Employment Standards TRIBUNAL

An appeal

- by -

Shelley Henderson op. as Top to Bottom House Cleaners
("Top to Bottom")

- 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: Cindy J. Lombard

FILE No.: 2003A/11

DATE OF HEARING: March 21, 2003

DATE OF DECISION: March 27, 2003

DECISION

APPEARANCES:

The Appellant, Shelley Henderson ("Henderson") appeared on her own behalf.

The Respondents, Sue Fauteux (hereinafter referred to as "Fauteux") and Kim Hodgins (hereinafter referred to as "Hodgins") appeared on their own behalf together with a witness, Rhonda Harris.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Henderson of a Determination which was issued on December 3, 2002, which made the following findings:

Fauteux

a) Henderson had dismissed her without just cause or notice or compensation in lieu of notice contrary to Section 63 of the *Act* pursuant to which Fauteux was due two weeks wages in lieu of notice plus vacation pay;

b) Henderson owed Fauteux wages for 15 minutes travel time for shifts she worked between June 1 and June 15, 2001;

in the total amount of $512.11 plus interest accruing pursuant to the *Act*.

Hodgins

Henderson owned Hodgins 15 minutes travel time for each shift worked between November 1, 1999, and June 20, 2001, in the total amount of $913.90 plus interest pursuant to the *Act*.

ISSUES TO BE DECIDED

a) Whether Fauteux was dismissed by Henderson for just cause thereby resolving her liability to Fauteux pursuant to Section 63 of the *Act*.

b) Were Fauteux and Hodgins due wages for travel time.

FACTS

Fauteux was employed by Henderson, who operates a residential house cleaning business from January 26, 2000, to September 7, 2001, as a cleaner earning $8.50 per hour.

On September 7, 2001, Fauteux was dismissed by Henderson without notice and says Fauteux, without cause. Fauteux and the supervisor that she was working with that day, Angela Ketch (hereinafter referred to as "Ketch"), submitted time cards to Henderson indicating time worked to Henderson which were not the actual times worked at one client's home on that date.

The schedule that day for Fauteux and Ketch was as follows:

9:00 a.m. to 11:30 a.m.	Fitzpatrick
11:50 a.m. to 2:00 p.m.	Lapoint
2:30 p.m. to 3:30 p.m.	Kalyn

The time card submitted by Fauteux and Ketch show the following times worked:

9:00 a.m. to 11:30 a.m.
11:00 a.m. to 2:00 p.m.
2:30 p.m. to 3:30 p.m.

Henderson had observed Fauteux and Ketch at approximately 2:55 p.m. driving away from the last client's home in the direction of presumably Fauteux's daughter's school.

When confronted, Henderson says that Fauteux said "who cares" while Ketch was very apologetic. Fauteux says that she meant that while they may not in fact have worked the exact hours shown they had done the work for the amount of time indicated. Henderson says that she had been concerned for some time that false time cards were being submitted but that she had not previously at any time warned Fauteux that her job was in jeopardy if this occurred nor did she fire Ketch. Fauteux says that Henderson was aware when she hired her that she had to be available to pick up her children after school and that she had done so many times previously. Furthermore, Fauteux says that if she had been given the chance, she would have never again submitted a time card with inaccurate times of work on it.

Once confronted, Ketch amended the time card to show the following times worked:

8:45 a.m. to 11:15 a.m.
11:35 a.m. to 1:30 p.m.
1:55 p.m. to 2:55 p.m.

Henderson says that these times are also inaccurate because normally Fauteux was picked up at the Zellers parking lot at 8:45 a.m. and it would have taken 15 minutes to drive to the first house. If the two in fact began at 9:00 a.m. and driving time was allowed there were not enough hours between 9:00 a.m. and 2:55 p.m. to have worked all of the hours which the two said that they worked and for which Henderson then billed the clients. This appears to be the case, that is, that one or all of the clients were over billed on that date by a few minutes.

Fauteux did have the company vehicle for a two week period when the normal driver was on a holiday during the period June 1 to 15, 2001.

Hodgins

Hodgins was employed by Henderson from February 15, 1999, to June 20, 2001, as a "lead hand" cleaner at the rate of $9.50 per hour.

Henderson says that shortly after she took over the cleaning business in February, 1999 (Hodgins had been employed by the previous owner) she gave Hodgins a $1.50 raise which was meant to compensate her both for the additional responsibilities that she had which included driving the company vehicle and cleaners from, between jobs and home from the jobs. Henderson says that she found that the previous

owner's method of keeping track of the exact driving times and paying for that time cumbersome from an accounting standpoint.

Therefore, Henderson only paid Hodgins for the time worked and not for driving time.

ANALYSIS

The onus is on the employer, Henderson, to show on a balance of probabilities that the Determination was wrong.

Fauteux

Section 63 of the *Act* states that an employer is liable to pay an employee compensation for length of service when discharged unless the employee:

> "… (c) employment, retires from employment or is dismissed for just cause."

Furthermore, the onus is on the employer to show that the conduct of the employee justifies dismissal. Just cause can include a single act of misconduct if the conduct is willful, deliberate and of such consequence to repudiate the employee/employer relationship.

In this case the action of Fauteux in submitting an inaccurate time card for September 7, 2001, cannot be characterized as being of such serious consequence as to repudiate the employer/employee relationship because she did in fact work at the homes albeit probably not as long as the three hours indicated. However, if Henderson had issued a warning that this was never to occur again in the future, this kind of conduct could have become of such serious consequence had Fauteux continued in her employment and the conduct happened again. Further support for the fact that the conduct on this one occasion was not so serious as to repudiate the relationship is found in the fact that Henderson did not fire Ketch.

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.

On the facts of this case the employer, Henderson only satisfied a). She did not clearly warn Fauteux that her continued employment was in jeopardy if her conduct continued and did not give her any time to meet the appropriate standard.

For these reasons the decision of the Director that Fauteux was dismissed without cause was correct and she is therefore entitled to the compensation awarded by the Director pursuant to Section 63 of the *Act*.

Travelling Time

The Director awarded 15 minutes per shift for traveling time, that is the time spent picking up other employees, driving them home or driving from the Henderson's office to the first home.

Henderson has asserted in particular with respect to Hodgins that her hourly raise was intended for travel time and the fact that during the time periods in question both women had the use of the company vehicle during personal time off.

With respect to Hodgins and the raise, we do not accept this as compensation for traveling time for the following reasons:

a) we accept Hodgins evidence that there was no mention of this by Henderson;

b) the *Act* requires that an employer pay an employee for all time worked.

With respect to the assertion that use of the company vehicle on personal time was meant to compensate for travel time, Section 20 of the *Act* requires that an employer must "… pay all wages in Canadian currency."

For the foregoing reasons the Decision of the Director with respect to travel time is upheld.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated December 3, 2002, be confirmed as issued plus whatever further interest may have accrued pursuant to Section 88 of the *Act* since the date of its issue.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal