

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 -

Kalum Kabs Ltd.
("Kalum")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 98/461

DATE OF HEARING: September 21, 1998

DATE OF DECISION: January 14, 1998

DECISION

APPEARANCES

Roger Bal	for the Appellant
Richard Ambridge	the Respondent
John Dafoe	for the Director of Employment Standards

OVERVIEW

This is an appeal by Kalum Kabs Ltd. (“Kalum”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”). The appeal is from a Determination issued by John Dafoe, a delegate of the Director of Employment Standards on July 10, 1998. The Determination required Kalum to pay wages, compensation for length of service and other compensation to its former employee, Richard Ambridge, (“Ambridge”), in the total amount of \$5,695.75. Kalum filed an appeal on July 20, 1998. An oral hearing was held in Terrace, BC on September 21, 1998.

FACTS

Ambridge was employed by Kalum as a taxi driver and dispatcher from October 23, 1986 to June 23, 1997, when he was dismissed. He was paid on a commission basis for driving taxi, at the rate of 40% of the taxi’s earnings. When he acted as dispatcher, he was paid an hourly wages that varied over his employment. He was dismissed when Kalum learned he had asked the dispatcher to “write off” a trip for which he had not been paid, when in fact Kalum alleges Ambridge received a piece of jewelry as payment for the trip.

Ambridge alleges that he was not paid overtime wages, particularly on occasions when he was required to dispatch on the same day he was driving taxi. Ambridge also alleges that cash shortages during his shift were improperly deducted from his pay cheques, and that Kalum failed to pay him properly for statutory holidays and for regular holiday pay. Regarding his dismissal, Ambridge says he was dispatched to take a male passenger to Jenny Parnell’s residence in the Jackpine flats area of Terrace at 1:00 a.m. on June 22, 1997, and the dispatcher also instructed him to purchase a package of cigarettes for Ms. Parnell . When Ambridge arrived at Jackpine flats neither the passenger nor Ms. Parnell had any money to pay the fare. While the employer alleges Ambridge then received some earrings from Ms. Parnell, Ambridge says he has no recollection of receiving jewelry and instead hurried back to Kalum’s offices, as he had just been advised by the dispatcher that the windshield of his car had just been smashed where it had been parked at the beginning of his shift. Ambridge says this was the second time within a month that his windshield had been broken in that manner.

Kalum alleges through its witness Roger Bal that it was approached by Ms. Parnell a few days after Mr. Ambridge's June 22, 1997 trip. Ms. Parnell presented money to Mr. Bal to pay for the trip, and asked for her earrings back. When Mr. Bal spoke with Mr. Ambridge about the matter, Mr. Ambridge stated he had no recollection of making the trip, and that he had not taken any jewelry from Ms. Parnell. It is interesting to note that Kalum initially put to Mr. Ambridge that he had taken Ms. Parnell as his passenger in the night in question. Kalum filed a sworn statement from Ms. Parnell in which Ms. Parnell states that she was a passenger that night. This affidavit and others were considered by the Director's delegate in making his Determination. At the hearing of this appeal, however, Ms. Parnell was not called as a witness and the tenor of the evidence I did hear from both parties was that Ms. Parnell was *not* a passenger on the night in question.

In any event, in response to Mr. Ambridge's denial of the trip, and considering that Mr. Ambridge had asked the dispatcher to "write off" any record of the trip, Mr. Bal terminated Mr. Ambridge on the basis that he had effectively stolen the earrings and had lied about the entire incident. Kalum did call Allen Jones, who is Ms. Parnell's landlord. Mr. Jones testified that a person identified as Mr. Ambridge came to Ms. Parnell's residence a few days after the night in question and dropped off Ms. Parnell's earrings. Mr. Jones said that in dropping off the earrings, Mr. Ambridge said he had "got fired over the deal."

ISSUES TO BE DECIDED

This appeal requires me to decide whether the Determination under appeal is correct regarding; a) whether Kalum owes wages and overtime pay to Ambridge; b) whether Kalum owes holiday pay and statutory holiday pay to Ambridge; c) whether Kalum had properly deducted amounts of money from Ambridge's pay; and d) whether Kalum had just cause to terminate Ambridge and so whether it is liable to pay compensation for length of service.

ANALYSIS

The Director's delegate conducted a thorough investigation of Mr. Ambridge's complaint. Not only was a detailed review of Kalum's dispatch logs carried out on the wage and overtime issue, but several witnesses were interviewed in addition to the sworn statements filed by Kalum. In conducting the investigation, the Director's delegate found that the logs did not clearly indicate Mr. Ambridge's hours of work, and also that the logs appeared to have been tampered with insofar as records for Mr. Ambridge are concerned.

At the appeal hearing, I invited Kalum to point out how they felt the Determination was in error on the wage and overtime issued. In reply, Mr. Bal stated he did not know, because that would entail going through all of the company records before me at the hearing. Instead, Kalum had prepared their own calculations, which it presented through an accountant who had based his calculations on hours of work provided by Kalum. It was

then agreed that to test the accuracy of the Director's calculations, we would select several days on which Mr. Ambridge worked and in my presence, calculate the hours of work for each day. Some very disturbing results were achieved in so doing.

We first selected January 1, 1995, a day on which the Director found Mr. Ambridge worked 12 hours, but Kalum says he worked 10 hours. In reviewing the records in this way, I find it to be a fact that Mr. Ambridge worked 11 hours that day. We next selected January 8, 1995, a day on which Kalum says Mr. Ambridge worked 7 hours and the Director says he worked 10 hours. In reviewing these records, I found that the call designation "R-9" referred to Mr. Ambridge and his taxi, and that on one entry the letters "R-9" were covered up by white-out. No expert evidence was called to address this problem of possible falsification of the records, but I am satisfied from my own close examination that those letters were indeed covered up. The significance of this is that Mr. Ambridge's hours of work would appear to be less on that day, because a trip he took at 3:45 AM was covered up by white-out. Further, we found that a rest break was recorded for Mr. Ambridge between 11:10 PM and 12:15 AM, when from our examination of the dispatch logs for other drivers on this date, no other breaks were recorded for any other driver. I noted that the record of this break was made in red ink, which was a different colour of ink than that used to make all of the entries that day, and from my own observation, the handwriting in which the break was recorded appeared to be quite different from the handwriting in which all other entries were made that day. At the conclusion of reviewing the log for January 8, 1995, Mr. Bal for Kalum acknowledged that the Director's calculations were correct and Mr. Ambridge had indeed worked 10 hours that day.

We reviewed Kalum's records for January 22, 1995 and again I found that "R-9" had been covered with white-out and another driver's designation recorded on top. Mr. Bal acknowledged that Kalum's allegation that Mr. Ambridge worked 5 hours that day is not borne out by the records, which support the Director's finding that 7.25 hours were worked that day. In reviewing the records for January 29, Kalum again acknowledged that the Director's calculation of 13 hours worked was correct. When we considered the records for February 5, 1995, I found that "R-9" was covered by white-out at two different times. The Director says Mr. Ambridge worked 11 hours that day, while Kalum says he worked only 4 hours. I find the Director's calculation is correct. In reviewing records for February 12, 1995, the Director says Mr. Ambridge worked 10.5 hours, while Kalum says he worked 8 hours. I again found a break recorded for Mr. Ambridge on this day, made in different ink and in different handwriting from the remainder of the record. I find the Director's calculation is correct.

Finally, we reviewed the record for February 19, 1995, a day on which the Director says Mr. Ambridge worked 11 hours and Kalum says he worked 7.75 hours. On this date, I found entries were made in red ink and different handwriting, indicating that Mr. Ambridge had commenced work later and stopped work earlier than the trip records actually indicate. I was easily satisfied that the records indicated Mr. Ambridge worked 11 hours on that date, and I am satisfied that entries were made in these records in a different hand,

expressly in an effort to minimize the hours of work recorded in the dispatch log for Mr. Ambridge. Again, no other employees working on this day had any entries made on their trips in red ink or in different handwriting.

On the basis of the evidence and argument presented by Kalum to attack the Director's calculation of hours worked by Mr. Ambridge, Kalum has failed to make out even a *prima-facie* case that the Director's calculations are in error. Instead, the evidence I heard convinced me that Kalum had indeed falsified its records with the sole purpose of minimizing Mr. Ambridge's claim to wages and overtime. Kalum's alteration of its dispatch log in this case amounts to a deliberate effort to thwart the Director's investigation. If there is any doubt or ambiguity at all in any of the calculations made by the Director, I find that the Director's calculations should nonetheless be preferred over Kalum's because of the extent to which Kalum's records have been falsified.

Regarding the deduction of cash shortages from Mr. Ambridge's pay, Section 21 of the *Act* prohibits the deduction of any amounts from employee wages except as expressly allowed in the *Act*. The only possible way for Kalum to have properly deducted amounts from Mr. Ambridge's pay would have been by way of a written assignment of wages, and there is no evidence or suggestion of such an assignment in this case.

At the appeal, Kalum did not challenge the Director's calculation of holiday pay and statutory holiday pay owing to Mr. Ambridge. In any event, my findings regarding falsification of records would lead me to reject any submissions Kalum might have made on this point.

Finally, I must resolve the issue of whether Mr. Ambridge was terminated for just cause. I have already noted that Kalum advanced evidence that Mr. Ambridge's passenger on June 22, 1997 was Ms. Parnell, when at the hearing it appeared that Mr. Ambridge had taken a male passenger. This accords with the fact that the dispatcher had asked Mr. Ambridge to pick up cigarettes and bring them to Ms. Parnell's residence in the course of delivering his passenger there. I am troubled, however, by the evidence that Mr. Ambridge had returned earnings to Ms. Parnell residence after being terminated. The Director's delegate experienced similar difficulty determining exactly what happened prior to Mr. Ambridge's dismissal, and states the following in his Determination:

There are enough contradictions in the evidence regarding what occurred on 22 June 1997 to make it extremely difficult to discern precisely what happened. Several conclusions can be reached despite this confusion. First it is clear that Ambridge was guilty of very poor judgment in asking the dispatcher to white out the trip. This is a clear breach of company policy which was well understood by Ambridge. The Employer is entitled to an accurate record of trips, paid or unpaid, taken in their cabs driven by their employees. The Employer argues that Ambridge was fired for theft, but there is no evidence whatsoever of anything that amounted to theft in what occurred. If we accept that Ambridge held Parnell's earrings as collateral,

a fact not firmly established by the evidence, we must view this in the context of other statements that the earrings were offered willingly and swiftly returned. Ambridge is an employee of long service who has had a history of some conflict with the Employer, mostly occurring subsequent to his filing a claim for overtime while he was still employed by the Employer. Ambridge may also be guilty of not being completely forthcoming with the Employer, but the question is whether this adds up to just cause for dismissal. I cannot find that the Employer has proved that he had just cause for dismissal and accordingly I find that Ambridge is entitled to compensation for length of service in the amount of 8 weeks wages pursuant to section 63 of the *Employment Standards Act* and as set out in the attached calculation.

The burden rests with the appellant to present evidence and argument which casts doubt on the findings made in the Determination. Considering what evidence I heard on the appeal, and noting that the key participant, Ms. Parnell, was not called as a witness before me, I find that Kalum has basically restated the facts presented to the Director's delegate before he made the Determination. Accepting the facts as found by the Director's delegate, and hearing Kalum's argument that it had just cause for dismissing Mr. Ambridge, I am not convinced the Determination contains any error on the dismissal issue. While Mr. Ambridge committed a serious error in asking the dispatcher to "write off" the trip, that decision was up to the dispatcher. Mr. Ambridge did not commit any fraud or breach of trust in so doing - he merely made a request that was granted by the dispatcher. The dispatcher could easily have refused that request, and the matter would have ended there. I can only presume the dispatcher has some authority over Mr. Ambridge in that regard, and no one has suggested that Mr. Ambridge coerced the dispatcher in any way to write off the trip. As the Director's delegate points out, even if some earrings had been taken as collateral by Mr. Ambridge, that is in a way a matter between Mr. Ambridge and his impecunious fare. I agree that Mr. Ambridge did not commit any theft, even if he had taken the earrings. His only wrongdoing, if we accept all of the employer's allegations, was that he told the employer he had no recollection of making the trip or taking the earrings. This wrongdoing must be considered in the context of an employee of long service, who presumably had not previously had any disciplinary steps taken against him for similar conduct. I did not hear much evidence from the employer as to what discipline had been taken against Mr. Ambridge prior to his dismissal but from what I did hear, it appears any prior discipline related to minor infractions such as the company dress code. And as Mr. Dafoe notes, it appears undisputed that all prior disciplinary actions by the employer occurred after Mr. Ambridge had filed a complaint with the Director regarding overtime pay.

I must conclude by noting again the unsavory flavour of Kalum's evidence on the wage and overtime issue. I am faced by an employer who terminated its employee for an alleged breach of trust by lying, when at the appeal I found the employer to be guilty of miscreance to an astonishing degree. While I cannot use the employer's subsequent mendacious behavior to rebut its dismissal of Mr. Ambridge, I can make a finding that I have doubt about the employer's evidence wherever it is in conflict with Mr. Ambridge. To the extent

that the employer has deliberately falsified records to defeat Mr. Ambridge's claim to wages and overtime, I reject the employer's evidence wherever it differs from Mr. Ambridge's testimony on the dismissal issue. I agree with the Director's delegate that the proper course of action for the employer was to impose some discipline on Mr. Ambridge which stopped short of dismissal.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Dafoe is correct and the appeal should be dismissed. Pursuant to Section 115 of the *Act*, I order that the Determination dated April 23, 1998 be confirmed, together with Section 88 of the *Act*.

Ian Lawson
Adjudicator
Employment Standards Tribunal

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