

An appeal

- by -

Rebecca Spinner

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/625

DATE OF HEARING: March 18, 2003

DATE OF DECISION: March 25, 2003

DECISION

APPEARANCES:

On her own behalf:	Rebecca Spinner
On behalf of 620411 B.C. Ltd. operating as Versailles Spa:	Andrea Hounslow, Crystal Morris

OVERVIEW

This is an appeal by Rebecca Spinner, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 27, 2002. The Director found that 620411 B.C. Ltd. operating as Versailles Spa ("Versailles") contravened Sections 40 and 58 of the Act in failing to pay Ms. Spinner wages and vacation pay, and Ordered that Versailles pay \$2,953.87 in wages and interest to the Director on Ms. Spinner's behalf.

The delegate concluded that Versailles did not violate s. 83(1) of the Act by terminating Ms. Spinner's employment for filing a complaint under the Act.

ISSUE TO BE DECIDED

At issue on appeal is whether the delegate

1. correctly calculated the wages owed to Ms. Spinner; and
2. erred in determining that Ms. Spinner's employment was not terminated because she filed a complaint with the Employment Standards Branch.

FACTS

The relevant facts for the purpose of this appeal are as follows.

Ms. Spinner is a hair stylist. She worked at Versailles, a beauty salon and spa on August 1, 1999, under a "chair rental" agreement. The business was purchased in December, 2001. Ms. Spinner entered into a chair rental agreement with the new owners on January 7, 2002.

Ms. Spinner filed a complaint regarding the chair deposit against the previous owner on January 4, 2002. That matter was resolved between the parties and was not addressed by the delegate. Ms. Spinner added the issue of vacation pay to her complaint on August 14, 2002. Ms. Spinner's employment was terminated under a 30 day working notice on August 31, 2002. On September 16, 2002, Ms. Spinner added a section 83 complaint to her original complaint, contending that her employment was terminated because she had filed a complaint.

Versailles advised the delegate that it terminated Ms. Spinner's contract for a number of reasons, essentially because of behavioural issues. Ms. Spinner's deficiencies, as expressed to the delegate, were Ms. Spinner's "bad attitude" and her failure to perform chores outlined in her contract (clean cups, laundry, and washing out sinks). One of Versailles's owners advised the delegate that, in her last discussion with Ms. Spinner, she discussed Ms. Spinner's "negative attitude toward the salon, doing chores and cutting down other staff." She alleged that Ms. Spinner threatened to leave and would not talk to anyone. Further, she contends that, in any event, Ms. Spinner intended to advise Versailles of her intention to quit on September 1, 2002.

Following her investigation, the delegate concluded that Ms. Spinner's employment was terminated essentially for reasons of interpersonal conflicts with other employees.

The delegate found that the relationship between Ms. Spinner and Versailles had deteriorated for reasons other than the complaint, and that there was no evidence to indicate that the ending of the relationship was due to Ms. Spinner's complaint.

ARGUMENT

Ms. Spinner contended that the delegate incorrectly calculated the money owing to her since she only had her income to July 31 because some of her books went missing. She contends that income for August and September also ought to be considered in the calculation of wages owing to her.

The delegate submitted that the amount of vacation pay outlined in the Determination was based on the receipts that Ms. Spinner had provided, but that, if Ms. Spinner had further records or evidence to indicate the amounts were incorrect, the delegate would make the necessary adjustments owing.

Ms. Spinner argues that her employment was terminated only after the delegate began investigating her complaint, and that if she had demonstrated the behaviour Versailles alleges, such behaviour would have manifested itself well before August, 2001. She also argues that, if, as Versailles stated, her bad behaviour was apparent in December, 2000, Versailles would not have entered into a new chair rental agreement with her in January. Ms. Spinner also contends that another employee was also terminated after Versailles learned of her complaint, which suggests a pattern of behaviour.

The delegate contends that all relevant facts were considered in the Determination.

Ms. Hounslow contended that, about one day before she learned about Ms. Spinner's complaint with respect to vacation pay, she had contacted the delegate to seek advice on how to terminate Ms. Spinner's employment because of difficulties it was having with her. Versailles says that it was told to give Ms. Spinner 30 days notice of the end of the month, and gave her that notice, based on the delegate's advice.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met with respect to the s. 83 complaint. However, given the evidence of Ms. Spinner and the submissions of the delegate, I find it appropriate to refer the matter of wages owed back to the delegate for reconsideration.

Section 83 (1) of the *Act* provides that an employer must not

- (a) refuse to employ or refuse to continue to employ a person,

.....

because a complaint or investigation may be or has been made under this *Act* or because an appeal or other action may be or has been taken or information may be or has been supplied under this *Act*.

- (2) If satisfied that a person has contravened subsection (1), the director may make any determination authorized by section 79(3) or (4).

As this Tribunal has noted, it must be determined precisely why an employee was terminated. It will be a rare case where an employer admits to having taken action by reason of a complaint. Usually, one will have to draw reasonable inferences from proven facts. (*Photogenis Digital Imaging Ltd /PDI Internet Café Incorporated* BC EST #D534/02)

The delegate advised Versailles of Ms. Spinner's additional complaint on August 14, and her employment was terminated two weeks later. Versailles says that it contacted the delegate for advice on how to terminate Ms. Spinner's employment before it was advised of this complaint, and that it gave the notice at the end of the month, as it was advised to do.

The delegate did not address the question of whether it gave Versailles advice in her submissions, which she ought to have done, given the circumstances. At the time Versailles was seeking advice, if Ms. Hounslow is to be believed, the delegate was acting as advisor to the employer, investigating a complaint by the employee, and was about to render a decision on the employee's complaint. Although the delegate is statutorily empowered to perform these functions, where she does so in the context of a dispute between the same employer and employee, the circumstances give rise to a perception that the delegate cannot make a fair Determination.

There is no evidence that Ms. Spinner was given any written or verbal warnings about either her performance or her behaviour before she was given her 30 day notice. However, the delegate's investigation, including her discussion with witnesses, supported Versailles's position that there were difficulties in the employment relationship. Ms. Spinner did not challenge those findings, nor did she dispute Versailles's allegations that she had given her own notice to quit at the same time Versailles gave her notice.

I find there was sufficient evidence to support the delegate's conclusion that Ms. Spinner's employment was terminated because of reasons unrelated to the filing of her second complaint, and dismiss the appeal in this respect.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 27, 2002 be referred back to the delegate to investigate what additional amounts, if any, may be owed to Ms. Spinner as a result of the production of additional records.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal