



An appeal

- by -

Georgina Salisbury and Alain Reme operating as “Evolutions” and as
“Evolutions for Changes in Hair”
 (“Evolutions”)

- 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: Michelle Alman

FILE No.: 2000/707

DATE OF HEARING: January 5, 2001

DATE OF DECISION: January 18, 2001

DECISION

APPEARANCES:

Georgina Salisbury and Alain Reme, for themselves operating as "Evolutions" and as "Evolutions for Changes in Hair"

Leanne Karen Horan, for herself

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Georgina Salisbury ("Salisbury") and Alain Reme ("Reme") from a Determination issued September 22, 2000 by a delegate of the Director of Employment Standards ("the Director"). Salisbury and Reme are the principals of a hair styling business operating as "Evolutions" and as "Evolutions for Changes in Hair" ("Evolutions"). The Determination concluded that Evolutions owed its former employee, Leanne Karen Horan ("Horan"), two weeks' pay as compensation for length of service, plus vacation pay on that amount.

PRELIMINARY ISSUES

A preliminary issue arises in this case as to whether Horan was denied a fair opportunity to present witnesses due to her late receipt of the oral hearing notice from the Tribunal. The notice required that Horan specify to the Tribunal by no later than Friday, December 22, 2000, how many people she would be bringing to the January 5, 2001 hearing. Horan stated near the close of the hearing that she did not receive the couriered notice until it was too late to meet the Tribunal's contact deadline. Horan also said that when she contacted the Tribunal, she was advised her that it would be up to the hearing adjudicator to decide whether or not to allow Horan's witnesses to give evidence. Horan stated that she would have brought witnesses to confirm that she had discussed with them her problems at Evolutions when the problems were occurring. She confirmed that those witnesses had no direct knowledge of the facts in her case.

Because Horan's proposed witnesses could only supply hearsay evidence confirming Horan's reports of the facts, I ruled that Horan's direct evidence was to be preferred over her proposed witnesses' evidence in any event. For this reason, I find that Horan's late receipt of the hearing notice in no way denied her a fair opportunity to present relevant evidence.

ISSUE

The issue to be decided is whether Horan was terminated from her employment with Evolutions, such that she is owed two weeks' wages as compensation for length of service, or whether she resigned and is owed no compensation for length of service.

THE FACTS AND ANALYSIS

Evolutions is a hair styling business owned and operated by Salisbury and Reme in Delta. Horan began employment as a receptionist with Evolutions on February 15, 1999 and continued through May 30, 2000. Evolutions is not a large operation, and the two principals, Reme and Salisbury, are both directly involved with the enterprise. Salisbury apparently has primary responsibility for the personnel and administrative issues of the business, but consults with Reme. Salisbury and Reme both testified that there were no problems with Horan's job performance and that they had not wanted to lose her as an employee.

The parties agree that on or about April 20, 2000 Horan and Salisbury had a disagreement during work. Horan felt wronged and upset, so she gave two weeks' verbal notice of her intention to quit. Her last day of work was to be May 6, 2000. From here the parties' evidence differs significantly.

Salisbury, Reme, and three other witnesses gave evidence for Evolutions. Salisbury testified that on April 27, 2000, a week after first giving her notice, Horan "took back" the May 6, 2000 quit date and extended her notice period until May 31, 2000. Salisbury said that Horan offered to train her replacement, and that she appeared to believe she was doing her employers a favour by staying on through the end of May. Salisbury testified that she agreed to the change in Horan's notice period and asked Horan to make sure that the resumes on file were up to date so she and Reme could seek a replacement for Horan. Salisbury did not get anything in writing from Horan to reflect the change in Horan's resignation date.

Salisbury also testified that on April 27, 2000 Horan first raised the question of what employment-end description code would be entered on her Record of Employment ("ROE") from Evolutions. Salisbury repeatedly stated in her evidence that Horan did not want to have "quit" entered on the ROE and sought Salisbury's agreement to have the code for "shortage of work", or at least the code for "other," used. Salisbury said that she told Horan she could not say that there was a shortage of work at Evolutions because she was seeking to replace Horan. Their conversation became difficult and did not last long. Salisbury contended that Karla Ellett ("Ellett"), one of the other Evolutions hair stylists, was present during part of this exchange on April 27, 2000 and heard Horan seeking to discuss what code would be entered on her ROE at the end of her employment.

Salisbury also testified that not long after the agreed extension of Horan's notice period, Horan informed her that she was applying for an advertised job as a hair colour technician in

Vancouver. Horan needed to take time off work to attend an interview, which Salisbury granted. Salisbury testified that she knew that Horan was taking her hairdresser licensing examination in early May, 2000, and said that if Horan had not been so discontent with her situation at Evolutions, she would have offered to hire Horan as a stylist once she passed her examination. Horan attended the colour technician job interview on or about May 18, 2000 but was unsuccessful in obtaining the position.

Salisbury said she asked Horan to orient a potential new receptionist on May 20, 2000 and to train the potential hire more fully on May 24 and May 30, 2000, which Horan did. Salisbury denied that she and Reme hired the new receptionist until May 30, 2000, when Horan became ill during work and went home early. Salisbury hired the new receptionist to work on May 30, 2000, and prepared and mailed a ROE for Horan indicating that Horan had quit her job at Evolutions. Salisbury testified that after she mailed the ROE, she had numerous conversations with Horan about Horan's ROE code, which Horan wanted changed. Salisbury said she finally called Human Resources Canada, who told her that she could not change the ROE code once the document was issued.

On cross-examination, Salisbury remained unshaken from her contentions that Horan did not rescind her notice to quit on April 20, 2000, and that on April 27, 2000, Horan verbally changed the notice period to be "the end of the month" of May, 2000. Salisbury denied repeatedly that she ever agreed that Horan could continue to work for Evolutions until and unless Horan succeeded in obtaining a specific alternate position, at which point Horan would give Evolutions two weeks' notice. Salisbury agreed that Horan did ask her for a reference for the hair colourist technician job, but said she had never been contacted by any potential employer for Horan to give any reference. Salisbury remained firm, too, that it was Horan who brought up May 31, 2000 as her end date for work at Evolutions, and denied that she had told Horan, "Let's see what happens at the end of the month," when they spoke on April 27, 2000.

Reme testified that Horan approached him on or about April 27, 2000 and told him that she was seeking employment elsewhere. He said that he did not recall Horan mentioning a specific date to him as her last day of work at Evolutions, but said that he had discussed the matter with Salisbury and understood from her that Horan was leaving at the end of May, 2000. Reme stated that no one had been hired to replace Horan by May 17 or 18, 2000 when he asked Horan about whether she knew what she was doing yet. He agreed that Horan told him she had not yet interviewed for the colourist technician job, but was doing so the next day and would let him know when she knew anything further.

Reme stated that he did not hire the replacement receptionist, and that Salisbury must have done so. He testified that he was called at home by Horan after she received her ROE, and that she was upset because it stated she had quit her job at Evolutions. She wanted the ROE changed to "other," or "termination" because she said she didn't quit but had been dismissed while looking for another job. Reme testified that he told Horan he believed she hadn't been

dismissed but had quit. She had told him she was looking for another job and had asked him for a reference. She had told him she was going to an interview for the other job. Reme denied recalling any conversations with Horan in which she told him before May 31, 2000 that she was not quitting her employment at Evolutions.

On cross-examination Reme agreed that when he spoke with Horan on May 17 or 18, 2000 about what she was doing, he also told her that they might want one of the prospective replacements for Horan to start on June 1 or June 15. Reme further agreed on cross-examination that Horan had told him twice that she was not quitting unless she got the hair colour technician job. On re-direct examination Reme said that he had not discussed those conversations with Salisbury, who had the main responsibility for Evolutions's personnel matters. Reme stated on re-direct examination, too, that Horan told him she wanted "sufficient" notice if she was dismissed, and he denied Horan had told him she needed two weeks' "proper" notice. He concluded by testifying that he did not believe that Evolutions needed to give Horan any notice, as she had told him she was quitting and was acting like she was quitting by going to a job interview and asking him for a reference.

Ellett gave testimony that she was present during part of the conversation that took place on or about April 27, 2000 between Salisbury and Horan. She could not recall the exact date of the conversation, other than that it occurred before May 1, 2000. Ellett stated that the conversation became heated while the two were discussing something about ROE codes, and she left because she didn't feel she should be overhearing more. She had the impression on April 27, 2000 that Horan was discussing ROE codes with Salisbury because she was quitting. Ellett testified that because of rumours in the shop, she was aware before the conversation that Horan was intending to quit by May 6, 2000. Ellett said she had asked Horan directly what was going on, and that Horan told her she wanted to be employed as a hairdresser in downtown Vancouver. Ellett testified that Horan mentioned an end date by which she was leaving Evolutions, but Ellett could not recall the date. According to Ellett, Horan never mentioned that she was quitting Evolutions only if she got a specific job. Ellett also said Salisbury never told her a date by which Horan was leaving. Ellett said further that she never thought Salisbury and Reme were trying to get rid of Horan, and that she was under the impression that Horan had extended her end date from May 6, 2000 to the end of May, 2000.

On cross-examination Ellett agreed that Horan had never told her she was leaving on May 31, 2000, and that it may only have been her assumption. It was undisputed that Ellett did ask Horan "point-blank" when she was leaving. Ellett insisted on cross-examination that Horan did tell her she was quitting, that Horan did not mention she was quitting only if she got a specific or another job, and that Horan told Ellett directly that she was leaving "at the end of May, 2000."

Michael Sandford ("Sandford"), another hair stylist at Evolutions, also gave evidence for Evolutions. He lives with Salisbury. Sandford testified that he understood Horan was

quitting on May 6, 2000. When he saw her again at work the next working day, he asked her what was up. Sandford stated that Horan replied that she was staying to the end of the month. He testified that he got no impression that Horan was leaving only if she got another job.

On cross-examination Sandford denied that the Director's delegate accurately quoted or paraphrased him in the Determination. Specifically, he denied saying that Horan told him she "was still planning to quit once if she was successful in her job interview [sic]." Horan agreed with Sandford that the Director's delegate had often paraphrased in the Determination, and did not challenge Sandford's denial. Sandford said the Director's delegate seemed confused while speaking with him, in that after about 10 minutes of conversation, she revealed that she thought he was Reme. Sandford remained firm in his contention that Horan told him shortly after May 6, 2000 that she was staying "to the end of the month." He also testified on cross-examination that Horan telephoned Salisbury at their home at least six times trying to get her to change Horan's ROE code to something other than "quit."

Kimberly Arthur-Leung ("Arthur-Leung"), a lawyer and customer at Evolutions, also gave evidence. Arthur-Leung stated that she has her two young daughters' bangs and hair trimmed about once a month because they appear in commercials. She testified that she brought the girls in for quick hair trims with Horan on May 23, 2000, and that Horan told her during the appointment that this would be the last time she did the girls' hair, as she would not be there the next time they came in. When Arthur-Leung asked Horan why, Horan told her that she had a hair colourist job downtown. Arthur-Leung recalled this statement clearly because she had not previously known of such a specialization.

Horan agreed with Arthur-Leung's evidence for the most part, but questioned whether she had actually told Arthur-Leung she did have a job for certain. Arthur-Leung testified and remained certain that she recalled Horan telling her, "I have a job downtown." She stated also that she was not aware of any of the background to the dispute, but Horan had told her on May 23, 2000 that she had a job elsewhere. Horan agreed with this.

Horan's evidence was that after giving Salisbury her notice on April 20, 2000, she thought things over, cooled off, and rescinded her notice only about 20 minutes after giving it. Horan stated that Salisbury accepted the retraction of the notice, and that she told Salisbury that she would not "ditch" them, but would give them two weeks' notice if she did quit later. On or about April 27, 2000, Horan said she noticed a pencil notation in the appointment book to the effect that Horan's last day was May 6, 2000. It was the notation, Horan testified, that caused her to go to discuss the situation further with Salisbury on or about April 27, 2000. Horan said she again made it clear she was not quitting, and denied that in that conversation she ever agreed to extend her notice to the end of May, 2000. Horan denied discussing her ROE with Salisbury on April 27, 2000, and said she reminded Salisbury that she had agreed Horan was not quitting her employment with Evolutions on May 6. Horan said she believed the

matter was ended when Salisbury agreed Horan should erase the May 6 notation from the appointment book.

Horan stated that it was about three weeks after that conversation that she saw the hair colourist position advertised. She recalled the ad's date as May 12, 2000, a Friday, because she said she buys the paper on Fridays and looks at the ads. Horan testified that she was excited by the possible job, as she had a special interest in hair colouring and felt over-qualified as a receptionist. She contacted the advertising employer and applied for the position. She then spoke with Salisbury and Reme, asking them for references and telling them that she'd applied for the hair colourist job and would be interviewing the following Friday. Horan stated that both seemed all right with that, and stated she'd told them both because she did not want to jeopardize her job, which she liked.

Horan said Salisbury okayed the Friday interview time off, but asked her not to miss too much work. Horan also said Salisbury asked her at that point to go through the resumes on file to be sure that they were up to date. It was Horan's evidence that on Thursday, May 18, 2000, Reme asked her what was happening, and that she then showed him one resume from the file that seemed like a good replacement prospect. Horan stated that Reme agreed the replacement prospect's resume looked good, and that it would be possible for her to start June 1 or 15, 2000. She stated that she told Reme she was interested in the hair colourist job, but didn't want to quit at Evolutions. Horan said she told Reme that she'd not yet had the colourist position interview, and that she would give him and Salisbury two weeks' notice if she was leaving. Horan also testified that she told Reme that he and Salisbury would have to give her "proper" notice if they replaced her before she quit. She testified that although she knew that the *Act* required her employers to give her two weeks' written notice if they terminated her employment, she did not tell that to her employers because that was not her responsibility.

Horan testified that on May 20, 2000 Salisbury called in a replacement prospect for Horan to orient. The replacement prospect had no receptionist experience, so Horan said that she was not too alarmed by being asked to orient her. Horan testified that she became worried that she was losing her job when Salisbury asked her to train the replacement prospect further on May 24 and May 30, 2000, and when Salisbury asked her to check to be sure there were ROE blanks in the files. Horan said that when it became clearer to her that she was going to be replaced, she told Salisbury that she was not quitting and didn't have another job. Horan stated that Salisbury didn't want to discuss the situation, but that she told Salisbury they would have to give her proper notice if they replaced her. Horan said she told Salisbury this because she didn't want the money instead of notice, she wanted to keep her job.

Horan agreed that she had told Arthur-Leung that she would not be there the next time she brought in her daughters, but said she would not have told Arthur-Leung that she had got another job. Horan said she likely only said she was "pretty sure" she had another job. Horan also said she did not want to talk with a customer about her problems with Evolutions,

as that would not have been professional, and that she preferred to leave Arthur-Leung with the impression that she was leaving for a new job rather than being replaced. Horan asserted that she never would have said she had another job because she did not know that for sure on May 23, 2000.

Horan testified that she told Salisbury during the latter part of May, 2000 that if she gave a new person Horan's job, she would be terminating Horan. It was Horan's impression that Salisbury believed Horan was quitting by applying for another job, but Horan testified that she'd had no intention of quitting unless she did have another job. Horan also denied that she ever suggested to Salisbury that she use the "shortage of work" code on her ROE, but had also suggested that she use "other" with an explanation that she had been replaced while looking for other employment. Horan agreed she had telephoned Reme and Salisbury at their homes after receiving her ROE with the "quit" code entry, and that she wanted the ROE changed to reflect either "other" or "dismissal."

Horan said that Ellett was mistaken as to the date of the conversation she heard between Horan and Salisbury. Horan believed her conversations with Salisbury about her ROE code all took place in May, 2000 after it became clear to her that she was going to lose her position at Evolutions. Horan denied that she ever told Salisbury she was leaving on May 31, 2000 or at the end of May, and claimed that Salisbury was the only one who mentioned seeing what happened at the end of May.

On cross-examination Horan remained firm that she had rescinded her two weeks' notice on April 20, 2000, and that she never gave Salisbury the end of May, 2000 or May 31, 2000 as her new quit date. Horan also insisted that she did not speak with Salisbury about her ROE code in April, 2000, but only at the end of May, 2000. Horan admitted on cross-examination that she never made an arrangement with Salisbury that she would leave Evolutions with two weeks' notice only if she got the colourist job, but said she agreed on this with Reme. Horan stated she did not get both Salisbury and Reme together to speak about this matter because the salon was busy and both were too preoccupied with work.

Decisions from the Courts and this Tribunal have held that an employee's right to quit his or her employment is personal. An employee has to make up his or her own mind that he or she is quitting a job, and the employee must somehow objectively demonstrate that decision, as for example, by offering a letter of resignation. The employee's objective act must be one that is inconsistent with the continuation of the employment. See, e.g., *Wilson Place Management Ltd. (c.o.b. Wilson Place)*, BC EST #D047/96, and the following discussion in *Maple Ridge Travel Agency Ltd.*, BC EST #D273/99:

I agree with the adjudicator in RTO (Rentown) Inc., BCEST #D409/97:

“Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their “resignation” when the resignation was given in the heat of argument. To be a valid and subsisting

resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an “outside” observer must be satisfied that the resignation was freely and voluntarily given and represented the employee’s true intention at the time it was given.”

There is no dispute in this case that on April 20, 2000 Horan gave notice that she was leaving her employment at Evolutions on May 6, 2000. There is, however, a conflict in the evidence as to whether on April 20, 2000 Horan rescinded that notice. The most significant conflict in the evidence concerns whether on April 27, 2000 Horan reached agreement with Salisbury to modify her resignation notice to continue working until the end of May, 2000. There is also a question of whether at some point after May 6, 2000, Reme agreed with Horan that she would leave her position at Evolutions only if she obtained another job.

In assessing the conflicting evidence from this case, I apply the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases on conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Horan alone recalled having rescinded her resignation on April 20, 2000. Salisbury could not recall that having taken place, and remembered instead that Horan modified the end date for her employment in their April 27, 2000 discussion. Salisbury's evidence was that on April 27, 2000 she agreed to Horan's requested modification of her resignation notice and allowed Horan to extend her employment with Evolutions until May 31, 2000. There was also evidence from Salisbury, corroborated by Ellett, that on April 27, 2000 Horan raised the matter of her ROE and discussed heatedly with Salisbury which employment end code would be entered on Horan's ROE.

Ellett was certain that the conversation had taken place before the beginning of May, 2000 because she'd experienced a health problem in early May and recalled the ROE discussion as taking place before the health problem occurred. The discussion about Horan's ROE would logically only have taken place if Horan's employment was ending. If the discussion occurred on April 27, 2000, then it follows that at that point Horan intended to quit by a date certain. Ellett is a disinterested witness in the sense that she is not a party to the dispute. She

is, however, a current employee of Evolutions and has a certain degree of interest in maintaining a good working relationship with her employers. Ellett gave her evidence in credible fashion and remained very certain that the date of the ROE discussion was before May 1, 2000. Ellett also remained unshaken that Horan had directly told her that she was leaving on a date certain, which date Ellett could not recall. On balance, I find that Ellett's interest in her current employment relationship is not sufficient to undercut her evidence, and that the conversation between Salisbury and Horan on April 27, 2000 did include a discussion of Horan's ROE code.

Sandford's unshaken evidence was also to the effect that not long after May 6, 2000, Horan told him she was leaving Evolutions but staying through the end of May instead of leaving on May 6, 2000. Sandford lives with Salisbury and, therefore, must be seen as having a degree of interest in common with Salisbury. He is also an Evolutions employee, like Ellett. Because of the greater degree of personal involvement with a party, I give Sandford's evidence lesser weight, but note that it corroborates the evidence of others that Horan let it be known at Evolutions that she was leaving at the end of May, 2000.

It was undisputed that Horan told Arthur-Leung on May 23, 2000 that she would not be at Evolutions the next time Arthur-Leung would be in, approximately a month from that date. Arthur-Leung, a completely disinterested witness, was quite sure that Horan also told her on May 23, 2000 that she had a job downtown as a hair colourist.

Taking all of the above-noted evidence from the witnesses into account, and giving the evidence its due weight, I find on a balance of probabilities that Horan did not rescind her resignation notice on April 20, 2000. I find instead that it is more likely than not in all of the circumstances that Horan sought and reached agreement with Salisbury on April 27, 2000 to change her resignation notice so that she would be quitting her employment with Evolutions on May 31, 2000. This is not a complete end to the matter, however, since Horan believed that she had again changed her resignation notice from speaking with Reme.

Horan's evidence that she told Reme twice in May, 2000 that she was not leaving Evolutions unless she got the hair colourist job she'd applied for was confirmed by Reme on cross-examination. This does not, however, necessarily mean that Horan and her employer agreed to modify her resignation notice in the desired manner. Reme testified that he did not discuss Horan's statements with Salisbury, and his evidence made it clear that he was relatively uninvolved in hiring and firing matters. Salisbury was primarily responsible for Evolutions personnel matters, and she did not recall Horan ever speaking to her about staying on in her job at Evolutions until she found a different job. Reme's evidence was also clear that he believed Horan was leaving by the end of May, 2000, though he agreed he had not heard that directly from Horan.

Horan's evidence that she also told Salisbury of her change of plans was not confirmed by Salisbury. When asked on cross-examination why she did not speak with both Reme and

Salisbury together about the further change she alleged she wanted made in her resignation notice, Horan only stated that "The salon was busy." Horan was visibly upset while giving that testimony, however, and may indeed have been very frustrated in trying to speak with the two Evolutions principals together during their busy May graduation season. It is my finding, nevertheless, that on a balance of probabilities Reme did not actually agree to the further requested change in Horan's resignation notice, and Salisbury did not agree to the further requested change. Without a clear agreement from her employers to the requested change, Reme's resignation notice remained accepted as providing that she was quitting as of May 31, 2000.

Because I have concluded that Horan gave notice of her intention to resign from her employment with Evolutions as of May 31, 2000, and because she gave objective evidence of her intention to resign through her active seeking of other employment, I find that Horan was not fired but voluntarily left her employment. Horan is, therefore, owed no compensation for length of service.

ORDER

Pursuant to section 115 of the *Act*, I hereby cancel the Determination issued September 22, 2000.

MICHELLE ALMAN

**Michelle Alman
Adjudicator
Employment Standards Tribunal**