

An appeal

- by -

Mark Pho operating as Centurian Health and Fitness  
("Centurion" 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

**ADJUDICATOR:** Paul E. Love

**FILE No.:** 2002/599

**DATE OF DECISION:** February 26, 2003

## DECISION

### OVERVIEW

This is an appeal by an employer, Mark Pho operating as Centurian Health and Fitness (“Centurian” or “Employer”), from a Determination dated November 15, 2002 (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 Delegate found Shirley Norman (the “Employee”) was entitled to compensation for length of service, vacation pay, and interest. The Employer seeks to appeal the Delegate’s finding on the basis of issues collateral to the main issue, but has not raised any appeal of the finding that the Employee was dismissed without just cause. I dismissed the appeal on the basis that the Employer failed to appeal the finding that the Employee was entitled to compensation for length of service, vacation pay and interest. In the balance of the Decision, for the purpose of completely addressing the arguments presented, I have addressed a number of issues raised by the Employer, which are irrelevant to the main issue, and which have no bearing on the correctness of the Determination. I confirmed the Determination of November 15, 2002.

### ISSUE:

Did the Delegate err in finding that the employee, was entitled to compensation for length of service, vacation pay and interest?

### FACTS

I decided this case after considering the written submission of the Employer, Employee, and the Delegate.

Shirley Norman worked for Centurian for the period December 4, 2001 to May 22, 2002, as manager of its fitness centre. She was terminated on or about May 23, 2002. She filed a complaint with the Employment Standards Branch alleging that she was owed final wages for the period May 15 to 23, 2002, commissions on initiation fees charged, bonuses in the amount of 25 % of the business’ net profit, and medical and dental benefits, and compensation for length of service. After an investigation, the Delegate found that the incident leading up to termination was not sufficiently serious to amount to just cause. The Delegate issued a Determination in the total amount of \$619.93, representing 1 week’s wages for compensation for length of service in the amount of \$548.25, vacation pay in the amount of \$23.37, and interest of \$12.31. By the date of the investigation, the Employer had paid wages for the final pay period, which were outstanding at the date of the complaint. The Delegate dismissed the balance of the claims made by Ms. Norman as unproven. It is apparent, in the events leading up to the termination of Ms. Norman, that the parties were unable to resolve negotiations on compensation and other issues.

The Delegate ordered, pursuant to section 79(3) of the Act, that the Employer cease violating section 63(1) of the Act.

### Employer’s Argument:

The Employer argues that there has been delay in the investigation such that the Delegate ought not to have proceeded to issue a Determination. The Employer says that the Delegate ought not to have been

given an extension of time to respond to the Employer's submission. The Employer says it ought to be allowed to deduct the costs of changing the locks, and source deductions from the Determination. The Employer says that the:

Board may have broken their wrights [sic] by having a police officer enter my building and ask me if I know Amanda Welder ...

The Employer says that it was misinformed by the Delegate that Ms. Norman was owed two week's notice, when in fact, the entitlement was one week's notice, and that the Employer may have acted differently if he had received the correct advice.

**Employee's Argument:**

Ms. Norman wrote to the Tribunal requesting that this matter be decided by written submissions rather than an oral hearing. She has not filed any submission responsive to the grounds of appeal raised by the Employer.

**Delegate's Argument:**

The Delegate notes that the Employer has not argued that the Determination was wrong with respect to the conclusion that outstanding wages are owed to Ms. Norman for compensation for length of service. The Delegate argues that there has been no delay in the investigation of this matter, and that each party was given an opportunity to participate in the investigation. The Delegate denies contacting the police concerning the Employer's business. The Delegate argues that the fact that statutory deductions can be made from a Determination does not constitute any error to warrant setting aside a Determination.

**ANALYSIS**

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that the finding of the Delegate was that Ms. Norman was dismissed without just cause, and she was therefore entitled to compensation for length of service. The notice of appeal provided by the appellant does not challenge that finding. The Employer raises no issue as to the correctness of the wage calculation. An employee is entitled to compensation for length of service, unless the Employer can establish a resignation, or a dismissal for cause. As the Employer has not appealed this finding, I find that this appeal fails.

I note that most of the Employer's arguments are not responsive to the main finding of the Delegate that Ms. Norman was not dismissed for cause. I wish, however, for the purpose of completeness, to respond to the arguments raised by the Employer.

**Delay:**

In my view, there was no significant delay in the investigation of this matter, and no unfairness to the Employer arising from delay. Here the complaint was filed by the Employee on June 12, 2002 and the Determination was issued on November 15, 2002. The Delegate has a duty under section 77 of the *Act* to provide the parties an opportunity to respond to a complaint. For the purposes of expediting an

investigation, a Delegate may ask for responses from the parties, within specified time periods. There are no time limits set in the legislation placed on the Delegate to investigate a complaint and issue a Determination. In many cases, the amount of time required to investigate a complaint and issue a Determination can be traced to the “administrative resources” available. The Delegate attempted to elicit information from each party before making a Determination. The fact that there was some delay in the Employee responding to the Delegate’s request for information does not raise any questions as to the correctness of the Delegate’s finding, or any issues of unfairness. The Employer points to no prejudice to him, from the fact that this complaint was resolved less than six months after the filing of the complaint. In my view, the Employer’s argument with regard to “delay” is unfounded, and would not warrant the setting aside of this Determination.

**Delegate “Misinformation”:**

The Employer claims that he may have acted differently if he knew that the Employee was only entitled to one week’s wages for compensation for length of service, rather than the two weeks he says the Delegate told him about. In my view, if the Employer correctly represents what he claims he was told, this would not amount to an error by the Delegate in the issuance of the Determination. If the Employer terminated Ms. Norman and alleged cause because he thought he owed her two weeks, rather than terminating her and just paying her one week’s wages, this does not detract from the statutory entitlement of the Employee to one week’s wages. It may explain why he sought to save himself two week’s of wages, but it certainly does not effect the Employee’s statutory rights.

**Police Visit:**

The Employer speculates that a police visit to his premises was caused by the Delegate. In her written submission, the Delegate indicates that she played no role in a police visit. I accept her statement over the speculation of the Employer. In any event, a police visit raises no issue of error in the Determination.

**Money owed by the Employee:**

The Employer claims that money is owed by the Employee, because Centurian had to change the locks following the Employee’s departure, because the Employee failed to turn in her keys. I note that costs associated with lock changes is a business cost. Section 21(2) of the *Act* provides:

An employer must not require an employee to pay any of the employer’s business costs except as permitted by the regulations.

An employer cannot deduct a business cost from wages owing to an employee. The Tribunal has no jurisdiction to consider such a set-off.

**Statutory Deductions:**

The Employer argues that “I am still owed \$107.25 for source deductions which should be taken away from the 619.93 the Board claims I owe her.”

The Determination in this case provides that:

If statutory deductions are required, please include a statement with your payment indicating the individual amounts remitted to Canada Customs and Revenue Agency.

The Delegate did not err in finding the amount due and owing, and then advising the Employer to remit in the manner set out in the Determination.

## **ORDER**

Pursuant to s. 115 of the *Act* the Determination dated November 15, 2002 is confirmed, with interest in accordance with section 88 of the *Act*.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**