

**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 -

The Owners, Strata Plan LMS 908 and Strata Corporation LMS 908  
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE NOS.:** 98/817, 98/818

**DATE OF HEARING:** March 17, April 13, 1999

**DATE OF DECISION:** May 14, 1999

**DECISION**

**APPEARANCES**

John Williamson      For The Owners, Strata Plan LMS 908  
and Strata Corporation LMS 908

Gail Danler                      For herself

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by the Owners, Strata Plan LMS 908 and Strata Corporation LMS 908 (the "Employer") against two Determinations issued by a delegate of the Director of Employment Standards (the "Director") on December 16, 1998. In one Determination, the delegate found that the Employer had failed to pay two former employees, Jayeson Danler and Gail Danler (the "Danlers") overtime and compensation for length of service, plus interest from the last day of Danler's employment. In addition, the Determination imposed a penalty of \$0.00 as a disincentive against future violations of the *Act*. A second Determination imposed a penalty of \$500.00 because of the Employer's failure to maintain records required by the *Act*.

The Employer appealed the Determination on the grounds that it had not received an opportunity to present its side of the case; that the Employer did not have possession of logbooks or dairies kept by the Danlers for "forensic examination;" that the Director's delegate had threatened to impose a fine if the Employer did not agree to a settlement and that the Danlers' contract barred "self-initiated" overtime, which the Director's delegate had not considered in the Determination. At the first hearing, the Employer also alleged that the calculation of overtime owed to Jayeson Danler was incorrect. Mr. Williamson further argued that the Danlers had left their jobs without permission and thus had resigned their employment.

After discussion with the parties, I offered the Employer the opportunity to present evidence in support of its allegations that the Determinations were incorrect. The parties further agreed that two substantive matters were in dispute: the circumstances under which the Employer terminated the Danlers' employment and the quantum of overtime owed to the Danlers.

**ISSUE TO BE DECIDED**

The issues to be decided in this case were: whether the Employer should have unlimited access to the logbooks used by the Danlers; did the Danlers resign their jobs; and the amount of overtime pay owed to the Danlers.

**FACTS**

The Employer hired the Danlers on November 1, 1995 Employer as the maintenance persons for two apartment buildings. Jayeson Danler was the Building Manager and was to be paid \$1875 per month for working 40 hours per week and being on call 24 hours per day. His hours of work were 8:30 a.m. to 4:30 p.m., Tuesday to Saturday. Gail Danler was employed to provide cleaning services with the same monthly pay and hours of work. Between November 1, 1995 and May 19, 1996, the Danlers were the only maintenance employees in the complex. Several tasks assigned to them were to be done daily or even twice a day. In May 1996, a third person was hired, and he relieved the Danlers of some of their duties.

The Danlers kept logbooks or diaries during their period of Employment, which recorded work they had done, telephone calls received and the like. After filing their complaints, the Danlers assembled a calendar of hours worked based on data contained in the logbooks. The Director's delegate found that the calendar did not contain all of the work noted in the logbooks.

According to a statement from the Director's delegate, the logbooks were in Murray's possession until August 27, 1998, and she held them until at least mid-September 1998. The Employer did not maintain any records of daily hours worked.

The Director's delegate calculated the hours the Danlers had worked based on the data in the logbooks. The Employment Standards Branch retained the logbooks and then provided them to the Tribunal after the Employer filed its appeal.

At the outset of the hearing, the Employer repeated an earlier demand that the logbooks be returned to the owners of the complex so that they could be examined for evidence of fraud. Prior to the hearing, the Registrar of the Tribunal had refused a similar request, but made the logbooks available for inspection during normal working hours. The Employer asked that the logbooks be returned to the owners of the complex, who are the owners of the documents. I ruled that the logbooks should remain in the Tribunal's custody until the proceedings were completed, but be available for inspection during normal working hours. At the second hearing, Williamson stated that he had not instructed anyone to examine the logbooks.

The hearing then proceeded on the issues of the termination of the Danlers and the quantum of the overtime owed to them. The Employer acknowledged that it owed the Danlers for some overtime, but disputed the amount contained in the Determination.

## Termination

The Employer asserted throughout the investigation by the Director's delegate and the hearing that the Danlers had quit their jobs on November 26, 1998, when they left the building. Therefore, the Danlers were not entitled to compensation for length of service. The Employer did not present direct evidence in support of its position to the Tribunal. It did introduce an affidavit of Janet Murray "Murray"), a property manager responsible for the Employer's premises, in support of a letter to the Employment Standards Branch dated February 16, 1998. The letter asserted that the Danlers had "walked off their job." The letter acknowledged that Jayeson had left the building to seek medical advice but that he had removed personal equipment and tools from the premises before he left. Murray concluded that both of the Danlers had resigned their positions on November 26, 1997, based on Jayeson Danler's actions and a telephone call she received from Gail Danler stating that she was fed up with the new Strata Council and was leaving the building.

Williamson stated that a new Council for the Employer was elected in November 1997 and toured the building, and that he was the new president. Members of the Council found the storage rooms messy. Jayeson Danler had a private work area for cutting keys and other tools in the storage area. On November 26, the Council members visited the storage area again and observed that Jayeson Danler's tools had been removed. Moreover, the hot tub was empty and the pump was running. According to Williamson, Murray asked Gail Danler where Jayeson Danler was, and Gail Danler did not know. Murray then asked the Danlers to meet with the Council, and they did not reply. By 3:30 p.m. that day, Murray had not been able to contact the Danlers, so Williamson told her to notify the Danlers that they were terminated and that they should turn in their keys. Murray arranged to have the locks on the building changed and posted a notice to residents that they should regard the Danlers as trespassers if they were observed on the premises.

Gail Danler testified that she met with Williamson and another member of the new Council, who informed the Danlers that changes in the operation of the building would be made, but there were no plans to terminate the Danlers. The Council members toured the building and were dissatisfied with Jayeson Danler's tools and effects in the storage room, so the Danlers removed their possessions after the tour. On November 24, the Council posted new shift schedules for the Danlers that entailed longer hours for Jayeson Danler. Murray and the Council then prepared a monthly schedule for the Danlers, which they resisted on the grounds that work could not be scheduled a month in advance. Murray expressed her dissatisfaction with the Council's actions but advised the Danlers to agree to its demands.

On November 26, Murray left a telephone message for the Danlers instructing them to re-key the office of the complex, which had the effect to locking Gail Danler out. The Danlers were experiencing stress from these events and decided to seek medical attention. At 12:06, Gail Danler spoke to Murray and told her that she and Jayeson Danler had left the building and that they could no longer deal with the Council. The Danlers then went to their physician, who advised them to take time off with their stress. The medical advice was confirmed in a statement from the Danlers' physician submitted by the Director's

delegate. Early in the afternoon, Williamson asked Murray to locate the Danlers. By 3:30 p.m., Murray had not spoken to the Danlers, and Williamson instructed Murray to send the Danlers a letter asking them to return their keys. Murray delivered the letter to the Danlers' residence, which was across the street from the Employer's premises.

The Danlers returned to the building at 6:30 p.m. and found the sign barring them from the premises and a letter threatening to sue them for failure to give notice of their resignation. The letter also instructed them to turn in their keys to the building. A number of the Danlers' possessions were in the office and had not been returned to them by the date of the first hearing.

The Employer treated the Danlers' absence on November 26 as a resignation without notice and demanded payment for work done while the Employer was hiring replacements for the Danlers.

### **Overtime**

Apart from allegations that the logbooks had been tampered with, the Employer's appeal on the quantum of overtime was based on a "job description" signed by Jayeson Danler that barred "self initiated overtime" without prior approval from the property manager or the Council. In the hearing, Williamson pointed out that the Danlers had not presented requested payment for overtime prior to their separation from the Employer although they were responsible for keeping records of time worked. The new Council had presented a revised contract of employment to the Danlers. The Danlers discussed the contract with the Employment Standards Branch. Apparently, the Danlers were told that the Employer could not implement changes unilaterally, and Williamson stated at the hearing that the Employer accepted that the proposed contract would not have been binding on the Danlers.

Both Williamson and the Danlers made statements containing general comments about the work that the Danlers had done and time off they had taken while they were employed.

## ANALYSIS

Under the procedures of the Tribunal, the Appellant bears the onus of demonstrating that the Determination under appeal was incorrect and should be cancelled or varied. In this case, the Employer did not present any evidence that was not available to the Director's delegate when she issued the two Determinations in question.

The Determination correctly stated that an employer must prove that an employee had the intention to quit and acted in a manner consistent with the desire to quit. Neither condition was fulfilled in this case. The Employer did not demonstrate to the Director's delegate or the Tribunal that the Danlers intended to quit their employment. The only evidence consistent with a desire to quit was the removal of Jayeson Danler's personal tools and equipment from the storage area between November 22 and November 26. The Danlers' explanation that they took their belongings out of the area because of the evident disapproval of the new Council is logical and convincing. While the Council may have believed that the Danlers had left their employment, their actions did not meet the tests of the law.

The Director's delegate made detailed calculations of the overtime the Danlers had worked. These calculations were provided to the Employer and the Tribunal. The Employer did not produce any evidence to refute those calculations. Argument consisted of statements about the Danlers' credibility, without any substantiating evidence. The Employer had ample opportunity to inspect the logbooks and identify any errors. It did not take advantage of that opportunity.

Jayeson Danler's contract of employment with the Employer contained a job description that barred overtime without the approval of the property manager or the council. In fact, the Danlers worked as a couple, and many of their duties were interchangeable. The contracts between the Employer and both of the Danlers required them to be on call for 24 hours per day. The Director's delegate found that they had answered many calls outside of the normal working day, and this evidence was part of the basis of her overtime calculations.

The Employer argued that the penalty should not be imposed because it did not know about its liabilities and had no opportunity to refute allegations against it.

The penalty Determination was issued because the Employer had not met its obligations under Section 28 of the *Act*. The Employer did not argue that it had met the requirements of the *Act* to maintain proper payroll records.

**ORDER**

For these reasons, the Determination of December 16, are confirmed pursuant to Section 116 of the *Act*. The Danlers are entitled to \$12,815.20, plus interest accrued since the date of the Determination pursuant to Section 88 of the *Act*.

**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**