

An appeal

- by -

Isle Three Holding Ltd. operating as Thrifty Foods

- 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: John M. Orr

FILE No.: 2001/885

DATE OF HEARING: April 22, 2002

DATE OF DECISION: May 15, 2002

DECISION

APPEARANCES:

Susan L. Beach	Counsel on behalf of Isle Three Holdings Ltd.
Jerry Lee	On his own behalf
Gerry Omstead	Delegate of the Director

OVERVIEW

This is an appeal by Isle Three Holdings Ltd. operating as Thrifty Foods (“Thriftys”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated November 28, 2001 by the Director of Employment Standards (the “Director”).

Jerry Lee (“Lee”) was employed as a full time grocery clerk in one of the Thrifty Foods grocery stores on Vancouver Island. He was employed from April 28 1997 to April 5 2001 when his employment was terminated for insubordination. Lee made a claim for compensation for length of service but the employer claimed that he was dismissed for just cause and that therefore the obligation for compensation was discharged.

The Director determined that there was not just cause for dismissal and found in favour of the employee. The employer had argued that Lee had disobeyed direct instructions from two supervisors and had received several warnings prior to the final incident. The Director determined that Lee did do what he was asked, be it only after he was asked a number of times. The Director also found that Lee was torn between following policy in performing one task as a priority and following the direct instructions of his supervisors. The Director determined that Lee was doing what he thought was correct and therefore his disobedience was not wilful and was not grounds for dismissal.

FACTS

Thriftys called six witnesses at the hearing and Mr Lee testified. Having heard the witnesses, listened to their evidence carefully, and heard submissions from the parties and the Director, I find that the following are the essential facts in this case.

Lee’s supervisors had expressed verbally to him a number of occasions concerns with his job performance in an effort to improve his work attitude. As there was not notable improvement management moved to a written form of direction in an attempt to motivate Lee to improve his work habits.

On June 24 2000 Lee disobeyed a direct instruction from a supervisor and was suspended for the balance of the workday. On August 15 2000 Lee was given a formal letter of reprimand. On October 4 2000 the grocery manager had a meeting with Lee about his poor performance in stocking his shelves and changed his work schedule to assist him better keep track of his orders. On October 9 2000 Lee became extremely angry at work, used profanities, was rude and abrupt to customers, and insubordinate towards his

supervisor. The supervisor was forced to call in a more senior manager and Lee was once again suspended. He initially refused to leave the workplace. He was suspended for one-week. On October 17, 2000 Lee was given a letter that stated in part:

As we have talked about previously, your lack of cooperation, unprofessionalism, and your verbally abusive manner with management and staff, is unacceptable behaviour at Thrifty Foods...

This is a serious situation, Gerry. As a result you were suspended without pay We have developed the following Action Plan to be implemented immediately:

- you promise to treat co-workers, management and customers in a respectful and professional manner
- you are committed to working as a team member with all Thrifty Foods staff
- you promise to refrain from using foul language in the workplace
- I recommend that you seek counselling for anger management through our Employee Assistance Plan

I will check with you periodically over the next 30 days to discuss your progress.

Failure to honour this Action Plan will result in dismissal

Within the 30 days Lee's supervisor did speak to him on November 9 2000 and warned him that his performance was still not up to standard. Lee was spoken to again in February and three times in March.

On April 2nd 2001 the store had been through a major case lot sale and the loading area was cluttered with cases of product that needed to be moved and stored elsewhere to make room in the loading dock area for the daily deliveries. A supervisor asked Mr Lee to help the other grocery clerks to clear the area. Lee refused. Lee claimed that his priority was to stock his own shelves first. The supervisor told him that he would arrange for extra help stocking Lee's shelves after the cleanup was completed. Lee still refused. The supervisor arranged for another supervisor to attend and speak to Lee. This other supervisor was someone with whom Lee had a relatively good working relationship. The second supervisor again asked Lee to do the cleanup first and told him that if he refused he would be sent home and that there may be further consequences when senior management considered the matter. Lee once again refused and did so in a mocking and taunting manner. The second supervisor once again directed Lee to do the cleanup job immediately.

It is true that Lee finally attended to the loading dock area to assist in the cleanup but, except for one small item, the job had already been completed. In all, Lee had refused four times the directions of his supervisors and after the fifth direction he attended to do the job that it was already completed.

ISSUE

The issue in this case is whether the repeated refusals by Lee to follow the directions of his supervisors in a timely manner were insubordination giving rise to just cause for dismissal.

ANALYSIS

In my opinion the Director's delegate made two errors in the determination. Firstly, the delegate found that Lee had performed the task that he was directed to do despite some initial reluctance. On the evidence before me it was clear that 99% of the task was completed before Lee finally followed the direction of his supervisors. Secondly, the delegate found that Lee had not been sufficiently warned that his job was in jeopardy. I cannot agree with this conclusion. Over the ten months prior to the termination Lee had been warned on numerous occasions about his lack of team effort and insubordination. The letter of October 17th could not have been more clear that future insubordination would result in dismissal.

I am satisfied that the appellant has met the onus of establishing that the determination was wrong. There was an abundance of evidence to establish that on April 2nd 2001 Lee was insubordinate. He disobeyed direct instructions of two supervisors. This was certainly grounds for discipline. In light of the many warnings there could have been no question that further insubordination could result in dismissal. The fact that Lee eventually obeyed the instruction could not undo his blatant disregard for the directions of his supervisors. His behaviour was a repudiation of supervision and went to the heart of the employment contract. I am fully satisfied that the employer had just cause to dismiss Mr. Lee. Therefore, the determination will be cancelled.

ORDER

I order, under section 115 of the *Act*, that the Determination dated November 28 2001 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal