

BC EST # D065/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Bhader S. Bola
(operating as "Classy Cuts")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 96/625

DATE OF DECISION: February 12, 1997

DECISION

APPEARANCES

Bhader S. (Bob) Bola on behalf of Classy Cuts

Sara Bola on behalf of Classy Cuts

Dragica Klarica on her own behalf

Ms. Lynn Egan on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Bhader S. (Bob) Bola operating as Classy Cuts ("Bola") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination number CDET 004223 issued by a delegate of the Director of Employment Standards (the "Director") on October 4, 1996. The Director's delegate determined that Classy Cuts contravened Section 63(2) of the *Act* by failing to pay compensation based on length of service.

ISSUES TO BE DECIDED

Did the employer terminate the employee without just cause thereby incurring a liability under Section 63 or did the employee quit?

FACTS

The employer, Bhader S. (Bob) Bola, operates a hair salon called "Classy Cuts." The salon is situated at approximately the corner of 84th Avenue and 120th Street in Surrey, B.C. Mr. Bola works in the salon and has one employee. At the relevant times that employee was the complainant Ms. Klarica. She worked for Mr. Bola as a stylist from March 3, 1995 until February 25th, 1996. Ms. Klarica worked for a salary of three hundred and eighty dollars (\$380.00) per week based on a forty hour week. Her regular days off were Tuesday and Wednesday. On February 25, 1996 Ms. Klarica advised Mr. Bola that she had secured another position at a hair salon situated across the street and that she was giving two weeks notice of termination of her employment. She stated that her last day of employment would be March 11, 1996. After giving her notice Ms. Klarica continued to work as the salon was busy. She worked until approximately five thirty pm that day or about one half hour before

regular closing time. Whether Ms. Klarica quit or was fired is at issue; however, what is certain is that when she left her place of employment that day she did not return.

Mr. Bola takes the position that after Ms. Klarica gave notice she attempted to solicit business from the customers that were attending at "Classy Cuts" that afternoon. Mr. Bola asserts that she invited two or three of "Classy Cuts" customers to patronize her at her new work place. Mr. Bola takes the position that when he confronted Ms. Klarica with this information at about five thirty pm she walked out of the work place thereby resigning her employment.

Mr. Bola testified that Ms. Klarica was telling the customers that she had quit Classy Cuts and that the next time the customer needed a hair cut that the customer should come over to her new work place. Mr. Bola testified that he told her not to say that and that she was to leave his clients to him. He states that her response was that the clients were her customer. Bola takes the position that he also had many reasons to fire Ms. Klarica although he didn't because he was satisfied with the quality of her work. At the hearing he complained that she would arrive late in the morning and sometimes leave before her regular quitting time. He complained that she spent a great deal of time in the shop that was next door to his and that he often had to go and get her when customers would arrive. He also complained that every six weeks she would colour her hair in the work place but she would do it on paid time rather than her own time. He testified that sometimes customers were waiting while she was doing this. However, he did not raise these complaints with her during the course of her employment. Mr. Bola did not call any witnesses other than himself but he did refer to letters that were supplied to the Director which were written by customers of Classy Cuts. One of the letters states that while Mr. Klarica was cutting this customer's hair she told him that she was quitting Classy Cuts and going across the street and the next time he should come there for a haircut.

Ms. Klarica testified that she gave two weeks verbal notice on February 25, 1996 at approximately eleven thirty a.m. The regular Sunday shift is ten thirty a.m. to six p.m. She states that Mr. Bola accepted her resignation and she then worked through the day to complete her shift. She testified that at approximately five thirty p.m. Mr. Bola approached her and told her to "pack your stuff you are fired." She testified at this time that she noticed that the front door was locked and there were no customers in the salon.

Ms. Klarica testified that her friend, Maryanne Bracun, was to be the last appointment of the day. When Maryanne arrived the doors were locked. Ms. Klarica testified that Maryanne arrived at the time that Mr. Bola was terminating her. She stated Mr. Bola ignored Ms. Bracun's pulling at the door and continued with the conversation. She stated that during this conversation she told him that he could not fire her because she had given notice. She testified that his response was that he could fire her and that he could do anything because it was his business. She testified that she then started packing her things because she didn't know what else to do. She stated that she noticed at this time that

her friend Maryanne had come back to the door and that Mr. Bola went to the door to allow her to enter. She testified that a conversation then ensued between Ms. Bracun and Mr. Bola in which Mr. Bola told Ms. Bracun that he had fired Mr. Klarica. Ms. Klarica testified that Ms. Bracun told Mr. Bola that she didn't understand how he could fire her if she had given verbal notice. Ms. Bracun then began to help Ms. Klarica pack her things.

Ms. Klarica testified that Mr. Bola then went to the till and came back with a cash payment, a hand written receipt, and her paycheque which she was to receive the next day. Mr. Bola explained that the cash payment was for her holdback with a deduction for a set of clippers that she had purchased. He also gave her a paycheque which amounted to her final pay but which did not include any amount for severance pay or vacation pay on that severance amount. She stated that she signed the receipt but did not get a copy of it. She stated that she asked for her two weeks' severance pay and holiday pay but that Mr. Bola replied, "No way, I fired you, you don't work here any more". She testified that she picked up her belongings and left with Ms. Bracun.

Ms. Bracun testified that on the Sunday she talked by telephone with Ms. Klarica at about one p.m. The conversation was in Croatian. She testified that Ms. Klarica asked if she was still coming at five thirty p.m and that she couldn't talk for long because she had a busy day. When Ms. Bracun arrived at the salon the doors were locked but she noticed that Mr. Bola and Ms. Klarica were alone in conversation. She felt that something was wrong but she could see them through the window and returned to her car. She stated that she waited approximately twenty minutes and then went back to the doors. Mr. Bola opened the doors for her. She entered and asked what was going on. Ms. Klarica told her to ask Mr. Bola and she testified that Mr. Bola stated that "He fired her". Ms. Klarica then stated no that she had given two weeks notice and the discussion then ensued between Mr. Bola and Ms. Bracun about whether he was right to fire her after she had given notice. She testified that Mr. Bola confirmed that he could fire her. She stated that Mr. Bola then went to the till and returned with some money and a paycheque. She confirmed that Ms. Klarica asked about the two weeks severance pay and the holiday pay and that Mr. Bola responded that he had fired her. She states that after that she helped Ms. Klarica pack her things.

Under cross examination Mr. Bola suggested that Ms. Bracun was motivated to support Ms. Klarica's testimony because she was a hairdresser herself and that when she was unemployed Mr. Bola would not give her a job. Ms. Bracun testified that although she is a hairdresser she had been working in a ceramics shop for the past two years and at no time had she ever asked Mr. Bola for a job. It was later determined that Mr. Bola had heard from another person that Ms. Bracun was seeking employment and that he had told that person that he did not have a position for her.

The real question in this case is whether Ms. Klarica resigned her employment after being confronted by Mr. Bola with the allegation that she was soliciting his customers for her new place of employment.

The only evidence that Ms. Klarica was soliciting customers is the letter submitted by Mr. Bola from one of the customers. However, that person was not called to testify. Ms. Klarica on the other hand denies inviting the customer to come to her new work place although she does admit that when the customer asked her in conversation how things were going that she informed the customer that she had given her notice at Classy Cuts and would be going a different employer. She states that she did not invite the customer to patronize her at the new workplace. The other letter submitted by Mr. Bola did not address the issue of Ms. Klarica soliciting the customers.

I find that Ms. Klarica was forthright in her testimony in both direct and cross examination. She had continued to work after giving her notice and attended approximately fourteen customers that afternoon. She stated that she did not raise the fact she had resigned but did respond to general questions put to her by customers about how things were going. The only evidence of soliciting customers was the letter although Mr. Bola suggested she had solicited two or three others that day. Ms. Klarica denied this.

I am faced with conflicting evidence and must decide this matter after examining the consistency of the evidence with the probabilities of the conditions at the time. (Faryna vs Chorny (1952) 2 D.L.R. 354 (BCCA).) I had the benefit of being able to assess Ms. Klarica's demeanor and the consistency of her evidence. I am unable to conclude that she was soliciting customers. I am further unable to conclude that Mr. Bola had just cause to terminate her for other reasons as he had sustained her employment despite those short comings for approximately one year. Finally, I am not able to conclude that Ms. Klarica resigned or quit her employment at five thirty pm that afternoon. I find that Mr. Bola terminated her employment and failed to pay her severance pay as required under the *Act*.

ORDER

Pursuant to Section 115 of the *Act* Determination CDET 004223 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal