

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act S.B.C.1995, C.38

By

Data Enterprises Ltd.

- of a Determination issued by -

The Director of Employment Standards

ADJUDICATOR: E. Casey McCabe

FILE NO.: 96/568

DATE OF HEARING: December 16, 1996

DATE OF DECISION: January 7, 1996

DECISION

APPEARANCES

Mr. K. Arian
Mr. Sam Arian for Data Enterprises Ltd.

Ranbir Pinder Singh Ghag in person

Ken Elchuk for The Director of Employment Standards

OVERVIEW

This is an appeal by Data Enterprises Ltd., pursuant to section 112 of the *Employment Standards Act* ("The Act"), against Determination #003905 of the Director of Employment Standards ("The Director") issued on September 9, 1996. In this appeal the employer claims that no wages are owed to the employee, that no overtime is payable to the employee, that no vacation pay is payable to the employee, and that the employer is not liable to pay compensation in lieu of notice to the employee.

The employer operated a Mac's Convenience Store located at 13983-16th Ave in Surrey, B.C. The employer ceased operating the store on or about October 31, 1995. Mr. K. Arian was the operator of the store. Mr. Arian employed his son, Sam, and two others. One of these employees, Mr. Ghag, is the complainant in this case. Mr. Ghag was employed from August 1, 1994 until October 28, 1995 as a salesclerk on the night shift. Mr. Ghag filed a complaint on December 7, 1995 alleging that he was not paid his wages for the month of October 1995, overtime pay for hours worked in May, June, and July 1995, annual vacation pay for the entire period of his employment and compensation (termination) pay in lieu of written notice. The Director issued Determination #003905 in the amount of four thousand, one hundred and seventy-eight dollars and eighteen cents (\$4,178.18) on September 9, 1996.

The employer takes the position that the employee is not owed wages for October 1995, the overtime pay, the annual vacation pay or the compensation pay because the employee allegedly stole monies and/or inventory from the employer over a period of time. The employer claims that the entire shortfall amounted to approximately \$11,000. The employer states that it is not fair that it should have to pay the determined amount when it alleges that the employee stole far in excess of that sum. Furthermore, the employer takes the position that it should not be liable for compensation pay in lieu of notice because its contract with Silcorp Ltd., who control the Mac's Convenience Stores group, was terminated without notice on October 31, 1995. When Silcorp terminates a store dealership the staff that are employed by that store dealer are also terminated and the new dealer is expected to staff the store with his/her own employees. Mr. K. Arian testified that as a result of the cash shortfalls Silcorp terminated his dealership and offset the shortfall from the monies owing to him, therefore, there were no monies available to pay Mr. Ghag's claims.

Mr. S. Arian testified that there is video surveillance in the store the purpose of which is to give some comfort to the store clerks should there be a robbery or security problem while the clerk is on duty. The clerks are aware of this video surveillance and know how to turn the camera on and off. Mr. S. Arian testified that during October 1995 he installed a second camera which was unknown to the complainant. Mr. S. Arian testified that the video tape from the second camera shows Mr. Ghag approaching the back room and apparently turning the first camera off. The video tape in the second camera then shows Mr. Ghag approaching the adult magazines that are kept behind the cash register, removing a bag from between the magazines and counting what Mr. S. Arian alleged was money from that bag. Mr. S. Arian stated that the video tape showed Mr. Ghag taking money from under the counter, where it is alleged he was counting the money removed from between the magazines, and placing the bills in his personal wallet which he returned to his back pocket.

Mr. S. Arian reported the matter of the alleged theft to the Surrey detachment of the RCMP. Constables Fisher and Sharma investigated the matter. Mr. Ghag was subsequently charged with theft. After two adjournments the criminal trial was set for May 8, 1996. On that day Crown Counsel stayed the charges.

Constable Fisher was called as a witness. She testified that she was dispatched to investigate an allegation of theft by Mr. K. Arian against Mr. Ghag. She testified that she had been advised by the Arians that money had been found in the magazines which were kept behind the cash register. It was unknown where the money had come from but the Arians suspected theft from the till. As the only employees in the store were Mr. K. Arian, Mr. S. Arian, the complainant and one other, the Arians suspected the complainant. Constable Fisher testified that it was explained to her that Mr. S. Arian had watched the store on the night of October 28/29, 1995 and that he had set up the second video camera. She stated the second tape was shown to her by the Arians and that she was able to identify the complainant as being the man in the tape. She stated the tape showed money being removed from the magazines, counted several times and placed under the counter. She states that she noticed on the tape that more money was removed from another area and added to the money removed from the magazine areas. The money was then divided in two piles, put back together, put under the counter in two different spots, removed and counted again. She stated she believed what was being counted was twenty dollar (\$20.00) bills and that Mr. Ghag placed the money in his personal billfold which he put in his back pocket. She stated the two areas where the money had been hidden were not returned to and the second video tape showed Mr. Ghag returning to the back of the store and reactivating the first video camera. She stated there was a time lapse of approximately ten minutes. She felt there was sufficient evidence to proceed with charges and subsequently arrested Mr. Ghag and proceeded with charges against him. She candidly stated that she was not able to substantiate the full amount of the money and that she assumed the bills were twenties (\$20.00), but they could have been fifties (\$50.00) or fives (\$5.00). She also stated that she assumed the amount was less than \$5,000.00. She stated there were no other persons seen on the tape and that Mr. Ghag was the only person charged.

Constable Fisher further testified that on the evening of October 29, 1995 she attended with Constable Sharma at Mr. Ghag's residence in order to place him under arrest. She stated that Mr.

Ghag was not home at the time, but when notified, returned. She stated that she then advised him that he was under arrest, told him of his Charter rights, warned him and advised him of his right to counsel. She stated that Mr. Ghag denied being involved in the theft of the monies. She also stated that Constable Sharma advised Mr. Ghag that he was seen on video tape and that Mr. Ghag then made a statement, in Punjabi, to Constable Sharma to the effect that it was only one time. Constable Sharma was not called to testify and the reason given was that it was his day off.

Mr. S. Arian also testified that if the cash register is shutdown during a shift a notation is made with Silcorp and a technician is dispatched to correct any problems. Mr. S. Arian testified that this had occurred on only two occasions during Mr. Ghag's employment. This testimony was given to support what Mr. S. Arian claimed was a statement by one Constable Newton that he had entered the store premises on occasions to purchase a cup of coffee and had seen Mr. Ghag using a calculator to record sales and make change rather than using the cash register. Mr. S. Arian alleged that this was evidence that Mr. Ghag was not recording all the sales through the cash register. Mr. S. Arian provided printed evidence entitled a History of Calls which showed that on the two times during Mr. Ghag's employment that the till was not working the technician attended in order to remove a paper jam and on the second occasion to reprogram the printer.

Mr. S. Arian agreed when questioned by Mr. Elchuk that one could not tell on which shift any given shortages may have occurred. That is because the inventory is done for a period of six weeks rather than individual shifts. Mr. S. Arian did explain that there would be no purpose in he or his father causing any shortages. That left only Mr. Ghag and the other employee and Mr. S. Arian strongly suspected Mr. Ghag.

In response to the overtime claim Mr. S. Arian testified that often Mr. Ghag would send his brother or some other person to work his shift. Mr. S. Arian estimated that this occurred approximately thirty five times. He further testified that when this did occur the hours that were worked by that person were included on Mr. Ghag's cheque. This was done even though the person that worked in Mr. Ghag's place had requested that he be paid in cash. Mr. S. Arian also testified that Mr. Ghag's brother or other persons would not give the necessary employment information for the Arians to place that person on the payroll. Mr. Ghag challenged this testimony stating that this type of situation occurred less than six times and for the three month period for which he had pay stubs and was claiming the overtime the situation did not occur.

Mr. S. Arian candidly admitted that Mr. Ghag did work overtime and that overtime was computed on hours worked over forty hours per work. That is, it was recognized that Mr. Ghag worked shifts that ranged between eight and twelve hours and that if Mr. Ghag worked more than eight hours on any particular day he would not be accorded overtime unless his hours for that week exceeded forty. However, the Arians, despite having independent payroll accounting, did not provide any payroll records either to Mr. Elchuk for the purposes of the original determination nor at the appeal hearing to substantiate their argument.

It is acknowledged by the Arians that Mr. Ghag was an employee from August 1, 1994 through October 28, 1995. It was also acknowledged that he was not paid his wages for the month of October 1995 nor was he given compensation (termination) pay upon his termination. It is the

Arians' position that they did not terminate Mr. Ghag but rather Mr. Ghag lost his employment due to Silcorp cancelling its contract with Mr. K. Arian thereby causing the layoff of all the employees of Data Enterprises Ltd. The Arians also acknowledged that Mr. Ghag did work some overtime but dispute the hours claimed by him under the paystubs for the May, June, and July period.

ISSUE TO BE DECIDED

Is the employee owed wages for October 1995, overtime pay for the hours claimed in May, June and July 1995, annual vacation pay and compensation pay?

ANALYSIS

This case is an appeal of a Determination by the Director regarding monies owed by the employer to the employee. The onus, therefore, is on the appellant employer to show that the determination made by the Director of the Employment Standards is incorrect. The employer stated that it had video tapes showing theft by Mr. Ghag and that the shortage of approximately \$11,000.00 over a period of time could only be attributed to Mr. Ghag. The employer did not produce the video tapes although the employer was informed that if it wished to enter the video tapes as evidence it would have to supply the necessary VCR and television to show the tapes. Mr. S. Arian stated that he could provide a VCR but that it was too difficult to bring a television. Consequently the tapes were not produced as evidence.

The employer further relied on the evidence of Constable Fisher. However, Constable Fisher's evidence referred to the video tapes and also conversations between Mr. Ghag and Constable Sharma. Constable Sharma was not called as a witness. Nor was Constable Newton called to testify.

The standard of proof required for a criminal offense in a civil proceeding is less than that required at a criminal trial. However, clear and convincing evidence of a criminal act is required. The standard of proof in a civil case involving a criminal aspect is proof on the balance of probabilities that is commensurate with the gravity of the allegation. Theft is a serious allegation. I am not able to conclude that the employer has proven theft in this case. (See Dalton Cartage (1982), 40NR 135(S.C.C.)). The evidence tendered by the employer to prove the theft is hearsay. The video tapes were available but were not produced. Constable Sharma was not called to testify about the conversation with Mr. Ghag. I find the evidence does not meet the test established in R. vs Khan (1992 S.C.R. 531) for necessity and reliability. In reaching this conclusion I cast no aspersions on Constable Fisher's testimony. The fact remains that her evidence was uncorroborated hearsay which was tendered to establish a crucial and central point in the case. I am unable to find on the evidence before me that a theft occurred such as to relieve Mr. K. Arian from his liability under the Director's determination for unpaid wages, overtime, and annual vacation pay.

Turning to the matter of the overtime claim I recognize that there were shifts when Mr. Ghag's brother or some other person worked for Mr. Ghag. However, the employer was not able to say

which shifts were worked by another person. Mr. Ghag states that for the periods for which he had pay stubs and claimed overtime he worked the hours. I am unable to conclude otherwise. The payroll records are the records of the employer and the onus is on the employer in this appeal to show that the time on Mr. Ghag's pay stubs was not in fact worked by him.

As stated earlier, it was acknowledged by Mr. K. Arian that he had not paid Mr. Ghag for hours worked in October 1995 nor had he paid annual vacation pay on any earnings since August 1, 1994. Those monies are due and owing.

Finally, Mr. K. Arian argues that he is not liable for compensation (termination) pay because the decision to terminate Mr. Ghag was not his. The employer argues that because Silcorp terminated Mr. K. Arian's dealership that Data Enterprises Ltd. was reacting, by issuing a termination notice to Mr. Ghag, to a situation over which it had no control. I cannot accept that submission. The liability for compensation pay is a liability that accrues during the term of employment and becomes payable at the point of termination. I have much sympathy for Mr. Arian's personal financial situation and the loss of his dealership. However, I cannot find that Silcorp's decision to terminate the employer's dealership relieves the employer of its obligation to Mr. Ghag for the compensation pay.

ORDER

I order, pursuant to Section 115 (1) of the *Act*, that Determination #CDET 003905 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal