

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 -

Elizabeth Mincey
Operating Image West
("Image West")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Ralph Sollis

FILE NO: 96/160

DATE OF DECISION: May 17, 1996

DECISION

OVERVIEW

This is an appeal by Elizabeth Mincey operating Image West pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination #CDET 001095 issued by the Director on February 8, 1996. In this appeal, Image West seeks a variance of the Director's Determination in which a former employee, Cherie Gray ("Gray") was found to be entitled to severance pay in lieu of notice under Section 42 (3) of the former *Act*. Image West is not appealing that portion of the Director's Determination concerning general holiday pay and annual vacation pay.

Consideration of this appeal falls under the transitional provisions of the *Act*.

Section 128 (3) of the *Act* states:

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- (3) If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including Section 80 of this *Act*, as a complaint made under this *Act*.

FACTS

Gray was employed on a commission basis by Image West as a Hair Stylist from March 15, 1991 to December 27, 1994. Gray submitted complaints in December, 1994 concerning the nonpayment of general holiday pay, improper deductions from her wages and severance pay. A delegate of the Director issued a Determination dated February 8, 1996 in the amount of \$1,300.20.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Image West is required to pay two week's severance pay in lieu of notice to Gray.

ANALYSIS

In late December, 1994, Gray gave Image West notice that she would be terminating her employment in ten working days which is the equivalent of two week's work.

This notice followed discussions between Gray and Image West concerning general holiday pay and alternate terms and conditions of employment, including chair rental. Upon receiving Gray's notice, Image West terminated Gray's employment without either written notice or the equivalent severance pay.

The employer's position is she could not allow Gray to work out her two week's notice as she had been previously caught taking the names of salon's clients.

Lastly, the employer states that if severance pay is owing it should be for twenty-five hours only as the salon was closed for much of the time over the Christmas season.

The relevant Section 1 of the former *Act* concerning notice one as follows:

- 41. In this Part
"severance pay" means the greater of the employees'
 - (a) normal weekly wages, or
 - (b) average weekly wages within the last 8 weeks in which he earned wages, but for the purpose of this definition, overtime wage as defined by Section 26 shall not be included or taken into account for the purpose of determining or calculating normal weekly wages or average weekly wages;

- 42. (1) An employer shall not terminate an employee without giving the employee, in writing, at least
 - (a) 2 week's notice where the employee has completed a period of employment of at least 6 consecutive months, and
 - (b) after the completion of a period of employment of 3 consecutive years one additional week's notice, and for each subsequent completed year of employment an additional week's notice up to a maximum of 8 week's notice.

Although Gray would have been entitled to 3 week's notice based on her years of employment, I concur with the Officer that the statutory notice period, as provided in Section 42(b) is limited to the period of notice given by Gray of 2 weeks.

As to the question of severance pay in lieu of notice, I find that sections 41 (b) clearly sets out the method of calculating such severance pay. Further, that the Director's representative utilized that method in arriving at Gray's severance pay entitlement in the Determination. It is possible that if Image West had allowed the complainant to work out her notice period, that her earnings would have been less than the severance pay. When Image West terminated Gray without notice or just cause, it became liable to pay severance pay calculated in accordance with Section 41 and 42 of the former *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 001095 be confirmed.

“Ralph Sollis”
Ralph Sollis
Adjudicator
Employment Standards Tribunal