

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C. 38

- by -

L.E.S. Enterprises Ltd. Operating
as Sparkle Wash
("L.E.S.")

- of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO: 96/474

HEARING DATE: November 13, 1996

DATE OF DECISION: November 20, 1996

DECISION

OVERVIEW

This is an appeal by L.E.S., pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on July 24, 1996. In this appeal the employer claims that no severance pay is owed to Corey Sammann ("Sammann").

Les Edgelow ("Edgelow") appeared on behalf of L.E.S., Sammann appeared on his own behalf and Erwin Schultz appeared on behalf of the Director.

The issues to be decided are the quantum of overtime and Sammann's entitlement to overtime pay and his entitlement to severance pay. The parties agreed to settle the overtime pay issue by reduction in the Determination. Accordingly, it was agreed that the amount of overtime payable was \$514.00

FACTS

Sammann had worked for L.E.S. for several months. In the last month and a half of his employment he was promoted to the position of supervisor.

L.E.S. is in the business of mobile washing of buildings and vehicles. On Sunday, October 1, 1995, certain events occurred which L.E.S. says amounted to a resignation on the part of Sammann.

Sammann denies the event occurred as alleged and denies that he resigned or that he had any intention of resigning his employment. There is a great divergence in the evidence of Edgelow and Sammann.

On Sunday, October 1, 1995, Sammann was ill. When he realized he could not report to work at 5:30 a.m. he had a discussion with a fellow employee, Mr. Brough ("Brough") who lived nearby. Sammann usually drove Brough to work. Sammann gave Brough his car keys in order that Brough could attend work and advise Edgelow that Sammann would not be able to report to work due to illness.

Edgelow says he had been attempting to contact Sammann starting at approximately 6:00 a.m. without success, i.e. the phone was not answered and the messages left on the answering machine were not returned. Sammann denies receiving any phone calls or messages from Edgelow. Edgelow says that when Brough arrived at work approximately 1/2 hour late, Brough advised Edgelow that Sammann was ill and that he would not be returning to work again and that he had no intention of repaying a loan of approximately \$500.00 that Sammann had received from L.E.S.

Unfortunately, Brough was not present at the hearing to give evidence as to what transpired.

Edgelow and Sammann had different recollections as to what Brough told each of them about the events of that day. As I advised the parties, I can not give any weight to the hearsay accounts of what Brough said.

Edgelow went on to say that he continued to attempt to reach Sammann later that day without success.

Sammann testified that at about 9:30 a.m. he felt that he could attempt to return to work and made attempts to contact Edgelow. Both parties say they left numerous messages with the other, either on pagers or telephone answering machines but both deny receiving any such messages.

At some point during the day Sammann's keys to the warehouse and mailbox of L.E.S. were removed from his key chain and ended up in the possession of Edgelow. Edgelow says that Brough presented the keys to him as instructed by Sammann. Sammann denies this and says that the keys were on the keychain which Brough required to use Sammann's vehicle to go to work that day. When the keychain was returned to him by Brough his employer's keys were missing. He took this as an indication that his job was in jeopardy.

The discrepancies in the evidence continue with respect to the events of the following morning. Sammann says he reported to work at the usual time, i.e. 7:30 a.m. Edgelow says it was approximately 9:45 a.m. Sammann says that he was immediately asked by Edgelow for his pager. Edgelow says that Sammann came in and was apologetic about missing work the previous day. Edgelow gave slightly contradictory evidence as to whether the discussion revolved around the appropriateness of missing work or confirming the fact that Sammann had quit his employment.

Sammann was denied the opportunity of further work with L.E.S. and the next day filed a complaint with the Board seeking overtime and severance pay.

ISSUE TO BE DECIDED

Did Sammann resign from the employ of L.E.S.?

ANALYSIS

Due to the conflicting nature of the testimony at the appeal hearing, it is not an easy task to determine what exactly transpired.

I am mindful of the principle that the appellant, L.E.S. in this case, has the onus to show that it is more likely than not that the Determination is in error. It has not satisfied that onus for the following reasons:

1. If Brough had communicated the resignation of Sammann to Edgelow on Sunday morning, given the evidence that Edgelow accepted that resignation and was otherwise dissatisfied with Sammann, I have difficulty accepting that he would continue to attempt to call Sammann after 6:00 a.m. in the morning;
2. While returning of keys in an employee's possession is an act consistent with a resignation, I am not satisfied that Sammann tendered his keys. The evidence is more consistent with Sammann's explanation - that the keys were merely given to Brough to enable him to get to work. Further, if Sammann had instructed Brough to return his keys to L.E.S. one would expect that Sammann would have had Brough return his pager as well, which did not occur; and
3. When he was asked to precisely describe the events of Monday, October 2, 1995, Edgelow gave evidence that his first words to Sammann concerned how unacceptable it was for Sammann to have missed work the day before. This is inconsistent with Edgelow having accepted the resignation of Sammann the day before.

Having considered all of the evidence, I am not satisfied that Sammann resigned. It was not argued that Sammann's absence from work on October 1, 1995 constituted cause for dismissal. Even if it had been argued, I am satisfied that Sammann was ill and not fit to report to work that morning. He communicated that to Edgelow. In the circumstances L.E.S. would not have had cause to dismiss Sammann.

ORDER

I order under Section 115 of the Act, that the Determination No. CDET 003485 be varied such that the amount of overtime pay be reduced to \$514.00 (as agreed between the parties) and vacation pay calculated on the adjusted amount of overtime pay.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal