BC EST #D084/97

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 -

HILMOE FOREST PRODUCTS LTD.
("Hilmoe")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Alfred C. Kempf
FILE NO.:	96/606
DATE OF HEARING:	February 11, 1997
DATE OF DECISION:	February 21, 1997

DECISION

APPEARANCES

The hearing was held in Penticton, British Columbia on February 11, 1997. Clark Hilmoe represented Hilmoe Forest Products Ltd. and Cory Braun ("Braun") represented himself. Donna Miller was in attendance on behalf of the Director. Clark Hilmoe gave evidence on behalf of Hilmoe but also called evidence from John Bucsck ("Bucsck"), Ken Colp ("Colp"), and Ron Bouwer ("Bouwer").

OVERVIEW

This is an appeal by Hilmoe, pursuant to Section 112 of the Employment Standards Act (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on September 27, 1996. In this appeal Hilmoe claims that it has no liability for severance pay to Braun.

ISSUE TO BE DECIDED

Did Hilmoe give Braun sufficient notice of termination of his employment or, alternatively, did Hilmoe have just cause to dismiss Braun on February 19, 1996.

FACTS

Braun's employment with Hilmoe ended on February 19, 1996. At that time he had worked for Hilmoe for over three years.

Hilmoe operates a sawmill in Rock Creek, British Columbia. Braun worked in a number of positions at Hilmoe and at the time of his dismissal he was employed as a "floater". His position was so called because he performed a number of functions throughout the course of his employment as required by the circumstances. One constant job for him was clean-up at the end of the shift

Clark Hilmoe and Bucsck testified that Braun had originally been a very good employee but in the year or so prior to February 19, 1996, Braun had shown less enthusiasm for his work and needed to be reminded about performing his work properly. These reminders were referred to as warnings although neither witness was able to put a precise date or time to these "warnings". In addition, none of the witnesses were able to describe these warnings other than in a very general way. I accept that Bucsck and Clark Hilmoe criticized Braun's performance from time to time in the last year of his employment but I cannot find that there was any specific clear warning given which would be sufficient for Braun to know exactly what performance standard was expected of him and what he was required to do to reach it.

The warnings were not "progressive". In other words, the warnings were not such that Braun knew, for example, that if there was repetition of some unsatisfactory performance that he would be dismissed.

Hilmoe gave no written warning nor made any record of any discipline.

On February 19, 1996, Clark Hilmoe in passing through the plant during the clean-up phase noticed that the skragg and resaw areas had not been properly cleaned. He pointed this out to Colp who was in charge of clean-up. Colp mentioned this to Braun who was responsible for these areas. There is some conflict in the evidence as to whether at this point Braun had finished the clean-up on the skragg and there is also some conflict in the evidence as to whether the issue of the skragg machine was mentioned at all to Braun. This conflict does not really affect the outcome of this appeal.

It is clear that after the conversation between Colp and Braun that Braun approached Clark Hilmoe with the intention of discussing the remedial work that was required to be done. There were no witnesses to the full conversation between these two or the altercation that followed.

There is some agreement on the evidence as to what occurred. There was a discussion between Clarke Hilmoe and Braun concerning the clean-up required at the resaw. The parties were both standing at or near the resaw. Hilmoe pointed out the sawdust that had not been cleaned. Braun complained that he had too many jobs to do and that therefore he had not been able to clean the sawdust to the satisfaction of Clark Hilmoe. It is at this point that Clark Hilmoe became agitated. Clark Hilmoe testified that Braun was standing in a 27 inch passageway at the time. A truck had arrived to make a pick-up from the mill. Clark Hilmoe had to deal with the truckdriver. He told Braun "he did not have time for this" (the discussion) and attempted to leave. Clark Hilmoe said that in order to get past Braun he had to take him by the arms and move him against a railing where he held him, on his own evidence, for about a minute. During this physical confrontation Braun said words to the effect of "you can't push your employees around like this". Clark Hilmoe responded "if I was going to push you around I'd throw you off this God damned mill". Clark Hilmoe testified that Braun at this point replied "I'd like to see you" although this is denied by Braun.

Clark Hilmoe's evidence is that he then advised Braun that "this is your two weeks notice" however in his written submission he said that he gave Braun unspecified notice of dismissal ("this is your notice"). Braun's evidence is that he was told that he was "relieved of his duties".

After the altercation Clark Hilmoe went off to deal with the truck. Braun put away his broom and told Colp that he had been fired. Colp testified that Braun had told him that he had been fired but denied that he advised Braun to report the matter to the Labour Board as alleged by Braun. Braun, after leaving the premises, attended at his doctor's office to have his back looked at and reported the matter to the RCMP and the "Labour Board". He did not report to work the next day or any day thereafter.

