

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 -

Stenmark Jewellers Ltd. operating Morgans Diamonds & Gems
("Stenmark")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Jim Wolfgang

FILE NO.: 97/492

DATE OF HEARING: September 22, 1997

DATE OF DECISION: October 23, 1997

DECISION

APPEARANCES

Cleve Stenmark	Stenmark Jewellers Ltd. operating Morgans Diamonds & Gems
Helene Cooper	On her own behalf
Ray Stea	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Stenmark Jewellers Ltd. operating Morgans Diamonds and Gems (“Stenmark”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 9, 1997.

The Determination found that Stenmark had contravened Sections 18(1) and 63(2)(b) of the *Act* and ordered Stenmark to pay compensation in the amount of \$1,971.01.

Stenmark filed an appeal dated June 25, 1997 of the Director’s Determination.

A hearing was held on September 22, 1997 at which time I took evidence from all parties.

ISSUE TO BE DECIDED

Is Helene Cooper (“Cooper”) entitled to compensation for length of service?

FACTS AND ARGUMENT

Cooper was employed by Stenmark as a salesperson from July 17, 1989 to June 15, 1996 and again from September 17, 1996 to October 29, 1996.

Cooper alleges she was given notice of layoff June 14, 1996 due to shortage of work to commence the following day June 15, 1996 for an undetermined period of time and that she was given two weeks vacation pay. Cooper’s Record of Employment form dated June 17, 1996 reflects the above.

Cooper in her Supplementary Record of Claim form writes she was telephoned August 20, 1996 to come to work September 14, 1996, the 14th being the eve of the 13 weeks of her termination period. In her rebuttal letter dated July 15, 1997 she alleges that Mr. Stenmark called her September 14 to cover for him one day September 17, while he attended a funeral. The delegate states in the Determination Cooper commenced work September 16, 1996 however, all other evidence agrees Cooper's actual starting date was September 17, 1996.

Cooper claims she contacted "Labour Relations" on both the occasion of her layoff and rehiring.

Cooper states Mrs. Stenmark contacted her September 19, 1996 to open the store and work that day as Mr. Stenmark had suffered a stroke. Cooper also worked September 20, 1996 and the weeks of September 23, and 30, 1996. She claims during the week of September 23rd she was the sole employee, opening the store, working full days without any breaks or lunch periods and closing the store. Cooper believes the reason she was called to work was a result of Keith Stenmark, the owner's son not being available as he was taking a course in Victoria.

Stenmark claims Cooper was allowed to "lock the store for necessary breaks etc."

On October 4, 1996 Stenmark informed Cooper she would not be required in the store from October 7 to October 12, 1996 as his son from Vancouver would be working.

Cooper states she worked a further two weeks from October 14 to October 25, with October 21 off as a sick day.

Stenmark claims that on June 14, after a discussion with Cooper he agreed to give her one week's notice of layoff but Cooper later that day told him she would be leaving the next day, June 15.

Stenmark in his correspondence argues Cooper was on holidays from June 16 until June 29, 1996 with full pay. He claims her layoff started July 1, 1996. That "Holiday time is employment time. July 1, 1996 to September 13, 1996 is one day short of 11 weeks."

Stenmark states Cooper was called in to work but was unavailable September 21, October 21 and October 28, 1996.

Cooper argues she had a regular scheduled day off September 21, and Trent Stenmark, the owner's son was working that day. October 21, she called in sick, and that she notified Stenmark the day before that Monday October 28, she would not be available she was going to visit a critically ill friend. Stenmark argues "It does not matter what the excuse was. She had been offered work".

Stenmark claims in his letter that on Friday Cooper had opened the store and operated it until his return at approximately 4:30. His son Greg and his wife were there. He left the store briefly and returned about 5:20. Cooper left at 5:30 as his son and wife stayed another 15 minutes. He then checked the till and found he had insufficient change for opening the following day and the banks were closed.

Stenmark claims on Tuesday, October 29, 1996 he mentioned to Cooper that she left him with very little change in the till. This developed into an argument and Stenmark went into his office. A few minutes later Copper appeared with her coat on and said "I'm going". He inquired if she was quitting and at his point she started yelling and left.

Stenmark states after several days he knew Copper had quit since she never came back. In earlier letter to the Tribunal he further stated in part "... several days later I then had to phone my accounting firm and inform them to terminate her from our payroll. Not being a large firm, I was not cognizant of the fact that the use of the word terminate meant exclusively fired".

Stenmark claims he did not read Cooper's Record of Employment dated October 31, 1996.

Stenmark argues that Cooper was not released to make room for his son Keith Stenmark. Keith was not employed at the store although he had helped on a very infrequent basis for many years and did not get paid unless he was asked to specifically cover for Stenmark. Further, his duties are different that those of Cooper i.e. goldsmithing, repairs, and engraving.

Stenmark states no other permanent help has been hired.

Cooper alleges she left work early on October 29, 1996 as a result of being fired. She feels that after 40 years in the business Stenmark know exactly what "terminate" means.

Cooper argues Keith Stenmark filled in for Stenmark on numerous occasions and, while not being an officially paid employee, was paid from the till in cash for time he spent in the store. His duties included not only repairs but also waiting on customers.

The delegate states after investigation "There appears to be little doubt that the Employer wanted to have family members take on the work of this employee. This is supported by the fact that she was laid off during the summer while the son of the owners worked in her place and again during the week of October 7, 1996".

ANALYSIS

Several points have been raised around what constitutes a temporary layoff or, more properly, when does it end and become termination.

The first point raised by Stenmark concerned the application of vacation pay to time worked after notice of layoff. Section 67(1) of the *Act* prevents an employer from requiring an employee to take vacation during the notice period. Further, Cooper could not be laid off June 15, 1996 given a Record of Employment for that date, and then be considered “working” until June 29, 1996.

The matter of whether Cooper was available for work September 21, October 21 and October 28, 1996 is not of importance to this case.

Notice was apparently given to Cooper August 20, 1996 to return to work September 14, 1996. This would have been the last day of a 13 week temporary layoff. An employee must return to work the before the end of the normal working hours on the last day of the 13th week or the layoff has been exceeded.

We have no evidence that Cooper in fact worked September 14, 1996. The delegate indicated her first day of work was September 16, 1996 and both Cooper and Stenmark claim Cooper worked September 17, 1996. In any case, the 13 week temporary layoff has been exceeded and Cooper returned to work in the 14th week.

Cooper’s claim of payment for length of service was established at that point and what happened on October 29, 1996 has no bearing on her entitlement.

Even if we were to find that Cooper had worked September 14, 1996 the layoff on October 7, 1996 for one week would have qualified her for payment for length of service as she would then have been laid off for 14 weeks in a 20 week period as determined under Part One, Introductory Provisions of the *Act*.

Stenmark claims he did not understand the specific meaning of the word “terminate” and had not read the Record of Employment which had the designation “M”, meaning dismissal as the reason for leaving rather than the “E” meaning quit. The record of Employment had been prepared by his accounting firm, which I am sure understand the difference between quit and dismissal even if Stenmark did not.

Stenmark on two occasions, in writing, claimed he had waited “several” days before contacting his accounting firm however, the Record of Employment was issued on October 31, 1996 two days after the events of October 29, 1996. This period falls within the requirements of Section 18(1) of the *Act* which states:

(1) an employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

For the above reasons, I find no cause to alter the Determination.

ORDER

I order, under Section 115 of the *Act* the Determination dated June 9, 1997 against Stenmark Jewellers Ltd. operating Morgans Diamonds & Gems be confirmed.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal

JW:sr