

**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 -

Benny's Bagels & Pretzel Works Inc.  
("Benny's Bagels")

Of a Determination issued by

**THE DIRECTOR OF EMPLOYMENT STANDARDS**

(The "Director")

**ADJUDICATOR:** Ralph Sollis

**FILE NO:** 96/055

**DATE OF HEARING:** March 28, 1996

**DATE OF DECISION:** April 2, 1996

**DECISION**

**APPEARANCES**

Colin Gareau	for Benny's Bagels & Pretzel Works Inc.
Philip Martin Swagar	On his own Behalf
Ron. Corrigan	For the Director of Employment Standards

**OVERVIEW**

This is an appeal by Benny's Bagels & Pretzel Works Inc. ("Benny's Bagels") pursuant to Section 112 of the Employment Standards Act (the "Act") against Determination CDET000357 issued by the Director of Employment Standards (the "Director") on December 7, 1995. In this appeal Benny's Bagels claim that severance pay is not owed to Philip Martin Swagar ("Swagar")

A hearing was held at 940 Blanshard Street, Victoria, BC on March 28, 1996.

**FACTS**

To assist in the efficient hearing of the appeal, Mr. Gareau ("Gareau") and Swagar agreed that the following facts are not in dispute.

1. Swagar was employed by Benny's Bagels and/or Benny's Bagels Ltd. from either April 15 or May 15, 1993 to November 10, 1994.

2. If 2 weeks' Severance Pay is owing to Swagar, \$1,153.84 is the correct amount

Swagar requested that if severance pay is owing to himself, that interest be included in the Determination.

Mr. Corrigan ("Corrigan") stated that under Section 88 of the Act, interest would accrue from the date the Act was proclaimed (November 1, 1995) to the date of the Tribunal's decision.

In dispute was whether Benny's Bagels had just cause to terminate Swagar's employment without 2 weeks' written notice or the equivalent severance pay. Swagar's employment ended before November 1, 1995 (the date on which the Act was proclaimed into force) and therefore the relevant statute for purposes of determining the employer's liability is the Employment Standards Act (S.B.C. Chapter 10) ("the former Act"). The relevant parts of Section 42 and 43 of the former Act state:

**NOTICE REQUIRED**

42. (i) An employer shall not terminate an employee without giving the employee, in writing, at least

(a) Two weeks' notice where the employee has completed a period of employment of at least 6 consecutive months, and

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**NOTICE NOT REQUIRED**

43. Section 42 does not apply to  
(a) An employee discharged for just cause.

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The evidence of Gareau representing Benny's Bagels was that Swagar was initially hired to make bagels at the Bay Street production facility. In January, 1994 Swagar was promoted to working Manager of the Bay Street production and retail outlet and changed from hourly to salary basis. Benny's Bagels major business, (at least 80%) was in Vancouver where Gareau spent the majority of his time.

Swagar was expected to operate the bagel machine three days a week and the other two days to complete paper work, machine maintenance and other duties. During either late October or early November, 1994 Gareau became suspicious about the Bay Street operation when the total hours of all employees were excessive. At about the same time Gareau had a telephone call from Nancy Beamish, who worked at the storefront of Bay Street, stating something was very wrong concerning Swagar's hours of work. Gareau met with Swagar and the staff at Bay Street on the following day and testified that several employees alleged that Swagar was marking down hours that he had not worked, particularly on Oct. 20, and Nov. 1, 1994. Because of this breach of trust with Swagar, he terminated his employment on November 10, 1994 without notice or severance pay.

Swagar's evidence was that after his promotion in January, 1994 he was to act as a buffer for Gareau for all three operations in Victoria. Specifically, he was to manage the Bay Street production and Retail and also to assist in the Hillside Mall and Market Square operations. The latter had its own manager but Swagar was to assist her in providing, when necessary, supplies or to look after major issues. Swagar emphasized that although his major responsibilities were at the Bay Street facilities, he did visit the other two sites on a regular basis. After assuming this new position, Swagar did not record his hours of work for the first few weeks as he was paid a salary of \$2500.00 per month. Gareau requested that he submit his hours on the weekly time sheet. Apparently there was some discussion concerning extra hours when Swagar was repairing or adjusting the controls on the freezer.

Lastly, Swagar testified that he did some of the paper work from his home and that he visited all three operations in Victoria and the employees of Bay Street would be unaware of his hours of work when leaving those premises.

## **ARGUMENTS**

Gareau argues that Swagar was terminated for just cause as provided in Section 43 (a) of the former Act.

## **ANALYSIS**

As noted in my overview this appeal is to be decided under the provisions of Section 42 and 43 of the former Act.

Section 42 of the former Act requires that an employer shall not terminate an employee without giving notice in writing. However, Section 43 (a) of the former Act states that Section 42 does not apply to "... an employee discharged for just cause."

The burden of proof for establishing that Swagar was dismissed for just cause rests with Benny's Bagels.

It is widely accepted that in an order to sustain a dismissal for just cause, the employer must establish that:

1. Reasonable standards of performance have been set and communicated to the employee.
2. Progressive discipline has been given to the employee for failure to meet such standards, which includes insuring that the employee has been made clearly aware that the continued employment is in jeopardy if such standards are breached.
3. A reasonable period of time has been given to the employee to meet such standards;  
and
4. The employee did not meet these standards.

Benny's Bagels did not give progressive discipline or conform with the above standards but relied on the culminating incident being the alleged falsification of hours of work on October 20, 1994 and November 1, 1994. Gareau argues that such falsification constitutes theft by Swagar and that neither notice or progressive discipline was necessary.

I disagree. If there was a problem with Swagar's time record then such differences should have been discussed with the employee and appropriate standards established as to how he was to report his hours of work. If there was an error in his time record, it was not of sufficient magnitude to constitute dismissal without notice.

Lastly, there was evidence given by Swagar that on or about November 10, 1994 he suggested to Gareau, that he would step down from his working manager's position and return to the bagel machine operation at the rate of \$8.00 per hour. Gareau could not recall this conversation and in any case Swagar was terminated before such a job change could be implemented.

#### **ORDER**

Pursuant to Section 115 of the Act, I order that Determination #CDET 000357 be confirmed. Because the former Act applies I have not included interest in this order.

April 2, 1996

Ralph Sollis  
Adjudicator  
Employment Standards Tribunal

Date