BC EST # D119/97

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 -

Kevin O'Donnell Operating as Mission Mohawk
and
K. O'Donnell Holdings Ltd. Operating as Abbotsford Mohawk

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/704

DATE OF HEARING: February 26 1997

DATE OF DECISION: March 13, 1997

DECISION

APPEARANCES

Kevin O'Donnell	For K. O'Donnell Holdings and on his own behalf
Fred Lay	Witness
William Bull	For the Director
Absent	The complainants

OVERVIEW

The appeal is by K. O'Donnell Holdings Ltd. Operating as Abbotsford Mohawk ("O'Donnell Holdings") and Kevin O'Donnell Operating as Mission Mohawk ("Mission Mohawk") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination # CDET 004559 of the Director of Employment Standards (the "Director"), a decision dated November 1, 1996. In the Determination, Brenda L. Hoing and Michael W. Hoing are found to be owed compensation for length of service and overtime pay.

ISSUES TO BE DECIDED

At issue is the matter of which Act applies, the old *Employment Standards Act,* or the new.

At issue is the matter of whether the employees are owed compensation for length of service. The appellant employer argues that both employees were terminated for just cause.

At issue is the matter of whether overtime pay is owed the employees. In that regard, the employer argues that extra hours of work were granted only as a favour to the employees and that the employees agreed to work at straight-time pay rates. The employer also says that claims are of a vexatious nature, mere retaliation for the terminations.

The employees also have their complaints with the Determination. The issues which they raise are not matters for me to decide. The employees have not appealed the Determination, and the issues are not properly before me.

FACTS

O'Donnell owns K. O'Donnell Holdings Ltd., and through that company, owns and operates Abbotsford Mohawk gas station. In 1995, O'Donnell took over the Mission Mohawk station and operated that station for several months before selling it to Fred Lay. Fred was manager of the stations and in charge of day-to-day operations. O'Donnell has other businesses and undertakings and did not work full-time at his gas stations.

Brenda Hoing began work at the Abbotsford Mohawk on July 31, 1995. Her husband started working for the employer on September 2, 1995. The employees worked at both of the two gas stations. They were terminated on the same day, December 9, 1995, without notice.

The employer does not want to pay overtime pay but his employees wish to earn extra income. The employees occasionally wish to work extra hours, beyond eight hours a day, and the employer grants them extra hours on the understanding that the pay is at straight-time rates. B. Hoing took on extra work on this basis, and so did husband Michael. No one was forced to work extra hours.

Neither B. Hoing, nor M. Hoing, worked beyond eight hours at one gas station in any day. They would, however, work at both stations in the same day and when the hours worked are combined, it is more that eight hours on several days.

B. Hoing was terminated because she proved to be a difficult employee who got along neither with customers nor employees. Employees were threatening to quit. They disliked her habit of laying blame on them for what they viewed as her mistakes in handling the till. Employees resented what they saw as Lay's special treatment of the Hoings, the amount of extra work that they got and the fact that they got to work certain shifts.

B. Hoing's relations with customers were of particular concern to the employer. Contrary to company policy, she would push for payment on overfilling a fuel tank. And she often quarrelled with customers. It is explained to me that persons in need of fuel for their vehicle are not always in the best of moods, and gas station attendants need to be able to accept that. The evidence is that B. Hoing could not, or at least, did not always do that. She was often confrontational and in one particularly upsetting exchange, she swore at a customer.

Lay had a soft spot for the Hoings, B. Hoing in particular, and he genuinely wanted to help them "get on their feet" as he puts it. He gave them a great deal of extra work so that they could earn additional income, he staggered their shifts so that they could avoid having to hire a baby-sitter, and he gave B. Hoing pay advances totalling $1,000. In the summer, Lay spoke with B. Hoing a number of times about her work and her attitude and he expressed that she was not working out as an employee and would have to improve. Despite the efforts of Lay, she did not improve and that led O'Donnell to warn her, verbally, of what was expected of her and what had to stop. There was no improvement in the weeks that followed and that led to a November meeting at the A&W between O'Donnell and B. Hoing. A lack of privacy at the station forces the discussion of serious matters elsewhere and the nearby A&W serves that purpose. At the A&W meeting, Hoing was told that she would be terminated unless there was a marked improvement in attitude and work. Lay confirms that the meeting took place and the nature of the warning. There was no improvement, and both employees were then terminated without notice. M. Hoing was discharged because his attitude changed as criticism of his wife's performance mounted.

On being handed termination slips, Brenda raised the matter of overtime pay. Lay reminded her that the overtime was at their request and for their benefit, and that she had agreed to work for straight-time pay. She said that she was pursing the claim because O'Donnell was an "asshole". Brenda later telephoned Lay and said that she wished to remain friends with Lay but that she intended to get back at O'Donnell.

ANALYSIS

The old *Employment Standards Act*, S.B.C. Chapter 10, (the "old *Act*"), provided employers with a probationary period of six months in which they could assess employees and terminate the employment relationship without cause or notice. On November 1, 1995, the new *Act* was proclaimed. The new *Act* provides for a probationary period of three months, s. 63 (1) being as follows:

> *(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.*

The termination of employees who, like the Hoings, began their employment before proclamation of the new *Act* and are terminated after November, 1, 1995 is governed by a transitional section of the new *Act*, s. 128. Parts (4) and (5) of that section are of particular relevance and are as follows:

> *(4) Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.*
>
> *(5) An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to* ***the greater*** *of the following:*
>
> > *(a) the number of weeks' wages the employee would have been entitled to under section 42 (3) of the former Act if the employment had been terminated without compliance with section 42 (1) of that Act;*
> >
> > *(b) the amount the employee is entitled to under section 63 of this Act.*
> >
> > (my emphasis.)

Both B. Hoing and M. Hoing worked more than three months for the employer. The old *Act* provided for neither notice nor severance pay in the event of termination in the first six months of the employment relationship. Section 63 of the new *Act* calls for a weeks' compensation for length

of service after three months of employment, in the absence of notice or just cause. The provision of the new *Act* is the greater. It is the new *Act* that governs.

The Determination awards a weeks' compensation for length of service to both employees on finding agreement that no notice of termination was given the employees. But as matters are presented to me, the employer argues that it had just cause to terminate the employees.

A single deliberate act can cause such damage to the employment relationship that the employer has just cause for termination of the employee. Less serious infractions, when repeated, or a consistent failure to perform work as may reasonably be required, can also constitute just cause but in such cases an employer must show that:

a) Reasonable standards of performance have been set and communicated to the employee,
b) the employee was clearly and unequivocally warned that his or her employment was in jeopardy if such standards were not met,
c) the employee is given reasonable time to meet the standards, and
d) the standards are not met by the employee.

As matters are presented to me, termination of the employees was not as a result of one serious act. The employees were terminated because it was decided that B. Hoing's work was generally unsatisfactory and because of the poor attitude of the Hoings and their inability to get along with co-workers, in other words a consistent failure to act and to work as required. As such I must consider the four points listed above, and do so first with respect to B. Hoing, and then with respect to M. Hoing.

The employer's standards are reasonable in the setting of a gas station, and they were communicated to B. Hoing, that is my conclusion, nothing to the contrary. I am as well satisfied that B. Hoing was terminated because she did not meet the reasonable standards of Abbotsford Mohawk. But was B. Hoing plainly and clearly warned that her job was in jeopardy unless she improved, in sufficient advance of the termination so that she had reasonable time to improve? In that regard I must find in the affirmative, even though there is in this case no written warning. As matters are presented to me, I am satisfied that B. Hoing, well in advance of her termination, was given clear and unequivocal verbal warning that her job is in jeopardy unless she improved. In the latter respect there is an escalation of warnings, from the friendly advice of Lay to a final warning of O'Donnell; no evidence of the condoning of behaviour or substandard work; and the corroborating testimony of Lay; and nothing to the contrary. Lay as manager was in a position to know of what transpired, displays a clear grasp of events, does not now work for O'Donnell, and remains clearly sympathetic to the Hoings. I am led to the conclusion that in terminating B. Hoing, the employer had just cause.

The same cannot be said with respect to the termination of Michael Hoing. As matters are presented to me, I conclude that it was the attitude and work of B. Hoing that was the real problem for the employer, and that the employer, on deciding to terminate B. Hoing, decided that M. Hoing should be terminated as well. The employer tells me a great deal about the shortcomings of B. Hoing as employee but has said virtually nothing about M. Hoing. In doing so the employer fails to

establish either that M. Hoing was given clear, unequivocal warning that his job was in jeopardy, or that M. Hoing failed to meet the employer's standards. I am led to the conclusion that the employer did not have just cause in terminating M. Hoing and that compensation for length of service is owed as a result.

Turning to the matter of overtime, I note that there is no questioning of the conclusions of the Director's delegate in respect to the hours worked by the employees. The issues are whether an employee is entitled to claim overtime pay after first agreeing to work overtime hours at straight-time pay rates and whether the claim of the complainants should have been dismissed on the basis of its being vexatious. On the latter point, I note that the Director's delegate has, as does the Tribunal, the power to dismiss an application on the basis that it is trivial, vexatious or not brought in good faith but that it is discretionary. In deciding whether to reject a complaint on that basis, the Director must also consider the need to enforce other sections of the *Act*.

The complainants claim for overtime went well beyond what is awarded to them in the Determination. Much of the claim appears to me to have been trivial, vexatious or not brought in good faith and to have been rejected on that basis. Other parts of the claim were pursued out of a concern for the basic employment standards that are the *Act*, that is how I read the Determination.

The *Act* does not allow an employee to agree to accept less than the standards of the *Act.* They are **minimum** standards. Section 4 is as follows:

> *The requirements of the Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 refer to employees covered by collective agreements. The Hoings did not enjoy the benefits of a collective agreement. They did agreed to work overtime at straight-time pay rates but that agreement has no force or effect. It does not justify the paying of work that is beyond 8 hours in a day or 40 hours in a week at straight-time rates.

It is, moreover, a requirement of the *Act* that an employer pay overtime wages if the employer in any way allows employees to work more than the standard work hours of the *Act*. Section 35 is as follows:

> *35 An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or directly, or indirectly, **allows** an employee to work*
>
> *a) over 8 hours a day or 40 hours a week,* (again, my emphasis).

In allowing the Hoings to work overtime as it did, the employer contravened an important minimum standard of the *Act.*

In summary, I find that the employer had just cause in terminating B. Hoing, that the employer did not have just cause in terminating M. Hoing, and that M. Hoing, but not B. Hoing, is entitled to compensation for length of service as a result, as the current *Act* provides. Furthermore, the employer allowed B. Hoing and M. Hoing to work overtime hours, and in doing so, contravened s. 35 of the *Act.* The complainants are entitled to overtime pay as a result.

In finding that compensation for length of service is not owed B. Hoing, there is a need to reduce the amount that she is found owed in the Determination by one weeks' compensation for length of service. It remains that she is owed $663.28 in overtime wages, including interest. It remains that M. Hoing is owed $481.75 including interest, as is set out in the Determination.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 004559 be varied in its findings. For reasons outlined above, I find that Brenda Hoing is not owed compensation for length of service and accordingly, that the employer owes her overtime pay alone, and interest on that amount.

The conclusions of the Director's delegate in respect to Michael Hoing are confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc