

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to section 112 of the
Employment Standards *Act* S.B.C.1995, C.38

By

Lordco Parts Ltd.

-and-

The Director of Employment Standards

ADJUDICATOR: E. Casey McCabe

FILE No.: 96/544

DATE OF HEARING: December 20, 1996

DATE OF DECISION: January 7, 1997

DECISION

APPEARANCES

Mr. Robert Nygren Counsel for Lordco Parts Ltd.

Mr. Liam Doherty

Ms. Diane MacLean for the Director of Employment Standards

Mr. Philip Lanyon for himself

Mr. Gary Lanyon

OVERVIEW

This is an appeal by Lordco Parts Ltd., pursuant to section 112 of the *Employment Standard Act* ("*The Act*"), against Determination No. CDET 003804 of the Director of Employment Standards ("The Director") issued on August 23, 1996. In this appeal the employer claims that the employee is not entitled to compensation (termination) pay as the employee had voluntarily quit his position, or, alternatively, the employee was dismissed for just cause.

The employer, Lordco Parts Ltd. ("Lordco"), operates several auto parts stores throughout British Columbia. The employee, Mr. Philip Lanyon ("Lanyon"), was employed at the Edmonds Street store in Burnaby, B.C. Lanyon commenced employment on October 10, 1994 as a parts driver. On or about October 4, 1995 he was promoted to the parts counter. At the time of his termination, February 15, 1996, he was working as a counter man.

Mr. Liam Doherty ("Doherty") is the store manager. Mr. Doherty became the manager on December 1, 1995. He replaced Mr. Guy Olsen. Mr. Doherty and Mr. Olsen had different management styles. Mr. Doherty expected his employees to work with less supervision and more independence. As he put it when he took over "I wouldn't be standing over their shoulders". Mr. Doherty acknowledged that when Mr. Lanyon started working on the counter in October of 1995 that Mr. Olsen had "helped him a lot". Mr. Doherty testified that Lordco, as an auto parts supplier, was very high on customer service. He testified that a counter man may field 120 to 130 telephone calls per day and write up to 60 or more invoices. He recognizes that employees can make mistakes and that occasionally an employee can have a bad day. He acknowledged that mistakes could be made once or twice a week on a regular basis but that he would expect that mistakes would not be a daily occurrence. He further testified that if a part is in stock he would expect a counterman to receive the order and bill the invoice in thirty to forty-five minutes. If the part had to be obtained from a warehouse it would take one and one half to two hours.

He stated that if a wrong part is dispatched to a customer it causes the customer to lose time which in turn may cause a customer to complain which ultimately reflects poorly on Lordco. Mr. Doherty testified that although he understands that once in a while employees will make mistakes he has told them that if they are only 99% sure of a part to call him and he would be available to help. Mr. Doherty testified that if a mistake is made the customer usually calls him to complain rather than the counter man who initially made the error.

Mr. Doherty testified that it usually takes between three and six months for someone to learn the counter man position. He felt it would take a minimum of three months with an average of three to six months. If a person had not grasped the job within six months he would not likely be able to ever fulfil it properly. Mr. Doherty testified that he has a policy of speaking to an employee to draw inconsistencies or deficiencies to the employee's attention before he would document any matters. He stated that if there is a problem that he feels can be corrected with instruction that he wouldn't "black mark" an employee until he had decided that the problem wasn't going away. He stated that once the matter has been written down it is because he had decided to document the issue since the verbal warnings were not working. Mr. Doherty testified that the employer uses a document entitled Employee Warning Report. Mr. Doherty testified that he does not write up every instance of error or deficiency in an employee's work. He will only write up if he thinks that the matter is serious.

Mr. Doherty gave evidence of four instances which he felt required a written notation on Mr. Lanyon's record. The first notation is dated January 24, 1996. The write up noted that Mr. Lanyon was having a relationship with another employee which had been affecting his work and concentration in a negative way. Lanyon had been told about it but nothing had been done by him. Mr. Doherty testified that he raised the issue of the relationship with both the employees. He told them both that he didn't like it and that he felt it was wrong. He attempted to correct the matter by enquiring if there was a vacancy in the Whalley store to which Mr. Lanyon could transfer. There was no vacancy at Whalley or in any other stores that were reasonably close to the Edmonds Street store. Mr. Doherty was concerned that if an employee was not getting along with his girlfriend and the two had to work in the immediate area that it could affect the employees' concentration. He felt that the situation was affecting Mr. Lanyon. He discussed the situation with the two employees and wrote an Employee Warning Report on Mr. Lanyon. However, he stated that although he discussed the situation with Mr. Lanyon he did not present Mr. Lanyon with the written report. He stated that he was attempting to get the two employees to leave the relationship at home.

The second written warning is dated February 2, 1996. In that warning Mr. Doherty states that Mr. Lanyon had been very careless at work and notes four specific incidents. Firstly, there was an incident with Goodyear where an incorrect thermostat was shipped which caused Goodyear to ultimately lose that job. Secondly, in another shipment to Goodyear, Mr. Lanyon neglected to include a fuel hose with other items that had been ordered. In a third incident Mr. Lanyon sent the brake pads for a C Series truck when the customer had ordered brake pads for a G Series van. In a fourth incident a customer complained that he had not received the ordered spark plugs in a timely manner. The customer had ordered the plugs at 11:25 am and the invoice was not billed until 12:05 pm. Mr. Doherty testified that customers will often express their displeasure with verbal complaints and will then send less business to Lordco for a period of time. Mr. Doherty testified

that he had to make extra efforts particularly with Goodyear to appease the customer. The aforementioned incidents occurred in a period of approximately two days. Mr. Doherty testified that he discussed the incidents with Mr. Lanyon but he did not show Mr. Lanyon the written report. He further stated that he did not send this report to head office.

Approximately one week later Mr. Lanyon had another written report noted on his file. This time he had received a speeding ticket when out on a parts delivery. The RCMP officer who issued the ticket had also taken the time to phone the employer and complain about Mr. Lanyon's driving. The employer was very concerned about this incident and, after discussing the incident with Mr. Lanyon, imposed a two day suspension. The suspension was served on February 11 and 12, 1996.

On February 13, 1996 Mr. Lanyon called the employer. He had been scheduled to work that day but, due to his involvement in an automobile accident on February 11, 1996, he was unable to attend work. Mr. Doherty viewed this as a sick call in. Mr. Doherty testified that although Mr. Lanyon was not specifically scheduled for Monday the 13th, he did want Mr. Lanyon to telephone in the hope that it would provide some food for thought for Mr. Lanyon regarding his attitude at work. Mr. Doherty stated that he has nothing personal against Mr. Lanyon; however, he feels that Mr. Lanyon does not concentrate and is too inconsistent with his work.

Mr. Doherty stated that he has a policy whereby an employee is expected to make up a sick day by working on an otherwise scheduled day off. Mr. Lanyon's next scheduled day off was February 14, 1996. Mr. Lanyon did not report for work that day. Mr. Doherty took exception to this because in a meeting in December of 1995 he had expressed the policy of making up sick days by working on a day off to the employees and he fully expected the employees to call in to see if work was available on a regular day off if they had taken a sick day that week. Mr. Doherty testified that Mr. Lanyon did not call him and that he was not aware that Mr. Lanyon had called one of the other employees to tell that employee that he was still too sick to attend work. Mr. Doherty testified that by February 14 he had enough of Mr. Lanyon and didn't see him as an asset to the company. He felt that Mr. Lanyon lacks enthusiasm and that he was not doing a great job on the counter. Mr. Doherty then drew up a document entitled Termination Report. The document was dated February 15, 1996. Mr. Doherty further testified that he felt that he had given sufficient time to Mr. Lanyon to learn the counterman job, that he had received extra help and was still not enthusiastic about his duties.

Mr. Doherty had decided that Mr. Lanyon's employment must end. He called Mr. Lanyon to a meeting. He felt that the store would be better without Mr. Lanyon and that he had cause to terminate Mr. Lanyon's employment. Mr. Doherty stated that he did not want to give Mr. Lanyon a "black mark", that is, for Mr. Lanyon to have a firing on his record. He presented Mr. Lanyon with two options: firstly, he could resign with a recommendation or secondly, be fired with a notation that he was terminated for cause. In the meeting Mr. Doherty reviewed the written reports with Mr. Lanyon. It was the employers position that Mr. Lanyon had chosen the option of quitting. Mr. Doherty testified that he felt that Mr. Lanyon understood from the verbal discussions regarding the prior incidents that he was in trouble. Mr. Doherty stated that he felt that he had made it clear to Mr. Lanyon after the RCMP report that Mr. Lanyon was "on thin ice". However, Mr. Doherty candidly admitted that at no time had he informed Mr. Lanyon that his job was in jeopardy.

unless he improved. Mr. Doherty felt that the February 14 incident reflected Mr. Lanyon's lack of enthusiasm and was a culmination of all previous events.

Mr. Lanyon testified on his own behalf. He stated he started as a driver in October 1994, liked the job, and tried to do the best he could. The former manager, Mr. Olsen, told him he could move up to the counter. He testified that Mr. Olsen was training him and offered a great deal of assistance. He stated that when Mr. Doherty became the manager he was not as helpful as Mr. Olsen had been.

He stated Mr. Doherty left him alone when he felt that he still needed help. In answer to the issue about the relationship with the other employee, Mr. Lanyon stated that he is still in a relationship with that person and that he can only remember one day where they were fighting. He did not think that it affected his job. In answer to the issue arising from the speeding ticket Mr. Doherty testified that he challenged the ticket in court and won. He testified he now has a clear driving record and is expecting to receive the 40% safe driver discount. He stated that other drivers had received speeding tickets but did not receive warning reports from the employer. He stated that in fact that on the day of the driving incident he had gone in a half hour early and worked without pay because he knew that Mr. Doherty was getting upset about the personal relationship with the other employee. He recognized that the two had to work with each other during the day.

Mr. Lanyon acknowledged that Mr. Doherty had stated the sick day policy at a meeting with the employees. However, he felt that he should have been given the option to make up the day. He further testified that he had called in and had spoken to another employee, the employee with whom he had the relationship, and she had informed him that it was a scheduled day off. Mr. Lanyon testified that he did not feel the warning reports were progressive discipline. He felt they were too close together and that he may not given sufficient time to improve. He noted that at one point he had told Mr. Doherty that he needed help but that Mr. Doherty did not seem willing to give him a hand. He felt Mr. Doherty was mad at him the whole time. The request for help was made on the same day that Mr. Doherty discussed the relationship issue with Mr. Lanyon. In response Mr. Doherty testified that he couldn't specifically remember the request.

ISSUE IN TO BE DECIDED

Is Mr. Lanyon owed compensation (termination) pay?

ARGUMENT

The employer takes two positions. Firstly the employer takes the position that Mr. Lanyon voluntarily quit; alternatively, the employer states that it had just cause to terminate Mr. Lanyon and that it had met the test of implementing a system of progressive discipline. With regard to the latter point the employer notes that Mr. Lanyon started off as a driver and became a counter man after approximately one year of employment. He was given a period of time to learn the job and had received direct supervision from the previous manager. The employer argues that the approximately two months he spent working under Mr. Olsen was long enough for him to learn the job. The employer draws attention to the verbal discussions that Mr. Doherty had with Mr. Lanyon in December 1995 and the clear verbal warnings in 1996 with respect to the relationship with the

other employee, the police incident and the breach of the policy regarding call in for available work on a regular day off if there had been a sick day previously taken that week. The employer argues that Mr. Lanyon was well aware of the policy and that it was a deliberate breach for him to phone the employee with whom he was having a relationship rather than Mr. Doherty. The employer argues that the absence of acknowledgement in writing of the incidents upon which the employer relies is not sufficient to disprove the cause. The employer states that Mr. Lanyon is definitely having difficulties meeting the expectations of the job. The employer argues that despite being given the opportunities to meet the expectations of the position Mr. Lanyon still made mistakes. In the face of the police incident and the breach of the call in policy for sick days the employer argues that Mr. Doherty had no recourse but to terminate Mr. Lanyon.

Alternatively, the employer takes the position that if just cause is not shown then Mr. Lanyon voluntarily quit. The employer feels that it gave a benefit option to the employee with that option being to quit with a recommendation or to have an employment record indicate termination for cause without a recommendation. Incases such as this the employer argues that if such a situation is not viewed as a voluntary termination it will not give employees this option in the future. The employer argues that if an employee decides to quit that should be the end of the matter.

For the Director Ms. MacLean argues that the termination speaks for itself. The Director's decision was based on the balance of probabilities. The Director looked at the disciplinary causes not so much to scrutinize the written record but rather to scrutinize the quality of the communication. The Director wanted to be satisfied that the employee knows what is wrong, how to improve and that termination would be a consequence of failure to improve. The Director argues that the quality of communication has not been achieved. The Director notes that the first two warnings are very close in time, January 24 and February 2 respectively, with not much evidence about concrete improvement. The Director said that the driving infraction could well be serious but there is little information about whether the employee was improving on the job. The Director argues that Mr. Lanyon felt he was doing fine and that if he was not doing well he should have been given more time than was allotted to improve. The Director further argues that there was no plan put in effect to bring to the employee's attention what was necessary. The Director further argues that there is no evidence that Mr. Lanyon understood that his job was in jeopardy. With regard to the sick day call in policy the Director argues that it is an informal policy and that it was not made clear to the employees who they were to call. The Director also argues that the verbals were viewed as an informal warning and that the formal written warnings did not get to the employee until it was too late. The Director argues that the quality is not proper progressive discipline.

Mr. Lanyon argues on his own behalf that he felt that he was doing a good job. He liked his work and was trying hard. He stated that the week that he got the speeding ticket things were not going well for him. He states that he did not feel that he had enough warning of potential consequences to his employment and he did not think that he had enough time to improve. Prior to the suspension for the driving incident he states he had only three days to improve and he does not feel that was enough time.

ANALYSIS

I will deal firstly with the issue of just cause. The employer argues that it had just cause to terminate Mr. Lanyon. The employer relies on the disciplinary record which included a relationship with a fellow employee of which the employer disapproved; the mistakes of early February; the driving incident and the call in or scheduling incident. The employer states that Mr. Lanyon is not suitable for the job in that he lacks enthusiasm and after a substantial period of time does not seem able to grasp the duties of counter man.

I view the reasons given by the employer to substantiate the termination on the basis of just cause as being for both culpable and non culpable behavior. If an employer wishes to dismiss an employee for non culpable behavior the employer is obliged to show that it has established a required level of job performance, that the level required was clearly communicated to the employee, that suitable instruction and or supervision was given to the employee to allow the employee to meet the required standard, that the employee was incapable of achieving the required standard and that the employee was warned that failure to meet the standard would jeopardize the employment. I do not feel that the employer in this case effectively communicated to Mr. Lanyon the level of job performance that it expected. Clearly Mr. Lanyon was in a training period for the position of counter man. Mr. Doherty's evidence was that it would take three months at a minimum to achieve an acceptable level of work performance and that the average was three to six months. Mr. Lanyon worked in the job for slightly over four months. He worked under close supervision during the first two months of his employment but when Mr. Doherty became the manager the close supervision was removed. Mr. Doherty testified that he spoke to Mr. Lanyon about his work performance in December but the evidence is that work performance was not raised again until late January or early February. Mr. Lanyon testified that he thought he was doing all right and that he was not concerned until the end of January when he was called in to discuss the issue of the relationship with the other employee. It is at this meeting that Mr. Lanyon asked for help. It is not that Mr. Doherty denied the help but the evidence is that Mr. Lanyon was not being given sufficient supervision to meet the expected standard. Furthermore, a clear standard was not communicated to Mr. Lanyon. Mr. Doherty acknowledged that employees made mistakes and in fact had bad days. He stated that he had about one day a month that he would call a bad day. The complaints regarding Mr. Lanyon's competence are centered around a two day period in early February. Insufficient time was allowed for improvement. Furthermore it is clear that Mr. Doherty did not communicate to Mr. Lanyon that failure to improve would jeopardize his employment. I turn now to the issue of the relationship with the other employee. I find that the employer's policy of forbidding such relationships was not communicated to these employees prior to the commencement of the relationship. I further find that there was only one day when the two employees were not fully cooperative at work. However, I cannot find that the relationship itself was causing such a prolonged problem in the work place that interference by the employer would be justified. That is, a single instance of two employees not getting along well on a single day is not necessarily tied to a personal relationship but could just as well happen between two employees for reasons other than personal.

I must examine the culpable aspect of Mr. Lanyon's behavior. The driving incident was viewed by the employer as serious. Mr. Lanyon testified that he disputed the ticket and was ultimately vindicated in court. He states he now has a clear driving record and has retained his safe driver's

discount. However, that all occurred after the fact. At the time the employer viewed the offense as one meriting suspension not termination. In fact, the employer was prepared to take Mr. Lanyon back on February 13, 1996 but for Mr. Lanyon's sickness. The employer relies on the breach of the call in policy for sickness as a culminating incident. Mr. Lanyon acknowledges that the policy was discussed at an employee meeting in December of 1995. However, Mr. Lanyon did call in and was told that it was his day off. There was no dispute that February 14, 1996 was a regularly scheduled day off for Mr. Lanyon. However, Mr. Doherty states that he should have called him to discuss whether work was available for Mr. Lanyon. Mr. Lanyon states he was still recovering from the injuries due to the car accident and having determined that the 14th was a regular day off felt that there was no need to go to work regardless. Mr. Lanyon felt that the ability to work a day off if you had a previous sick day was an option that was available to an employee. It should be noted that hourly rated employees, such as Mr. Lanyon, are not entitled to sick pay. Against this background I do not see that an employee should be compelled to be sick on his day off which is the effect of the employer's policy. It made no production difference to the employer that Mr. Lanyon did not report or was available for work on February 14. That was his scheduled day off. I see no detriment to the employer in this situation. Mr. Lanyon was prepared to accept the loss of pay for the day on which he was sick. The employer was not short handed because that was a regularly scheduled day off. Leaving aside any question of propriety of the employer's policy I do not see where Mr. Lanyon's actions created a situation that was worthy of discipline.

In such cases the employer is required to show that company policy is clear, reasonable, not ambiguous, consistently applied to all employees, has been brought to the attention of the affected employee and that the employee understood that failure to abide by the policy could be a cause for discipline up to and including discharge. The employer's policy of rescheduling sick days was not in writing. Granted Mr. Lanyon acknowledges that he attended an employee meeting where the policy was announced by Mr. Doherty but the fact that Mr. Lanyon felt it was optional for employees not receiving sick pay shows that the policy had not been clearly communicated. Furthermore there was no evidence that Mr. Lanyon had been informed that a breach if the policy could have disciplinary consequences.

For the above reasons I find that the employer did not have just cause to terminate Mr. Lanyon.

I turn now to the issue of whether Mr. Lanyon quit his employment. A quit has both a subjective and objective element. The subjective element requires an intention by an employee to terminate his employment. The objective element requires that the employee do some act, which may include a verbal statement, which confirms the intention to quit. A situation where an employee is faced with an option of quitting rather than being fired does not, in my view, meet the subjective element. The subjective element is missing where an employee, who otherwise disputes that there is just cause for termination, is pressured or compelled or put under an obligation to resign to preserve a good job reference in the face of a threat to terminate without a favorable recommendation for future employment. For these reasons I do not find that Mr. Lanyon quit his employment.

ORDER

In order, pursuant to Section 115 (1) of the *Act*, that Determination No. CDET 004131 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal