

An appeal

- by -

Hair Express Salon
(“Hair Express”)

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2016A/99

DATE OF DECISION: October 13, 2016

DECISION

SUBMISSIONS

Bradley Daniel Silbernagel

on behalf of Hair Express Salon

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Hair Express Salon (“Hair Express”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 24, 2016.
2. On March 15, 2016, Mackenzie Lee filed a complaint with the Director alleging that Hair Express contravened the *Act* in failing to pay her wages.
3. Following a hearing, a delegate of the Director concluded that Hair Express had contravened sections 21, 58 and 63 of the *Act* in failing to pay Ms. Lee wages. The delegate determined that Ms. Lee was entitled to wages, including unauthorized deductions from wages, annual vacation pay, compensation for length of service and interest, in the amount of \$923.46. The delegate also imposed two administrative penalties in the total amount of \$1,000 for Hair Express’ contraventions of the *Act*, for a total of \$1,923.46.
4. Hair Express contends that the Director erred in law.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. These reasons are based on Hair Express’ written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

ISSUE

7. Whether or not Hair Express has established any of the statutory grounds of appeal.

FACTS AND ARGUMENT

8. A delegate of the Director held a hearing into Ms. Lee’s complaint on June 17, 2016. The facts before the delegate were as follows.
9. Hair Express was incorporated in British Columbia on July 13, 1999. Ms. Lee was employed as a hairdresser at Hair Express from June or July 2012 until February 2016. At the time Ms. Lee began working at Hair Express, the business was owned by Susana LaChapelle. On December 1, 2015, Ms. LaChapelle sold the business to Bradley Silbernagel. Effective that day, Ms. LaChapelle ceased to be a Director and Mr. Silbernagel became Hair Express’ sole Director. Under the terms of the purchase and sale, Ms. LaChapelle was to terminate the employment of all employees effective December 1, 2015.
10. Approximately one week before the end of Ms. Lee’s employment, Ms. Lee and a co-worker provided services to a client who left a tip to be split between them. The allocation of the tip between Ms. Lee and her

co-worker created some difficulties. On February 22, 2016, Ms. Lee met with Hair Express' manager, Jannette Van Der Meer, to discuss that situation. There is no dispute that Ms. Lee quit her employment at the end of the meeting. At issue before the delegate was whether she quit her employment immediately or whether she provided notice.

11. Ms. Van Der Meer's evidence was that Ms. Lee said "I quit, I have another job" and asked for a box, packed her effects in the box and left the salon.
12. Schezel Apperloo and Ruby Ross, two other staff members, also gave evidence at the hearing. Ms. Apperloo, with whom Ms. Lee was to split the tip, testified that Ms. Lee gave her a portion of the tip but only after "an ordeal." She testified that she overheard part of the discussion between Ms. Lee and Ms. Van Der Meer, including the words "I quit" and that she had a job elsewhere. She also testified that Ms. Lee asked for a box for her belongings, packed them up and left the salon. Ms. Ross testified that, before Ms. Van Der Meer arrived at the salon, Ms. Lee whispered to her "I am quitting." Ms. Lee did not say why, or that she had another job. Ms. Ross testified that she overheard parts of the conversation between Ms. Lee and Ms. Van Der Meer, including Ms. Lee say "I quit." Ms. Ross also testified that Ms. Lee packed up her belongings, said that she had a job at an adjacent salon and left.
13. A third employee, Alexis Hoffman, testified that although she was not at the salon on February 22, she had heard before then that Ms. Lee was planning to quit her job.
14. Ms. Lee testified that when Ms. LaChapelle thought about selling the salon, Ms. Van Der Meer expressed an interest in purchasing it. Ms. Lee said that Ms. LaChapelle did not terminate her employment before Mr. Silbernagel took over the business. Ms. Lee said that she was dissatisfied with the manner in which Mr. Silbernagel operated the business, and became particularly concerned when he installed cameras in the salon. Because of her dissatisfaction, she had considered quitting her employment, but did not look for work before February 22, 2016.
15. Ms. Lee agreed that the allocation of the tip was an issue between herself and Ms. Apperloo, but said that it was resolved the day it occurred. Ms. Lee said that at the meeting on February 22, Ms. Van Der Meer informed her that she had watched a video which recorded the tip incident and asked Ms. Lee for her version of the events. Ms. Lee explained to her that the tip issue had been resolved and that she was uncomfortable that Hair Express recorded audio of herself and her clients without their consent. Ms. Van Der Meer informed Ms. Lee that she would disable the audio recording capability of the cameras.
16. Ms. Lee told Ms. Van Der Meer that she was quitting her job, and asked her if she would allow her to work her two weeks. Ms. Van Der Meer said that Ms. Lee could work the notice period. As Ms. Lee was walking to the main salon area, Ms. Van Der Meer told her to "take her stuff and go."
17. Ms. Lee gathered her things and found employment with an adjacent salon effective February 26. Ms. Lee submitted a letter from the salon manager stating that she had interviewed Ms. Lee on February 23, 2016.
18. On February 27, 2016, Hair Express paid Ms. Lee her final wages, deducting \$122.40 for products Ms. Lee had taken for her personal use. Ms. Lee did not provide written authorization for Hair Express to deduct the cost of the products from her final wages. While Ms. Lee acknowledged that she had taken products which she had not fully paid for, she said that she had never before been charged retail price. She did not know the wholesale value of the product.

19. At issue before the delegate is whether Ms. Lee intended to work a notice period, giving notice of her intention to quit on a future date, or whether she quit with immediate effect. In light of the conflicting evidence, the delegate had to assess the credibility of the parties and witnesses.
20. The delegate noted that the manager of the adjacent salon provided a statement confirming Ms. Lee's evidence that she first contacted the salon on February 22 and was hired the following day. Based on that statement, the delegate found it was unlikely that Ms. Lee would have told Mr. Silbernagel, Ms. Van Der Meer, Ms. Apperloo and Ms. Ross that she had another job before quitting her employment and concluded that she did not do so.
21. The delegate found that the evidence of Hair Express' witnesses was "remarkably consistent" which led him to believe that it was "rehearsed." The delegate stated:

Each witness described an almost identical sequence of events using the same language; Ms. Lee became "confrontational", she stated she had another job, she stated "I quit", and then she asked for a box to pack her things. When pressed, the Hair Express witnesses could not provide details of the conversation. While Ms. Lee and Ms. Van Der Meer both testified that their discussion was primarily to do with Hair Express' cameras, Ms. Apperloo, who claimed to have overheard the entire conversation with only a brief gap, testified that the two had solely discussed the tip issue from the week prior. Ms. Ross' testimony was internally inconsistent, initially indicating that she could not hear the conversation clearly, but subsequently stating that she clearly heard Ms. Lee say, "I quit", and that Ms. Lee at no point offered to work a notice period.

For the reasons outlined above, I do not find the Hair Express witnesses' testimony to have been credible. It was inconsistent with determinable facts, as well as with the testimony of the other witnesses, as well as appearing to have been practiced beforehand. Ms. Lee was, on the other hand, able to provide a detailed account of the conversation with Ms. Van Der Meer. I find that Ms. Lee's testimony was more credible than that of the Hair Express witnesses, and I therefore find that Ms. Lee asked to work a two week notice period, and that Ms. Van Der Meer decided not to allow her to do so.
22. The delegate concluded that, as Ms. Lee's employment had not been terminated prior to the sale of the business in December 2015, Ms. Lee's employment was continuous from June or July 2012. He therefore determined that she had more than three but less than four years' service when her employment ended and was entitled to three weeks' regular wages as compensation for length of service. Having given two weeks' notice of her intent to quit, he determined that Ms. Lee's entitlement to compensation for length of service was limited to the remainder of her notice period, or two weeks regular wages.
23. The delegate also found that Hair Express contravened section 21 of the *Act* in deducting \$122.40 from Ms. Lee's wages without her written authorization: "Regardless of whether Ms. Lee owed Hair Express for the product, Hair Express was barred from making the deduction without Ms. Lee's written consent to do so."
24. Hair Express contends the delegate erred in determining that its witnesses were not credible. Mr. Silbernagel argues that the delegate misjudged the evidence "To impose his person belief that if all the witnesses say the same thing it's a lie" [*sic*]. Mr. Silbernagel submits that there is only one way to say the words "I quit do you have a box?"

ANALYSIS

25. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

26. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

27. Hair Express contends that the Director's delegate erred in law in weighing the evidence of the parties.

Error of Law

28. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

29. The Tribunal will not interfere with the delegate's assessment of credibility or the weight to be given to certain evidence, as those matters are questions of fact, not law. Section 112(1) does not provide for an appeal based on errors in findings of fact unless those findings amount to an error of law. An error of law relating to the facts may be demonstrated where the delegate made findings of fact without any evidence or where the evidence does not provide any rational basis for the findings made; in other words, that the findings are perverse or irrational. The occasions on which an alleged error of fact amounts to an error of law are few. (see *Britco Structures Ltd.*, BC EST # D260/03)

30. The delegate considered the evidence and noted that the issue to be decided rested on an assessment of the credibility of the parties.

31. Credibility assessments are left to the trier of fact, that is, the delegate, who has the benefit of observing the witnesses. The delegate set out the reasons for rejecting the evidence of Hair Express witnesses in the Determination. He found objective evidence to support Ms. Lee's testimony, and formed the opinion that the evidence of the witnesses for the Employer had been "rehearsed" because of their similarity and lack of detail. Although Hair Express disagrees with those conclusions, I am unable to conclude that they were perverse or irrational. I am not persuaded that the delegate acted on a view of the facts that could not reasonably be entertained or made a finding without any evidence.

32. While I note the delegate did err in his recitation of some of the evidence in the analysis part of the Determination, I find nothing turns on this misstatement. The delegate wrote that the owner of the adjacent salon confirmed that Ms. Lee contacted the salon on February 22 and was hired the following day. In fact, the owner stated that she interviewed Ms. Lee on the 23rd and that she began work on the 26th of February. Indeed, the delegate accurately set out the facts earlier in the Determination and any misstatement has no affect on the conclusion.

ORDER

33. Pursuant to section 115 of the *Act*, I order the Determination dated June 24, 2016, be confirmed in the amount of \$1,923.46, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal