

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Collectrite Services Kelowna Ltd.  
(" Collectrite ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard

**FILE No:** 1999/542 & 1999/543

**DATE OF HEARING:** November 19, 1999

**DATE OF DECISION:** February 18, 2000

**DECISION**

**APPEARANCES:**

Roderick MacDonald, President and Secretary of Collectrite Services, together with his wife, Maureen MacDonald, appeared for the appellant and gave evidence. In addition, Darryl Sherwood, the office manager at the relevant time also gave evidence by teleconference on behalf of the appellant.

Carey Meier appeared on her own behalf and gave evidence.

The following documents submitted by the appellant were entered as Exhibits:

- Exhibit #1 Letter from Collectrite Services Kelowna (R. M. MacDonald) to Carey Meier dated May 11, 1999
- Exhibit #2
- (a) letter from Collectrite Services Kelowna (Rod MacDonald) to Ministry of Labour Employment Standards Branch, Attention Larry Bellman, dated May 25, 1999, with enclosures
  - (b) employment agreement between Collectrite Services Kelowna and Carey Meier dated September 3, 1996
  - (c) letter from Carey Meier dated January 30, 1998
  - (d) letter from Collectrite Services Kelowna (Darryl Sherwood) to Carey Meier dated May 1, 1998
  - (e) appointment card from Dr. Clive Brown
  - (f) letter from Collectrite Services Kelowna (Darryl Sherwood) to Carey Meier dated May 11, 1998
  - (g) letter from Carey Meier to Kyle, undated
  - (h) note from Craig McAllister dated May 20, 1999

**OVERVIEW**

This is an appeal by the employer, Collectrite Services Kelowna Ltd. (“Collectrite”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from two determinations of the Director of the Employment Standards (the “Director”) both issued on August 13, 1999.

The determinations were issued following a complaint by a former employee, Carey Meier (“Meier”) that:

- (a) she was terminated without cause and without written notice or compensation in lieu of notice as is required by Section 63 of the *Act*;

- (b) Ms. Meier did not receive overtime owed to her during her employment as required by Section 34 of the *Act*;
- (c) Ms. Meier did not receive minimum daily pay in contravention of Section 34 of the *Act*.
- (d) Ms. Meier did not receive statutory holiday pay during her employment as required by Section 40 of the *Act*.

The Director made the following determination:

- (a) Ms. Meier did not quit as alleged by Collectrite, rather she was terminated without cause and without written notice or compensation in lieu of notice. Based on Ms. Meier's employment for a period of approximately one year and eight months, she was entitled to two weeks' in lieu of notice or the sum of \$830.40;
- (b) Ms. Meier did not receive overtime due to her during her employment in contravention of the *Act*. The employer had the employee sign an employment agreement purporting to give up any right to overtime (Exhibit 2(b)) which is in contravention of the *Act*. Overtime due to the employee was calculated at 123 <sup>3</sup>/<sub>4</sub> hours or a total of \$642.26.
- (c) Collectrite had not complied with the provisions of the *Act* relating to minimum daily pay in contravention of Section 34. The Director also found that the employer had not complied with the minimum daily pay during the period of the employee's employment and therefore the employee was owed 34 hours at \$10.38 per hour or a total of \$352.92.
- (d) Furthermore, the employee was due vacation pay on the total of the above, ie. in the amount of \$1,825.58, with interest pursuant to Section 88 of the *Act* in the total sum of \$235.45.

The total ordered due by the employer to the employee was \$2,061.03.

The Director issued a further determination on August 13, 1999, namely, that in the process of his investigation Collectrite Services Kelowna Ltd. had contravened Section 46 of the *Act* by failing to produce proper payroll records and ordered a penalty imposed pursuant to Section 28(b) of the *Act* in the amount of \$500.00.

### **ISSUES TO BE DECIDED**

1. Whether Ms. Meier quit her employment or was she terminated without cause and without written notice or compensation in lieu of notice as required by Section 63 of the *Act*.
2. Whether Ms. Meier was owed overtime.
3. Was she owed wages for a minimum daily pay.
4. Was she owed statutory holiday pay.

5. Did Collectrite Services Kelowna Ltd. contravene Section 46 of the *Act* by failing to produce proper payroll records.

## THE FACTS AND ANALYSIS

Meier was employed by Collectrite from September 3, 1996 to May 1, 1998, as a bailiff. Her salary was \$1,800.00 per month at the date her employment terminated.

1. Whether Ms. Meier quit her employment or was she terminated without cause and without written notice or compensation in lieu of notice as required by Section 63 of the *Act*.

On May 1, 1998, Collectrite gave Meier an employment review. Ms. Meier was extremely upset by the content of the review and says that instead of finishing her day's work that day, she did leave the office and went to Vancouver to see her family. May 1<sup>st</sup> was a Friday. Meier phoned in sick on Monday, May 4, 1998, and went to see her doctor. As indicated on the appointment card, which is Exhibit 1(e), she attended at the office of Dr. Clive Brown on Monday, May 4, 1998. Meier advised Collectrite on Tuesday, May 5, 1998, that she would be returning to work on Wednesday, May 6, 1998. Meier says that she did not at any time indicate that she was quitting.

When Meier returned, Collectrite advised her that she needed a letter from her doctor confirming that she had in fact been ill. Collectrite took the position that because Meier had left her duties that day and not returned to work until Wednesday that without producing a doctor's letter confirming her illness that they had cause to let her go and in any event her actions in leaving were indicative that she was quitting and furthermore in failing to supply a doctor's letter that they had the right to terminate her.

The onus is on the appellant-employer to show that the determination was incorrect. Furthermore, the burden of proving that the employee intended to quit or that her conduct in failing to produce a doctor's letter justified a dismissal is on the appellant-employer, Collectrite.

As set out in the Employment Standards Tribunal of Re: RTO (Rent-Town) Inc. 1997 (BCESTD #453 October 6, 1997), the employee must demonstrate a real and continued intention to terminate the employment relationship in order for an employer to rely on the defence provided in Section 63(3)(c) of the *Act* which absolves the employer from liability to give notice or pay in lieu of notice if the employee quit. It has been repeatedly held that an employee resigning or leaving in the heat of the moment is not necessarily quitting, rather the employee must clearly communicate by word or deed an intention to terminate her employment relationship and that intention must have been confirmed by some subsequent conduct.

In this case, Ms. Meier left in the heat of the moment, i.e. she was extremely upset by the content of the employment review which is Exhibit 1(d). As stated, it was a Friday and she left and went to Vancouver to be with her family. Upon returning, instead of going in on the following Monday, she was still upset to the extent that she simply said she was ill that day. As required by the employer, she did attend at her employer's office. It was not necessary in the circumstances to produce a medical report as it is clear that her illness arose from her emotional upset over the

employment review. Ms. Meier's subsequent conduct did not in any way confirm any intention to quit, rather she called Collectrite on the morning of Tuesday, May 5<sup>th</sup> and stated that she would be coming in to work on the following morning. When she arrived on Wednesday to return to her employment, she found that her employer had gone through her desk and had removed binders which contained a combination of company and personal information, and when she became upset that the binders had been removed, the office manager asked her to leave clearly indicating that she was being dismissed. Ms. Meier was not allowed to return to work.

The employer furthermore says that in the alternative they had cause to let Ms. Meier go due to the combination of the following:

1. She had been argumentative in fellow staff, in particular a fellow named Kyle.
2. She had been solicited by another company to work.
3. Her performance had declined.

In response, Ms. Meier says that she did have a disagreement with a fellow employee but it was not a significant thing, her performance had gone down because the company performance had gone and her performance was based on having enough work to perform well.

Again, the onus is on the appellant-employer in proving that the conduct of Meier justifies dismissal. Just cause can include a single act of misconduct if the conduct is willful, deliberate and of such consequence to repudiate the relationship and none of these acts were so serious to repudiate the employer-employee relationship.

In the absence of serious misconduct, then the employer must establish just cause by proving:

- a) that reasonable standards of performance have been set and communicated to the employee;
- b) that the employee was warned clearly that his or her continued employment was in jeopardy if such standards were not met;
- c) a reasonable period of time was given to the employee to meet such standards;
- d) the employee did not meet these standards.

In the meeting of May 1, 1998, the employer did raise some concerns; however, no time was given to the employee to rectify any valid concerns.

Thus the evidence before me is insufficient to discharge the onus on the employer, Collectrite.

2. Whether Ms. Meier was owed overtime. and
3. Was she owed wages for a minimum daily pay.

The employer and his witness, Sherwood, state that in the employment contract, any overtime had to have written authorization. The employer says that no overtime records were kept of hours worked by employees. Meier says that this is not true but in fact was kept both in a diary

kept by the office manager, Sherwood, as well as in the computer. Ms. Meier did produce to the Director copies of her Day-Timers which indicated overtime for which the Director ordered overtime and minimum daily pay for which the Director ordered that she be paid.

I find Meier's evidence to be credible and Collectrite produced no time records to refute this evidence.

Therefore, the appellant has not discharged the onus that the determination was incorrect.

4. Was she owed statutory holiday pay.

The determination of the Director having been upheld, statutory vacation pay is due as ordered by the Director i.e: 4% of \$1,825.58 being \$73.02 plus interest pursuant to Section 88 of the *Act*, \$160.43 (Total \$235.45)

5. Did Collectrite Services Kelowna Ltd. contravene Section 46 of the *Act* by failing to produce proper payroll records thereby justifying imposition of a fine in the amount of \$500.00 pursuant to Section 28(b) of the Regulations.

On April 19, 1999, the Director issued a Demand for Records pursuant to Section 85(1)(f) of the *Act* to Collectrite Services Kelowna Ltd. Proof of service was by certified mail indicating that the material was received on April 22, 1999, by Collectrite.

The expiry of the Demand was April 29, 1999. Mr. Bellman advises in the determination that Roderick MacDonald requested an extension to May 25, 1999, and it was granted. The Director furthermore advises that on May 25, 1999, Mr. MacDonald provided a written submission without any payroll records which would meet the requirements of the *Act*. To the date of the hearing, the appellant still had not produced proper payroll records therefore the determination is upheld.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the determination with respect to Meier be confirmed as issued in the amount of \$4,881.79 plus whatever further interest may have accrued pursuant to Section 88 of the *Act* since the date of its issue.

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**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**