

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 -

Hills Foods Ltd.
("Hills")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/296

DATE OF HEARING: August 30, 1996

DATE OF DECISION: May 6, 2001

DECISION

APPEARANCES

Mark Hills	on behalf of	Hills Foods Ltd.
Jose Lledo	on his own behalf	
Shelina Shivji	on behalf of	Director of Employment Standards

OVERVIEW

This is an appeal by Hills Foods Ltd. (“Hills”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 001906 which was issued on April 11, 1996 by a delegate of the Director of Employment Standards. In this appeal Hills claims that it had just cause to dismiss Jose Lledo (“Lledo”) from its employment and, therefore, it did not contravene Section 63 of the *Act*.

Adjudication of this appeal falls under the transitional provisions (Section 128) of the *Act*.

Evidence was given under oath or affirmation by Mark Hills and Jose Lledo at the hearing on August 30, 1996.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Hills Foods Ltd. had just cause to terminate Jose Lledo’s employment without notice.

FACTS

The following facts, which are set out in the Reason Schedule attached to the Determination, are not in dispute:

- Lledo was employed by Hills as a driver/warehouse worker from August 8, 1994 to June 19, 1995. His initial wage rate was \$8.00 per hour. His wage rate was \$9.00 per hour effective October 2, 1994.
- Lledo received a letter dated October 3, 1994 from his employer concerning a complaint about driving the company’s 5-ton truck erratically. The letter requested Lledo’s assurance that Hills not receive any more complaints from the public about his driving habits.

- On November 16, 1994 Hills received a complaint from a member of the public concerning the excessive speed at which Hill's Truck was driven on Highway #1. Following a discussion with Lledo, Mark Hills (President of Hills Foods Ltd.) received Lledo's assurance that it would not happen again. Mark Hills made it clear to Lledo that his driving must improve and that he must obey the rules of the road. He also told Lledo: "Next time, you're fired."
- On February 1, 1995 Lledo's wage rate was increased to \$10.00 per hour and he was told to "watch his driving habits" and to pay attention to his personal appearance and grooming.
- On May 8, 1995 Hills received a complaint from a member of the public concerning the way in which Lledo was driving the company's 5-ton truck on the Lion's Gate Bridge.

During April, 1995 Hills provided a uniform to Lledo which he participated in selecting and which he agreed to wear. Mark Hills gave evidence that Lledo also agreed to shave regularly and to pay closer attention to his appearance and personal hygiene. Lledo subsequently refused to wear the uniform.

Mark Hills gave evidence that he spoke to Lledo on May 8, 1995 concerning the most recent complaint about his driving. Hills testified that after discussing the incident he told Lledo "this is the last straw," and "that's it, you've had your warnings...we don't want you in our employment." Hills also testified that he had "separation papers in his hand" to give to Lledo. According to Hills' evidence, Lledo "pleaded for his position back" and he (Hills) decided to give Lledo one final chance.

Lledo's evidence at the hearing concerning the event of May 8, 1995 corroborated most of Hill's evidence in so far as it concerned the complaint about his driving and Hill's intention to dismiss him. Lledo testified that Hills "...had the firing papers in his hand." He also testified that Hills told him "Clean up your act...you'll be fired next time." However, Lledo's evidence differed from Hills' evidence on one point. Lledo testified that, in his opinion, Hills gave him another chance because he was doing a good job.

Hills testified that Lledo was 1 hour late when he arrived at work on May 9, 1995 and again arrived late on May 10, 1995. On both days, Hills testified, Lledo "showed up with a miserable attitude and upset all staff with negative comments around the office." He also testified that he asked Lledo "to grow up and not to swear or use foul language/profanity around the office."

On May 10, 1995 following a discussion with Lledo, Hills gave him a letter which contained the following statements:

From the beginning of your employment till today's date the company has received at least three telephone calls from the driving public sighting specifically our truck when driven by you. The telephone callers in each instance did comment vehemently toward and about your driving actions in and around their vehicle relative to what they considered unsafe driving activity.

We have discussed this matter at length with you and we understand you have committed to change your aggressive, unsafe driving habits.

The company is concerned with its image and customer/consumer appeal. Not only with our product but our service as well. The attire and deportment of our driving staff is of great importance to us because, more often than not, the driver is the only physical contact with the majority of our customers.

The company looks forward to your support and cooperation to meet the challenges of being the best driver you can be. To represent Hills Foods Ltd. in a clean, courteous, efficient and safety conscious manner is your mandate.

Lledo was on vacation from May 11, 1995 to May 20, 1995 inclusive.

Lledo's employment with Hills was terminated on June 19, 1995. According to Mark Hills, Lledo's mood on that day was foul and he upset the staff in the office and warehouse. In a written statement to the Tribunal, Tina Hills states that Lledo was "miserable to the warehouse staff, was throwing boxes in the warehouse and was using profane language." Mark Hills testified that he was accompanied by Marc Jones (General Manager) when he informed Lledo, at approximately 1:30 on June 19th, that his employment was terminated. Hills testified that he dismissed Lledo "due to his past behaviour, irresponsible nature, uncaring attitude towards staff and his poor personal hygiene." Hills emphasized in his testimony that his decision to dismiss Lledo was based "primarily on his attitude, behaviour and deportment" rather than Lledo's involvement in incidents or accidents while driving the company's truck.

Lledo gave evidence that after May 10, 1995 he "got his act together" and did everything he was asked to do by his employer. He also testified that he was told of any complaints about his work between May 10th and June 19th. Lledo testified that he spoke to Marc Jones (General Manager) concerning payment for overtime hours he had worked and Jones told him he would discuss the issue with Mark Hills. Lledo's evidence concerning his conversation with Mark Hills on June 19th was that Hills told him "you're not happy working here, perhaps you should look elsewhere."

ANALYSIS

Section 128 of the *Act* states, in part:

- (3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.
- (4) Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.
- (5) An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to the greater of the following:
 - (a) the number of weeks' wages the employee would have been entitled to under section 42 (3) of the former Act if the employment had been terminated without compliance with section 42 (1) of that Act;
 - (b) the amount the employee is entitled to under section 63 of this Act.
- (6) The employer's liability to an employee referred to in subsection (4) for compensation for length of service is deemed to be discharged if the employee is given notice according to section 42 (1) of the former Act or according to section 63 (3) of his Act, whichever entitles the employee to the longer notice period.

On the facts of this appeal, Section 42 of the former *Act* requires Hills Foods to give Lledo at least 2 weeks' notice or pay an equivalent amount in severance pay unless Lledo's employment was terminated for just cause.

The Determination under appeal requires Hills Foods Ltd. to pay Lledo \$800.00 (two weeks wages) plus interest. The Reason Schedule attached to the Determination concludes with the following rationale:

The Complainant confirms that he was terminated on June 19, 1995. The Complainant alleges that he was terminated because he has asked his employer for a raise and that the Employer was not willing to consider this. The Complainant also alleges that prior to this date, he was not given any indication by the employer that his employment was in jeopardy and that he would be terminated.

The onus of establishing “just cause” rests with the Employer. Based on the documentation provided by the Employer, the officer is mindful that the Employer has established that there were problems with the Complainant and that the Employer may have attempted to utilize the principles of progressive discipline. However, under the circumstances, the officer finds that it would not have been unreasonable for the Employer to provide the Complainant with the required 2 weeks notice. The Complainant alleges that he was not aware that he would be terminated on that day and there is no evidence of a culminating incident that would lead to immediate dismissal. Further, the Employer has not provided evidence that the Complainant received a final warning that stated that further incidents would lead to termination.

Hills argues in its appeal that it had just cause to terminate Lledo’s employment on June 19, 1995 because it had given “numerous warnings” to him about his “attitude and poor performance.” In particular, Hills argues that Lledo understood clearly on May 8, 1995 that he was being given “one final chance.”

As noted earlier, the fundamental issue which I must decide is whether Hills Foods had “just cause” to terminate Lledo’s employment.

The burden of proof for establishing that there is “just cause” to terminate Lledo’s employment rests with Hills. “Just cause” can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, willful misconduct or a significant breach of the workplace policy. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures by the employer. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate “just cause” by proving that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards

Lledo was employed by Hills for ten months. The evidence shows that Hills set reasonable standards of performance (driving habits, personal appearance, deportment) and communicated them clearly to Lledo. Following the discussion with Mark Hills on May 8, 1995 Lledo was clearly aware that his continued employment was in jeopardy if he

did not “clean up his act.” Hills intended this to be and Lledo understood it to be a final warning. Furthermore, Mark Hills’ letter of May 10, 1995 sets out his expectations of Lledo’s driving habits, attire and deportment. Nothing in Lledo’s evidence suggest that he did not understand those expectations nor the consequences of his failure to meet them. I find, therefore, that Lledo was given a final warning, in clear and unequivocal terms, that his employment was in jeopardy.

I also find that Lledo’s actions on June 19, 1995 gave his employer grounds for disciplining him. Therefore, I find that Lledo’s use of profane language and his “throwing boxes around the warehouse” constituted a final or culminating incident. By his own evidence, Lledo had understood clearly that Hills had given him a final warning on May 8, 1995. This was confirmed in writing in Mark Hills’ letter of May 10, 1995.

With respect, for the reasons given above, I do not agree with the Director’s delegate when she concludes that Lledo “...was not given any indication by the employer that his employment was in jeopardy and that he would be terminated” and further that “the employer has not provided evidence that (Lledo) received a final warning that stated that further incidents would lead to termination.”

ORDER

I order, under Section 115 of the *Act*, that Determination #CDET 001906 be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:nc