

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 -

United Automotive Distributors Ltd.
("Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Richard S. Longpre
FILE NO.:	97/83
DATE OF HEARING:	May 12, 1997
DATE OF DECISION:	May 26, 1997

DECISION

APPEARANCES

Mr. Doug Reid for the Employer
Mr. Matthew Norton for himself

OVERVIEW

This is an appeal by United Automotive Distributors Ltd.(the “Employer”) pursuant to Section 112 of the *Employment Standards Act, R.S.B.C., c. 113* (the new “*Act*”) of a Determination, dated January 27, 1997. Mathew Norton (“Norton”) worked with the Employer for two years before leaving his employment. The Determination, issued by the Delegate of the Director of Employment Standards (the “Director”), found that the Employer owed Norton \$1,963.67 for past overtime worked and \$1,262.50 for the termination of Norton’s employment. With vacation and interest, the total amount found owing Norton was \$3,570.73.

ISSUE TO BE DECIDED

At the outset the parties agreed that the Employer had paid Norton two weeks salary upon his termination of employment. The Determination’s conclusion that the Employer owed Norton \$1,262.50 of severance was incorrect.

The Employer argued that the Determination’s finding that Norton was owed outstanding overtime pay was an incorrect interpretation of the new *Act*. Specifically, the Employer argues that the *Employment Standards Act, S.B.C. 1980, c. 10* (the “old *Act*”) was in effect for the time period covered by the complaint. The old *Act* permitted Norton to claim overtime wages owed for only the six months prior to the claim. The Determination applied the current *Act* over the 24 months prior to his termination and was, therefore, incorrect.

In addressing the issue of overtime wages owed, the Employer made one further argument. The Employer argued that Norton had been terminated for just cause. The Employer says that it was not compelled to pay the two week compensation for length of service of \$1,262.50 upon his termination. The Employer says that if Norton is owed for overtime wages, the first \$1,262.50 has already been paid.

In reply, Norton says that he had not been terminated for just cause. Norton challenges the Employer's argument on this point.

FACTS

Norton commenced employment with the Employer in November 1993. He supervised a crew of six or seven counterpersons. The Employer acknowledged that Norton was a competent and intelligent supervisor.

In an effort to improve service to its customers Doug Reid, President of the Employer, held meetings with the management group to discuss, *inter alia*, the need for a focus on customer service and the leadership required by the supervisors. Norton attended these, and other, management meetings.

Norton was involved in three incidents. On two occasions he broke the Employer's telephones. Norton agreed the first incident was out of anger. He says that the second incident was not caused by anger. On both occasions he discussed his conduct with his crew.

The third incident lead to his termination. A customer approached the service counter where Norton worked. As he approached Norton raised his arms and said "oh fuck." The customer reported the incident to Norton's supervisor on November 15, 1995. The matter was discussed with senior management and on the same day, Norton was terminated.

At the hearing, the Employer says Norton's termination was for just cause. It went against the discussions at the management meetings that he attended. It was improper conduct before his crew. His language was a risk to losing a customer. Norton was terminated because of his conduct. He was given two week severance pay to minimize the impact of the termination.

Norton acknowledges that this last incident occurred. However, he says that when his supervisor terminated his employment the reason given for his termination was general. The specific reason for his termination was not given and he was not able to give his explanation of events.

With respect to overtime worked, the Employer says that it made arrangements with employees to allow them to work overtime at straight time rates of pay. Had this agreement not been reached, the Employer would have hired new employees to work part time at straight time rates. Norton supervised the allocation of the overtime worked to employees, and to himself, at straight time.

ANALYSIS

Should the Employer's failure to pay overtime be reviewed under the terms of the former *Employment Standards Act*, S.B.C. 1980, c.10 (the "old Act") or the terms of the *Employment Standards Act*, R.S.B.C., c. 113 (the new "Act")? Under the old Act, breaches of an employer's obligation to pay proper overtime rates could be taken back six months from the date the claim was made. Norton agreed that the Employer had properly paid overtime rates for the nine months prior to his claim under the old Act. He would have no further claim under the old Act. The Employer agreed that if the 24 month period of the new Act was applied then Norton would be owed, for the reasons discussed above, overtime wages.

The Employer argues that the retroactive provision under the new Act, 24 months, does not apply to circumstances that occurred under the old Act. With the proper payment of overtime for the six months prior to the introduction of the new Act, the Determination was incorrect in looking at the previous 24 months.

The Tribunal recently dealt with this same issue in *Rescan Environmental Services Ltd.* BC EST #D007/97, (appeal of Determination No. CDET 3562). It reviews the applicable sections of the new Act:

Section 80

The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

- (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and*
- (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages.*

Section 128 (3)

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

The Tribunal determined the issue to be " whether the new Act provides that claims filed under s. 80 may reach back 24 months even if part or all of this period is prior to

November 1, 1995.” (p.6) A broad judicial review was undertaken by the Tribunal.

It ultimately decided that the new *Act* has “a retrospective application, in the sense that it permits recovery for unpaid wage which became payable in the period to November 1, 1995. I have not limited this period to 6 months as I have found that the new *Act* by “necessary and distinct implication” permits that period to be extended to 24 months.” (p.9)

Applied to this case, the Employer owes Norton \$1,963.67 for past overtime hours worked.

I turn now to the second issue: can the Employer's two week payment to Norton when he was terminated, allegedly for just cause, be applied to overtime wages owing? The Employer explained that the payment was made to make Norton's transition easier. Whether Norton was owed the money as notice or was not owed the money because of just cause for termination, the Employer paid him the money. The Employer took some pride in terminating his employment in such a manner. I see no basis to allow the Employer to put conditions on that payment 18 months later. That is, the Employer can not seek the money back if it owes Norton payment for overtime hours worked in the 24 month period prior to the *Act's* introduction on November 1, 1995.

ORDER

Pursuant to Section 115, I order that Determination dated January 27, 1997 be varied. The Employer owes Norton \$1,963.67 plus vacation pay and interest of \$78.55 which totals \$2,042.22.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal