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 -

TOO GOOD TO BE TRUE
FROZEN YOGURT LTD.
("TOO GOOD")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Barry Goff
FILE NO:	96/695 & 96/631
DATE OF HEARING:	February 25, 1997
DATE OF DECISION:	March 27, 1997

DECISION

APPEARANCES

SUZANNE DOUGAN JOHN DOUGAN	for	TOO GOOD
CARLY ASHDOWN	for	HERSELF
PAT DOUGLAS	for	DIRECTOR OF EMPLOYMENT STANDARDS

OVERVIEW

This is an appeal by Too Good, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against determinations CDET004204 and CDET004523, issued by the Director of Employment Standards (the "Director") on October 4, 1996 and October 30, 1996, respectively.

The Director determined that Too Good owed Carly Ashdown ("Ashdown") the sum of $829.35 for unpaid overtime, statutory holiday pay and compensation for length of service. The Director also determined that Too Good had contravened Section 28 of the *Act* (payroll records) and Section 46 of the *Employment Standards Regulations* (the "*Regulations*") (production of records) and imposed a penalty pursuant to Section 98 of the *Act* of $500.

Too Good argues on appeal that no overtime, statutory holiday pay, or compensation for length of service are owed to Ashdown. Too Good also asserts that it produced proper payroll records and, therefore, it has not contravened the *Act* and *Regulations* and should not be required to pay a penalty.

ISSUES TO BE DECIDED

1. Is Ashdown entitled to overtime, statutory holiday pay and compensation?

2. Did Too Good maintain payroll records in accordance with the Act?

FACTS

Too Good operates a fast food outlet in the Willowbrook Mall, selling yogurt and ice cream. Ashdown was employed from December 8, 1995, until Too Good terminated her employment on May 20, 1996. Ashdown filed a complaint with the Employment Standards Branch on June 17, 1996, which stated that she had been employed as an assistant manager for Too Good for 8 - 9 hours per day, 5 days per week. Ashdown complained that she had not received annual vacation pay, statutory holiday pay, or compensation for length of service.

The complaint was investigated by an Industrial Relations Officer who discussed the complaint with Too Good on August 23, 1996. On September 5, 1996, the officer wrote to Too Good, confirming the nature of the complaint, and advised, in part, as follows:

> "You have also confirmed to me that you fired Ms. Ashdown and you are claiming you had just cause to do so, and, therefore, do not owe compensation for length of service. The onus rests with the employer to provide evidence of just cause. I have asked you to provide your payroll records, including time sheets of daily hours worked, along with any evidence you have to support your claim that you had just cause to terminate her without notice or compensation. If you have such evidence or witness to support your claim, then no compensation for length of service may be owing. If you choose not to provide your evidence, you will not have proven your case, and one week's compensation will be owing.
>
> A demand for employer records is attached. Please ensure you comply with all the requirements by September 19, 1996."

The officer wrote again on September 6, 1996, to Too Good, and provided an *Employment Standards Act* Guide, reflecting recent changes to the *Act* and some material on progressive discipline.

Too Good submitted its payroll records which indicated Ashdown's working days with a "W" rather than indicating the specific hours worked. In addition, Too Good supplied a letter setting out its response to Ashdown's request for holiday pay and vacation pay, along with its explanation for terminating Ashdown. Too Good's submission, with respect to holiday pay says:

> "She owed us money which she was paid in advance with the knowledge that she would make up the hours which she did not. She went to bartending school and left work early to do so."

The letter provides a series of dates through April and May, set out in the following fashion:

> April 8, 1996 - Left at 4:30 and was supposed to work until 6:15
> (1.75 x $7.00 = $12.25)

The employer arrives at a total owing by this method, which it claims should be deducted from the vacation pay owing.

Ashdown maintained a calendar of her daily hours, which the Director's Delegate found credible. As the employer had not maintained a daily record of the hours worked, Ashdown's records were used to calculate the overtime and statutory holiday pay owing. Too Good was also required to pay

a penalty of $500 for failing to maintain proper payroll records as required by the *Act* and *Regulations*.

Too Good's argument on appeal was consistent with that of its written position.

- Ashdown was "on a permanent set schedule every week. Monday and Tuesday from 9:30 a.m. to 6:00 p.m., Wednesday, Thursday, Friday, from 9:30 a.m. to 5:15 p.m. The only exceptions were statutory holidays, 11:00 a.m. to 5:15 p.m. and when Carly went to Bartender School". These "daily records" were supplied on September 18, 1996, to the Branch in compliance with Section 85(1)(f).

- Employees of Too Good work solo, except when the Dougans come in to assist. Many of the hours claimed on Ashdown's records, overlap with employees who have been paid for those hours. Therefore, it is Too Good's position that Ashdown made up the calendar of daily hours, which is further supported by the fact that her initial complaint does not claim for overtime.

- Too Good submits that it was told by Industrial Relations Officer, Roy Langill, to put its daytime/fulltime manager on a salary with a permanent, flexible work schedule. The payroll records for Ashdown comply with this direction. If changes in the rules occur, all employers should be notified and Too Good was not notified of any change to the rules concerning payroll records.

- Ashdown's own statements in her complaint confirmed that she worked regular hours, 8 to 9 hours per day, five days per week. "Pat Douglas agreed she was scheduled regular hours but she states that Carly somehow worked different hours than what Carly states and we state she worked. Carly only claims for annual vacation pay, statutory holiday pay and termination pay. She does not mark the box for overtime and regular wages. Pat Douglas states that she worked other hours than her normal hours and that we did not provide her with daily hours. How could we state and give her the hours she worked and Carly agreed to this and still say we did not provide her with daily hours?"

- The decision to impose the penalty was only made after Too Good complained to Kevin Rooney about Pat Douglas. "We felt she did not listen to our facts in determining CDET04204. She was extremely bias [sic] and was very short with us when we were trying to explain our side of the story. She got frustrated with us on several occasions and hung up the phone. We felt this was extremely unprofessional and felt she should be arbitrating this complaint, not considering us guilty. We complied with all her requests and were trying to resolve this complaint, quickly."

- Ashdown was fired for cause, and therefore compensation for length of service is not owed. Suzanne Dougan submitted that "Carly was told by written daily memos,

addressed to her attention, how she was performing and what type of things she needed to improve. When Carly was dismissed, she was given an option to stay working for us as long as she was willing to improve her job performance. The day she was dismissed it was a holiday Monday, and I had told her to do some simple job tasks. I called her first thing in the morning and told her it was imperative that she did what I had asked, as it was going to be very busy and that we would get behind if they were not done, immediately. This was at 11:00 a.m. I got to the shop around 1:00 p.m. and she had not done what I had asked and she was reading a book. I told her I was extremely disappointed and I told her that if she did not perform her job tasks when asked, she would have to look for a job elsewhere. She shrugged her shoulders and said "Do what you have to do". I was extremely disappointed. I got there at 1:00 p.m. and she was dismissed at 3:00 p.m. During that time I was discussing with her how disappointed I was with her job performance and attitude. I was trying to get Carly to say she was sorry and would change. After two hours of talking with her, I got the impression she was not going to change and had purposely, wilfully disobeyed what I had asked her to do that morning. I gave her the chance to stay and work with us if she was willing to improve her work ethics. She gave me no indication that she was willing to do this. I did not just come in and see that she had not done what I had asked and had to dismiss her. I gave her a chance. After two hours, I realized she was not going to change and having her at our store one day longer was going to cost us money. "

ANALYSIS

A central purpose to the *Act* is to:

(a) ensure that employees in B.C. receive at least basic standards of compensation and conditions of employment.

The provisions of the *Act* are designed to support that purpose. It is the duty and obligation of the Employment Standards Branch to administer the *Act* and ensure full compliance with its provisions. The employer bears the responsibility to keep abreast of and comply with the legislation.

Too Good argued that its payroll records complied with the requirements of this *Act.* It maintained that the fixed schedule worked by Ashdown was simply recorded with a "W", rather than repeating the same hour in the small space provided in its daily hours worked section of its payroll records. The records are more easily kept it submits with symbols. In its records, "W" refers to a worked shift, "H" for holiday, "S" for school and "A" for absent.

Section 28 of the *Act* regarding payroll records provides as follows:

(1) for each employee, an employer must keep records of the following information:

(d) the hours worked by the employee on each day, regardless whether the employee is paid on an hourly or other basis;

(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;

(i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and the amounts owing;

Part 4 of the *Act* refers to hours of work and overtime. Under Section 31 an employer must display hours of work notices in each work place and locations where the notices can be read by all employees.

(2) An Hours of Work notice must include:

(a) when work starts and ends;

(b) when each shift starts and ends; and

(c) the meal break schedule during the work period.

Section 32 sets out provisions for meal breaks:

(1) an employer must ensure

(a) that no employee works more than five consecutive hours without a meal break; and

(b) that each meal break lasts at least a half hour.

(2) an employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

The *Act* does not permit or contemplate a substitution of any symbol or representation, other than an hourly designation on payroll records or, for that matter, a schedule of hours of work. A letter or a tick or any other form, other than the numerical, is not in compliance with the *Act*.

Too Good received a penalty for failing to maintain payroll records in accordance with Section 28 of the *Act*, which is provided for under monetary penalties, under Section 98 of the *Act*, which reads:

1. If the Director is satisfied that a person has contravened a requirement of this *Act*, or the *Regulations* or a requirement imposed under Section 100, the Director may

> impose a penalty on the person in accordance with the prescribed schedule of penalties.

In short, Too Good failed to heed a legislated red light and received a ticket.

There is no evidence presented by Too Good, nor any inference to be drawn from the file, which supports its argument that a penalty was imposed only because it complained about the conduct of the investigating officer.

As well, there is no evidence to support Too Good's argument that its payroll records had been maintained in accordance with the direction provided by another Industrial Relations Officer at an earlier time.

The employer bears the onus to establish that an employee has been terminated for just cause. The employer's evidence fell well short of establishing just cause. The employer complains of minor misconduct, which the employer may well have complained about, previously, but has taken no clear steps to correct. The written warnings referred to by the employer consisted mainly of reminders or directions to perform certain tasks within the business. Too Good agreed that it did not provide any letter or impose any discipline, previously on Ashdown, which might constitute progressive discipline. Ashdown was not provided with notice of termination and in the absence of just cause she is entitled to compensation for length of service.

Finally, I concur with the investigating officer's decision to utilize the records of Ashdown in support of her claim, where Ashdown was a credible witness. Where the employer's payroll records are not in compliance with the *Act*, the records of the employee are to be preferred.

ORDER

I order, pursuant to Section 115 of the *Act* that determinations No. CDET004204 and CDET004523 be confirmed.

Barry J. Goff
Adjudicator
Employment Standards Tribunal
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