

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Exmac Foods Ltd.

(“Exmac”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/318

DATE OF HEARING: October 21st, 1996

DATE OF DECISION: October 24th, 1996

DECISION

APPEARANCES

Jacqueline L. Reiser for Exmac Foods Ltd.

Christopher Garrish on his own behalf

Mary O'Byrne for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Exmac Foods Ltd. ("Exmac") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 002109 issued by the Director of Employment Standards (the "Director") on April 26th, 1996. The Director determined that Exmac owed Christopher Garrish ("Garrish") the sum of \$168.04 on account of two weeks' severance pay (including 4% vacation pay and interest).

FACTS

Exmac operates a "Subway" sandwich franchise located in a shopping mall in the Royal Oak area of Victoria, B.C. Garrish commenced working for Exmac in November 1994 as a front-end clerk; he frequently worked the last shift of the day and, on those occasions, usually worked alone and was responsible for "cashing out" and closing up the shop. While his hours varied throughout late 1994 and into the spring and summer of 1995, he typically worked between 20 and 30 hours per week and was paid the statutory minimum wage.

According to Garrish, in November 1995 he requested that he only be scheduled to work on Saturdays or Sundays. Previous to November 1995, Garrish often worked two or three "weekday" shifts in addition to working on the weekends. According to Ms. Reiser (who is a shareholder, officer and director with Exmac and who was Exmac's only witness), Garrish's request to limit his working hours was made in October 1995.

Regardless of when the request was made, it is clear from Exhibit 6, which is a record of Garrish's hours worked from January 1995 to January 1996, that Garrish's working hours were dramatically reduced in early October 1995. Indeed, Garrish only worked on two separate days (both 4-hour shifts) from early October 1995 to late January 1996.

Garrish maintains that the reduction in his hours was a concerted attempt on the part of the employer to force him to quit. Exmac, on the other hand, maintains that Garrish simply was not available for work, and in any event, on January 13th, 1996, at the end of a 4-hour shift, he was given two weeks' notice of termination. The employer says that during the two-week notice period Garrish was scheduled to work on at least one occasion when he failed to show up (Garrish says he told his supervisor that he had a scheduling conflict and would not be able to work that particular 4-hour shift). Exmac also says that other shifts (not particularized) were offered to Garrish after January 13th but that he refused to work them.

Exmac did not assert, before me, that it terminated Garrish for cause; rather, Exmac says that it gave Garrish two weeks' notice and thus has fully satisfied its statutory obligation [see section 63(2)(a) of the Act] to him.

ISSUES TO BE DECIDED

Was Garrish lawfully terminated in accordance with section 63(2)(a) of the Act?

ANALYSIS

Ms. Reiser was not able to identify any shifts that were offered to, and refused by, Garrish during the two week notice period other than one four-hour shift on January 23rd. Only the Royal Oak store manager, Ms. Odeljan, could have provided such evidence but she was not called as a witness.

During the course of her testimony, Reiser stated that:

- she accepted Garrish's October 1995 request to be scheduled to work only weekends;
- after October 1995, Reiser agreed that she would try to schedule Garrish to work between the hours of Noon to 8 P.M. on Saturdays and Sundays;

- a number of new staff were hired in October/November 1995;
- weekend shifts would be offered to other staff members (including the new staff hired in October/November) before being offered to Garrish (Reiser stated: “When I hire people if I can give them more hours I give it to them”); and
- “I didn’t have hours for him (Garrish); Other people were getting hours instead of Chris.”

In light of the foregoing, I am satisfied that, although Reiser purported to agree to allow Garrish to restrict his working hours to the weekends, in fact, despite the availability of weekend shifts, Reiser chose to offer those shifts to employees other than Garrish. Other than the 4-hour shift worked on the day he was terminated, Garrish was not scheduled to work a single shift from October 31st, 1995 to January 12th, 1996. I would characterize this behaviour as a constructive dismissal thereby triggering Garrish’s entitlement under section 63 of the Act to two weeks’ pay as compensation for service. In my view, the approach taken by Director’s delegate with respect to the calculation of Garrish’s termination pay is entirely in accord with section 63(4) of the Act.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 002109 be confirmed in the amount of \$168.04, together with additional interest which has accrued, pursuant to section 88 of the Act, as and from the date of the Determination.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal