EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

L.E.J. International Trucks Ltd.
(“LEJ” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/441

DATE OF DECISION: October 26, 2000

DECISION

OVERVIEW

This is an appeal brought by L.E.J. International Trucks Ltd. ("LEJ" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 13th, 2000 under file number 078-146 (the "Determination").

The Director's delegate determined that LEJ did *not* have "just cause" to summarily terminate the complainant, Duane Stephens ("Stephens"), and accordingly, was obliged to pay Stephens the sum of $1,923.37 on account of compensation for length of service (2 weeks' wages), concomitant vacation pay and interest.

FACTS

The principal facts are not in dispute. Stephens was employed by LEJ as a truck mechanic. On November 25th, 1998 Stephens drained the oil from a customer's truck but failed to put in fresh oil; this was a mistake on Stephens' part and he acknowledges as much. Further, Stephens checked and initialed an item on a 4-page maintenance work sheet indicating that the oil change had been completed (*i.e.,* the oil drained and replaced) even though the work, obviously, had not been completed. The employer's standard-form maintenance work sheet lists 35 separate maintenance items (plus a tire wear/pressure analysis chart) all of which were either checked off and initialed by Stephens or noted to be "NA" which I take to mean "not applicable". The oil change is part of an item described as "Change engine oil, oil filters, service fuel water separator, and check air filter".

Stephens did not complete the service on the vehicle by the end of his shift; another mechanic completed the requisite service and repair work and upon starting up the vehicle discovered (after it automatically shut down due to lack of oil pressure) that the oil had been drained but not replaced. The situation was rectified and there was no damage to the vehicle although, obviously, but for the automatic shut-down system, there could have been very significant damage for which LEJ would have been liable. On the basis of this error, the employer terminated Stephen's employment and issued a termination letter on November 27th, 1998 citing Stephens' "lack of due diligence" in regard to the November 25th "oil change" incident.

There are some further relevant background facts. On October 8th, 1998 LEJ issued a warning letter to Stephens citing three comparatively minor work-related errors or omissions and complaining about Stephen's slow work pace. By way of written reply to the employer's warning (which states that "any further occasion for disciplinary action will render you liable to discharge"), Stephens accepted responsibility for the three items in question and expressed a desire to improve his performance and abilities as a mechanic but took issue with the complaint about his work pace stating that the employer was unable to present him with any "evidence upon which you base your statement" and complained about not having been invited to a meeting

where his performance was discussed with the other shop employees. Stephen's reply ends: "I will not accept the letter rendering me 'liable for discharge'".

On November 25th, 1998 (the day of the "oil change" incident), LEJ issued Stephens a letter stating that he was to be "laid off" as of December 1st, 1998 due to a shortage of work. Of course, prior to the layoff taking effect on December 1st, Stephens was dismissed.

REASONS FOR APPEAL

In a letter appended to the employer's appeal form (and this is the only substantive submission filed by the employer in this appeal), LEJ states that it believes it had just cause to dismiss Stephens because he:

- failed "to follow proper company procedures to replace the engine oil in an engine while doing a general service on a chassis";
- "failed to complete [the maintenance checklist] correctly by initialing the engine oil complete once oil had been installed, but instead checked it off complete without installing the required oil" and, finally,
- "clearly failed to show due diligence in acting in the best interests of the company by not following proper procedures given to him which could have resulted in a major loss of revenue and customer accounts had the engine seized from no engine oil".

I should add that neither Stephens nor the delegate filed any submission with the Tribunal with respect to the merits of the appeal although the delegate did provide, without further comment, copies of all background documents.

ANALYSIS

The delegate held that given the circumstances, dismissal was an "excessive consequence" and that the employer ought to have imposed "a less severe disciplinary action" (Determination , p. 4). However, in my view, this is not a case about the appropriateness of *disciplinary* action. The delegate accepted--and certainly there is no evidence before me to suggest otherwise--that Stephen's omission was not malicious. In my view this is not a case about misconduct justifying discipline; this is a case about *performance*; more accurately, about a *failure to perform.*

Employers are entitled to set reasonable work rules for their employees. In this case, the employer had a rule that when service work was completed, a service report was to be filled out and initialed by the person doing the work. While one can appreciate that mistakes occur from time to time, the rationale for a checklist is to minimize the occurrence of mistakes and to create a "fail-safe" mechanism so that mistakes that are made can be rectified. I do not wish to harshly criticize Stephens for his failure to replace the drained oil with fresh oil--innocent mistakes are a fact of life. On the other hand, in my view, recording and initialing work as "completed" when

that is manifestly not the case is an entirely different matter. Such action bespeaks of either intention or, somewhat more charitably, gross neglect.

The fact that Stephen's error did not result in any vehicle damage or pecuniary loss to the employer is fortuitous; however, but for the automatic shutdown system in the vehicle, the employer would have suffered a loss of customer goodwill and an attendant loss of revenue over and above its immediate liability for damages suffered by the customer. As noted by Malcolm MacKillop in *Damage Control* (Canada Law Book, 1997): "An isolated incident of sub-standard performance will generally not constitute cause for dismissal *unless the incident demonstrates severe or gross incompetence on the part of the employee or has very serious consequences*" (my *italics*). I believe this latter statement to be a correct summation of the law in this area.

In this case, there were previously documented and acknowledged performance problems, albeit comparatively minor; this was not the first incident of poor performance and/or a failure to follow the employer's work rules. Stephens had been warned, in writing, about his performance deficiencies and his failure to follow company protocols. Stephens' actions on November 25th in failing to add new oil and, more importantly, his falsification of an important company record (the maintenance checklist), amounted, in my view, to a serious defalcation on his part. Stephens' failure to add new oil, however innocent that failure may have been, can only be characterized as a gross error (especially for a trained service technician with, according to Stephens, some 22 years of experience). His initialling of the maintenance record even though the service work was not, in fact, completed, could be characterized as dishonest–at the very least it reflects an extraordinary lack of care. As I previously noted, but for the intervention of the automatic shutoff system, Stephens' actions could have had very severe consequences for the employer.

In my respectful view, the delegate erred in determining that the employer did not have just cause for dismissal.

ORDER

The employer's appeal is allowed. Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal