

Glendon #6

ARBITRATION

EMPLOYER

-and-

EMPLOYEE

Termination Appeal

SUBJECT

Appeal of termination for repeated abuse of break privileges.

ISSUES

Was Employee terminated for just cause?

CHRONOLOGY

Termination: July 3, 2002

Appeal filed: July 17, 2002

Arbitration hearing: March 10, 2003

Employer's brief received: April 30, 2003

Award issued: June 5, 2003

SUMMARY OF FINDINGS

Because store management was complicit in appellant's recurring break privilege abuses, and in light of her long and otherwise good service to the Employer, those abuses were just cause for less severe discipline but not termination; therefore the appeal must be sustained to this extent that the termination shall be set aside and reduced to a one-week suspension and appellant shall be reinstated and paid all wages she lost from July 10, 2002 until date of reinstatement,

minus interim earnings and other payments she may have received in lieu of employment during that period.

BACKGROUND

Appellant Employee worked for the Employer approximately ten years, the first seven as an hourly team member, the last three as a team leader, a supervisory position in which she supervised four or five hourly team members. The Employer terminated her employment on July 3, 2002 on the ground that she had abused break privileges. She filed an appeal on July 17, 2002 in the Employer's Termination Appeal Procedure, claiming the termination was unjust because there was "no rule or written policy about breaks" and had been "no discussion about discipline or time off." The Employer's denial stated that her termination "was done with just cause for violation of the Employer policy on accurate reporting of time worked, gross negligence in the performance of and serious disregard for leadership responsibilities and the Employer's interests, and excessive misuse of Employer time." Appellant then filed an election to arbitrate. The issue in arbitration is whether she was terminated for just cause.

In summer 2001, store director Person 1 learned of team members' complaints about team leaders spending excessive amounts of time in the smoking break room. To investigate their validity, he had loss prevention personnel install a video camera there. Tapes from July 21 through August 2 revealed that ten team leaders had spent more time there than Person 1 considered appropriate.

Person 1 said forty-hour team leaders such as appellant get two fifteen-minute breaks and a half-hour lunch period each day, the same as is provided contractually for union-represented employees. The Employer's Team Member Handbook addresses this subject as follows:

Break and Meal Periods

Depending on the number of consecutive hours you work, you will be offered an unpaid meal period of at least 30 minutes Paid 15-minute breaks are also scheduled for you Your first assistant will provide further information.

Breaks for team leaders at this store (No. 28) were not "scheduled," however. The team leaders took breaks as and whenever they saw fit and their lines team leaders did not monitor or try to control them. Grievant was one of the ten team leaders in question, shown to have been in the smoking break room forty-three times for a total of thirteen hours and forty-six minutes on seven work days during the surveillance period.

After consultation with labor relations specialist Person 2, Person 1 decided not to take disciplinary action against the ten team leaders but to address the issue generally in a team leaders' meeting and then have lines team leaders talk to them individually. The general meeting took place August 20, 2001. As noted on Person 1's agenda for it, it started with congratulations to appellant and another employee for receiving the "President's Award." The eighth item on that agenda was 'Smoking Breakroom concerns discussed.' Person 1 said he told the group there was a camera in the smoking break room and it had taped several of them, whom he did not name, spending too much time there. He said he told them this was "very serious" and the team leaders in question "would be counseled in regards to realizing that this was not appropriate behavior" by their lines leaders. He said he also told them "the camera would stay in the break room" and "could be turned on at any time." He said he also told them they should not be doing "business" in the break room, but in the store conference room or learning center.

Hard lines team leader Person 3 met with appellant later that day. He said they had a "brief" and "very casual" talk about the "number of minutes" she had been in the break room, during which he "referenced" but did not show her the sheet with exact tabulations of all ten

team leaders' time there. When asked what "direction" he gave her, he said it was "just that we have to watch our visits, you know, you get two 15-minute breaks and a 30-minute lunch, and that we shouldn't go in excess of that." Appellant said she did not remember him specifically saying that, but otherwise generally agreed with his account of the meeting, during which it is undisputed that nothing was said about potential discipline if she again were to exceed those limits.

Person 1 said he believed the team leaders appropriately limited their breaks after the August meetings, but nothing was done to make sure of that. The camera was turned off, and neither he nor the lines leaders made any special effort to monitor or control breaks. Person 1 said it is not his "management style" to be "looking over people's shoulders and I'd prefer that my management staff does not do that either." Although there is a window in the smoking break room door, Person 2 testified that he understood lines leaders did not routinely visit the back of the store where the room is located.

In the spring of 2002 Person 1 heard of renewed complaints about team leaders in the smoking break room. He had the camera reactivated and got reports from loss prevention that seven of them had been there many times for excessive periods in early June. Appellant was one of the seven, shown to have been in the smoking break room six times on June 2 for a total of 2:22 hours; seven times on June 6 for 1:53 hours; six times on June 7 for 2:38 hours; and eight times on June 8 for 2:41 hours.

Person 1 again consulted with Person 2 and decided to terminate six of the seven team leaders, making an exception for the seventh only because she had not been counseled by her lines leader back in August. He said that decision had a "huge impact" on store management, but he made it because he felt "betrayed in regards to giving direction realizing that they're

leadership staff" and their repeated abuse of break privileges "was just gross negligence." Person 2 elaborated, citing the same multiple grounds as were stated in the Employer's response to the appeal.

After the June 2002 surveillance, appellant was interviewed by loss prevention team leader Person 4. According to his written report of that interview, she said she knew team leaders only got two fifteen-minute breaks and a thirty-minute lunch break and "was wrong for being in there" more than that, and "said her problem is she is a follower, and when others ask her to go to break she goes," although she knew that "wasn't a good reason" and "ha[d] to stop doing it." Person 4 also asked her what she thought would happen if one of her team members did what she had done "and she said they would be fired." Person 4 asked her if she would like to write a report of her own, and she did. Her written statement reads as follows:

On June 21, 2002 I was confronted about my breaks being excessive. This is true and I apologize for it. Most of the time I go on break with the other team leaders. Sometimes I am running a register and when I'm going I need to go sit down before I go back to my dept. Sometimes I am on lunch and they call me to run a lane, so I cut my lunch short. Then I'll take a break later. I do my job, along with being a cashier, working out in the garden center & wherever I am asked to work. I will make sure this doesn't happen anymore. I like my job, but there is a lot of stress along with it lately. I sometimes need to get off the floor.

In arbitration, appellant acknowledged Person 4's report and her statement were accurate, but said she felt her termination was unjust because despite ten years employment and a record of good service she was not given a chance to correct her mistakes. She also said she never clearly understood that team leaders were limited to two breaks and lunch, although she admitted that was what she told Person 4 and said she thought Person 1 might have said so in August. Appellant also said much of the time she and other team leaders were in the break room was

devoted to business matters such as preparing team members' assignments and conversation about inter-departmental matters.

Team leader Person 5 (who still works for the Employer in that capacity), gave similar testimony. He also said it usually was not convenient to use the conference room or learning center for such activities. He said he often saw lines leaders, including Person 3, taking extended breaks. He said he never was told team leaders were limited to two fifteen-minute breaks and a thirty-minute lunch. He testified that when he became a team leader the then store director told him that if he got frustrated he should "sit down and take breathers and then come back with a fresh head." He said lines leaders also did business in the break room, citing as examples an inventory manager who spent an entire day in the smoking break room doing paperwork and his meeting with his own first assistant there to receive and discuss his management review.

The Employer argues appellant and other team leaders got ample warning from Person 1 and their lines leaders in August 2001 that they must adhere to specified break limits or face serious disciplinary consequences. In its view, her failure to maintain adherence to such limits was a serious breach of trust, if not outright insubordination. Thus it insists termination was the only appropriate response to her repeated abuse of break privileges, for the reasons and on the grounds set forth in the Employer's initial answer to her appeal and Person 1 and Person 2's testimony.

DISCUSSION AND FINDINGS

Although she was not afforded a second opportunity to correct her abuses of break privileges in 2002, grievant got a first chance in 2001. She apparently took good advantage of it for a while. But serious back-sliding occurred in 2002, as she admits, and despite her quibbles about when and to what extent she was aware of the two-breaks-and-lunch limit, it is clear she

knew that was the rule in June 2002. With that knowledge, she took twenty-seven breaks totaling more than nine and one-half hours in four work days, which was a serious matter and just cause for serious disciplinary action, but it was not just cause for termination for the following reasons.

Under the Employer's Termination Appeal Procedure, the arbitrator may not reduce a termination "to some lesser disciplinary action" if he finds that a "team member violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the team member was terminated for that violation." Here, however, it has not been proven that the rule or policy in question was established as just cause for termination.

The only written embodiment of the two-breaks-and-lunch rule in evidence is the handbook excerpt which merely tells employees they "will be offered an unpaid meal period of at least 30 minutes" and "paid 15-minute breaks [number and timing unspecified] are also scheduled for you." It gives no warning that termination or any other discipline will be imposed for abusing those privileges, and there is no evidence that Person 1 gave any such warning to the team leaders in the August 20 meeting or that Person 3 specifically so warned appellant during their "brief [and] very casual" conversation later that day.

Just as important, what Person 1 seems to consider a benevolent, trusting "management style" could just as well be viewed as complicity in the very abuses by which he felt "betrayed." It is incomprehensible – more important, incredible—that seven to ten team leaders routinely could spend two to four hours a day in the smoking break room without higher management being aware of that. There is a window in the door to that room, so the team leaders' whereabouts and activities would have been readily apparent to anybody who bothered to look. Even if lines leaders did not often go to that part of the store, the team leaders' absence from the floor for such

long periods could not have gone unnoticed, and after August 20, 2001 that obviously would have been a logical place to look for them. Also, according to Person 5's unrefuted testimony, some lines leaders themselves did business and spent extended periods in the same room, so in all likelihood the team leaders were seen spending more time there than they should have, but nothing was done about it after August 2001 until six of them were terminated.

Carefully considering all the evidence, one has an abiding impression that Person 1's management style" was not so much nobly trusting as sloppily permissive and lax habits that were permitted to develop and redevelop only concerned him or his immediate subordinates when hourly team members complained about them. In those circumstances, and in light of appellant's long and otherwise undisputedly good service (signified by the President's Award for which Person 1 congratulated her at the August 20, 2001 meeting), her repeated abuse of break privileges was just cause for discipline no more severe than a suspension equal in duration to the documented period of such abuse in June 2001.

AWARD

The termination appeal of Employee is sustained to the following extent: her termination is set aside and reduced to a one-week disciplinary suspension; the Employer shall reinstate her to the position she held immediately before termination and pay her all wages she lost from July 10, 2002 until reinstatement, minus her earnings from other employment and any unemployment compensation payments or other sums she was paid in lieu of employment during that period, but with no offset attributable to a failure to mitigate damages. The arbitrator retains jurisdiction for the purpose of resolving any dispute between appellant and the Employer regarding back pay computation or, as provided in the Termination Appeal Procedure, to consider an Employer request for monetary award in lieu of reinstatement.

Paul E. Glendon

Arbitrator

June 5, 2003