

An appeal

- by -

CITC Timber Corp. and 527748 B.C. Ltd. operating as A.B. Cedar Ltd.
("CITC")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2001/514

DATE OF DECISION: October 29, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "*Act*") brought by CITC Timber Corp ("CITC") of a Determination issued on June 20, 2001 by the Director of Employment Standards (the "Director"). The Director found that CITC owed Kenneth Andrews ("Andrews"), \$1,121.76 for compensation for length of service and interest.

CITC appealed on the grounds that the Director erred in interpreting the facts and the law. The Director found that Andrews lacked credibility on his claims for 'rate of pay' and 'overtime'. However, the Director concluded there was insufficient progressive discipline to warrant dismissal. CITC maintains this finding was contrary to the evidence from both parties and that Andrews had not raised an argument based on insufficient warnings.

ISSUE

Did the Director err in determining that CITC did not have just cause for terminating Andrews' employment and in awarding compensation for length of service?

BACKGROUND

Kevin McKinney is the sole Director of CITC which owns a sawmill and A.B. Cedar Ltd. which markets the product. Andrews was employed from September 1, 1998 to July 21, 2000, at both of McKinney's operations. He had been hired as a working foreman but there is disagreement over whether he remained a foreman throughout his employment.

On July 17, 2000 the Cedar Shake and Shingle Bureau ("bureau") conducted an inspection and found that the shingles produced at the mill failed to meet grade requirements. When McKinney, who was out of town at the time, heard the results of the inspection, he told Andrews to send everyone home. On July 21, 2000, with Andrews' pay cheque, McKinney enclosed a notice terminating his employment.

As a result of the bureau's inspection, CITC had to regrade and repack all of mill product. In a letter in August 2000, McKinney estimated that the cost would be about \$20,000.

SUBMISSIONS

CITC maintained that Andrews was a foreman throughout his employment. As foreman, Andrews was responsible for ensuring that the shingles met the bureau's grade requirements. McKinney stated that, just prior to the bureau's inspection, he and his brother had done separate inspections and found that product was below grade. They notified Andrews on both occasions.

CITC submitted that Andrews had been given warnings about his performance concerning the grade of the shingles, that he did not correct the problems and, accordingly, he was dismissed for just cause.

Andrews contended that as of May 2000, coincidental with an increase in the hourly rate, he and two other employees began to share responsibilities. At that point, his responsibility as foreman ended and it was not reinstated. Andrews also contended that McKinney knew his experience was as a shake worker, not a shingle worker and, therefore, it would not be reasonable to expect him to know the grade requirements. The grade requirements were not posted. At some point prior to the July 2000 inspection, the bureau representative had told Andrews he would forward the grade requirements to CITC but Andrews did not receive them.

Andrews submitted that there were many difficulties at the mill which combined to produce an inferior product. In his view, the product grade was not his responsibility. He stated that the employer's previous inspections had not been brought to his attention although he was aware that there had been yellow ribbons left on some bundles, with a note for the packers to correct the bundles.

ANALYSIS AND DECISION

Section 63 of the *Act* creates a liability for employers to pay compensation based on length of service, unless the employer gives the employee written notice (s. 63(3)(a)), or dismisses the employee for just cause (s. 63(3)(c)).

Liability resulting from length of service

- 63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
- (2) The employer's liability for compensation for length of service increases as follows:
- (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
- (3) The liability is deemed to be discharged if the employee
- (a) is given written notice of termination as follows:
 - (i) one week's notice after 3 consecutive months of employment;
 - (ii) 2 weeks' notice after 12 consecutive months of employment;
 - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
- (c) terminates the employment, retires from employment, or is dismissed for just cause.

In *Hall Pontiac Buick Ltd.*, BCEST #D073/96, the Tribunal stated, page 4:

The burden of proof for established [sic] that there is just cause rests with Hall, the employer. It is generally accepted in common law that for an employer to establish that there is just cause to dismiss an employee, it must meet the following test:

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

It is clear from the various “correction notices” that Hall did not find Chopyk’s work performance to be satisfactory. However, there is nothing in Hall’s submission to the Tribunal which shows that Chopyk was warned clearly that his continued failure to meet Hall’s performance standards would result in his employment being terminated.

The concept of “just cause” requires an employer to inform an employee, clearly and unequivocal [sic], that his or her performance is unacceptable and that failure to meet the employer’s standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

I find that CITC has not established that Andrews was dismissed for just cause. The evidence does not demonstrate that CITC clearly warned Andrews that his employment was in jeopardy if he did not meet certain standards. Even if I accept that CITC notified Andrews of the prior two inspections and problems, this would not amount to setting clear standards or notice that failure to meet the standards could result in termination.

The parties disagreed on whether Andrews was a foreman throughout his employment and whether he should have known the grade requirements. Regardless, if CITC had given adequate

warnings, the shortcomings in Andrews' performance would have been raised and there would have been opportunity to instruct him.

The Director considered the factors set out above, whether there had been progressive discipline, and whether the employer had demonstrated a fundamental breach of the employment contract. The Director observed that the purposes of providing progressive discipline are to give the employee an opportunity to correct his actions and to give the employee notice that his job is at risk.

In a recent decision of the Tribunal, *Jace Holdings Ltd.*, BCEST #D132/01, Adjudicator John Orr addressed the Director's submissions on progressive discipline and noted that they apply in the context of arbitrations under the *Labour Standards Act*, but not under the *Employment Standards Act*. In other decisions, EST Adjudicators have given consideration to whether progressive discipline had been applied in determining whether an employee had been dismissed for just cause. It is apparent that the Tribunal has expressed differing views.

I did not receive submissions on progressive discipline. I accept that Adjudicator Orr may be correct in saying that consideration of progressive discipline has no place in decisions on whether an employee was dismissed for cause and, thus, entitled to compensation under s. 63 of the *Employment Standards Act*. If he is correct, that would indicate a fundamental flaw in the Director's reasoning in this case.

However, as I read the Director's Determination, it is outlining basically the same principles and expectations that are defined in the *Hall* case. That is, set standards, communicate the standards, give an employee warnings when standards are not, warn that employment is in jeopardy, and give a reasonable time to meet the standards. That procedure is the accepted basis for establishing just cause, accepted by Adjudicator Orr in the *Jace* decision "for unsatisfactory job performance, incompetence, or minor infractions of workplace rules."

CITC's appeal noted the Director's reliance on the failure to meet progressive discipline standards and that Andrews had not raised an argument based on insufficient warnings. The fact that it was not raised in Andrews submissions is not determinative. Regardless of the parties' submissions, the Director is responsible for applying the law. The law as applied to this case, required that CITC take the steps outlined in the *Hall* case. The Director found that CITC did not do that.

Although the Director may have been incorrect in framing the Determination as a "progressive discipline" case, I find that the Director's result accords with the accepted parameters of "just cause" dismissal.

I find that the Director did not err in determining that Andrews' employment was terminated without just cause. Accordingly, Andrews is entitled to compensation pursuant to section 63.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued June 20, 2001.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal