

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 -

Downie Timber Ltd.
("Downie Timber")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 97/781

DATE OF HEARING: January 6, 1998

DATE OF DECISION: January 22, 1998

DECISION

APPEARANCES

for Downie Timber Ltd.	Vince Carl and Cheryl Saxon
for the individual	no one appearing

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Downie Timber Ltd. (“Downie Timber”) of a Determination of a delegate of the Director of Employments Standards (the “Director”) dated October 6, 1997. In that Determination, the Director concluded Downie Timber had contravened subsection 21(1) and paragraph 63(2)(b) of the *Act* and ordered Downie Timber to cease contravening the *Act* and to pay an amount of \$5344.22 in respect of the termination of employment of Robert G. Valair (“Valair”).

Downie Timber says their obligation to pay Valair length of service compensation was discharged because Valair had given them just cause for termination.

ISSUES TO BE DECIDED

The main issue to be decided is whether Downie Timber had just cause to terminate Valair. As well, Downie Timber has raised a question about a set off of a credit obligation incurred by Valair while employed by Downie Timber. I only need to address that issue if I conclude Downie Timber did not have just cause to terminate Valair.

FACTS

I heard from three witnesses presented on behalf of Downie Timber: Alan Smythe (“Smythe”), Operations Manager; Robert Marusic (“Marusic”), Planer Superintendent; and Lance Pavoll, an employee of Downie Timber and, at the relevant times, chair of the Employee Grievance Committee.

Valair attended by telephone and I received evidence from him about the events relating to his termination.

Valair was employed by Downie Timber from January 7, 1990 and was terminated in a letter dated October 7, 1996. He last performed any work for Downie Timber on September 13, 1996. On that day he was suspended for an incident, which will be more fully described later, between him and Marusic.

Downie Timber is the most significant and visible employer in Revelstoke. It employs more than two hundred people in its sawmill operations. Valair worked as a planer trimmer. At the time of his suspension and subsequent termination he was on a graduated return to work from a compensable injury that had kept him off work for much of 1996. From time to time Marusic had supervised Valair, but had not done so for over 1½ years.

Downie Timber has an established disciplinary policy which it has outlined in an employee handbook and has distributed to all employees. Valair was aware of the disciplinary policy. Essentially it is a policy of progressive discipline with each incident involving a “safety infraction and/or unacceptable behaviour” leading to increased disciplinary responses, beginning with verbal and written warnings, suspension and, finally, dismissal. Undoubtedly, there are infractions which justify by-passing one or more of these steps and some infractions which justify summary dismissal. Each employee’s disciplinary file is maintained by the company. Valair’s disciplinary file was introduced in evidence.

In 1991 Valair was given a two day suspension for smoking in a non-smoking area and a verbal warning for fighting. That is the extent of the recorded discipline relied upon by Downie Timber to support its decision to terminate Valair following the events of September 11 and 14, 1996. In addition, Downie Timber relied upon evidence of “attitude”, which it said supported a conclusion there was just cause for dismissal. Smythe testified about an incident on September 13, 1996, when, he was informed, Valair angrily tore up a letter which had been given to him concerning an episode that had occurred during his graduated return to work. The episode was not relied upon to support the dismissal, only Valair’s response to the letter given in respect of it. This display of anger had taken place in the administration office with other employees present. Valair does not deny he tore up the letter in anger, but denies the circumstances as related by Smythe and most particularly denies he tore it up in the office with other employees present. Valair says his reaction to receiving the letter from Smythe was a response to an interview he had with Smythe on September 13 about the matters which were later outlined in the letter, during which Smythe had screamed and swore at him, had flung his hard hat at him and had threatened him with termination of employment.

In addition to the record and his attitude, Downie Timber relied upon events which occurred September 11 and 14 involving Valair and Marusic. The first of these events

occurred at and near Valair's apartment on September 11. Marusic was on vacation time off at the time, although Valair was not aware of that. The event began innocently enough. Marusic, who was dropping off a friend who lived in a neighbouring apartment to Valair, saw Valair and said "hello". Valair did not respond and Marusic repeated the greeting. What transpired next was the subject of conflicting evidence between Valair and Marusic. Marusic says Valair told him to "f*** off" and that he should "kick [Marusic's] head in" right there. Valair says he told Marusic to "f*** off" and to leave him alone or else he would kick [Marusic's] head in. I do not need to decide between those two versions as I do not consider them, for the purpose of this decision, to be significantly different. What is significant is that Valair threatened a supervisor of his employer. What is equally significant is that in response to the threat from Valair, Marusic accepted the challenge that had been proffered and invited a confrontation with Valair right there. Valair declined, pointing out to Marusic that he was on a W.C.B. claim.

Valair's initial response to Marusic was triggered by a belief Marusic's friend had been located in the apartment complex close to Valair with instructions to spy on Valair and to report to Marusic any activity that would be inconsistent with the existence of a continuing disabling injury.

Shortly after the initial exchange, Valair approached Marusic. He told him why he had responded as he did and indicated that if his belief was right, he felt he would be justified in kicking Marusic's head in. Marusic denied there was any plot to set Valair up to lose his W.C.B. benefits. Valair replied that if that was so, he apologized for the threat. The apology was not sincere as Valair never lost his belief that Marusic was involved in trying to set him up.

On September 13, Marusic went to the office to pick up his pay cheque. While there he met Smythe, who told him about a comment made by Valair during their meeting earlier that day. Apparently, Valair had questioned why Downie Timber was "on his case" for claiming W.C.B. benefits and compared his situation with that of Marusic, who, said Valair, had claimed compensation benefits for an injury but was never "hassled" because one of the managers liked his sister. Marusic took offence to the comment and told Smythe what had happened on September 11.

After hearing the story, Smythe decided to suspend Valair and called him into a meeting. He asked Valair for an explanation. Initially, Valair refused, taking the position the incident with Marusic was a personal matter. Smythe pressed him for an explanation and threatened to suspend him if he failed to provide one. Valair broke down and, weeping, provided Smythe with his version of the incident between he and Marusic. He was suspended. The suspension was confirmed in a letter dated September 16, 1996 which also indicated an investigation would be conducted when Marusic returned from holidays.

Another letter dated September 20 confirmed the September 11 incident and a subsequent discussion which had taken place on September 14 between Valair and Marusic. The letter continued the suspension “until further notice”.

On September 14, the day following the initial suspension, Valair called Marusic at his home. He asked Marusic why did he told Smythe about their discussion of September 11 and that he thought it had been sorted out between them by the end of it. Marusic said he thought so too, until Smythe told him the comments made by Valair about him and his sister. Valair got angry and called Marusic a “gutless coward” who needed his head bashed in. The discussion ended abruptly at that point. Marusic reported the comment made by Valair to Smythe on September 20.

On October 7, a letter was addressed to Valair from Smythe stating he was terminated for “uttering threats against a supervisor on September 11, 1996 and again on September 14, 1996”.

In October, 1995, Downie Timber purchased a computer for Valair. Valair agreed to repay the purchase price by allowing Downie Timber to deduct \$155.00 from his paycheck each pay period. Valair signed a written authorization for that amount of deduction. There was an outstanding amount owed at the time of his termination.

ANALYSIS

The principles applied by the Tribunal where the issue is termination for “just cause” have been summarized in the following excerpt from Kenneth Kruger, BC EST #D003/97:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 1. A reasonable standard of performance was established and communicated to the employee;
 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 4. The employee continued to be unwilling to meet the standard.
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3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee; and
 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

(at pages 3-4)

The burden in this case lies with Downie Timber. They must persuade me the Determination is wrong when it concluded they did not have just cause to terminate Valair. Showing deficiencies in the reasoning in the Determination does not necessarily meet that burden. I agree the analysis of the delegate is incomplete. It is difficult to understand why the delegate did not take address the events of September 14, 1996 when assessing the circumstances leading to the dismissal. I will reconsider the conclusion based on the facts presented to me.

I have no difficulty concluding Downie Timber has not demonstrated it had just cause based on a cumulation of minor offences.

The two disciplinary matters on the record do not assist Downie Timber in the circumstances of this case. The two day suspension was for conduct which is unrelated to the conduct for which Valair was terminated. The verbal warning Valair received in 1991 was for fighting on company property. The warning addressed the conduct as a safety issue. Both matters occurred more than five years prior to the incident which led to his termination. Downie Timber has not shown Valair was unable to meet the standards required of him in the letters confirming the discipline. In fact, the passage of five years without recurrence of further discipline for the matters related to the suspension and the warning suggests Valair was able to meet the standards demanded by his employer in those

areas. There is insufficient proof that Valair's "attitude" should be accepted as support for his dismissal. There was no evidence Valair had ever been warned that he was required to change his "attitude" and could be terminated if he did not change it. Neither did Downie Timber show the existence of an "attitudinal standard" that had been communicated to him and against which his "attitude" could be measured. In any event, caution is necessary when "attitude" is put forward as justification for dismissal. Attitude is essentially subjective. Its existence can only be determined if it is manifested in outward behaviour. Even if the employer can prove the behaviour does manifest the purported attitude, they must still show that attitude is one which disables, or is likely to disable, the employee from the proper performance of their job. I do not accept that the tearing of the letter, even if it occurred as the employer understood it, to be demonstrative of a general attitude. I view the incident as a momentary outburst of anger, that may have justified some minor discipline in an arbitral setting, but does not constitute or support just cause for dismissal in the circumstances of this case or as the Tribunal has administered that concept under the *Act*.

If Downie Timber is to justify the dismissal of Valair it must do so on the basis that his conduct on September 11 and September 14, 1996 constituted an act of misconduct sufficiently serious to justify summary dismissal.

Threatening a supervisor is a serious matter. Valair says it is alright to do so if the threats occur away from the work place and relate to matters that are personal as between he and Marusic. He is wrong about that. Threatening to assault a supervisor is not acceptable behaviour at any time and will justify, in all but the rarest of circumstances, some response from the employer. The rationale for this view is that the act of threatening is contemptuous of authority and undermines the ability of the employer to manage. The appropriate response from the employer, specifically whether the threat justifies summary dismissal, will be determined by examining the circumstances. In the circumstances of this case, I do not find the misconduct of Valair to be sufficiently serious to justify summary dismissal.

There are a number of reasons why I reach that conclusion. First, the initial threat was not treated as significant by Marusic. He did not tell Smythe about it until Smythe relayed the comment Valair had made about him and his sister. That is confirmed by both Marusic and Valair in their evidence. As well, Marusic did not tell Smythe of the telephone call which was made by Valair on September 14 until September 20, when he returned from vacation time off.

Second, Marusic's response to the threat made on September 11 gave no outward indication that it would be treated as serious misconduct from an employment perspective. His response to that threat was to take off his jacket and reply, "Anytime".

Third, Valair was under considerable pressure relating to his W.C.B. claim. The threats were made by Valair in the context of what he perceived to be a scheme by the employer to adversely affect his W.C.B. benefits, and possibly his employment, and he viewed Marusic to be taking a large part in that scheme. He was both angry and frightened by what he felt was happening. The emotional effect upon him of the pressures he felt are evident in his breaking down and weeping during his meeting with Smythe on September 13.

Fourth, the threat made by Valair could not be viewed as imminently likely. Marusic said in his evidence that Valair told him in the September 11 discussion that he would not fight because he was on a compensation claim. Immediately following the threat made by Valair on September 11, Marusic involved himself in a discussion with Valair during which, in his own words, he tried to “de-escalate” the situation. By the end of the discussion he was satisfied he had done that. For his part, Valair thought it was sorted out between them.

Fifth, Marusic was not warned or otherwise disciplined for his part in the incident. If the employees are to believe Downie Timber does not condone threats of assault against their supervisors at any time, their supervisors must be discouraged from inviting the altercation initiated by the threat. Downie Timber seemed unconcerned that Marusic had accepted the challenge offered in the September 11 threat.

Finally, while Marusic is a supervisor and from time to time would supervise Valair, there is no indication that the threats had any effect on the ability of the employer to manage its business, or on Marusic’s ability to continue to effectively supervise. Valair believed the matter to be unrelated to work and personal to he and Marusic. It was not a direct challenge to the authority of the employer.

For the above reasons, I reject the contention that Downie Timber had just cause to dismiss Valair.

In respect of the credit obligation incurred by Valair while employed at Downie Timber, I conclude Downie Timber may deduct \$155.00 from the amount owed to Valair as length of service compensation. Subsection 22(4) of the *Act* allows employees to arrange for assignments of wages to meet credit obligations, including credit obligations to their employer. The agreement to repay Downie Timber for the purchase price of the computer is considered a credit obligation under that subsection. The credit obligation created by Valair is genuine, was not coerced by the employer and was acknowledged by him as a continuing credit obligation in his evidence. He assigned, in writing, an amount of \$155.00 each pay period to Downie Timber to repay the purchase price of a computer. I am allowed to give effect to that assignment, but I may not expand upon it, as I am prohibited

by subsection 21(1) of the *Act* from allowing any deductions or payments from wages not otherwise authorized by the *Act* or by some other provincial or federal enactment.

Because length of service compensation is payable in its entirety on termination of employment, the full six (6) weeks length of service compensation to which Valair was entitled was payable during the pay period in which the date of termination, October 7, 1996, fell. Downie Timber may deduct the payment agreed by Valair to be deducted from his wages for that pay period, which is \$155.00.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination of the Director, dated October 6, 1997, be varied to show the principal amount owing as \$4721.80. Interest will accrue on that amount in accordance with Section 88 of the *Act*, from the date of termination to the date of payment.

David Stevenson
Adjudicator
Employment Standards Tribunal