Clark Hilmoe testified that he received notification that Braun had reported the matter to the RCMP and the Employment Standards Branch. In the next week or two he offered to employ Braun for his 3 week notice period. Clark Hilmoe was of the belief that such offer of notice would satisfy Hilmoe's obligations pursuant to the notice and termination provisions of the Act.

Due to his length of service, if there was not cause for dismissal Braun would have been entitled to 3 weeks notice of termination or severance pay in lieu.

There was never any written notice of termination provided by Hilmoe to Braun.

Hilmoe, in a written submission dated October 14, 1996, made the following statements:

> "About a month previous to the incident, Clark had reason to tell Cory that his work was not satisfactory. He just wasn't getting things done. Cory's comment was that he was doing the best he could and told Clark - 'you do what you have to do'."

There was no mention in the written submission of any other disciplinary meeting until the incident of February 19, 1996. At the hearing, however, Clark Hilmoe gave very specific evidence about a meeting which he says took place near the end of January during which he told Braun that he had "just about had enough, and if you don't do it I will have to lay you off".

Bucsck signed the written submission referred to above but there is no reference in that submission to the evidence that Bucsck gave at the hearing to the effect that he regularly told Braun that his performance was not satisfactory and that if it did not improve he would be dismissed.

At the hearing, Clark Hilmoe gave evidence that Braun had a problem with tardiness although this issue was not addressed in the written submission or raised with Braun on February 19, 1996.

There was also some evidence as to the fact that approximately 8 months prior to February, 1996, Braun had been fired and re-hired shortly thereafter.

ANALYSIS

Notice of dismissal

It is necessary to consider whether the notice alleged to have been given is sufficient to discharge Hilmoe's obligation under the Act. Section 63(3) allows an employer to dismiss an employee without cause and severance pay if written notice is provided based on the employee's length of service as determined in section 63(2).

Any oral notice of dismissal given by Hilmoe on February 19, 1996 would not be effective under the Act and would not excuse Hilmoe from the obligation to pay severance pay in lieu. There was no attempt on the part of Hilmoe to give written notice of termination at any time after February 19, 1996. Failure to give written notice of termination is sufficient to dispose of this aspect of the case, however, I should add that I have no hesitation in finding that Clark Hilmoe told Braun that he was dismissed (as opposed to having received notice) on February 19, 1996. The reasons for this finding are as follows:

(a) Clark Hilmoe's evidence as to the amount of notice given at the hearing differed between his written submission and his oral evidence;

(b) He was clearly agitated at the time of the communication of the words;

(c) Braun testified that he had been fired;

(d) Colp who is still employed by Hilmoe agreed that Braun told him within minutes of the altercation that he had been fired;

(e) Braun did not report to work on the following day nor is there any evidence that Hilmoe expected him to report to work.

Cause for dismissal

I turn next to the issue of whether there was cause for dismissal on February 19, 1996. The evidence disclosed that cause could arguably have existed arising out of:

(a) discussions and events during the altercation; or

(b) a pattern of incompetence or unsatisfactory performance.

I find that the incident itself did not justify the dismissal of Braun. The evidence is that Clark Hilmoe was the aggressor in the incident although it is likely that Braun was argumentative and perhaps insolent. However, it is notable that Hilmoe has not in any submission argued that it was the manner of Braun's reaction to criticism on February 19, 1996 that justified the dismissal.

Hilmoe's argument was focused on the fact that Braun had been an unsatisfactory employee for a period of one year.

The Tribunal has accepted the following principles as applying to the issue of dismissal for just cause:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offenses 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:
   (a) a reasonable standard of performance was established and communicated to the employee;
   (b) 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;
   (c) the employee was adequately notified their employment was in jeopardy by continuing failure to meet the standard; and
   (d) the employee continued to be unwilling to meet the standard.

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.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify 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.

Applying this test:

1. I am not satisfied that Hilmoe clearly expressed to Braun the standard of performance that was required of him; and

2. I am not satisfied that Braun was made aware that his performance was viewed as so defective that he would be subject to dismissal if Hilmoe in the future determined the resaw not to be properly cleaned.

I have great reservations about the stated dissatisfaction of Hilmoe given the evidence that Hilmoe was prepared to have Braun to come back to work through a three week notice period.

While it is obvious that Hilmoe believes it had reason to dismiss Braun, Hilmoe has not established that those reasons constitute just cause for dismissal according to the laws that bind this Tribunal. Accordingly, the appeal is dismissed.

ORDER

In summary, I order under Section 115 of the Act, that the Determination #CDET 004111 be confirmed.

_____
ALFRED C. KEMPF
Adjudicator
Employment Standards Tribunal

ACK:cef