

**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 -

Silverline Security Locksmith Ltd.  
("Silverline")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO:** 96/307

**DATE OF HEARING:** July 29, 1996

**DATE OF DECISION:** July 31, 1996

**DECISION**

**APPEARANCES**

Terry Amisano           for Silverline Security Locksmith Ltd.

Murray Superle         for the Director of Employment Standards

**OVERVIEW**

This is an appeal by Silverline Security Locksmith Ltd. (“Silverline”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 002115 which was issued by a delegate of the Director of Employment Standards on April 29, 1996. Silverline disputes the findings in the Determination concerning overtime wages owed to a former employee, Charles Davis (“Davis”), and also alleges that Davis’ employment was terminated for “just cause.”

A hearing was held on July 29, 1996 at which time evidence was given under oath by Paul Denley (“Denley”), a co-owner of Silverline. Davis did not appear at the hearing and informed the Tribunal in a letter dated July 1, 1996 that he was “ ... unable to commit to this date or any future date.” However, he did make a written submission to the Tribunal.

**ISSUES TO BE DECIDED**

1. Did Silverline have just cause to terminate Davis employment ?
2. Does Silverline owe overtime wages to Davis ?

**FACTS**

The following facts are not in dispute:

- Davis was employed by Silverline as a locksmith from May 7, 1994 to September 12, 1995 at an hourly wage of \$14.00/hour. His employment with Silverline was terminated without notice on September 12, 1995.
- Silverline paid Davis two weeks wages (\$1,120.00) in lieu of notice.
- Davis submitted a compliant to the Employment Standards Branch alleging that he was not paid for overtime hours worked during his employment with Silverline.

- The Determination and attached schedules, based on Silverline's payroll records, show that Silverline owes Davis \$1,314.14 comprised of:

unpaid wages	\$1,242.50
vacation pay	\$49.70
interest	<u>\$48.94</u>
Total	\$1,341.14

- Davis was licensed as a locksmith through his employment at Silverline.

In addition to those undisputed facts, Silverline's appeal, submitted by Denley, states that Davis' employment was terminated "... for just cause and (he) was not entitled to 2 weeks compensation. After reading the Employment Standards Act I realized I did not have to pay 2 weeks compensation."

Silverline's written submission to the Tribunal acknowledges that Davis requested and was scheduled to work extra (overtime) hours, to assist with Davis' financial circumstances at the time.

With respect to the termination of Davis' employment, Denley's written submission states that Davis was charged in November, 1994 with driving while impaired. He also states that in February, 1995 Davis told him that he intended to resign from Silverline "... no matter what the outcome ..." of his impaired driving charge.

According to Denley's submission, Davis was dismissed on September 10, 1995 because he "... could not guarantee that he would have a drivers license in the near future ...". He also states "I felt I had just cause to let him Mr. Davis go. I paid him 2 weeks severance pay."

Denley's oral evidence at the hearing confirmed the statements made in his written submissions and, in addition, he testified as follows:

- Inventory was "missing" from the truck which Davis drove, but there is no evidence to show that Davis is responsible for the missing items;
- He was suspicious that Davis was working on his own behalf after hours;

- It is illegal to work as a locksmith unless one is licensed and Davis was only licensed while working as an employee of Silverline;
- He is currently investigating a complaint from one of Silverline's customers that Davis performed locksmith work for that customer on his own behalf;
- He smelled alcohol on Davis' breath when he was at work one morning during May, 1995 but he decided not to pursue it when Davis said that he had not been drinking.

## ANALYSIS

*Was there just cause to terminate Davis' employment ?*

Section 63 of the *Act* creates a liability for employers:

63. (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.
- (2) The employer's liability for compensation for length of service increases as follows:
  - (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
  - (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

This liability is deemed to be discharged if an employee is given written notice or is dismissed for just cause[see Section 63(3)(c)].

The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, willful misconduct or a significant breach of the workplace policy.

It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

While I accept Denley's evidence that he was concerned about Davis' and had suspicions concerning the missing inventory items, that is not sufficient to discharge Silverline's liability under Section 63 of the *Act*. Denley has not proven that any of his suspicions are founded in fact.

There is nothing in Silverline's submission to the Tribunal nor in Denley's evidence which shows that Davis was warned clearly that his work performance was unsatisfactory to the point his employment was in jeopardy or that there was a fundamental breach of the employment relationship.

The concept of "just cause" requires an employer to inform an employee, clearly and unequivocal, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

Denley asserts in his evidence that Davis intended to resign his employment with Silverline. The act of resigning employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

I can find no evidence to support Denley's assertion that Davis resigned ("quit") his employment with Silverline. For all of these reasons I conclude that Silverline has not proven that Davis' employment was terminated for just cause.

*Does Silverline owe wages to Davis ?*

According to Denley, he did not know that he was required to pay 1 1/2 times regular wages for hours worked in excess of 40 hours per week. Denley states in his written submission:

*“We were not busy enough to have him come in on his (days) off ... I was just trying to help him make ends meet. I should not have to pay the price for trying to help an employee to get ahead in life.”*

Section 40 of the *Act* requires an employer to pay overtime wages at 1 1/2 times the employee’s regular wage if that employee works there more than 8 hours in a day or more than 40 hours in a week.

Section 4 of the *Act* states that:

*The requirements of this 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.*

The calculation of wages owing to Davis as set out in the Determination is based on the payroll records provided to the Director’s delegate by Silverline. There is nothing to suggest that Davis was not scheduled to work all of the hours recorded in those payroll records. While I understand Silverline’s submission that it was attempting to assist Davis by allowing him to work extra hours, I find it difficult to believe that any person who has been in business for several years would be unaware of the requirement to pay overtime wages. For all of these reasons I conclude that the Determination sets out correctly the wages owed to Davis.

## **ORDER**

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 002115 be confirmed.

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**Geoffrey Crampton**  
**Chair,**  
**Employment Standards Tribunal**

GC:sr