

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 -

Lori L'Heureux and Ray L'Heureux operating as
The Hat (Wo)Man Custom Embroidery
(“ the L'Heureux ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No.: 1999/764

DATE OF HEARING: February 4,2000

DATE OF DECISION: April 14, 2000

DECISION

APPEARANCES

Lori L'Heureux	on behalf of Lori L'Heureux and Ray L'Heureux operating as The Hat (Wo)Man Embroidery
Ray L'Heureux	on behalf of Lori L'Heureux and Ray L'Heureux operating as The Hat (Wo)Man Embroidery
Shirley Lamoureux	Counsel for Francis Day
Francis Day	on her own behalf

OVERVIEW

This is an appeal by Lori L'Heureux and Ray L'Heureux operating as The Hat (Wo)Man Embroidery ("the L'Heureux ") under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination dated November 29, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). The L'Heureux allege that the delegate of the Director erred in the Determination by concluding that Francis Day ("Day") was entitled to compensation for length of service in the amount of \$1,396.03.

ISSUE

The issue to be decided in this appeal is whether the L'Heureux are liable, pursuant to Section 63 of the *Act*, to pay compensation for length of service to Day.

FACTS

The parties agree the following facts are not in dispute:

- Day worked for the previous owner of the business from October 1, 1995 to June 30, 1996;
- the business was sold as of June 30, 1996 and Day continued to work for the new owners (the L'Heureux) until January 7, 1999;
- Day worked as a machine operator;
- the rate of pay was \$11.00 per hour;
- Day worked 8 hours per day, 5 days per week;

Ray L'Heureux and Lori L'Heureux ("the L'Heureux ") and Francis Day ("Day") testified at the hearing. I will only reproduce the relevant evidence provided at the hearing and through the submissions of the parties.

The L'Heureux testified that:

- both Ray L'Heureux and Lori L'Heureux are owners of the business;
- Day was never "left in charge" of the business when L. L'Heureux was ill and in Vancouver;
- the sister-in-law was left in charge when L. L'Heureux was off sick;
- L. L'Heureux would phone from Vancouver each day to see how things were going;
- Day was refusing to make up "run sheets" for customer orders so other employees would know particulars of the customer's order;
- the only times Day was called at home was when she had failed to make up a run sheet and the employee on shift needed the information;
- they did have some problems with the new embroidery machine;
- Day was instructed to only run a single item on the machine to ensure machine was operating properly and set up correctly prior to running multiple items;
- Day constantly refused to run single items and as a result, orders had to be picked apart if possible or the materials replaced;
- Day put a logo upside down on 5 jackets which could have been avoided if she had followed instructions and done a single item first;
- Day alleged to the delegate of the Director that she had not been paid her final pay and vacation pay but claimed to have "forgot" when proof was presented;
- they believe Day performed some work for customers but did not turn the proceeds over to the business;
- the policy of the business is that a customer's logo is not put into the computer until that customer has paid the setup fee;
- the customer's logos were put into the computer but there was no evidence that the setup fee had been paid;
- Day was spoken to on a number of occasions about her work performance and her attitude;
- Day was aware that her job was in jeopardy if she did not change her behaviour;
- on one occasion when money was missing, Day was told that if money ever disappeared again, she would be fired, never had any money go missing after that.

In response to cross examination by counsel for Day, the L'Heureux stated:

- when they took over the business, Day was a good and trusted employee;
- Day's attitude began to change in about October 1998 but she was still professional at work;
- Day's work always had some errors but the dollar value of those errors became greater when the new machine came into use;
- when Day was working Saturdays for a period of time they were concerned about the amount of productive work being done;
- they required all employees to provide a "stitch count" in order to maintain controls on productivity;
- they believe Day was doing work for herself when customers came into the shop and claimed that work had been done;
- The two customers in question were Vampire Tattoo and Double Diamond Quarter Horses;
- on one occasion Day spent her entire workday picking out a logo which she had applied incorrectly;
- Day was always paid for her work even when she was just correcting her own mistakes;
- when using the new machine, if a single item is done first to check the accuracy, then the multiple items will be done without any errors;
- since Day has left the business, we have no more regularly occurring errors;
- we do have the odd error when a casual employee is utilized but that doesn't happen very often;
- we had difficulties with Day from the time the new machine came in as she did not want to follow our directions about how to use that machine;
- Day was told that multiple item orders were to be done by making a single item first and then the balance of the order;
- we gave Day a work day off with pay to consider changing her attitude or else she would be fired;
- the information provided to the delegate of the Director that Day had not been told her job was in jeopardy was in reference to an earlier discussion with Day;
- Day did make up some run sheets but not always as required;
- they believe Day's attitude related to the fact that at one time she was considering purchasing the business;
- we did have a problem with a computer card in the new machine;
- had meetings weekly to discuss issues with Day;
- Day even refused to stay overtime for extra training on the new machine as she said she did not need it;

The L'Heureux argued that Day was well aware that her attitude and work were not acceptable. They further argued that Day was also aware that her continued employment was in jeopardy if she did not change her attitude and work habits. They further argued that the amount of compensation for length of service is incorrect as Day was not employed by them for the full period of her employment. They finally argued that they believe that 'just cause' exists for the termination of Day.

Day testified that:

- when the L'Heureux took over the business, they were fairly good people and she enjoyed her job;
- she had to show the L'Heureux how to run the machines;
- there were some problems when the L'Heureux separated for a period of time;
- during the time of the separation, she and Lori L'Heureux became good friends;
- she was told by Lori L'Heureux not to pay any attention to instructions from Ray L'Heureux;
- when the L'Heureux reconciled, her work became under more scrutiny;
- she was never told she would be fired if her work and attitude did not change;
- at one time, a number of receipts were found in Lori L'Heureux's truck;
- when an employee was working at night, she would ensure that the logos would be on disk, either a run sheet prepared or the colours written down, made sure that there would be enough work for the night shift;
- there was a night shift on over the Christmas rush;
- not sure how many times she was called at evening;
- she was disciplined on a couple of occasions for not using run sheets but she had written the colours on the work order;
- she considers herself a good worker;
- she has on occasion corrected mistakes made by other employees;
- Lori L'Heureux was present at the time the mistake was made on the 5 jackets;
- she told Lori L'Heureux that she would fix the jackets and was told to go ahead;
- the logo for the tattoo parlor was made up prior to the L'Heureux taking over the business;
- there was only 1 casual employee from the time the new machine was purchased and the time she was fired;
- her recollection of the discussions held with Ray L'Heureux in October 1998 was that as things were tense between them, she told him she was going to quit but he asked her to stay on;

- in regard to the refusal to stay overtime to train on the new machine, she felt that as they had wasted 45 minutes that day on a break, and as she did not want to have to do the maintenance on the new machine, there was no reason for her to stay;
- the reason she was given for being fired was that the 5 jackets were the last straw.

In response to cross examination by the L'Heureux, Day stated:

- Ray L'Heureux threatened to fire her during the time that they were separated and she had been told by Lori L'Heureux to ignore instructions from him;
- she recalls being told after the reconciliation that Ray L'Heureux would be coming into the shop a lot more;
- she was told that Lori L'Heureux would be responsible for the maintenance of the new machine;
- she recalls that on the day she was fired saying "whatever" and throwing the keys at Ray L'Heureux;
- the only thing she mentioned to the delegate of the Director was severance pay and no pay stubs;
- the work done for the tattoo parlor was done before the L'Heureux bought the business;
- in regard to the Double Diamond Quarter Horses order, she recalls giving the customer a receipt for the work;
- she acknowledges that she violated policy by entering the Double Diamond Quarter Horses logo into the computer without a set up fee having been paid but she did so because she felt this customer was promising;
- doesn't recall very much with regard to the time money was missing;

In response to questions from the Tribunal, Day stated:

- she acknowledged being told to do a single item first on all multiple orders;
- she did do that on occasion but did not do it for each order;
- problems with the machine did not occur all the time;
- she was thinking about buying the business but did not as finances could not be arranged;
- in regard to the incident with the jackets, she set up the machine to do all 5 jackets at the same time and did not notice that they were set up upside down;
- the tattoo parlor work was done prior to the L'Heureux buying the business;
- never did any work for any customer for herself;
- the maintenance on the machine was done by Lori L'Heureux at first and also later by Day;
- recalls in October 1998 when Ray L'Heureux spoke to her and said things had to change and she told him she was going to quit;

- Ray L'Heureux then asked if she would stay if things got better;
- things got better for awhile but again got hectic around Christmas time;
- she does not recall having been given the day off with pay to consider her future with the business;
- she recalls revising the logo on the computer for the tattoo parlor, updated the logo that was there from the previous owner;

Counsel for Day argued that Day was not made aware that her job was in jeopardy. Counsel further argued that the reason she was fired was a personality clash between her and Ray L'Heureux. Counsel finally argued that there was no evidence presented to establish 'just cause' existed for the termination of Day.

The delegate of the Director investigated the complaint of Day and found that the work done for the tattoo parlor was performed prior to the purchase of the business by the L'Heureux. The delegate of the Director further found that a receipt was issued for the work done for Double Diamond Quarter Horses. The delegate of the Director finally concluded that the L'Heureux failed to establish that just cause existed for the termination of Day and therefore compensation for length of service in the amount of 3 weeks wages is owed.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, the L'Heureux.

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

Section 63, Liability resulting from length of service

- (1) *After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
- (2) *The employer's liability for compensation for length of service increases as follows:*
 - (a) *after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
 - (b) *after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*
- (3) *The liability is deemed to be discharged if the employee*
 - (a) *is given written notice of termination as follows:*
 - (i) *one week's notice after 3 consecutive months of employment;*
 - (ii) *2 weeks' notice after 12 consecutive months of employment;*

- (iii) *3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
 - (b) *is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
 - (c) *terminates the employment, retires from employment, or is dismissed for just cause.*
- (4) *The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by*
 - (a) *totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,*
 - (b) *dividing the total by 8, and*
 - (c) *multiplying the result by the number of weeks' wages the employer is liable to pay.*
- (5) *For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.*

Section 63 (3) (c) *supra* provides that the liability of an employer to pay compensation for length of service is discharged if, among other things, the employee was dismissed for 'just cause'. The issue therefore is whether the L'Heureux had "just cause" to dismiss Day.

The L'Heureux advised the delegate of the Director during the investigation that they had not told Day she would be fired if she did not improve her work performance and attitude, yet before this panel, they claim that reference was with respect to an earlier discussion with Day. The L'Heureux have not, in my view, provided any substantive evidence to support their allegations that Day was aware her work performance and attitude were such as to bring her continued employment into jeopardy.

The evidence of the L'Heureux is that Day made errors in her work for the entire period of her employment but the dollar value of those errors increased after the new machine was purchased. There was no documented evidence that Day was disciplined for the errors made during her period of employment.

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that the L'Heureux have not established that just cause existed for the termination of Day. Day is therefore owed compensation for length of service.

With respect to the issue raised by the L'Heureux that Day was only employed by them for a short period of time, Section 97 of the *Act* provides:

Section 97, Sale of business or assets

- 97. *If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is*

deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Based on the evidence provided, I conclude that, pursuant to the provisions of Section 97 *supra*, the employment of Day is deemed to be continuous.

The total period of Day's employment (more than 3 years) generates an entitlement to 3 weeks compensation for length of service.

I am further satisfied that the calculation of compensation for length of service as performed by the delegate of the Director in the Determination is correct in all respects.

The appeal by the L'Heureux is therefore denied.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 29, 1999 be confirmed in the amount of \$1,396.03 together with whatever interest has accrued pursuant to Section 88 of the *Act*. I further order that the Determination dated November 29, 1999 be varied to reflect that both Ray L'Heureux and Lori L'Heureux operate as The Hat (Wo)Man Embroidery.

Hans Suhr
Adjudicator
Employment Standards Tribunal