

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-

Josefina Balbaira

(“Balbaira”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/722

DATE OF HEARING: March 10th, 1997

BC EST # D111/97

DATE OF DECISION: March 13th, 1997

DECISION

APPEARANCES

Josefina Balbaira	on her own behalf
Elie Azar	for Uptown Hair Unisex Inc.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Josefina Balbaira (“Balbaira”), a former employee of Uptown Hair Unisex Inc. (“Uptown” or the “employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004668 issued by the Director of Employment Standards (the “Director”) on November 14th, 1996. The Director determined that Uptown had just cause to terminate Balbaira and therefore was not obliged to pay her any termination pay under section 63 of the *Act*.

The appeal in this matter was heard on March 10th, 1997 at the Tribunal’s offices in Vancouver at which time I heard testimony from Balbaira and from Mr. Elie Azar (“Azar”), a director, officer and shareholder of Uptown. The Director did not attend the appeal hearing.

ISSUE TO BE DECIDED

Did Uptown have just cause to terminate Balbaira, thereby relieving it of any obligation to pay her compensation for length of service [see sections 63(2) and 63(3)(c) of the *Act*]?

FACTS

Balbaira worked as a hairdresser with Uptown from May 1993 until her termination on or about July 2nd, 1996. The employer paid Balbaira up to and including July 6th, 1996.

Balbaira's evidence is that on the morning of June 27th, 1996 she gave verbal notice of her intention to quit to Azar and subsequently gave her employer written notice of her intention to quit. The written notice was submitted by the employer during the course of the appeal hearing and it purports to give "two weeks notice effective this date" (the note is dated June 27th, 1996). There are at least two inconsistencies in the appellant's evidence on this point.

First, she says that her verbal notice of resignation was given about one week before her written notice. Second, she says that Azar "ripped up the notice in front of me and threw it in the garbage". The resignation letter, which Balbaira acknowledged to be genuine, stands in stark contrast--it is dated June 27th, 1996 (*i.e.*, the very day Balbaira says she gave *verbal notice*--she says written notice was not given until a week later) and the letter was fully intact; clearly it had never been "ripped up".

I find as a fact that, although Balbaira made various allegations regarding "unfair treatment" by the employer, the sole reason why Balbaira gave notice in late June 1996 was because she had established her own competing hairdressing business which was imminently about to open for business. Her evidence on this latter point is as follows:

- she commenced negotiations to lease suitable premises in April 1996;
- a lease agreement was signed in April 1996;
- she commenced paying rent in April 1996 and took possession of the premises in May 1996;
- leasehold improvements and other renovations commenced in May 1996 and were completed by July 1996;
- she applied for a Surrey business licence in May or June 1996; and
- she saw some customers in July 1996 and officially opened for business, under the name "Jobonds Hair Salon", in August 1996.

Balbaira's new salon is in the same general trading area as the Uptown salon--the new salon is located on 108th Avenue in Surrey; Uptown is located in the Guildford Town Centre shopping mall. Balbaira, so far as I can gather, operates the new business as a sole proprietorship.

The evidence before me is that Azar, after learning that Balbaira may have been soliciting Uptown customers, sought advice from the local Employment Standards Branch office, and then decided on July 2nd, 1996 to terminate Balbaira's employment. As noted above, Balbaira was paid until July 6th.

ANALYSIS

In my view, I need not make a finding of fact that Balbaira was, in fact, soliciting Uptown clients during the period between June 27th, 1996 (the day she gave notice) and July 2nd, 1996 (the day she was terminated).

I am satisfied that, as a matter of law, by establishing a competing business while still employed by Uptown, Balbaira breached her contractual obligations to her former employer and thereby gave Uptown just cause to terminate her without severance pay or notice in lieu thereof.

In April 1996, when Balbaira undertook the preliminary steps to establish a business that would directly compete with Uptown, and by proceeding to take all the ordinary steps to establish that competing business over the ensuing three months (including negotiating and signing a lease, undertaking renovations, getting business cards printed, arranging for telephone service etc.) while still employed by Uptown, she violated her duty of fidelity vis-à-vis Uptown (see *Empey v. Coastal Towing Ltd.* [1977] 1 W.W.R. 673).

Balbaira's breach of her duty of fidelity (namely, establishing a competing business while still in Uptown's employ), placed her in a conflict of interest and thus, gave her employer just cause to unilaterally terminate her employment without notice, or severance pay in lieu of notice.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004668 be confirmed as issued.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal