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 -

Ian McFarlane
("McFarlane" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/394
DATE OF HEARING:	August 24, 1998
DATE OF DECISION:	September 10, 1998

DECISION

APPEARANCES

Mr. Ian McFarlane	on behalf of himself
Mr. Casey Leyenhorst	on behalf of West Central Forest Products Ltd. ("West Central" or the "Employer")

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on May 28, 1998. In the Determination, the Director's delegate found that the Employer had terminated McFarlane's employment for "just cause". The Employer based the termination on a "hit and run" accident at an A&W in Langley on February 16, 1998. McFarlane left the scene of the accident and did not inform his Employer who learned of the incident from the RCMP. As well, the delegate based the Determination on two previous warnings. The Employee appeals the Determination. The Employer maintains that McFarlane was terminated for "just cause".

ISSUE TO BE DECIDED

The issue to be decided in appeal is whether the Employer had just cause to terminate McFarlane's employment.

FACTS

McFarlane had been employed by West Central between January 8, 1992 and February 23, 1998 as a truck driver paid on an hourly basis, $14.00 per hour.

On February 16, 1998, McFarlane was involved in a "hit and run" accident at an A&W in Langley. McFarlane hit the A&W sign while driving the company vehicle. The manager of the A&W saw the accident and observed McFarlane leaving the scene. The manager stopped McFarlane and asked what he was doing. McFarlane told the manager that he was going to park the truck and come back. However, rather than doing that, he drove off. Upon his return to the Employer he did not report the accident. In the result, the Employer did not know of the accident until informed by the RCMP which charged McFarlane with leaving the scene of an accident.

McFarlane does not dispute this. However, he says that when the owner of the Employer, Paul Hamlin, learned of the accident, he suspended him for four days. He also says that Hamlin told him not to look for another job. The operations manager of the Employer, Casey Leyenhorst, was away from the work place when the Employer was informed of the accident. When McFarlane returned to work on February 23, he worked until the end of the day when Leyenhorst gave him the written termination notice. Leyenhorst, who has the authority to hire and fire, explained that he investigated the matter, including obtaining a report from the manager at the A&W where the accident occurred, before making the decision to terminate McFarlane's employment. He also mentioned that he was in the office when McFarlane returned to the Employer's premises on the day of the accident and, at that time, had

asked him if anything had happened. McFarlane did not explain what happened and Leyenhorst did not know what happened until RCMP appeared at the Employer's premises just before closing time.

The two disciplinary letters, referred to in the Determination, in McFarlane's personnel file concerned two matters. One letter, dated April 2, 1997, stated that McFarlane had been absent from work without notice. He signed the letter. At the hearing, McFarlane explained that he did in fact give notice that he was home ill that day and that a former employee of the Employer, a secretary, could testify to that effect. He did not, however, call her to testify at the hearing. The Employer denied receiving a telephone call that McFarlane was unable to come to work due to illness and stated that it did not expect to receive advance notice of absence due to illness. The second letter, dated May 14, 1997, was a written warning for being rude to a customer. The letter contained his signature. McFarlane denied that it was his signature and suggested that the signature had been forged. Leyenhorst denied this and stated that the document came from McFarlane personnel file, had not been forged, and the reason for the signature looking "traced" was that it was signed on the hood of a truck.

Leyenhorst testified that there had been a previous incident where the truck usually driven by McFarlane had been involved in a "hit and run" accident with a pick up truck. He had asked McFarlane if he was the driver which McFarlane denied. At the time, Leyenhorst believed him and had refused to pay for the damage caused to the pick up truck. McFarlane denied that he was involved in this incident and stated that the truck could have been driven by somebody else.

ANALYSIS

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal have been summarized as follows (*Kruger*, BCEST #D003/97):

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
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> 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 instances of minor misconduct, it must show:
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> 1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and 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.

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 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."

In this case, the burden is on McFarlane, the Employee, to persuade me that the Determination should be set aside. For the reasons that follow, I am not satisfied that he has discharged that burden. McFarlane had received warnings about his performance. At the hearing he sought to deny this. Based on the evidence at the hearing, I do not accept McFarlane's explanation regarding the discipline letter dated April 2, 1997. He clearly received the letter as evidenced by his signature. The letter stated that the Employer expected him to give notice if he was going to be absent from work. If Mcfarlane, as he says, called in sick, it is unlikely that the would have told him to give notice in respect of future absences. The Employer said it would not have given Mcfarlane a warning letter for being off due to illness. While Mcfarlane insisted that a former employee could testify to the assertion that he had called in sick, he did not call that former employee to give evidence. Similarly, I do not accept his explanation that his signature on the May 14, 1997 letter had been forged by the Employer. McFarlane argued that the signature appeared to have been "traced". I am unable to determine whether that is the case. The signature may have been somewhat distorted for a variety of reasons. In all of the circumstances, I prefer Leyenhorst's explanation that the letter was signed on the hood of a truck. Having said that, neither of the two disciplinary letters are clear and unequivocal with respect to the consequences of failing to adhere to the standard. Nevertheless, I accept that McFarlane had previous discipline against him.

In my view, the "hit and run" accident and the conduct subsequently was a serious matter which justified the termination of Mcfarlane's employment. The accident itself was not in issue. The Employer was concerned that he had taken off from the scene of an accident, driving a company vehicle. The Employer was also concerned that he not only did not report the accident on his own, but, in fact, lied about it. Upon his return to the Employer on the day of the accident, Leyenhorst asked him if anything had happened. Mcfarlane said no. Leyenhorst testified that in a previous incident he had accepted McFarlane's word that he did not drive the Employer's vehicle. After the "hit and run" at A&W he did not believe Mcfarlane. In short, McFarlane conduct had caused the employer to lose trust in him. At the hearing, McFarlane argued that the reason he did not remain at the accident scene or report it to the Employer was the death of close relatives and illness and that it was an "automatic reaction" on his part. He did not offer any evidence or call any witnesses to corroborate this. However, the Determination stated that he did not offer any explanation for his conduct to the delegate. In all of the circumstances, I do not accept his explanation.

In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 28, 1998 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal