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 -

Marilia Silva, operating as
Escape Day Spa

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO: 1999/730

DATE OF HEARING: February 11, 2000

DATE OF DECISION: February 22, 2000

DECISION

APPEARANCES:

Marilia Silva	on her own behalf
Carolyn Herdman	On her own behalf

OVERVIEW

This is an appeal by Marilia Silva ("Silva") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (No. 095050) dated November 08, 1999 by the Director of Employment Standards (the "Director").

Silva operates a home based esthetics business in which clients attend her home for such things as facials and hair removal. She engaged Herdman to assist her from October 1998 to April 01, 1999. It was the nature of this engagement and the circumstances surrounding the ending of the relationship that were the subject of the Determination and this appeal.

Silva maintained that Herdman was an independent contractor and that termination occurred because Herdman "quit" two weeks prior to the expiration of the contract.

The Director's delegate determined that Herdman was an "employee" and was therefore entitled to certain wage benefits such as statutory holidays. The delegate also determined that Silva had terminated the employment without just cause and as a result Herdman was entitled to compensation for length of service.

Silva appealed on several grounds including that Herdman was an independent contractor, that the contract was for a specific term, that Herdman quit of her own choice, and that there was just cause for dismissal.

At the hearing of this appeal Silva, the appellant, withdrew her appeal on the issue of whether Herdman was an employee or contractor and conceded that Herdman was in fact and law an employee. It was also conceded that Herdman was not dismissed for cause.

ISSUES TO BE DECIDED

The issues left to be decided in this case relate solely to compensation for length of service and whether the employment contract was for a definite term or whether the employee chose to terminate the employment.

THE FACTS AND ANALYSIS

Silva operates a home based esthetics business in which clients attend her home for such things as facials and hair removal. She engaged Herdman to assist her full time from October 1998 to April 01, 1999. Silva testified that she hired Herdman for a "definite term". She says that Herdman was previously employed by a doctor caring for her children. The Doctor was taking maternity leave and Silva says that it was understood that Herdman would only be employed for 6 months and she would then return to working for the doctor.

Section 63 of the *Act* provides for compensation for length of service but Section 65 provides that section 63 does not apply to an employee *"employed for a definite term"*. Therefore if Herdman was employed specifically for a 6 month term she would not have been eligible for compensation at the conclusion of that term.

Herdman testified that there was not a definite term. She agrees that the doctor was taking maternity leave from her practice but says that there was no specific length determined for that leave and that there were no discussions between herself and Silva limiting the term of employment. She says it was open ended.

Herdman did, in fact, resume her employment with the doctor on May 01, 1999. This was subsequent to the termination of employment with Silva which occurred on April 01, 1999.

It was not disputed that on or about March 17, 1999 Herdman told Silva that she would be going back to work for the doctor on May 1, 1999. Herdman expressed the desire to continue working as well for Silva from May 1st onwards two days a week preferably Friday/Saturdays. Silva said she would consider it and took a week to do so. On or about March 23 Silva told Herdman that the proposed arrangements were not suitable and she would not be able to offer Herdman part time employment in May.

During the discussion on March 23rd Silva told Herdman that business was, in fact, slow and that starting the following week Herdman's work would be reduced to 2 days per week until she returned to work for the doctor in May. Herdman went to discuss the situation with *Employment Canada* and after attending a seminar discovered that she was considered an employee and was entitled to certain wage benefits and compensation.

The next discussion between Silva and Herdman occurred on April 01, 1999 and was not cordial. Voices were raised and both parties recall the conclusion quite differently. Silva says that Herdman quit, requested her final paycheque, returned her key and left. Herdman recalls that Silva demanded the key be returned and handed her the final paycheque. There was an independent witness, a customer present, but neither party called this witness to testify.

It is always difficult to determine the facts when there are two conflicting versions of events. In some cases the more likely facts can be ascertained by examining the surrounding circumstances and applying the principles suggested in *Faryna v. Chorney* [1952] 2 D.L.R. 354. (B.C.C.A.). However in this case either version is equally consistent with the probabilities that arise under the

existing circumstances. Both parties testified in a credible manner and it was apparent that each believed their version of events. I cannot say that one was more credible than the other.

In such a case I must look to the burden of proof. The Tribunal has held that the onus is on the employer to demonstrate that an employee resigned and that there must be clear and unequivocal evidence to support a conclusion that the employee voluntarily resigned: *Re T.M. Engineering Ltd.* BC EST #D038/98; *Re Wilson Place Management Ltd.* BC EST #D047/96. I can not say that in this case there is clear evidence to establish that Herdman voluntarily resigned.

There is also a further onus on the employer in this case because it is the employer who is appealing and this Tribunal has held consistently that the burden of persuasion is on the appellant to satisfy the Tribunal that the determination is wrong. On the evidence presented to me I cannot be satisfied that Ms Silva has met that burden.

I am also not satisfied, on the evidence presented to me, that the employment was limited to a 6 month period but even if it were it was terminated prematurely.

I conclude that the Determination should be confirmed.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal