

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-

Wille Dodge Chrysler Ltd.
(" Wille Dodge ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 98/213

DATE OF HEARING: May 27, 1998

DATE OF DECISION: June 23, 1998

DECISION

APPEARANCES

John Waldie, Barrister & Solicitor
Witnesses:
Michael Wille
Jim Else
James Lautenschlager
Norman Schultz
Darren Wong
Marguerite Zuk
Ken Franklin

For Wille Dodge

David Oliver
Steve Wigge

For the Director
On his own behalf

OVERVIEW

This is an appeal by Wille Dodge Chrysler Ltd. ("Wille Dodge"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 17, 1998 . The Director found that Wille Dodge contravened Section 63(1) of the Act in failing to pay Steve Wigge ("Wigge") compensation in lieu of notice, and statutory holiday pay. The Director's delegate Ordered that Wille Dodge pay \$5,592.06 to the Director on behalf of Wigge. Although Wille Dodge did not dispute owing statutory holiday pay, that amount had not been paid at the time of the hearing. The statutory holiday pay, which amounted to \$3452.82 including interest at the date of the hearing, was to be paid immediately.

Wille Dodge contends that Wigge quit his employment, and that no compensation is owing.

ISSUE TO BE DECIDED

Whether the Director correctly determined that Wigge was fired, rather than quit his employment.

FACTS

Wigge was employed with Wille Dodge from February 7, 1996 to January 3, 1998 as a commission salesman. There is no dispute that he was a successful salesman, and has been acknowledged as such by Wille Dodge, and Chrysler Dodge.

On Saturday January 3, 1998, Wigge was to be at work at 8:00 a.m.. He called the office at 8:15 to say he would be late, and arrived at 9:30. Later that morning, he left the showroom and went to Ensign Chrysler, a competitor dealership.

Wigge was to deliver a vehicle to a customer and close a sale later that morning. He was not present when his customer showed up, and another salesman took over the sale.

Upon Wigge's return, he and his supervisor, Michael Wille, had a conversation, during which Mr. Wille asked him to turn over his demo plates and keys, told him to go home and to call him on Monday.

Wigge began working with Ensign on Monday, and picked up his final paycheque and Record of Employment ("ROE") from Wille Dodge on January 6.

On January 7, Wigge called Mr. Wille and asked to be reinstated. On or about January 15, Wigge and Mr. Wille met to discuss the possibility of his returning to work. In the interim, Wigge filed a complaint with the Director of Employment Standards. He stated at the time he made the application that there was still a possibility of his returning to work.

On February 17, 1998, Wigge told the officer investigating his complaint that his position would not be reinstated.

The Director's delegate determined that Wille had the obligation of establishing that Wigge had quit. Following his investigation, the Director's delegate found Wille's evidence that Wigge had quit to be inconsistent, and determined that Wigge had not quit. The Director's delegate then determined that Wille had no just cause to terminate Wigge's employment, and made an Order for compensation for length of service.

Evidence

Appellant

I heard evidence from Michael Wille, the general manager of Wille Dodge; three salesmen who were working at Wille Dodge the morning of January 3, Ken Franklin, Norman Schultz and James Lautenschlager; the car detail man, Darren Wong; Marguerite Zuk, the bookkeeper/accountant for Wille Dodge; and Jim Else, who was working as a salesman for Ensign on January 3, but who has worked for a salesman for Wille Dodge since March 1998.

Mr. Wille testified that Wigge showed up for work at approximately 9:30. At approximately 10:40, Wigge's customer arrived and Wigge was not on site. Mr. Wille asked the receptionist where Wigge was, and when he was told he had gone out to eat, Mr. Wille arranged for another salesman to start the delivery process.

Mr. Wille's evidence is that Franklin approached him about this time and told him he had received a call from Else. Else had told Franklin that Wigge was at Ensign. Mr. Wille further testified that Franklin said that Wigge had told him that day was his last day on the job. Mr. Wille testified that when Wigge returned at about 11:40, he approached him on the lot and asked him how long he had been gone and where he had been. When Wigge indicated he had been gone about 20 minutes, Mr. Wille questioned him about that. Mr. Wille also asked him whether he had looked for another job and Wigge acknowledged he had. Mr. Wille's evidence was that he did not believe Wigge's estimate of time but he felt that further discussions would not have been fruitful, so he asked Wigge for his keys and plate, and asked him to go home and call him on Monday. Mr. Wille stated that Wigge asked him "Are you firing me?", to which he said nothing, but asked him to go home.

Mr. Wille stated that later that afternoon Franklin told him that Wigge had picked up a demo vehicle from Ensign.

Mr. Wille did not speak again to Wigge until Wednesday or Thursday. It was his evidence that, despite the events of the weekend, he would have rehired him if he was solely responsible for doing so.

Mr. Wille stated that he had sent salesmen home in the past, and that he had taken their keys and plates away as a disciplinary act, although he had never done so previously with Wigge. He stated that he had taken these steps with Wigge because there had never been an occasion when a salesperson had not been at the showroom when a customer arrived to take delivery of their vehicle. Consequently, he felt that suspending him for the day was appropriate in the circumstances.

Mr. Wille testified that at no time had he told Wigge he had been fired

Franklin, Schultz and Wong all testified that they were told by Wigge directly that this would be his last day of work.

Franklin's evidence was that Wigge arrived late for work, and when walking through the show room, he heard him say that he was "giving up" and that he would be leaving. Franklin testified that later that morning, Wigge approached him and said that he "would be leaving today", that "he couldn't get any respect", and that "he couldn't continue working there".

Franklin stated that later that morning, Wigge left for a considerable period of time, and when he returned, he was met by Mr. Wille outside the showroom. During the time Wigge was gone however, Franklin stated that he received a telephone call from Else, who was looking for a sales position. He got a second call from Else in the afternoon, at which time Else told him that Wigge had received a demo and that he would be working at Ensign as of Monday. Franklin passed this information along to Mr. Wille.

Wong testified that at approximately 9:30 Wigge brought a vehicle down to the detail shop to have it cleaned for delivery. Wong stated that Wigge told him that he was going to deliver his van and leave, that it was his last day on the job, and shook his hand. That information was not communicated to Mr. Wille until there was preparation for this appeal.

Schultz testified that when Wigge arrived that morning, he said "Steve, you're late". Wigge replied "I can be late if I want to because I'm not going to be working here any longer".

Lautenschlager's evidence is that at about 9:30 am, Wigge went into an office adjacent to the one he occupied, and made a telephone call. Lautenschlager testified that he overheard Wigge's conversation, during which Wigge said "this is my last day on the job", asking whether there was someone there now, saying he would be there right away, and leaving the showroom immediately.

Mr. Wille was told of Wigge's statements to the other salesmen regarding his intention to quit later that afternoon.

Else testified that between 9:30 and 10:00 am, Wigge arrived at Ensign and met with Ron Thomas, the sales manager, for some time. After Wigge left, Else, who had just returned from holidays and whose demonstrator vehicle had been sold during that time, asked Thomas for a specific replacement demo, a red Jeep. His evidence was that Thomas told him that vehicle had been promised to Wigge as a condition of his employment, and that his first shift would be on Monday. Else's evidence is that this all occurred prior to noon. Else contacted Ken Franklin and told him of this, and asked him whether there was a job available at Wille Dodge for him.

Else stated that Wigge returned later that day to pick up his vehicle, and that he contacted Franklin to advise him of that.

Else also testified that Thomas bragged about hiring Wigge.

Zuk testified that when she arrived for work on January 5, Mr. Wille told her that Wigge had gone to work at Ensign. Consequently, she began the paperwork to process his cheque and ROE. Although Mr. Wille indicated that Wigge would be calling her that day, she did not speak to him until Tuesday, at which time he indicated that severance pay ought to be included. Zuk indicated that she spoke with Mr. Wille again, and asked whether Wigge had quit or been fired. Mr. Wille's response to her was that Wigge had gone to work at Ensign. Consequently, she prepared the ROE indicating that Wigge had quit. She testified that she had not done that on the instruction of Mr. Wille, but on her own initiative.

Complainant

Wigge's evidence is that he slept in on the morning of January 3 due to a power failure in his building. When he arrived at work, he called his customer, and set up delivery of his vehicle for 12:00 noon. His evidence is that he took the vehicle to Wong, and told him "if things don't go better, I'm out of here". He acknowledged shaking his hand at that time. Wigge also indicated that he was upset with his working conditions, and had made it known to fellow salesmen that he would be quitting "if things didn't improve". He stated that he was just blowing off steam, and that his comments did not mean anything.

Wigge indicated that at approximately 10:30, he went to Ensign and had breakfast with Bob Thomas. Over breakfast, Wigge discussed leaving Wille Dodge, as he had been offered a position with Ensign a number of times in the past. He states that he was gone a maximum of 40 minutes, returning at approximately 11:10. He felt this left him sufficient time to meet his customer. On his return, Mr. Wille approached him, and demanded his plates and keys. Wigge testified that he asked to go inside to remove his personal goods, and Mr. Wille stated that they would be mailed to him. Wigge stated that he asked Mr. Wille whether he had been fired, and that Mr. Wille replied "if you don't quit you are fired". Wigge stated that as he felt he had no option, he walked home. He stated that he later received a call from Bob Jeancart, offering him a position, but that he did not accept it until Monday. His evidence is that he understood that he had been fired, not suspended.

In Wigge's written response to the appeal documents, he stated that Jeancart came to his house the afternoon of January 3, and that he accepted Ensign's offer of employment that day.

Wigge denied that he told the other salesmen that he had quit, although he acknowledged that he had threatened to do so if things didn't improve. He testified that he had been 'cold shouldered' by the others since the Christmas party, and felt he was not getting the respect he deserved.

Wigge also denied receiving a demonstrator vehicle on Saturday.

Although Wigge attempted to contact Mr. Wille on Monday, he was connected instead to Monica Wille, and never called back.

Wigge indicated that he did not quit, and that had he not been fired, he would have remained at Wille Dodge, as the pay was much better.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

The fact that Wigge began working at Ensign virtually the day after the events of January 3 leads to the inference that the job was obtained on Saturday. Wigge's own evidence as to when he accepted employment was contradictory. His oral evidence at the hearing was that he did not accept until Monday morning, while his written rebuttal letter indicated it was Saturday afternoon.

The issue is whether Wigge quit Saturday morning, or was fired on Saturday at noon.

In arriving at his determination, the Director's delegate found, on a balance of probabilities, Wigge had been terminated. On the evidence presented to me on appeal, I am satisfied that Wigge quit.

In *Burnaby Select Taxi Ltd.* (B.C.E.S.T. D091/96) and subsequent cases, the Tribunal has held

"The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment... the uttering of the words "I quit" may be part of an emotional outburst...and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship".

The evidence of all three salesman and Wong is consistent. They all testified that Wigge had made statements either directly to them or to another party, which led them to understand that he had quit, or intended to quit that day. Wigge's evidence was that in all instances his statement that he was going to quit had been qualified by "if things don't improve around here". That qualification was not heard by any of the witnesses. I appreciate that some of the witnesses, including Shultz, were not fond of Wigge, and would not have been disappointed to see him gone. Nevertheless, the evidence of Franklin, whom Wigge regarded highly and to whom he would turn for emotional support, was consistent with that of Shultz, Lautenslager and Wong. I am unable to conclude, on the evidence, that all four witnesses misheard Wigge. Although Wigge alleged that all of the salespeople were 'out to get him' since the Christmas party, none of their evidence changed, even after being tested on cross examination by Wigge and the Director's delegate.

I find that repeated statements to several individuals about quitting represented something more than an emotional outburst. I further find that statements about leaving made at the same time as shaking a fellow employee's hand to be inconsistent with an intent to remain on the job.

Consequently, I find that Wigge had formed an intention to quit.

The evidence that Wigge accepted employment with Ensign before noon on January 3 consisted of Else's conclusions based on Wigge's actions while at Ensign plus his information on Wigge being allocated a demo vehicle. That information was communicated to Franklin, who passed it along to Mr. Wille along with the information that Wigge had told him of his intention to quit.

At the time Mr. Wille and Wigge had their conversation, I find that Wigge had formed an intention to quit, and communicated that to other employees, although not to Mr. Wille directly. While Mr. Wille did not take steps to confirm the hearsay information that Wigge had accepted a position with Ensign, Wigge did not deny that he was looking for other employment when asked by Mr.

Wille. Furthermore, Wigge had failed to meet his customer for a delivery. I find that Wigge carried out acts inconsistent with his further employment.

Therefore, I conclude that both the subjective and objective tests outlined in *Burnaby Select Taxi* had been met at the time Wigge returned to Wille Dodge. Consequently, although the evidence as to whether Mr. Wille told Wigge that he was fired is conflicting, I accept that Wigge had acted in a way which entitled Wille Dodge to conclude that he had quit.

Further, it was not disputed that Wigge not happy at Wille Dodge. The working relationship he had with other salesmen had deteriorated gradually, and gotten much worse after the Christmas party. However, in order to receive his end of the year bonus, Wigge had to remain at work until the end of the year. January 3 was his first day back at work. In weighing the evidence, I find that these circumstances support the inference that Wigge intended to quit.

Further, even if I were to discount Else's evidence entirely on the grounds that he wanted to work for Wille Dodge and a vacant sales position would be to his advantage, his evidence with respect to the fact of Wigge's meetings with Ensign personnel that morning was not disputed. Else's statement that Wigge had been allocated a demonstrator vehicle on Saturday was denied but no rebuttal evidence from Ensign was presented. While the Director's delegate indicated he believed he had spoken to someone at Ensign, he could not confirm that. Whether Wigge had been allocated a vehicle on the morning of January 3 is a relevant and material fact to arriving at a conclusion as to whether Wigge quit or was fired. While the absence of evidence does not establish a fact, I have considered the information that Ensign was contacted, and all material evidence considered by the Director's delegate, in arriving at my conclusion.

Consequently, based on all of the evidence, I find that the Determination was incorrect in respect of the finding that Wigge is entitled to compensation for length of service under Section 63 of the *Act*.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination be varied to show that Wigge is not entitled to compensation for length of service under Section 63 of the *Act*.

Carol Roberts
Adjudicator
Employment Standards Tribunal