

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 -

AM Fidow Enterprises Ltd.
(“Fidow”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Norma Edelman

FILE No.: 2000/416

DATE OF HEARING: September 15, 2000

DATE OF DECISION: September 28, 2000

DECISION

APPEARANCES

Abdisalam Abdulle	on behalf of AM Fidow Enterprises Ltd. operating as M & M Food Store
Christina Vandale	on her own behalf

OVERVIEW

This is an appeal by AM Fidow Enterprises Ltd. operating as M & M Food Store (“Fidow”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on May 26, 2000. The delegate found that Fidow owed Christina Vandale (“Vandale”) regular and overtime wages.

In its appeal, Fidow argues that it does not owe Vandale any regular or overtime wages and it is not liable for compensation for length of service as Vandale quit her employment. Fidow further argues it was not treated fairly by the delegate.

ISSUES TO BE DECIDED

1. Does Fidow owe Vandale regular and overtime wages and compensation for length of service?
2. Was Fidow treated unfairly by the delegate?

FACTS AND ANALYSIS

Fidow operates a general food store in Fort St. John, B.C. which is open from 6 am to 10 pm. Abdisalam Abdulle (“Abdulle”) is the owner and principal operator of Fidow.

Vandale worked at the store as a cashier from August 17, 1998 to June 9, 1999 at a rate of pay of \$7.15 per hour. Her regular shift was from 3 pm to 10 pm. Lisa Sommerville was hired on July 1, 1999 to replace Vandale. Sommerville commenced employment on July 2, 1999.

Vandale filed a complaint with the Employment Standards Branch on June 11, 1999 alleging that Fidow owed her overtime wages, statutory holiday pay and compensation for length of service.

The delegate concluded that Vandale was owed regular and overtime wages for work performed in December 1998 and for one-half hour of work performed in June 1999, and compensation for length of service.

In determining that Vandale was owed regular and overtime wages, the delegate considered the records provided by Vandale and Abdulle. Vandale’s records of days and hours of work for

December 1998 and June 1999 showed she worked 8 hours per day, from 8 to 4, during the period December 1 to December 23; 7 hours per day, from 3 to 10, on December 28 and 29; and 4 and one-half hours on June 2. Abdulle's records showed Vandale worked 8 hours on December 1 to 4, and 14 to 15; 7 hours on December 6, 8 to 12, 17 to 18, 21 to 23, and 28 to 29; 6 hours on December 7 and 30; 7 and one-half hours on December 13; and 4 hours on June 2. The delegate preferred Vandale's records. Her reasoning is set out as follows in the Determination:

Mr. Abdulle had initially indicated that he did not maintain a daily record of hours worked by Ms. Vandale. He had stated that he recorded the hours on a calendar, but that he did not retain that calendar. When confronted with Ms. Vandale's claim of hours worked, Mr. Abdulle then produced a hand written list of the dates and hours of work performed by Ms. Vandale. Mr. Abdulle was requested to substantiate how he created the hand written list of dates and hours of work for Ms. Vandale, but he failed to provide any further information to corroborate the records he provided.

Careful scrutiny of the records provided by Mr. Abdulle suggests that the records were generated in one sitting, as they were neatly written in one colour of ink, with no reference to Ms. Vandale, the Employer, or other employment information. Without further information in support of those records, I am unable to rely on them as being a true and accurate record of the days and hours of work performed by Ms. Vandale.

Accordingly, the delegate used Vandale's records to determine wages owed by Fidow, and wage statements for December 1998 and June 1999 provided by Abdulle as proof of wages paid by Fidow. The delegate calculated that Fidow owed Vandale \$248.60.

The delegate also found that Vandale had been terminated from her employment and was entitled to one week's compensation for length of service in the amount of \$223.92. The delegate did not accept Abdulle's position that Vandale had quit her employment.

Finally, the delegate concluded that she was unable to determine the amount of statutory holiday pay owed to Vandale, as there was insufficient evidence of her days of work to complete calculations pursuant to Section 24 of the Employment Standards Regulation.

Fidow is not disputing the delegate's conclusion regarding statutory holiday pay. It is appealing the delegate's conclusion that Vandale is owed regular and overtime wages, and compensation for length of service. As well, it argues it was not treated fairly by the delegate.

Abdulle, on behalf of Fidow, testified that when he went to Edmonton in December 1998 Vandale started working the 8 to 4 morning shift. His wife opened and closed the store and worked the 3 to 10 afternoon shift. His wife worked double shifts on the days that Vandale did not work. There were no other employees at the time. When he returned to work just before Christmas, Vandale went back to working the afternoon shift. Abdulle said that the records he gave to the delegate are an accurate reflection of Vandale's hours and days of work and Vandale was properly paid for all hours worked in December and June. He said Vandale did not mention she was owed any wages when she received her December cheque and the first time he learned of her claim was when he got a letter from the delegate. Abdulle said when he met the delegate she

told him that Vandale had a calendar and she asked him to immediately produce his calendar. Abdulle said he told the delegate he was busy and he needed to find it and to give him some time. In August 1999 he produced the set of records for the delegate. He said this set of records is based on two calendars located in his office. Abdulle said he recorded Vandale's hours on these calendars every day. He said he never provided these two calendars to the delegate as she asked him to produce a calendar and that is what he did when he produced the set of records in August 1999.

Abdulle did not provide the two calendars to the Tribunal. The delegate submitted Abdulle's set of records to the Tribunal on July 5, 2000. In his appeal dated June 10, 2000 Abdulle submitted a computer sheet for the month of December which indicates Vandale worked 8 hours on December 5 and 7 hours on December 13. In a subsequent submission dated July 19, 2000, Abdulle submitted another computer sheet for December which shows Vandale worked no hours on December 5 and 7 hours on December 13. During the hearing, Abdulle stated he could not explain the discrepancies found in the two computer sheets and his set of records other than he got mixed up. He attributed his confusion to the delegate wanting him to provide a record running from Sunday to Saturday rather than a record running from the first of the month to the fifteenth of the month as per his pay periods. He also said he did not have a clue why the amount on Vandale's wage statement for the end of February 1999 does not match the amount shown on his employee detail sheet.

Abdulle further said that he believes Vandale created her calendar after she filed her complaint at the Employment Standards Branch. He says her calendar is unreliable because her entry on December 23 is not in the same writing, and the calendar shows she changed the times of her shift on December 28 and 29 from "8-4" to "3-10", and on December 24 from "8-4" to "off".

Vandale testified that she worked all the hours set out in the records she gave to the delegate. She said she tried to advise Abdulle that she had not been properly paid in December but it was to no avail. She further said that Abdulle's wife has two tiny children and could not work the hours claimed by Abdulle, especially 16 hours per day by herself for two days in a row on two weekends.

Vandale agrees there were two calendars at the work site. Either she or Abdulle entered her hours on the calendars. She also kept a calendar at home and for the most part her entries were made on the day she worked. Sometimes, however, her entries were made on the day before she worked. The hours she put on this calendar are identical to the hours on the calendars at work. She gave her home calendar for the months of December and June to the delegate, as these were the only months in dispute.

Vandale said she was scheduled to work from 8 am to 4 pm on December 24 and on December 23 she wrote this shift on her calendar. Abdulle returned from Edmonton on December 23, however, and he agreed she could have December 24 off and, as a result, she changed her calendar entry to "off". Regarding her entries on December 28 and 29, she said she made a mistake and immediately corrected the times on her calendar.

Vandale said the reason Abdulle has not produced the two calendars located at work is that it would show he was lying about her hours and days of work. She further said the discrepancies in Abdulle's records are proof his records are suspect.

Abdulle also argues that Vandale quit her employment and therefore she is not entitled to compensation for length of employment.

At the hearing, Abdulle said that Vandale was scheduled to work Monday to Friday, including June 10, 1999, from 3 pm to 10 pm. If Vandale could not work, she was supposed to phone him in advance. For example, she phoned him in advance on May 31, 1999 and June 7, 1999 and said she couldn't work, so he worked her shifts. In his appeal dated June 10, 2000 Abdulle said Vandale never complied with his request that she give him advance notice if she wasn't coming to work and as a result he gave her many warnings to keep to her schedule.

Abdulle said that Vandale missed work on June 10, 1999 and did not call him in advance. He phoned her home but there was no answer. In his appeal dated June 10, 2000 Abdulle said he left a message on Vandale's answering machine for her to call him. At the hearing, however, he agreed with Vandale that he did not leave a message, as she does not have an answering machine. Abdulle said he later saw Vandale driving by his store on her way home. He called again, but she did not answer her phone. On June 11, 1999 Vandale called him around noon and he asked if she was coming to work and why she had not come to work on June 10. She said she was not coming to work. Abdulle then told Vandale he would find someone else. Vandale said, "fine make my cheque ready". Abdulle said he told Vandale she would get her cheque on June 15, 1999. He said when he realized Vandale did not want to work he posted a help wanted sign and hired Sommerville. Vandale's ROE, which states the reason for issuance as "quit", was mailed to her on or about July 3, 1999. He said Vandale told him, either before or after he issued the ROE, that she didn't quit her job. He has no explanation why she would say this as in his view she was a person who did not want to work.

Vandale denies she quit her job. She said she was scheduled to work on June 10 from 3 pm to 10 pm. Prior to her shift commencing, she went uptown and when she was returning home she passed by the store and observed a "help wanted" sign on the store's door. When she arrived home she saw that Abdulle had called her twice because his number was recorded on her call display. She said she knew something wasn't right. A few days prior she and Abdulle had argued over her undercharging a customer 20 cents.

Around 1 pm she went to her neighbour's house to phone Abdulle. She asked her neighbour to listen to the conversation on an extension. She says that Abdulle told her to come and pick up her cheque on the 16th as he did not need her any longer. She says she then asked for a reason and Abdulle declined to give her any explanation for the termination. She was upset and called the Employment Standards Branch and filed a complaint the following day. On her complaint form she wrote that she had been "terminated for unjust reason". When she got her ROE she went to see Abdulle and told him she had not quit. He proceeded to call the RCMP to complain that she was harassing him.

Vandale acknowledges that prior to June 10, 1999 she had missed some shifts, but she says that she always telephoned Abdulle prior to the start of her scheduled shift to confirm he could manage without her. Vandale says she never missed a shift without calling Abdulle beforehand and he always understood if she needed time off. For example, she told him she couldn't work June 7, 1999 because her dad was ill and Abdulle said he understood. She denied ever saying she didn't want to work or that she quit. She said she was willing to work June 10 and 11.

Although she worked the odd time for her brother, she never got a permanent job for some time after June 10, 1999.

Vandale's neighbour provided a written statement confirming she listened to the conversation between Abdulle and Vandale on June 10, 1999. I give no weight to this letter as the writer was not present at the hearing where her testimony could be tested by cross-examination.

Abdulle also claims he was not dealt with fairly by the delegate. Before the delegate issued the Determination in the amount of \$501.64, she told him he owed Vandale \$823.55, which he denied, and then she told him he owed Vandale \$166.56 and again he told her he owed no wages to Vandale. The delegate also falsely accused him of not providing documents. After the delegate sent him a letter dated February 7, 2000, he phoned her manager and asked for another delegate to handle the matter. He was told there was no one else and the delegate would meet him in Fort St. John. They agreed on a date, but three days before they were scheduled to meet, he asked if it could be changed because his wife had a baby and he had no one else at the store. The delegate refused and issued the Determination. According to Abdulle, the delegate just believed Vandale's calendar and was after him as an employer.

In a submission dated July 5, 2000, the delegate submits that Abdulle was provided with a reasonable opportunity to participate in the investigation and to provide information and her Determination was prepared in a fair and neutral manner based on all the information before her at the conclusion of the investigation. The records show the delegate either phoned or wrote Abdulle ten times and Abdulle phoned or wrote her six times. Further, the delegate and Abdulle met on one occasion. The delegate said they were scheduled to meet again on March 22, 1999, but Abdulle phoned on March 20 and cancelled the meeting. She called him to reschedule and Abdulle advised he did not wish to meet as he had provided all the information he could. She then advised him she would issue the Determination.

In this appeal, the burden is on the appellant, Fidow, to show that the Determination should be varied or cancelled.

I am not satisfied that Fidow has shown that the delegate erred in awarding \$248.60 to Vandale for regular and overtime wages.

I accept Vandale's records as an accurate reflection of the days and hours she worked in December 1998 and June 1999. Vandale's position regarding her days and hours of work was consistent throughout the appeal. I am satisfied that her entries on the December and June calendars were made on the day she worked or the day before. I find no basis to conclude she created her records after she filed her complaint. Her explanation for changing three of the entries on the December calendar was plausible and was not challenged by Abdulle. Finally, although Vandale's entry on December 23 is in larger print compared to her other entries; this does not persuade me that her records are unreliable. In contrast, Abdulle presented inconsistent records throughout the appeal. His two computer sheets for December do not match and neither of these documents matches his set of records for the month of December. His reason for the inconsistencies in these documents is unsatisfactory because it does not explain why his records show Vandale worked different hours on December 13. Furthermore, I do not believe that Abdulle kept a daily record of Vandale's hours in December 1998 because he was in Edmonton for most of that month.

Abdulle created his set of records in August 1999. He claims he based this set of records on 2 calendars located in his store, but he has never produced those records. I do not accept his explanation for why he never produced the originals to the delegate. In her February 7, 2000 letter to Abdulle, the delegate very clearly asked him to produce the original records. I do not find Abdulle to be credible on this issue and the fact that he has never provided the originals records, in my view, supports Vandale's position that if he did produce them they would confirm her case. On the whole, I find Abdulle's records to be an unreliable guide as to the days and hours worked by Vandale. I prefer Vandale's records and her evidence to that provided by Abdulle.

I also am not satisfied that Fidow has established that Vandale quit her employment.

The position the Tribunal takes on the issue of whether an employee has quit is now well established. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. - and - Zoltan Kiss*, BC EST #D091/96:

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.

In this case, I find there are no "clear and unequivocal facts" to support a conclusion that Vandale quit her job.

I am not satisfied that Vandale formed an intent to quit. There is no evidence to support Abdulle's claim that Vandale told him on June 11 that she was not coming to work. Rather, it is undisputed that sometime after June 10 or June 11 Vandale told Abdulle she had not quit.

Furthermore, I am unable to find that Vandale carried out some act which was inconsistent with her wanting to remain employed at the store. There is no proof she had another permanent job to go to at the time and she filed a complaint immediately at the Employment Standards Branch alleging she was terminated by Abdulle.

In his January 29, 2000 letter to the delegate Abdulle stated: "If employee did not come to work for long period of time. Without notice and valid reason and never call to work. There is no compensation required." In his appeal dated June 10, 2000, Abdulle indicated Vandale never gave him advance notice she was not coming to work and he warned her many times to keep to her schedule. At the hearing, Abdulle did not advance the position that Vandale had been absent for a "long period of time". Rather, he said she had been off work for one shift which, in my view, is not a "long period of time". At the hearing he also said that Vandale called in advance on May 31 and June 7 to say she wasn't coming in to work which contradicts his earlier statement that she never gave him notice about not coming in to work. Furthermore, Abdulle changed his story about leaving a message on Vandale's answering machine. These inconsistencies in Abdulle's position also cause me to prefer Vandale's evidence that she did not quit, but was dismissed by Abdulle on June 10.

In light of the above, I agree with the delegate that Vandale was dismissed by Fidow and she is entitled to compensation in the amount of \$223.92.

Finally, the record before me makes it abundantly clear Abdulle was given a fair and reasonable opportunity to respond to the complaint and there is no evidence of bias in favour of one party or the other. The delegate did present different figures to Abdulle concerning the amount owed to Vandale, but this can be attributed, at least in part, to the fact that Abdulle failed to provide complete documents to the delegate. Moreover, Abdulle's claims that the delegate falsely accused him of not providing documents is entirely without merit given the fact that he never provided his original records to the delegate.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination be confirmed as issued in the amount of \$501.64 together with whatever further interest has accrued since the date of issuance.

Norma Edelman

Norma Edelman
Vice-Chair
Employment Standards Tribunal