

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 -

T.J. Glass Odyssey Inc.
operating T.J. Auto Body
("T.J.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 97/179

DATE OF HEARING: June 26, 1997

DATE OF DECISION: July 18, 1997

DECISION

APPEARANCES

Joe Neuburger on behalf of T. J. Glass Odyssey Inc.
Kathleen Connolly on behalf of T. J. Glass Odyssey Inc.

Craig Tuharsky on his own behalf

OVERVIEW

This is an appeal by T.J. Glass Odyssey Inc. operating T. J. Auto Body (“T.J.”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by the Director of Employment Standards (the “Director”) on February 28, 1997. In this appeal T.J. claims that no wages are owed to Craig Tuharsky (“Tuharsky”).

ISSUES TO BE DECIDED

The issues to be decided in this appeal are whether T.J. made an unauthorized deduction from Tuharsky’s wages and whether Tuharsky quit his employment or was dismissed by T.J.

FACTS

Tuharsky commenced employment at T.J. as a bodyman on January 24, 1996. His last day of work was on or about September 6, 1996. A Record of Employment (“ROE”) was issued on or about October 2, 1996 which indicated the reason for issuance as “A-shortage of work”. A final paycheque was also issued at that time. The following statement is on the back of the cheque: “Holiday Pay Less Monies Owing”. Another ROE was issued on March 31, 1997 which indicated the reason for issuance as “E-quit”. Both ROE’s were issued by Darlene Suzuki, the wife of Taki Suzuki (“Suzuki”). Suzuki is the owner of T.J.

Suzuki did not attend at the hearing. In his written submissions, he stated that no wages are owed to Tuharsky because he quit his job and he agreed to have \$260.00 deducted from his wages.

Suzuki stated that he did not know what was written on the first ROE until after Tuharsky filed his complaint at the Employment Standards Branch. When he learned that it mistakenly indicated Tuharsky had been laid off due to shortage of work he had another ROE prepared which indicated that Tuharsky had quit. He said that Tuharsky was not laid off due to a shortage of work. He had ample work available, but Tuharsky chose not to do the work. In the last month that Tuharsky was employed he was unavailable for work for

three weeks and then he showed up and asked for his holiday pay and ROE. Suzuki gave him his cheque for the holiday pay and Tuharsky agreed to have \$260.00 deducted from this amount to cover the cost of paint and body materials that he had used to repair a friends' truck. According to Suzuki, by endorsing the cheque with the statement on the back of it, Tuharsky allowed the deduction.

Suzuki further stated that Tuharsky was replaced by another bodyman. He said that if Tuharsky had not quit he would have fired him for a variety of reasons including refusal to work and tardiness.

Suzuki submitted various letters from individuals who worked with Tuharsky to support his position, including a letter from Boyd Autobody which states that they hired Tuharsky on October 11, 1996 and he told them he had quit his job at T.J.

Joe Neuburger ("Neuburger") attended at the hearing on behalf of T.J. Neuburger has worked at T.J. for eight years, and currently is the Manager. Neuburger testified that Tuharsky told him before he left T.J. that he was looking for another job and wanted a good reference, and just before he quit, he said that he had found another job at Boyd Autobody. According to Neuburger, during the last month that Tuharsky was employed at T.J., he rarely came in to work and this was the reason that his pay declined. Neuburger said there was work available at the shop and they hired a replacement for Tuharsky when he quit. He said the owner's wife did not know that Tuharsky had quit and that is why she put shortage of work on the first ROE. Neuburger further stated that Tuharsky agreed to the deduction from his last paycheque and the statement on the back of the cheque was written by Suzuki.

Kathleen Connolly ("Connolly") has been employed by T.J. as a secretary since February 1996. She testified that during Tuharsky's last month of employment he came in to work for only a few days a week, and then he didn't show up for three weeks. She thought he was working at some other shop. Finally, in late September he came in and asked Suzuki for his ROE and holiday pay. When Suzuki asked him about the money he owed him for using shop materials, Tuharsky told Suzuki that he could deduct the money from his cheque. Connolly said she believed that Tuharsky quit because he had a job elsewhere. She said that she does not know why Suzuki's wife, who does not work at the shop, wrote shortage of work on the ROE. She said there was work available, but Tuharsky just stopped coming in to work and did as he pleased.

Tuharsky testified that he was laid off due to lack of work. In the last several months at T.J. his paycheques were getting smaller. Tuharsky submitted various pay stubs to confirm this point. He said he never came in to work late and he went to work each day, but sometimes there was no work available. He also said that he refused certain jobs because Suzuki always wanted him to do them for cash or under the table, which is illegal, and he doesn't work that way. He said by October he could no longer afford to sit around and wait for Suzuki to provide him with work. Accordingly, he went in to the shop, on or about October 2, 1996 and asked for his ROE and vacation pay so he could collect UIC and

welfare as he was starving. On October 23, 1996 he started work at Boyd Autobody. He said while he was employed at T.J. he did not work at his own shop or for anyone else.

Tuharsky concedes he may have personally used some materials at the shop but he denies he agreed to allow any deductions from his wages. He further said that the statement on the back of the cheque was not there when he endorsed and cashed the cheque.

Tuharsky submitted various letters from former co-workers, a former room-mate and his current employer to confirm his good work and attendance record.

ANALYSIS

After considering all the evidence, I find that Tuharsky quit his employment. Further, I am not satisfied there is sufficient evidence to establish that he was forced to quit due to a declining income.

Tuharsky's own evidence supports the position that he quit his employment. He stated he could no longer wait for Suzuki to provide him with work so he requested his vacation pay and ROE in order to collect UIC and welfare. This conduct is consistent with a self-termination of employment. Furthermore, Suzuki, Neuburger and Connolly all stated that Tuharsky quit his job. Although the first ROE indicates that Tuharsky was let go due to shortage of work, given the foregoing evidence, I cannot conclude that this document is sufficient to establish that Tuharsky was dismissed by T.J.

Having concluded that Tuharsky quit his employment, the next issue to be decided is whether Tuharsky was forced to quit due to a declining income. That is, did T.J. so fundamentally alter Tuharsky's conditions of employment that his quitting can be classified as a termination of employment pursuant to Section 66 of the *Act*. I find insufficient evidence to make that conclusion.

There was uncontradicted evidence that Tuharsky was replaced by another bodyman and this implies there was work available at the shop. Furthermore, Tuharsky's pay stubs do not establish a declining income. Not all the stubs are dated and, as a result, it is not possible to establish a clear trend with respect to his hours of work. Finally, even if Tuharsky's income did decline, it is not established that this was caused by T.J. Neuburger and Connolly testified that Tuharsky's falling income was because Tuharsky refused to work, and to some extent, Tuharsky's own evidence supports this view insofar as he admitted he refused to do certain jobs. Tuharsky submitted various letters to confirm his work attendance, but I consider these letters (just as the letters submitted by Suzuki) to be hearsay and I am not prepared to give them consideration.

For the above reasons, I find that Tuharsky terminated his employment on his own initiative and therefore, pursuant to Section 63 (3) (c) of the *Act*, T.J. is not liable to pay him any compensation for length of service.

With regard to the deduction of \$260.00, however, I find that this deduction is in violation of the *Act*. Sections 21 and 22 of the *Act* prohibits an employer from making deductions from an employee's wages for any purpose except as permitted by enacted legislation or where the employee makes a written assignment to meet a credit obligation. Neither of these exceptions apply in this case. There is no legislation which allows this particular deduction and there is no document signed by Tuharsky which specifically allows this deduction. The statement on the back of the cheque was probably written by Suzuki, and it is not established that it was written at the time the cheque was given to Tuharsky. It does not constitute an agreement by Tuharsky to allow a deduction from his wages.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated February 28, 1997 be varied to indicate that Tuharsky is owed \$260.00 by T.J. Glass Odyssey Inc. operating T. J. Auto Body plus interest in accordance with Section 88 of the *Act*.

Norma Edelman
Registrar
Employment Standards Tribunal