Employment Standards TRIBUNAL

An appeal

- by -

Kate Roberts operating as Flaming June Day Spa
("Spa" or "Employer")

- 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

TRIBUNAL MEMBER: Paul E. Love

FILE No.: 2003A/287 and 2003A/288

DATE OF DECISION: March 30, 2004

DECISION

SUBMISSIONS

Kate Roberts	for the Employer
Ivy Hallam	for the Director of Employment Standards

OVERVIEW

This Decision is rendered in respect to an appeal by an employer, Kate Roberts doing business as Flaming June Day Spa ("Spa" or "Employer"), from a Determination dated October 9, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*").

The Employee filed a complaint alleging that she was entitled to compensation for length of service, and overtime pay. After conducting an investigation, the Delegate issued a Determination finding that the employee was dismissed without just cause, and that she was entitled to compensation for length of service.

The Employer filed an appeal alleging a breach of natural justice and an error of law. The Delegate afforded to the Employer notice of the hearing, and an opportunity to present information and challenge information given by the Employee. The Delegate did not fail to afford natural justice to the Employer.

The Employer argues that the case should be decided upon new evidence that it submitted with regard to just cause and alleged calculation errors. I declined to consider the fresh evidence provided by the Employer, as no cogent reason was advanced for the failure to adduce the evidence at the hearing. This is a case where the Delegate imposed a penalty for failing to produce records. I confirmed the penalty determination issued in a separate Determination dated October 9, 2003, as it was imposed on a proper basis by the Delegate, pursuant to section 29(1) of the *Employment Standard Regulation, B.C. Reg. 396/95,* as amended.

While the Delegate correctly identified the just cause test, it is my Decision that the Delegate erred in applying the test to the facts of this case. Basiri was a short term employee. She was warned in writing on two occasions that lateness was not acceptable. She was warned in writing that further instances could result in termination. On the third incident of lateness, Basiri was 1.5 hours late. She occupied a receptionist position, and staff and customers were inconvenienced by her lateness. In my view the Employer met the test. This is not a case where the Employer lulled an Employee into a false sense of security by failing to address tardy attendance. Nothing could have been clearer to the Employee. I therefore varied the Determination by deducting the compensation for length of service awarded by the Delegate, and otherwise confirmed the Determination.

ISSUE:

Did the Employer establish that the Delegate erred in finding that the Employer had not proven just cause for dismissal?

Did the Employer establish any error in the calculation of wages or overtime by the Delegate?

Employer's Argument:

The Employer claims that the Delegate failed to observe the principles of natural justice. The explanation of the breach of natural justice is "inaccuracies in calculations". The Employer says that evidence has become available that was not available at the time the Determination was made. The Employer's explanation is:

> proper calculations of Respondent's hours worked and employment determination based on it. Testimonial letter from employee who worked with Respondent but didn't work for appellant for some time.

The Employer wants the Tribunal to "make decision upon new facts".

The Delegate's Argument:

The Delegate submits that the Employer has submitted new records which were not produced during the investigation. The Delegate issued an administrative penalty for failure to produce complete records. The Delegate submits that the testimonial letters submitted by the Employer relate to compensation for length of service, and do not change the outcome of the Determination.

Employee's Argument:

The Employee did not file a submission with the Tribunal.

FACTS

This appeal proceeded by way of written submissions from the Employer, and the Delegate.

Faribi Basiri ("Basiri" or "Employee") was hired as a receptionist for the Flaming June Day Spa. She worked from April 16, 2002 to August 28, 2002 at a rate of $11.00 per hour. She was hired through a wage subsidy program, funded by the government to pay 40 % of her wages for the training period of the first 20 weeks of employment to a maximum of $3,200. Prior to being hired by the employer, Basiri was on social assistance.

The Employer terminated Basiri, alleging just cause. The Spa relied on a number of grounds for termination including lateness, failing to book a client with a particular aesthetician, gossiping about staff, speaking negatively about the employer, painting her nails while on reception, refusing to phone a repair person to fix a washer at the spa. Basiri was terminated on August 28, 2002 when she arrived 1.5 hours late for work. Following the termination, Basiri filed an employment standards complaint alleging a

claim for unpaid wages, overtime, failure to pay commissions and failure to pay compensation for length of service.

The Delegate conducted a hearing on April 8, 2003, and issued the Determination on October 9, 2003. The Delegate found that the Employer had not established just cause for dismissal, and the Delegate found that Basiri was entitled to compensation for length of service. The Delegate dismissed the employee's claim for commissions as unproven. The Delegate found that Basiri worked hours for which she was unpaid and worked overtime. The Delegate found that Basiri was entitled to the sum of $999.90 as follows:

Regular wages and overtime	$408.98
Compensation for length of service	$408.98
Accrued interest pursuant to s. 88 of the *Act*	$46.00
Total amount payable	$999.90

The Delegate found that Basiri was entitled to an extra 15 minutes per day work, because the Employer required that she attend at the workplace 15 minutes before the start of her shift. The Delegate found that the failure of the Employer to pay for the 15 minutes contravened section 18(1) of the Act. The Employer's records were incomplete. The Delegate used the employee's records, and a portion of the employer's records to calculate the entitlement.

With regard to just cause the Delegate found as follows:

> I accept that the complainant had various problems at work: her attitudes to her superiors, co-workers, and customers. She received 3 written warnings: two on her lateness and one on her failure to book a customer who asked for a particular aesthetician. There were expectations that the complainant had to improve in those areas at work. However, the employer has to prove that the complainant had repeatedly failed to meet an expectation. Therefore, in this case, it was the failure to meet an expectation to arrive to work on time.

The Delegate found that the first two warnings given by the Employer were for the Employee arriving 15 minutes late. The Delegate found that:

> It is undisputed that the 15 minutes were not the scheduled time of work, and the complainant was not paid for the time. In my view, the employer could not expect an employee to work without pay; the employee can only be disciplined for arriving late to work if he or she is scheduled to work and does not show up. Therefore, the complainant should not be disciplined on May 11 and May 28, 2002 and later terminated of her employment. The only time that the complainant was late was August 28, 2003. However, arriving late for work once is not just cause for termination. Therefore the employee did not meet the burden to prove that the complainant was terminated for just cause, and the complainant was entitled to one-week regular wages as compensation for length of service.

I note that in the Determination the Delegate found the Employer breached the *Act* by failing to pay the Employee for the extra 15 minutes the Employer required Basiri to work each day. The Delegate awarded wages to the Employee for the additional 15 minutes worked each day. The Delegate has also found that the Employee's failure to attend during that 15 minutes the Employer required the Employee to work on May 11 and May 28, 2002 was not "lateness" because Basiri was not paid for the work. The

Delegate also found an entitlement to overtime wages. The Delegate dismissed the claim for commissions on the basis of insufficient evidence tendered by Basiri.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(b) of the *Act* provides for an appeal on grounds that:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

Just Cause:

The Delegate correctly identified the standard with regard to just cause for lateness or absenteeism. An employer can dismiss an employee for lateness, however, the employer is required to set the standard for performance, warn the employee that the performance is substandard, and give the employee an opportunity to meet the standard, before terminating the employee.

I note that Basiri was not a stellar employee. There were numerous complaints about her work performance including her treatment of customers, her phone manner, painting her nails at her workstation, and her attitude towards the employer in the workplace. I note that the Employer did have a policy of using written warnings, and did warn Basiri for lateness, and failure to book an appointment. The Employer did not properly follow the just cause standard for "other behaviour" and the Delegate correctly found that the "other behaviour" did not amount to just cause. Her behaviour, other than lateness, demonstrates that she was a less than stellar employee, but this conduct does not support a termination by the Employer for just cause. She may well have been headed for other performance based termination, had she remained in the workplace.

I agree with the Delegate, that in this case, the issue of just cause falls to be determined on the issue of lateness. How much "lateness" must an employer put up with where an employee has been warned in writing of the consequences of late behaviour? Whether an employee attends or not at a workplace is entirely within the means of an employee. This is not a case of the employer failing to enforce attendance standards, and luring a tardy employee into a false sense of complacency. Here it is clear from the warnings given, that Basiri should have expected that lateness could result in termination of employment. Basiri was a short term employee. Here there were two written warnings for lateness that preceded her termination on her third time late for work. I note that she was 1.5 hours late on the last day.

Here the issue is whether the employer can rely on two warnings which were given for "days late" when Basiri was not paid for the time. The Delegate found that since the employee was late during the 15 minutes that she was unpaid on May 11, and May 28, 2002, this was not lateness. I note that in the Determination the Delegate found that the failure to pay the employee for the 15 minute period was a breach of the *Act*. The Delegate found an entitlement for wages, and did award wages to the Employee for the 15 minutes each day that the employee was required by the employer to attend at work.

I note that the Delegate preferred the Employee's notice for the May 28, 2002 warning, as portions of the Spa's form had been "whited out". Basiri's form, however, contained the warning of termination, however. In my view, the "whiteing out" of the form is irrelevant to the issue of proof of just cause.

In my view, the fact that the Employer did not pay wages for the "15 minutes late" did not afford any excuse for the Employees lateness on May 11, 2003, May 28, 2003, August 28, 2003. The Employer required Basiri to be at work 15 minutes prior to the start of the shift. The Delegate has awarded wages for the time that the Employer required Basiri to be in attendance at work. Basiri was well aware from receipt of the written warnings that the Employer did not accept late attendance in the workplace. Basiri was warned, in writing on May 11 and 28, 2003, that lateness could result in termination. On the date of termination, the employee was 1.5 hours late. She occupied a position as receptionist, which was important to the carrying on of the employer's business as a day spa. On the final date of lateness other employees and a customer were waiting for Basiri's arrival. Basiri was in a position where she was to open up the business, greet customers and tardy attendance is unacceptable.

In my view, the Employer has established just cause for the termination of Basiri. I am not sure what could be plainer to Basiri that lateness was not acceptable. The Employer set a clear standard, and the Employee was terminated on the third occasion of lateness. In my view, the Delegate erred in law in her application of the "just cause" test to the facts in this case as related to lateness. The Employer had just cause to terminate Basiri, and Basiri is not entitled to compensation for length of service pursuant to section 63 of the *Act*.

Calculation of Hours and Pay and New Evidence:

In my view, the Employer has not demonstrated any clear error with regard to the calculations of pay or overtime. The Employer did not supply all its documents to the Delegate during the course of Delegate's investigation or adjudication of the matter. There is no excuse offered for the failure to provide the information. I note that the Employer asks the Tribunal to "make decision upon new facts". The Delegate relied on the evidence that was available at the hearing. I note that an appeal of a Determination is not meant to be a fresh opportunity to an Employer to defend against a wage claim made by an employer. An appeal before the Tribunal is an opportunity for a party to identify errors that the Delegate made, during the course of an investigation or hearing, which would make a difference to the outcome. The failure of a party to properly participate by providing relevant evidence or documentation, without excuse, is not a reason for an adjudicator to embark upon a fresh evaluation of the facts. For the above reason, I dismiss the appeal by the Spa with regard to an alleged error by the Delegate in a calculation of hours worked and amount of pay.

Natural Justice:

The Spa was given notice of the hearing, had a representative in attendance, and had an opportunity to present its information, and challenge the information presented by the Employee. The Spa called two witnesses. The Delegate did not fail to afford natural justice to the Employer.

Penalty Determination:

I note that the Delegate imposed a $500.00 penalty, in a separate Determination issued on October 9, 2003, for a contravention of the *Act*. The Delegate issued a demand for records on February 10, 2003. The

Delegate extended the time to produce the records from October 25, 2003 to March 7, 2003. The Employer did fail to produce complete records to the Delegate. The Employer did not provide any explanation as to why time sheets submitted, had no dates recorded on the time sheets. The Employer admitted that the time sheets could not be double checked with the hours recorded on the payroll records. Further no explanation was given to "incomplete computer-generated daily hours. Further the Employer failed to produce records related to "banked time".

It is apparent that the records kept by the Employer were incomplete. The Delegate imposed the administrative penalty pursuant to section 29(1) of the *Employment Standard Regulation, B.C. Reg. 396/95,* as amended. I am satisfied that the Delegate did not err in imposing the penalty in the circumstances of this case.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated October 9, 2003 is varied to eliminate the claim for compensation for length of service, and the Determination is otherwise confirmed in the amount of $408.98, together with interest in accordance with section 88 of the *Act*.

Paul E. Love
Member
Employment Standards Tribunal