

IN THE MATTER OF AN EXPEDITED ARBITRATION

BETWEEN:

OVERWAITEA FOOD GROUP.

(the "Employer")

AND:

UNITED FOOD AN COMMERCIAL WORKERS UNION, LOCAL 1518

(the "Union")

(Grievance of A. Anderson)

ARBITRATOR:

HEATHER J. LAING

REPRESENTING THE EMPLOYER:

MICHAEL H. KORBIN

REPRESENTING THE UNION:

THEODORE C. ARSENAULT

DATE OF HEARING

April 18, 19, 30, May 1, and 9, 2002

PLACE OF HEARING:

Vancouver, British Columbia

DATE OF AWARD:

June 5, 2002

AWARD

INTRODUCTION

I was appointed to arbitrate this dispute by the Director, Collective Agreement Arbitration Bureau, pursuant to Section 104 of the *Labour Relations Code*.

On January 29, 2002, Allan Anderson, the grievor, was discharged for alleged theft of product, a Reese Peanut Butter Cup. The questions I must answer are whether there was just and reasonable cause for some form of discipline by the employer, whether discharge was an excessive response in all the circumstances, and, if so, what alternative measure should be substituted as just and equitable?

FACTS

The evidence in this case consists of extensive oral testimony from a large number of witnesses, including the grievor, over five days of hearings, together with a variety of statements and other documents as well as two video tapes, including one of the grievor engaged in the activity that ultimately brought about this grievance. I have carefully reviewed and considered all of the evidence in making my determination. In view of the conclusions I have reached, there is no need to reproduce all of the information provided to me or to comment on every particle of the evidence.

At the time of his termination, Mr. Anderson worked at the Langley Save-on-Foods store as a general clerk. His job was to work freight from the warehouse on to the store shelves. He had access to all areas of the store and the warehouse, except behind the pharmacy counter and, at times, the conference room. Approximately two hundred and thirty bargaining unit employees and five excluded managers work at the Langley Save-on-Foods store. The management offices are located upstairs and the only management presence in the warehouse occurs when managers occasionally walk through.

Given the number of employees, the layout of the store, and the scheduled hours managers work, it is not possible for management to directly monitor employees. Employees are largely unsupervised and trusted not to steal from their employer. In the retail food industry, termination is the usual employer response to theft.

Mr. Anderson is thirty nine years old, married and has three children. He has grade twelve education and has worked for Overwaitea Foods, since 1985. He is active in the Langley community, coaching baseball and hockey. Witnesses called to attest to Mr. Anderson's character described his participation in his children's school and the community in positive terms.

In the fall of 2001, because of the Overwaitea Food Group's concern about "shrinkage" or theft, a pro-active Employee Awareness Initiative was commenced. Doug Hartl, Resource Protection Specialist, gave a series of two hour power point presentations to employees at the Langley Save-on-Foods store. The purpose of the presentation was to share with employees the impact of shrinkage on the company and its employees, to encourage any employee who might contemplate stealing product to have a sober second thought, and to ask for employees' help to stop theft by customers and employees. The seminar was a proactive step, directed in particular at what Mr. Hartl identified as the sixty percent of employees who might steal if given the opportunity. Mr. Anderson attended one of these presentations, on November 14, 2002.

The Langley Save-on-Foods store has an employee Resource Protection Committee. At one its meetings, management brought to the committee's attention an area next to an exit door by the public washroom that was prone to losses. Recently, a digital camera, destined for the reward programme and stored in the area, had been reported missing. The committee suggested an overt camera be placed in the area. On January 22, 2002, Doug Hartl installed the camera.

On January 29, 2002, Mr. Anderson was working general merchandise, non-edibles, from 6:30 a.m. until 2:30 p.m. Products arrive, often wrapped in plastic, in large orange plastic "totes" with lids. The totes are placed on carts called "wheelers". Mr.

Anderson's job was to take his wheeler, on which he had approximately four or five totes that day, and work the products to the store shelves.

That day, January 29, 2002, the five managers of the Langley store held their regularly scheduled Core meeting, upstairs in the conference room. A TV monitor in the conference room, showing images from video cameras in the store, is always on, but is not regularly monitored. One of the topics of discussion at this meeting was a recent fine from WCB for having product in front of an electrical panel. During the meeting, Leith Walton, the Store Manager asked the group to look at images from the camera referred to above, because it showed the area in question. Mr. Walton was zeroing in on clutter in front of the electrical panel when one of the managers said, "what is Alan doing?" They saw Mr. Anderson move an orange carton that was on a full skid located to the right of the electrical panel and the exit door, reach into the back of the carton, and put something into the pouch of his apron. It was 9:12 a.m.

Rob Epp, Assistant Store Manager ran downstairs to the warehouse to see what Mr. Anderson had put into his apron. At 9:13.37, as indicated on the video tape in evidence before me, Mr. Epp found that the orange carton was a box of bags of Snack Size Reese Peanut Butter Cups. Each bag contained fifteen individually wrapped chocolate cups. The Reese box was up against others on the skid. Mr. Epp slid it away from the other boxes and found that the perforated side of the Reese box was opened. This opening was up against other boxes on the skid so that the opening could not be seen without moving the Reese box. Mr. Epp saw that one of the bags in the box had been opened. The store sells Reese snack size bags and packages of three cups, both of which are bar coded. Individually wrapped cups are not sold in the store. They are not bar coded and, therefore, cannot be purchased at the store. There was no general merchandise on the skid.

Mr. Epp then went through the door to the store and walked the length of the store, looking up and down the aisles for Mr. Anderson. He did not see the grievor anywhere. Mr. Epp went to aisle number nine where Mr. Anderson's wheeler was parked. He saw a number of orange totes on the wheeler, one of which was opened

and being used as a garbage tote. Employees usually put the plastic wrap used to bind products and other packaging into one tote as they work. Mr. Epp testified that he saw a chocolate peanut butter cup, out of its wrapping, sitting on a piece of cardboard on top of a tote. In the open tote, he saw the black paper tray in which the chocolate cup sits and the orange wrapper, in which both are packaged, sitting among some garbage.

Using the phone he had with him, Mr. Epp left aisle nine and phoned Mr. Walton to tell him what he had found and that he not yet seen the grievor. While continuing to speak on his phone, Mr. Epp walked back to the warehouse. Through the glass in the swing door between the store and the warehouse, Mr. Epp saw Mr. Anderson in the warehouse again in the location of the Reese box. Mr. Epp asked Mr. Walton to look at the TV screen to see what Mr. Anderson was doing. Mr. Walton said that Mr. Anderson was looking around the same boxes. At 9:18.25, as indicated on the video tape, Mr. Anderson moved the blue cardboard on top of the Reese box, and according to the position of his left shoulder it appears that he reached with his left arm behind the Reese box on the side of the opening. So as not to alert the grievor, Mr. Epp returned to aisle nine.

Another employee, Don Baldwin, was also working in aisle nine. Mr. Epp began to speak to him about the Electronic Article Surveillance system. As they were talking the grievor returned. Mr. Epp felt that the grievor thought something was up because he was inquisitive about what Mr. Epp and Mr. Baldwin were discussing and came over to join in the conversation. According to the video tape of aisle nine, this discussion occurred at 9:24. The conversation continued for approximately five minutes. In order not to raise suspicion, Mr. Epp did not look at Mr. Anderson's wheeler during this conversation. The grievor said nothing to Mr. Epp about the peanut butter cup.

After this conversation, Mr. Epp left aisle nine and phoned the Operations Manager to ask if he could get Mr. Anderson away from his wheeler, in order for Mr. Epp to see if the peanut butter cup was still in the same place. Mr. Epp returned to aisle nine. By this time Mr. Baldwin and the grievor had left. Mr. Epp went to the grievor's wheeler, according to video tape at 9:33.27. The peanut butter cup was gone. He looked where

the packaging had been in the tote and he could not see it. He dug into the garbage tote and found the tray and the wrapper rolled up together. He also saw the chocolate wrapped in clear plastic in the same tote.

Mr. Epp left things as he found them. He phoned Mr. Walton to describe what he had found. Mr. Walton put Mr. Epp through to Mr. Hartl. Mr. Hartl told Mr. Epp to take the product, the plastic, and Mr. Anderson to the conference room and said he would join them in ten minutes.

By this time the grievor and his wheeler had moved to another aisle. At approximately 9:55 a.m., Mr. Epp went to where Mr. Anderson, with his wheeler, was stocking stationary. Mr. Epp dug into the garbage tote on the wheeler and pulled out the wrapper, paper tray, and the cup wrapped in plastic. He said to the grievor, "you made a big mistake". The grievor said, "I guess this is it". Mr. Epp described the grievor as deflated, in shock, and looking as if the air had been sucked out of him. Mr. Epp told the grievor that he needed him to come to the conference room. The grievor asked what was going to happen. Mr. Epp responded that he did not know. Mr. Epp told the grievor that he had been in clear view of the camera and that the entire CORE Team had seen him steal. Mr. Anderson said nothing more, put a couple of index cards on the shelf, and followed Mr. Epp.

In the conference room, Mr. Epp placed the product, the wrapping, and the plastic on the table. A few minutes later, he went to get the grievor a glass of water. Shortly thereafter, an employee who was working in the conference room left, leaving the grievor in the room alone.

Because no shop steward was at work, Mr. Epp asked Mr. Baldwin to come to the conference room. Mr. Epp chose Mr. Baldwin because Mr. Epp understood that the employer and union had selected Mr. Baldwin to attend a joint union/management conference, he had a number of years with the company, and he was familiar with what goes on, on the grocery floor. Mr. Epp did not tell Mr. Baldwin what the meeting was about or give him an opportunity to speak to Mr. Anderson before the meeting began.

Eventually, Mr. Hartl, Mr. Walton, Mr. Epp, Mr. Anderson, and Mr. Baldwin were all in the conference room.

Before continuing on with my account of the facts of this dispute, there is an important procedural issue that must be addressed. The union submits that the audiotape of the investigative or security interview should not be admissible in evidence. The union contends that the grievor did not have a witness of his choice present during the security interview as required by Article 21.03 of the collective agreement, thereby requiring me to treat his statements in the meeting as inadmissible evidence.

The evidence before me is that when Mr. Anderson saw Mr. Baldwin he said, "does he have to be here?" Mr. Hartl told him that Mr. Baldwin was there as a witness. Mr. Baldwin agreed during his testimony that, as recalled by Mr. Epp, Mr. Walton, and Mr. Hartl, it is possible that what was said to the grievor was that there is no shop steward available, someone has to be here, and you are entitled to have anyone you want. Mr. Anderson testified that he knew he was entitled to have a witness of his choice. According to Mr. Anderson, he then sat down and said nothing because he felt he was in enough trouble and did not want to cause any more waves. According to other witnesses, Mr. Anderson said "ok, fine". The evidence before me is that on an earlier occasion, Mr. Baldwin had also been a witness at a disciplinary meeting concerning the grievor.

Having carefully considered the position of the union, I have concluded that, in these circumstances, the audiotape is properly before me as evidence and that the grievor's collective bargaining agreement rights were not violated. Article 21.03 does indeed provide that the grievor may have a witness of his choice present at such a meeting as this. The grievor testified that he was aware of his rights. He could have objected or made another choice but because he believed he was in enough trouble he did not do so. I find that he also added the words ok or fine, by which the employer understood he had agreed to have Mr. Baldwin as his witness. On the face of it, Mr. Baldwin was not an unreasonable choice. There is no evidence of bad faith on the part of the

employer. I find that by Mr. Anderson's actions and words, he must be considered to have acquiesced in the selection of Mr. Baldwin. He cannot now say he was denied his choice when he expressly admits he decided not to object because of the situation he was in.

In addition to the audiotape, a transcription of what happened at the security meeting was before me in evidence. The following are relevant portions of Mr. Hartl's (DH) interview with Mr. Anderson (AA).

.....
DH Okay, you understand, I mean you're a long term employee, you've been here about 18 years 17 years eh. You're aware of all of our Policies and Procedures.

AA Yep

.....
DH Yeah, tell me why, tell me what happened.

AA I don't know why. I don't know why. I just haven't been thinking straight lately and I don't know why, I know better, that's all I can say.

.....
DH Where did you get this item from?

AA Out of a box.

DH But where was the box?

AA On the camera.

DH No, the box isn't on the camera, where was the box that you took this item out of?

AA In the warehouse.

DH Okay and was it a sealed box?

AA No, it was already opened.

.....
DH Okay, how many did you take out of the box?

AA Just one I believe.

DH That's all?

AA I think so.

DH Ok, Why did you take it out of the box?

AA I don't know why. I don't know why.

DH Well you obviously planned on eating it?

AA Well, okay I planned on eating it, yeah.

DH Yeah

AA And I did, but I just, I don't know why I did it.

DH Okay, the only reason why I'm kind of curious, I mean you're aware, your aware, are you aware that we just put a camera in the back?

AA Uh, yes.

.....
AA Like I say, I was aware it was there, I don't know why I did it, like I say I haven't been thinking clearly lately, so I don't, I don't know why, I have no excuse, I have no reasoning for any of it.

- DH No, and you didn't pay for the item, right? I know this might sound silly, but there's a process we have to do right. You didn't pay for it and you obviously didn't have any intention to pay for it. Your intention was just to take and consume it, but you don't know why, is that what you're telling me?
- AA Pretty much
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- DH So why today?
- AA I don't, like I say I don't know, we went for breakfast this morning, I was hungry, I had breakfast and I was hungry and I don't know why, like I say, I just don't know why, if I knew why it wouldn't have happened.
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- DH Why weren't you thinking straight now?
- AA Just pressure at home, just feel the pressure here at work, just all around.
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- DH Okay, you understand that if you take some product and in this case you ripped it open and you were going to consume it, you understand that without, the simple fact of that that's theft eh? Do you understand that?
- AA I understand that.
- DH Okay, there's no real good reason other than that, that you can tell me other than you made a mistake and you're . .
- AA I don't know why I did it, really I don't other than, possibly to consume it, but I didn't even eat it, so I don't even know what that was about.
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- DH You are aware this was all captured on tape, obviously eh?
- AA I did
- DH Okay, and we'll see how many other ones you took, is there any other ones in your cart or? No, okay, all right, it's the end of the interview and it's 22 minutes after 10:00 and I'll shut off the tape here.

At the end of the interview, Mr. Hartl completed a Corrective Action Report. The grievor objected to that part of the report that said he "wrapped the product in plastic and stashed it". He made no other objection. Having concluded that Mr. Anderson had admitted to theft, no further investigation was conducted and Mr. Walton immediately terminated Mr. Anderson for "theft of product, Reese Peanut Butter Cup".

When the Reese box was inspected after the interview the employer found two bags had been opened. Thirteen of the fifteen cups were missing from one bag. Fifteen cups remained in the other opened bag.