

An appeal

- by -

Heather Gibson
(the “Appellant”)

- 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 (as amended)

TRIBUNAL MEMBER: Robert C.P. Walker

FILE No.: 2013A/22

DATE OF DECISION: July 10, 2013

DECISION

REPRESENTATIVES

Heather Gibson	on her own behalf
Christine Oakley	on behalf of Christine Oakley and Perry Oakley carrying on business as Zero Gravity! Hair and Esthetics
Joe LeBlanc	on behalf of the Director of Employment Standards

INTRODUCTION

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Heather Gibson (the “Appellant”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 20, 2013.
2. The delegate held that the Appellant was lawfully terminated for just cause by her employer Christine Oakley and Perry Oakley carrying on business as Zero Gravity! Hair and Esthetics (“Zero Gravity”). As a result she was not entitled to compensation for length of service.
3. This matter was initially forwarded to me for consideration under section 114 of the *Act*. At that stage the parties had not made written submissions other than the Appellant’s written arguments accompanying her Appeal. The Appellant has also sought a full hearing in which the facts may be presented and the employer cross-examined “to get to the truth of the matter”. I determined that I could not decide the Appeal under section 114 of the *Act* based upon the filed Appeal documents, the Appellant’s submissions including the Determination and Reasons for the Determination, and the Record filed by the Director. Submissions were then sought and received from all the parties. Upon a review of all the materials I am satisfied I am able to determine the merits of this Appeal without the necessity of a formal hearing.
4. The Appellant’s Appeal Form dated March 28, 2013, states three grounds of appeal. Firstly the Appellant submits that the Director erred in law. Secondly, she submits the Director failed to observe the principles of natural justice in making the Determination. Thirdly she submits there are a number of situations upon which the Director relied upon new evidence in making her Determination.
5. The Appellant’s third ground is not truly a “new evidence” argument in that she is not seeking to introduce new evidence that has become available; but was not available at the time the Determination was being made.
6. In this Decision I will deal firstly with her arguments regarding “new evidence” because my comments regarding those matters may affect submissions made by the Appellant regarding allegations that the Director failed to observe the principles of natural justice or made errors in law.

BACKGROUND FACTS

7. Heather Gibson was employed as a hair stylist with Zero Gravity from July 2, 2010, to September 20, 2011. At the time of her employment she brought with her a list of previous clients. Their personal information was entered into the computerized Zero Gravity Client List along with all other clients of the business.

8. Later in her employment, on May 4, 2011, the Appellant entered into an employment contract that included the following language:

Confidentiality of Client List

I recognize that Zero Gravity! Hair and Esthetics is legally responsible for maintaining the privacy and confidential information of its clients, and therefore customer phone numbers, addresses, colour cards and any information given to Zero Gravity! Hair & Esthetics in strict confidence of its customers is the property of Zero Gravity ! Hair & Esthetics.

Any attempt to copy this information without the written permission of Zero Gravity ! Hair & Esthetics and its management team will be cause for immediate termination and/or legal action.”

9. On a number of occasions during her employment the Appellant’s pay cheques were returned for insufficient funds; but payment was made good. The Appellant commenced looking for alternate employment and found it with a new hair salon due to open late in September 2012. She did not inform her employer but Ms. Christine Oakley, a co-owner working at the salon, found out from another source that the Appellant had found a new job. She also determined from a review of the Appellant’s access to Zero Gravity’s computer records (plus information from other employees) that the Appellant had come in early to work and had accessed and copied the Client List of Zero Gravity! Hair and Esthetics.
10. As a result the employer prepared and delivered a letter of termination of employment to the Appellant on September 20, 2011, at the beginning of the work day. It stated in part, “It has come to my attention that you have found employment at another salon. This is a conflict of interest with regards to your employment at Zero Gravity Hair and Esthetics and leaves me no choice but to terminate your employment effective immediately.” The meeting was apparently acrimonious, and it is clear from a number of Facebook entries that there was a dislike between Ms. Gibson and Ms. Oakley.

ANALYSIS

New Evidence

11. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05.
12. The Appellant must establish that:
- a. the evidence could not, with the exercise of due diligence, have been discovered and presented to the director during the investigation or adjudication of the complaint and prior to a Determination being made.
 - b. the evidence must be relevant to a material issue arising from the complaint.
 - c. the evidence must be credible in the sense that it is reasonably capable of belief; and
 - d. the evidence must have high potential probative value, in the sense, that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

13. Further, the Appellant has the burden to persuade the Tribunal there is an error in the Determination under one or more of the statutory grounds set out in section 112(1): see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and *AM-PM Work Force Ltd*, BC EST # D009/11.
14. The Appellant's arguments regarding new evidence are twofold. The first argument relates to the receipt of her termination letter. She states "to this date (the 28th day of March 1913[*sic*]) I have not been given a copy of my dismissal letter from anyone in management of Zero Gravity Hair and Esthetics." This makes no sense because it was the Appellant who submitted a copy of the letter to the investigating delegate. Further, it is not an argument that could be characterized as "new evidence" under section 112 of the *Act*.
15. The second argument regarding new evidence relates to the Appellant's position regarding existing clients of new employee hairdressers. The Appellant argues that staff are hired with their own client list. This is personal property of the employee and maintained by them to know the client. The fact that she had entered into the Zero Gravity client list without the required written permission of management was not a reason given to her at the time of termination but was relied upon by the Director and is therefore "new evidence". In fact it is not "new evidence" as contemplated under section 112 of the *Act* and the topic is clearly covered in the Appellant's employment contract of May 4, 2011.
16. In summary, there is no legal or evidentiary basis for the Appellant to rely on the ground of appeal under section 112(1)(c) of the *Act*.

Error in Law & Natural Justice

17. The Appellant has alleged the Director has erred in law in a number of areas. The first two areas relate to the reliance by the Director on evidence relating to the copying of client information by the Appellant without permission as a basis for termination under her employment contract whereas the Appellant alleges the only verbal information given to her by Ms Oakley at the time of termination was because she had a new job. She argues that the Director is limited to the verbal advice she received when terminated.
18. I have reviewed the evidence in the record, including the use of the "conflict of interest" phrase in the termination letter. In my opinion there is ample evidence and a basis in law that would allow the Director to consider a number of factors found in the investigation of the complaint to make a legal determination that the Appellant was lawfully terminated. He is not limited to solely considering the verbal advice the Appellant received. It is clear from the comments of the Appellant and her representative during the investigation that she was attempting to come up with new arguments as to why she was entitled to termination pay. For example, she alleged that she didn't have an employment contract; and then acknowledged she did; but then argued that the confidentiality of client records didn't apply to her because she was a manager (she was not). Further, she stated she didn't access the records; but then admitted she did, but just to update her own clients. In my opinion there was no error in law by the Director when relying on evidence relating to the Appellant obtaining client information as a basis for termination when it is clear from the employment contract that without the appropriate written permission from the employer it was cause for immediate termination, among other things.
19. The Appellant also argues that the reasoning of the Director confirming her termination is a failure to follow the principles of natural justice; presumably because the Appellant had no chance to respond. In fact, the delegate gave the Appellant and her representative ample opportunity to understand and comment on the reasons bringing about the conflict of interest. I can find no legal basis for the Appellant to allege a breach of natural justice by the Director.

20. The Appellant next argues that the Director erred in law; or failed to provide her natural justice; in relying upon her practice of price changing for hairdressing services as a basis for her termination. I have read the Reasons for Determination and nowhere in that document does the Director make such a finding or reliance. There is no legal or factual basis to support her arguments.
21. The Appellant alleges that the Director erred in law by giving weight to the allegation of the employer that the Appellant had a new job. As of the date of termination the new job had not commenced; but it is clear from the Record that the new job was arranged and the Appellant had been accessing the Zero Gravity's client list. The Director relied upon the general duty of good faith owed by an employee to his employer and the duty not to use special information for their own purposes contrary to the interest of the existing employer. Further, the Director relied upon an employee's legal duty to serve honestly and faithfully, including her obligation to avoid any conflict of interest with the employer. The Director clearly knew that the new job had not started but found, in all the circumstances, including the signing of a confidentiality/employment agreement that a conflict of interest arose and the agreement had been breached. I do not find the Director erred in law by giving weight to the fact that the Appellant had a new job.
22. In summary I find no merit to the numerous submissions of the Appellant on this appeal. Accordingly, this appeal is dismissed.

ORDER

23. Pursuant to section 115 of the *Act*, I order the Determination dated February 20, 2013, be confirmed.

Robert C.P. Walker
Member
Employment Standards Tribunal