# 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

JONES DIVERSIFIED SERVICES LTD.
("JONES DIVERSIFIED")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR**: Alfred C. Kempf

**FILE NO.**: 97/411

**HEARING DATE**: August 8, 1997

**DATE OF DECISION**: September 18, 1997

## DECISION

## APPEARANCES

An oral hearing was held in Kelowna on August 8, 1997. Jones Diversified appeared and gave evidence through its director, Albert Jones ("Jones"). Derek Erskine McAndrew ("McAndrew") appeared and gave evidence on his own behalf. Darryl Robert Boyce ("Boyce") did not attend.

## OVERVIEW

This is an appeal by Jones Diversified, pursuant to Section 112 of the Employment Standards Act (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on May 12, 1997. In this appeal the employer claims that no wages are owed to McAndrew and Boyce.

## FACTS

McAndrew and Boyce were employed by Jones Diversified to connect and disconnect cable services. Jones Diversified had a contract with Shaw Cable to do this work on its behalf. Jones Diversified became concerned with the hours being submitted by employees.

The procedure was that employees would complete an "Employee Time Sheet". Each time sheet had the following column headings: Date, Hours Worked and Bonuses. The Hours Worked column was further divided in to the following: Start, Break, End, Total.

McAndrew's time sheets were not submitted in evidence but Boyce's time sheets formed part of the evidence at the hearing. These time sheets indicated that during most of the period covered by the Determination employees did not record or deduct time taken for lunch breaks from their total hours recorded. After July 13, 1996 Jones Diversified corrected the time sheets to deduct time taken for breaks.

On July 7, 1995 Jones sent a memo to all Jones Diversified staff indicating that the hours of work for all employees would be 7.5 hours. Employees were required to take a one-half hour break which would not be compensated for. The memo also indicated the maximum work orders given to employees and setting out sanctions if work orders were returned without a "exemplary" reason.

Boyce's time records indicate that he did not deduct time taken for breaks from time recorded after July 7, 1995. On July 20, 1995 Boyce was given a memo from Jones outlining two recent occurrences of over-recording of time and concluding as follows:

> "Any more false times on your time sheet will result in immediate dismissal."

Jones gave evidence during the hearing that Boyce after receipt of this memo improperly recorded time for July 20, 1995. He testified that this false recording of time and a refusal to work described below resulted in Boyce's termination on July 21, 1995.

The employment of McAndrew was also terminated on July 21, 1995. McAndrew and Jones have differing versions of what occurred on that day. Jones' evidence is that McAndrew asked to speak with him about the hours of work issue and in particular the issue of not being paid for the one-half hour break.

McAndrew acted as the spokesperson for himself and two other employees, including Boyce. The three employees entered the business office of Jones Diversified and began protesting the company's recent memo dealing with hours of work. Jones testified that the discussion got somewhat heated and loud and he suggested that the parties go to the lunchroom upstairs to continue the discussion. It seems that this did occur and matters quickly came to an impasse whereby the employees refused to work unless Jones changed his approach on the hours of work issue. Jones says that he asked each individual employee whether they were refusing to work and when each replied yes he advised all of the employees that they were dismissed and should go home. The employees did leave the premises.

McAndrew gave an entirely different version of the events. He says that he was indeed the spokesman but only for the purposes of questioning Jones and also to seek clarification on the hours of work policy and the policy on overtime. McAndrew was evasive as to whether or not the conversation became heated but did finally admit that perhaps Jones (but not himself) became excited. McAndrew maintains that he did not refuse to work and that he was really not sure as to why his employment was being terminated.

McAndrew and Boyce filed complaints which ultimately resulted in the Determination being issued. Jones Diversified paid the overtime portion of the claim as well improperly deducted amounts on the understanding that it would be in full and final settlement of all claims, including the employees' claims for severance pay. Jones Diversified confirmed at the hearing that it was not taking the position that McAndrew's manner on July 21, 1995 and the subsequent finding of empty beer cans in the van used by him were grounds for dismissal. Jones confirmed that the only thing being relied upon to support the dismissal was McAndrew's refusal to work on July 21, 1995.

On July 27, 1995, McAndrew wrote the Employment Standards Branch saying in part as follows:

> "I strongly believe that there is no valid reason for my being fired. The only reason my employer has given me for termination is that he does not like me. I was also threatened by my employer. Two other workers were also fired at the same time I was and none of us have received any severance pay."

On August 3, 1995 he wrote to Shaw Cable as a follow up to a telephone conversation he had with an official of that company on July 22, 1995. He makes the following statements in this correspondence:

> "However, I strongly disagree with the unfair and illegal treatment I have received from Mr. Jones.
>
> I would like to draw you attention to the illegal manner in which Al Jones operates: I have never been paid for overtime. By my calculation he owes me approximately $4,000.00 .. when I asked Mr. Jones for my overtime pay he charged at me saying that I had better not mess with him or he would bury me. Lance and Darryl witnessed this shocking event.
>
> It should be obvious that Mr Jones has a total disregard for the well-being of his employees, which is due in part to his obsession with money.
>
> Now that the three of us has been fired, Al Jones is trying everything in his power to divert attention from his wrongdoing. The fact remains that he has been operating illegally. I am shocked that Shaw Cable would be associated with such an unscrupulous character."

McAndrew admitted at the hearing that his claim for overtime was far less than $2,000.00 and also admitted at the hearing that the overtime as calculated by the Branch was less than $400.00. McAndrew testified that he was aware of the rules and regulations affecting employers and employees under the Act and was aware of his entitlement to overtime. There is no evidence that he raised any objection about not being paid overtime prior to his dismissal.

What is apparent from McAndrew's evidence was that he was becoming more and more dissatisfied with his job because of declining income.

Jones Diversified did not at the hearing give any evidence or argument challenging that aspect of the Determination requiring repayment of deductions made by the employer.

## ISSUES TO BE DECIDED

The issues in this appeal are:

1. Whether or McAndrew and Boyce are entitled to the overtime as calculated by the Branch and as set out in the Determination; and

2. Whether Jones Diversified had cause for the dismissal of McAndrew and Boyce.

## ANALYSIS

Overtime

For approximately 1 year preceding the July 7, 1995 memo, Jones Diversified paid the employees for the time between when they reported for work and the time they reported back to the shop from the field. On the time sheets there is a space for recording break time but no break time is deducted until after the memo of July 7, 1995. While Jones gave evidence that he had never agreed to pay for the employees' breaks he admitted that he had access to the time sheets and reviewed them from time to time but had done nothing prior to July 7, 1995 to remind employees that he was not responsible for wages during their lunch breaks.

This issue is raised since it is Jones Diversified's only argument against the overtime Determination. He argues that if the employees worked a half hour less each day this would reduce the overtime calculation.

However, this argument cannot succeed since I find that Jones Diversified by paying for the employees lunch breaks prior to July 7, 1995 was in effect waiving its strict legal rights. The employees likely relied on such waiver. It would not be fair for Jones Diversified now have the employees account for this time by a reduction of their statutory right to overtime.

Just Cause for Dismissal

An employer may terminate the employment of an employee without notice or severance pay if he has just cause for the employee's termination. Whether or not an employer has just cause depends on the circumstances of each case. It has been suggested by the Branch in this case that progressive discipline must be applied prior to the termination of an employee.

Progressive discipline need not be applied in situations of serious misconduct on the part of an employee. Where the conduct is such that it goes to the root of the employment contract it is not necessary for the employer to give an opportunity to the employee to correct his defective performance.

In the case of Boyce, it is my finding that Boyce was given written notification on July 7, 1995 that the employer was not going to pay for break time and requiring such times to be deducted from hours recorded. On July 20, 1995 he was given a written warning that any further mis-recording of time would result in termination. Later that day Boyce again incorrectly recorded his hours to his favour. In the circumstances I conclude that there was just cause for Boyce's dismissal.

McAndrew

In order to resolve the issue concerning McAndrew it is necessary for me to make a finding of fact as to what happened on July 21, 1995. If Jones' evidence is accepted and if on July 21, 1997 McAndrew refused to work until his demands were met Jones Diversified would have cause for dismissal. The result may well have been different if the evidence had been that McAndrew was refusing to work in contravention of the provisions of the Act or if the refusal to work was made in the heat of the moment and was later withdrawn. However, that was not the case here since McAndrew's evidence was that he was calm throughout his conversation with Jones on July 21, 1995.

I prefer Jones' evidence to that of McAndrew, for the following reasons:

1. McAndrew's evidence was that the only reason proffered for his dismissal was that Jones did not like him. This is rather inconsistent with the fact that 3 employees were dismissed at the same time;
2. Jones' version of the evidence is consistent with other incidents or facts which are beyond dispute, namely, that three employees were dismissed at the same time, the conversation started in the office and moved to the lunchroom, the issue of hours of work was clearly alive been the parties, McAndrew was dissatisfied with the income that he was earning from his employment;
3. Jones delivered his evidence in a straightforward, forthright manner compared to McAndrew who was prone to speech making and was somewhat evasive on occasion;
4. McAndrew was obviously guilty of exaggeration in the communications I have referred to above to the Employment Standards Branch and to Shaw Cable.

I am mindful that Jones Diversified as the appellant has the burden to show that the Determination is wrong on the balance of probabilities. I find that Jones Diversified has met this burden since I am satisfied that what occurred on July 21, 1995 was that McAndrew and two of his fellow employees, after a discussion with Jones, refused to work unless Jones Diversified agreed to pay for their one-half hour lunch break. This conduct might be taken as a resignation or as constituting just cause for dismissal. In either event, compensation for length of service is not owed to McAndrew.

I have considered whether Jones Diversified's notification that it would no longer allow employees to be paid wages for their lunch breaks would amount to a constructive dismissal (thus allowing the employees to withdraw their services and receive severance pay). This was not a constructive dismissal since it was never a term of the employment contracts that the employees would be paid for their lunch breaks. The time sheets show that it was expected that breaks were to be recorded and deducted. While Jones Diversified waived its strict legal rights for a time it cannot be said such waiver created a contractual term.

**ORDER**

In summary, I order under Section 115 of the Act, that the Determination #71012 dated May 12, 1997 be confirmed with respect to the issues of overtime pay and deductions by Jones Diversified and cancel the Determination in respect to severance pay.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

/cef