Employer due to reasons of a criminal nature (stolen, forged, closed accounts, etc) will face discipline up to and including termination.

II. Discussion and Decision

The stipulated issues to be resolved in this case are: Whether Employer had just cause to discharge Employee 1 and, if not, what shall the remedy be?

The Employer states deletion of overtime violates state and federal wage and hour laws and deprives team members of earned compensation. Consequently it contends it has adopted a strict policy that prohibits the deletion of overtime and states in no uncertain terms that any violation will result in discharge. And it urges that when Store Director Person 1 questioned Employee 1 about his knowledge of this policy, his initial responses were in violation of the Employer's honesty policy and destroyed an important bond of trust between him and her.

Employer argues further that its policy prohibiting overrides to overtime is not ambiguous. The Handbook unequivocally states "overrides cannot be performed to eliminate overtime" and that changing the time a team member actually works is a violation of the law. However, the Employer policy on Reporting Time, while very clear that overtime should not be overridden, also permits override to the payroll reporting system "when absolutely necessary" and "for legitimate reasons." The Employer in effect argues this later language does not apply to overtime but employee overtime is included within "the payroll supporting system." And the policy further provides that "Changing the time a team member actually works is a violation of the federal wage and hour laws." This language is the language most at issue in this case because in Employee 1's mind, and Person 2's as well, the time he attempted to delete was not time

actually worked by Person 2. Employee 1 argues it was the result of a mistaken clock-out time resulting from his prolonged conversation with Person 2 and not from her actually working that time. It was in fact attributable to the conversation he had with Person 2 which, while work related, to a new supervisor may not have been thought of as time worked. In addition, whether Person 2 asked him to try to correct this "incorrect" overtime or not, she had no objection to it being deleted because she too did not think of it as time worked. Employee 1 may reasonably have felt because these fifteen minutes was not time worked, it was not overtime and therefore he had a legitimate reason to delete it. Because he thought this was not overtime, his knowledge or lack of knowledge of the Employer policy on deletion of overtime became unimportant. In addition, he deleted the overtime just minutes before the 12:00 noon hour when payroll records became final and before he talked to either Person 3 or Person 4.

As to the charge of dishonesty, the dishonesty charged was his initial statement to Person 1 that he did not know it was wrong to override overtime. He may or may not at that time have remembered his City A computer training. The Employer clearly emphasized the importance of this policy and just a few others in that training. But even assuming he remembered the training, the policy and the exceptions to it discussed did not clearly address the circumstances with Person 2 where it was not clear to Employee 1 that she had worked overtime.² Employee 1 may not have known what he did was wrong based upon that training. And he may well have come to realize it was wrong, based upon his subsequent discussions with Person 3, Person 4 and Person 1 - hence his admission that he screwed up³.

² The examples of legitimate reasons discussed were where a team member failed to clock in or out and so had to have a team leader override the time clock system to correct the error.

³ The fact that he asked Person 3 how to delete overtime evidences that he did not understand that overtime could not be deleted. And his explanation that the "overtime" resulted from his extended conversation with Person 2 also is consistent with his contention that he did not feel that Person 2 had worked the overtime. His follow-up discussion with Person 4 evidences that his reading of the Handbook and Person 3's statement to him did not fully convince him that he was wrong in trying to delete Person 2's, to him, unearned overtime.

In addition, the Employer policy relating to dishonesty is of necessity vague. It does say team members who are not totally honest will be subject to discipline up to and including termination. But it cannot mean all team members who are not totally honest will be discharged. A white lie to one's spouse about one's working hours is dishonesty but not subject to Employer discipline. More importantly, the types of dishonesty specifically noted in the policy as grounds for termination involve theft or unauthorized possession of Employer property, falsification of Employer records, unauthorized markdowns and criminally bouncing personal checks written to the store. Misunderstanding and the resulting misapplication of an Employer policy does not rise to the level of these dischargeable forms of dishonesty.

The Employer also cites the Employer Termination Appeal Procedure, which under "Arbitrator's Authority", states that if the arbitrator finds an employee violated any uniformly applied lawful Employer rule, policy or procedure established by the Employer for just cause for termination, and also finds that the employee was terminated for that violation (i.e. there was no pretext), then the employee's termination must be upheld. It argues the Employer uniformly enforced policy provides for termination if a team leader deletes overtime.

We have now gone full circle. As is set forth above, the Employer policy permits overrides to the payroll reporting system, which includes overtime, for necessary and legitimate reasons; precluding only changes to the time a team member actually works as that would be a violation of federal wage hour laws. Employee 1's case was a case of first impression. While there was evidence that the Employer had uniformly applied its policy to discharge team leaders who overrode overtime actually worked, there was no evidence that it had applied that policy to team leaders who deleted "overtime" which they reasonably, though incorrectly, viewed at the time as mistakenly recorded on the time clock as overtime because the time was not actually

worked.

Also under the Termination Appeal Procedure, the arbitrator has authority "to determine whether the Employer had just cause for termination." I am persuaded that the Employer did not have just cause to summarily discharge Employee 1, either for his erroneous, but apparently good faith override of Person 2's overtime or for his alleged dishonesty in initially stating to Store Director Person 1 that he did not know it was wrong to override that overtime. The only appropriate remedy for discharge without just cause in this instance is reinstatement of Mr. Employee 1 and payment to Mr. Employee 1 to make him whole for the lost earnings and benefits he suffered as a result of his discharge without just cause.

AWARD

Based upon the foregoing analysis of evidence in the record I find the Employer did not have just cause to discharge Mr. Employee 1. The Employer is hereby ordered to remove the discharge from Mr. Employee 1's employment record, to reinstate Mr. Employee 1 to his former position as a team leader at the City B Store, and to make him whole for his lost earnings and benefits as a result of that discharge. Pursuant to the Termination Appeal Procedure, in calculating what is owing to Mr. Employee 1 under this Award, the Employer is directed to determine the total amount of pay and benefits Mr. Employee 1 would have earned from the Employer from the time of his discharge until his reinstatement pursuant to this Award (hereinafter referred to as the back pay period) and to deduct from that amount Mr. Employee 1's interim earnings, benefits and any other sums paid to him in lieu of employment during the back pay period and the amount, if any, attributable to his failure to mitigate damages. I will retain jurisdiction for sixty days following the issue date of this Award noted below (or any reasonable

timely extension of that sixty days sought by either party and granted by me) to address only matters relating to the implementation of this Award.

Decided this 29th day of July, 2002.

Edward P. Archer,

Arbitrator