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 -

Alstad Brothers Logging Ltd.
("Alstad")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1999/66

DATE OF DECISION: April 7, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Alstad Brothers Logging Ltd. ("Alstad") of a Determination of a delegate of the Director of Employment Standards (the "Director") dated January 19, 1999.

The Determination was issued following a complaint by Harvey B. Critch ("Critch") that he had been terminated without notice and without compensation for length of service. Alstad took the position that Critch was dismissed for just cause and they were not liable for length of service compensation. The Director concluded that just cause was not established and that Alstad was not discharged from its statutory obligation to pay length of service compensation and ordered Alstad to pay an amount of $762.92

Alstad has appealed the conclusion that just cause was not established and, in any event, disputes the amount ordered to be paid as length of service compensation.

ISSUE TO BE DECIDED

The issue raised by the appeal is whether the appellant has met the burden of persuading the Tribunal that the Determination ought to be varied or cancelled because the Director erred in fact or in law in reaching the conclusions upon which the Determination is based.

FACTS

The findings of fact made by the Director are outlined in the Determination:

> The complainant was employed as a skidder operator for the employer from June 2, 1998 to October 7, 1998.
>
> The employer states it spoke to the complainant on numerous occasions about his work and told him if hr did not improve, he'd be fired. The complainant denies being warned about his work habits.
>
> The complainant damaged the employer's crewcab while skidding a log into the landing.
>
> The complainant was then fired by Arnold Alstad.
>
> Total damages were $568.02.

The Director concluded from the above facts that the incident for which the complainant was fired was not, on its own, sufficiently serious to warrant summary dismissal and that the "complainant was not clearly and unequivocally told that his next mishap or that his next safety infraction would result in termination".

ANALYSIS

In its appeal, Alstad reiterates that there was just cause to terminate Critch and views the conclusion of the delegate of the Director as suggesting the information provided by Alstad was not truthful:

> The information we have sent you on this employee seems to mean nothing. Both Arnold and Earl Alstad sent a letter along with one signed by Charles Wurst (bucker). Does this information means nothing? You are taking the word of one person over the word of three people. Are we to assume we are liars?

One of the documents filed with the appeal lists several dates on which "Harvey Critch was warned about his work habits: ie, not watching out for the bucker, being told to start machine in the morning and then being told to go to work instead of sitting there". The letter from Mr. Wurst, an employee of Alstad and co-worker of Critch during his period of employment, says in part:

> *I watched him get into **** several times for not starting and warming up his skidder in the mornings. He would sit in the crew cab until he was told to get out and start it. One such morning Arnold Alstad (boss) blew up at him for this and told him in front of me, to get to work right now or else because he had had enough. We had a safety meeting one day and I told Harvey that he was not looking behind him when he came into the landing and that it was dangerous for me. He was ok for about three drags and then he went back to his old ways of not looking out for me or the loader. Harvey ran into the back of the loader one day. Earl Alstad (boss) was running it at the time and got out and gave him **** for it and told him again to watch where he was going.*

I do not see anywhere in the Determination that the delegate of the Director has rejected the information given to him by Alstad as being untruthful. The question the delegate had to decide was whether, on the basis of all the facts and information given, Alstad had met its burden, which was to show there was just cause to terminate Critch.

In deciding that question, the delegate correctly stated the statutory implications of Section 63 and the principles to be applied in determining whether an employer has established just cause for termination under the *Act*. There was no error made by the delegate in applying the *Act*.

In reality, Alstad simply disagrees with the conclusion of the delegate and with the result. All of the same information relied on by Alstad during the investigation stage is raised again in the appeal. Alstad has not shown that the delegate rejected the information given to him by Alstad as meaningless, or failed to consider relevant information, or considered irrelevant information, in reaching his conclusion that there was no just cause shown in the circumstances of this particular case.

The Tribunal is not a forum for second guessing the conclusions in the Determination. There is a burden on an appellant to show some factual or legal error has been made in the Determination. The error must be shown to arise either from the material on file or from the Determination itself. Alstad has demonstrated no reason to change the conclusion of the delegate that there was no just cause to terminate Critch and the appeal from that conclusion is dismissed.

The appeal does show, however, that the amount ordered to be paid as length of service compensation is excessive. Subsection 63(4) of the *Act* says:

> *63.(4) The amount an employer is liable to pay becomes payable on termination of the employment and is calculated by*
>
> *totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,*
>
> *dividing the total by 8, and*
>
> *multiplying the result by the number of weeks' wages the employer is liable to pay.*

The delegate of the Director based his calculation of length of service compensation on a 40 hour work week at $18.05 an hour. Critch was employed by Alstad from June 2, 1998 to October 7, 1998, a period of 18½ weeks. Records provided by Alstad show that during that period, Critch worked a total of 44½ days, including only 5 weeks in which he worked 40 hours. In the last 8 weeks before his termination, he worked a total of 12½ days. He was paid by the hour and his regular wage was $20.00 an hour.

I do not intend to do an extensive analysis of subsection 63(4) and for that reason, this case has little precedential value. However, I do conclude that during his employment, Critch did not establish "normal . . . hours of work". In his last eight weeks of employment, he established an average of 12.5 hours of work a week. Critch is entitled to one week length of service compensation based on his average hours of work, 12.5 hours, at his regular wage, $20.00 an hour, for a total amount of $250.00. He is also entitled to vacation pay of 4%, or $10.00, on that amount and interest on the full amount from the date of termination of employment.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated January 19, 1999, to be varied to show the amount owing to Critch by Alstad as $260.00, together with any interest that has accrued from the date of termination, according to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal