

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 -

All Seasons Display Inc.
("All Seasons")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Norma Edelman
FILE NO.:	1998/737
DATE OF HEARING:	February 12, 1999
DATE OF DECISION:	February 19, 1999

DECISION

APPEARANCES

David Rowland	on behalf of All Seasons Display Inc.
Rick Rice	on his own behalf
Michael Reader	on his own behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by All Seasons Display Inc. (“All Seasons”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on October 30, 1998. The Director’s delegate found that All Seasons owed wages in the amount of \$14,663.70 to Rick Rice (“Rice”), Michael Reader (“Reader”), Robert Herbert (“Herbert”), Albert Wiebe (“Wiebe”) and Lee Davidson (“Davidson”). All Seasons does not dispute the amounts found to be owed to Wiebe and Davidson. It does dispute the amounts found to be owed to Rice, Reader and Herbert. The Director’s delegate found that Rice and Reader were terminated from their employment and owed compensation for length of service. She also found that Rice, Reader and Herbert were owed overtime pay. All Seasons has appealed on the basis that it did not authorize the majority of the overtime for Reader and Herbert, and Rice and Reader quit their jobs and therefore they are not entitled to compensation for length of service.

ISSUES TO BE DECIDED

Are Rice, Reader and Herbert owed wages by All Seasons as determined by the Director’s delegate?

FACTS

Rice was employed by All Seasons as a Display Technician from March 5, 1995 to May 6 or 7, 1997. Reader was employed as a Carpenter from September 9, 1995 to February 28, 1997. Herbert was employed as a Carpenter/Cabinet Maker from July 12, 1995 to July 28, 1997, when he quit his employment.

The Director’s delegate found that Rice was laid off from work on May 7, 1997 for a period in excess of 13 weeks and therefore he was entitled to two weeks compensation for length of service. She also found that Reader’s employment was terminated and he was entitled to two weeks compensation for length of service. Finally, based on a review of the employer’s records, the Director’s delegate found that Rice, Reader and Herbert were owed overtime wages.

David Rowland ("Rowland") is the President of All Seasons. He stated that Rice was given notice of layoff. Subsequently, around the first week in June, his assistant Judy Gane ("Gane") phoned Rice and told him to return to work on the following day as there was full-time work available. Rice replied that he would phone the following morning to confirm whether he was returning to work. Rice did not phone the next morning, nor did he show up for work. As a result, Rowland phoned Rice's residence and spoke to Rice's wife who said Rice was at a job in Chilliwack and he would not be coming in to work. Rowland advised her that if Rice did not return to work he would forfeit 2 weeks compensation and she replied that he would have to talk to her husband. Rowland stated that he was not rude to Rice's wife during their conversation. Later that morning, he saw Rice driving in Abbotsford. He pursued him in his car, but was unable to catch him. He said Rice saw him, but obviously had no interest in talking to him about his job. Rowland stated that neither he nor Gane had any further dealings with Rice concerning his job as Display Technician. He said that as he never heard from Rice he assumed he had quit his job and therefore he is not entitled to compensation for length of service. Rowland stated he was not disputing the overtime wages that the Director's delegate found to be owed to Rice.

Rice stated that he was told by his supervisor on May 6, 1997 that he was laid off effective immediately and that he might be called back to work. In early June, Gane phoned him and said he might be needed the following day and she would call him before 8:00 a.m. Rice said he waited until 9:00 a.m. and when he did not hear from Gane he went out looking for work. Later that morning, his wife phoned him and said Gane and Rowland had called and she had told them he was not available as he was looking for work, and that she would advise her husband of their calls. His wife also said that Rowland had not been pleasant and he made threats about cutting off Rice's unemployment insurance benefits. Rice said at no time did his wife tell Rowland or Gane that he would not be returning to work. Rice said after he finished talking to his wife, he went to the Employment Insurance office and complained about Rowland's call. One of the staff advised him that Rowland had no right to speak to his wife that way, and that Rice couldn't be expected to sit around waiting for phone calls that may or may not occur when he had job interviews to attend. Rice said he called Gane the next day and asked if she wanted him to come in to work. She indicated she may have some work but it was not necessarily full time work. Rice stated that since he couldn't get a straight answer from Gane, and Rowland never contacted him again, he believed he was terminated from his employment and is entitled to compensation for length of service.

Rowland stated that Reader also quit his job and is not entitled to compensation for length of service. He said Reader was always getting sick and taking days off work. Eventually, he began to have doubts about Reader and found he could not trust what he was saying because he would never provide details or any notes from his doctor. At the end of February, Reader allegedly got very sick and although he was advised he was needed at work he said he could not work and would be back in 8 days. Rowland said he decided he could not count on Reader and when Reader did not show up for work on the following day, he decided he had quit and he hired someone else. Reader did return to work on or about 8 days later and Rowland told him he was not needed and that he had made other

arrangements. Rowland stated that he never gave Reader any prior warnings that his job was in jeopardy. He did, however, previously advise Reader that he had to improve and that he was beginning not to trust him.

Rowland further said that although Reader was at times a good employee, he had a tendency to “milk” the overtime that was available to employees. After Reader quit his job, his bookkeeper said Reader did not work hard in the day so that he could get extra overtime. Another person that he hired to determine where the company was losing money, said that Reader told him he would leave the company if he did not get lots of overtime.

Rowland said that the majority of the overtime that Reader and Herbert accrued was unnecessary and unauthorized. He said he was out of the office during the day doing sales and he was often not at the office at the end of the day and Reader and Herbert took advantage of the situation to work beyond the end of their shifts. Rowland said that after Reader and Herbert quit, the company did the same volume with the same number of employees, but the payroll went down by \$100,000.00. Rowland said that if the Tribunal found that overtime was owed to Reader and Herbert, he agreed with the amounts that are set out in the Determination.

Reader said that prior to February, 1997 he only missed a few days of work. On February 28, 1997, he was hospitalized for 4 days due to exposure to a glue compound and was off work for two weeks. Rowland was aware that he needed to be off work for two weeks. When he was given clearance to return to work he phoned Rowland on Friday but Rowland would not talk to him. He went to work on Monday, and Rowland told him he was laid off. Eventually, he received a Record of Employment which indicated he had been terminated/fired. He said he did a good job while employed at All Seasons and in September, 1996 he received a letter which stated his work habits were exemplary. Moreover, 6 weeks before he was fired, Rowland left him in charge of one of the company’s biggest displays. He further stated that he worked as hard as he could and he was required by Rowland to work overtime, and Rowland was aware of the amount of overtime worked by his employees. He said that a display company like All Seasons cannot operate on a 8 hour day because there are deadlines and clients give information to them at last moment. He said significant amounts of overtime is the norm in the industry.

Reader also said that Herbert told him he may not be able to attend the hearing because he moved to Alberta and is working in a camp. Reader said he worked with Herbert and their circumstances concerning overtime hours that were worked, but not properly paid, were identical and therefore both are entitled to be paid the overtime wages that are set out in the Determination.

ANALYSIS

The burden of persuading me that the Determination is wrong with regard to Rice, Reader and Herbert is on All Seasons. In my view, it has not met that burden.

Section 63 of the *Act* places a liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks wages. An employer can be discharged from the obligation to pay length of service compensation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the liability to pay length of service compensation by doing one of three things; first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

Rowland, on behalf of All Seasons, argues that Rice and Reader self-terminated their employment and therefore All Seasons is discharged from its liability to pay length of service compensation. Rice and Reader argue that they were terminated from their employment.

I am satisfied that Rice and Reader were dismissed by All Seasons.

Rice was laid off on May 6 or 7, 1997. There is no evidence that he was given any prior written notice. The evidence suggests that he was on a temporary layoff. The issue is whether Rice was recalled during the temporary layoff period and declined to return to work. If so, he is not entitled to compensation for length of service. I am not satisfied that All Seasons has demonstrated that Rice was recalled and declined to return to work. First, All Seasons did not provide Rice with a written recall notice. Second, All Seasons did not take steps to confirm in writing that Rice was not returning to work. Third, there is no evidence that Rowland told Rice directly that he was to return to work. Fourth, Gane was not in attendance at the hearing to contradict Rice's evidence concerning their conversations. Therefore, on balance, I must conclude that Rice was terminated from his employment and is entitled to compensation for length of service as calculated by the Director's delegate.

I am also not satisfied that All Seasons has demonstrated that Reader quit his employment. The Tribunal has held in a number of decisions that there must be clear and unequivocal evidence supporting a conclusion that an employee has voluntarily quit his/her job. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, the employee must carry out an act that is inconsistent with further employment. In this case, there is an absence of an expressed intention to quit. Further, Reader returned to work on or about the time that he said he would and this conduct is not consistent with a desire to quit his job. I am unable to find any evidence or conduct by Reader that is inconsistent with a conclusion that he left work for medical reasons and that he intended to return to work in approximately two weeks. On the other hand, there is evidence to support a conclusion that Reader was terminated from his employment. Reader stated that his Record of Employment indicated that he was terminated/fired and this evidence was not contradicted by Rowland. All Seasons has failed to show on clear and unequivocal evidence that Reader quit. Therefore, I conclude

he was terminated from his employment and is owed compensation for length of service as calculated by the Director's delegate.

Finally, with respect to the issue of overtime, I find no basis whatsoever to conclude that Reader and Herbert are not owed the wages that are set out in the Determination. Section 35 of the *Act* states that an employer must pay overtime wages if it requires or, directly or indirectly, allows an employee to work overtime hours. The significance of the phrase "directly or indirectly" leads me to conclude that the responsibility rests with the employer to control when an employee works. If an employer does not wish employees to work overtime hours, it must not only order them not to work overtime, but must ensure that they do not work any hours not scheduled by the employer. There is no dispute that Reader and Rice worked overtime hours. Rowland claims he did not authorize the majority of overtime. The fact that he did not authorize certain overtime is not a relevant consideration since Section 35 of the *Act* dictates that overtime wages must be paid where the employer directly or indirectly allows overtime hours to be worked. I have no hesitation in finding that Rowland knew and indirectly or directly allowed Rice and Herbert to work overtime hours. Therefore, Rice and Herbert are entitled to overtime rates of pay and to the amounts set out in the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 30, 1998 be confirmed in the amount of \$14,663.70 together with whatever further interest has accrued pursuant to Section 88 of the *Act*.

Norma Edelman
Registrar
Employment Standards Tribunal