

An appeal

- by -

Hill Top Holdings Ltd. operating as Starlite Drycleaners
("Starlite")

- 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: Norma Edelman

FILE No.: 2001/809

DATE OF DECISION: January 14, 2002

DECISION

OVERVIEW

This is an appeal by Hill Top Holdings Ltd. operating as Starlite Drycleaners ("Starlite") pursuant to Section 112 of the Employment Standards Act (the "Act") of a Determination issued by a delegate of the Director of Employment Standards on October 25, 2001. The delegate found that Starlite owed Amanda Restall ("Restall") 4 hours of pay under Section 34(2) of the Act. Starlite appealed on the ground that it is not liable for the wages as Restall never commenced work on the day in question.

ISSUE TO BE DECIDED

Did the delegate err in concluding Restall is owed wages in the amount of \$34.66?

FINDINGS

Restall commenced work at Starlite on or about November 14, 2000 as a counter person at a rate of pay of \$8.00 per hour.

The dispute in this appeal concerns what transpired on March 6, 2001.

In the Determination the delegate stated the following:

Starlite claims that on Tuesday, March 6th they tried to reach Ms. Restall at the station first thing (9:25 a.m.) but there was no answer. Her shift starts at 9:30 and the general practice is to get there a few minutes early to set up their cash. Starlite claims that they continued to call the store every few minutes until twelve minutes to ten at which time they had assumed that she hadn't shown up for her shift. Starlite claims that at ten minutes to ten they called Hillside again and Ms. Restall answered. Starlite told Ms. Restall that they had been calling continuously for the last 25 minutes and she told them that she was not feeling well and was up in the bathroom being sick. Starlite claims at this time they told Ms. Restall that they had called Phyllis into work and that she was on her way there. Starlite claims that they told Ms. Restall that she was obviously not fit to work her shift, that they were not paying her to be sick in the bathroom, they were paying her to serve the customers and that she was go home. Starlite claims that Ms. Restall replied that she would be fine in a bit. Regardless Starlite claims that they required Ms. Restall to leave. Starlite claims that when Ms. Restall left Phyllis called them to advise them that the cash was not even put in the till and that the heat was still turned down.

The delegate found, based on evidence provided by Starlite, which she accepted as "accurate" and "truthful", that insofar as Restall answered the phone at ten minutes to ten on March 6, she started work. Further, Restall was sent home by Starlite despite her reassurance that she would be fine in a bit and did not need to leave. Accordingly, the delegate concluded that Restall was entitled to 4 hours wages, amounting to \$34.66, in accordance with Section 34(2) of the Act.

Carmen Fox ("Fox"), on behalf of Starlite, filed an appeal of the Determination on November 19, 2001. In her appeal, Fox stated the following:

We feel that Amanda Restall was not only unfit to work and conduct herself in a professional manner but that she did not in fact start her work day. Amanda's work day only starts after she turns the closed sign to open and takes the cash out and puts it into the till at that point in time the store is ready to receive customers. Amanda in fact did not do this, I tried to call her and when I finally got in touch with her she had said that she was being sick in the bathroom upstairs. At that point in time, I felt that she could not work. Amanda stated that she would be fine in a bit. Please define in a bit. Amanda had a history at her work place to be ill all day or for a few hours, I could not justify her being at work if she could not do her job and I could not determine what a "bit" meant or what kind of time frame we were talking about. This is the grounds for my appeal and the decision that employment standards made stating that because she answered the phone 20 minutes into her shift constituted her starting work that day.

The delegate and Restall were invited to reply to the appeal. Only the delegate replied and she stated that given Restall answered the phone at her work location, she "...performed a service for her employer and thus "started" work". As well, when Restall was told to go home in spite of her request to stay and complete her shift, this suspension of work was within, and not beyond, Starlite's control.

ANALYSIS

As the Appellant, Starlite bears the onus of showing that the Determination is incorrect. In this case, I am not satisfied that Starlite has shown the Determination is wrong.

Section 34(2) of the Act reads:

An employee is entitled to be paid for a minimum of

- a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or

b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with Part 3 of the of the Workers' Compensation Act or a regulation under that Part.

I agree with the delegate that Restall started work on March 6 and that her work was suspended for a reason within Starlite's control. Restall attended at her workplace and she answered the phone. As it turned out, the phone call was from Restall's employer, although it just as well could have been from a customer. By answering the phone she performed work for her employer. Section 34(2)(a) of the Act states that the only circumstance under which an employer is not required to pay a minimum of 4 hours pay to an employee who has started work is when the work is suspended for a reason completely beyond the employer's control. In this case, the circumstance causing a suspension of work was clearly within Starlite's control. Restall did not voluntarily leave the work site. Starlite sent Restall home. Although Starlite is of the view Restall was unfit to work on March 6, there is no evidence to support this position. Restall claims she could work "in a bit". Fox was not at the workplace and therefore she was in no position to directly observe Restall on March 6. Further, Restall's conduct on other occasions is insufficient to establish her fitness to work on the day in question. The obligation is on the employer to provide evidence that an employee is not fit to work. In this case, Starlite has not met that obligation. For these reasons, I dismiss the appeal.

ORDER

I order under Section 115 of the Act that the Determination dated October 25, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal