

An appeal

- by -

639515 B.C. Ltd. operating as Elaine Lesley Beauty Salon

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2003A/292

DATE OF DECISION: January 27, 2004

DECISION

SUBMISSIONS

Geraldine Burrell	On behalf of 639515 B.C. Ltd
Glenn Gallins	Counsel on behalf of Martine St. Amand
Terry Hughes	Delegate on behalf of the Director

OVERVIEW

This is an appeal by 639515 B.C. Ltd. operating as Elaine Lesley Beauty Salon (“the Company”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated October 16, 2003 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Company, including its predecessor, employed Martine St. Amand (“Amand”) as an aesthetician from May 7, 2002 until the termination of her employment on December 7, 2002. Amand complained that she was owed overtime wages and compensation for length of service. The Company denied owing any overtime wages and alleged that any liability for compensation for length of service was discharged because Amand had quit her job and was not dismissed.

The Director’s delegate investigated the matter, held some form of hearing and determined that Amand had been dismissed without cause and had worked overtime for which she was not properly paid. The delegate also found that the Company had not paid Amand’s final paycheque within the statutory time limits. The delegate imposed an administrative penalty.

The Company has appealed firstly on the basis that new evidence proves that Amand did not work the overtime she claimed and, secondly, the Company says that the delegate erred in law in finding that Amand was dismissed.

Amand submits that the appeal in this case should be dismissed because it was not filed in a timely manner or within the specified time limits.

ISSUE

There are three issues to be decided on this appeal. Firstly, whether the appeal was filed in a timely fashion. Secondly, whether the new evidence should be admitted to disprove the overtime claim and whether it does disprove that claim and thirdly, whether the delegate erred in finding that Amand was dismissed without cause.

ANALYSIS

Timeliness:

Counsel for Amand submits that the appeal in this case should be dismissed because it was not filed in a timely manner or within the specified time limits.

Counsel for Amand submits that the time for filing an appeal is set for 30 days after the date of service of the Determination where the person receiving the Determination is served by registered mail. Counsel submits that the 30 days ran from October 16, 2003 and the appeal was not filed until November 20, 2003. Counsel submits that Amand has suffered prejudice by the delay. Neither the appellant nor the delegate addressed this issue.

It is apparent that Counsel has made an error in the time calculation. The Determination was not issued until October 16, 2003. Thereafter, the Determination was mailed by registered mail but the time for filing an appeal runs from the date of service not the date of mailing. Section 122 of the *Act* provides that the Determination is deemed to have been served 8 days after mailing. Therefore, in this case, if the Determination was indeed mailed on October 16, the day it was dated, it would be deemed served on October 24th. The thirty days then would make the date for filing November 24th. Accordingly I am satisfied that the appeal was filed within the time frame contemplated by the *Act*.

New Evidence:

The Company has submitted new evidence that they say was not previously available. It was imbedded in a computer system that has taken some considerable effort to restore. The Company has submitted a letter from Milano Systems indicating that those records were not restored until November, 2003. The Company has also obtained records from a third party alarm systems company to indicate opening and closing times for the business.

Counsel for the respondent submits that the Company could have secured this information prior to the hearing. The delegate submits that a demand for records was made and that these 'new' records were not produced at the time of the hearing.

I am satisfied that the Company has provided a reasonable explanation for the unavailability of these records and for the delay in acquiring them from third parties. This was not the case of the employer "lying in the weeds" but rather there were legitimate reasons why the evidence could not be produced earlier. I am satisfied that the new evidence should be admitted to ensure a fair consideration of all of the issues between the parties. This difficulty has arisen before where a party is dependent on third parties to acquire the needed information and the evidence has subsequently been admitted: *Re: Wilson*, BCEST #D237/01; *Re: Cathay Traditional Chinese Medical Centre Ltd.*, BCEST #D169/01.

Overtime:

It is clear from a review of the new evidence that the calculation of hours worked and the overtime claimed by Armand are inaccurate. The calculations are based on start and finish times but fail to take into account significant times of absences from work that created, in effect, split shifts. None of the splits were in contravention of the provisions of the *Act* but the gaps in hours of work were not taken into account in the calculation of hours worked.

The records produced show very clearly that all hours worked fell within the standards required by the Act for straight time pay without attracting overtime premiums. This error is not to fault the delegate, as the claimant did not disclose these issues and the employer did not have the records upon which to challenge Armand's claims. The awarding of overtime premiums where it is not due is an error in law that is reviewable by the Tribunal. Accordingly I find that there was no liability on the part of the Company for the payment of overtime.

Compensation for Length of Service:

The facts as found by the delegate were that Amand went to see her doctor on Thursday, December 5, 2002. Her doctor told her that she should stop work due to medical reasons and gave her a note to that effect. She decided she wanted to take medical leave from her work. On December 7th a conversation took place between Amand and a representative of the Company. The Company claims that Amand said that she was leaving. The Company told the delegate that Amand was a good employee and there was no reason to dismiss her. Amand says that although she intended to take a period of medical leave she did not intend to quit.

The delegate found that the facts were more supportive of a dismissal than that Amand quit. He bases this on the fact that Amand obviously had decided to take a medical leave and not quit. However, the delegate does not explain why there would have been any entitlement to a medical leave. There is no provision in the *Act* that requires an employer to grant a medical leave. There was no evidence that the Company had a policy to allow medical leave or that medical leave was a term of the employment contract.

In the absence of any right to medical leave, the unilateral decision of the employee to take medical leave is more consistent with a finding that the employee chose to leave her employment. The delegate clearly found that Amand had decided she needed a break due to medical stress. This finding can only indicate that Amand had decided to leave her employment.

It seems that the delegate must have assumed that Amand had some form of entitlement to leave her employment on a temporary basis without the agreement of her employer. Accordingly, I find that the delegate erred in law in finding that Amand was dismissed. There is no evidence consistent with dismissal and considerable evidence consistent with Amand's decision to leave her employment.

Late Payment of Wages:

The Company addresses the issue of late payment of wages. They note that Amand had left her employment but did not advise the Company of an address for delivery until her letter of January 2, 2004. However no penalty was imposed in this regard and I find I do not have to address whether the Company had any liability in this regard.

Penalty:

In this case an administrative penalty was imposed based on the breach of Section 63 of the Act. As I have found that there was not a breach of Section 63 this penalty will also be cancelled.

Conclusion:

I have concluded that the Company has met the onus of establishing that there were errors in law in this case that warrants cancellation of the Determination. The new evidence conclusively establishes that no overtime wages were earned and I have found that the delegate erred in finding that the claimant was dismissed. The employer's liability for compensation for length of service was discharged when Amand terminated her employment – Section 63(3)(c).

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated October 16, 2003 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal