

An appeal

- by -

Rob Coll operating Suncity Tanning
(“Coll”)

- 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: M. Gwendolynne Taylor

FILE No.: 2002/640

DATE OF DECISION: April 23, 2003

DECISION

This decision is based on written submissions presented by Rob Coll operating as Suncity Tanning (“Coll”), Susan Conway (“Conway”) and the Director of Employment Standards.

OVERVIEW

This is an appeal by Coll from a Determination of the Director dated November 21, 2002, concerning a complaint by a former employee, Conway. The Director’s delegate found that Conway had been paid less than minimum wage, had not been paid for statutory holidays, had not been paid vacation pay, and had been terminated without just cause. The delegate ordered Coll to pay Conway wages in the amount of \$1,693.70, compensation for length of service (clos) in the amount of \$323.96, plus interest, for a total of \$2,276.03.

On December 12, 2002, Coll appealed the Determination on the grounds that the Director erred in the facts and that Coll needed additional time to prepare his records. By letter dated February 10, 2003, Coll submitted his records to refute Conway’s claim for wages. He also submitted a counterclaim in the amount of \$2,431.91, for the cost of tans provided to Conway at no charge (\$888.23) and for tax deductions (\$1,543.68).

ISSUE

1. Has Coll substantiated his claim that the Director erred in basing the decision on Conway’s evidence?
2. Can Coll advance a counterclaim before the Tribunal?

THE FACTS

The delegate found as fact that Conway worked for Rob Coll operating as Suncity Tanning from August 14, 2000 to October 25, 2001 as a secretary/salon attendant at the rate of \$7.00 per hour. She was paid in cash and was not provided with statements of hours worked or wage calculations. She was not paid for statutory holidays or vacation time. On October 25, 2001, she was dismissed without just cause and without compensation in lieu of notice. The delegate also found that Conway used some free tanning lotions that Coll received as samples from the suppliers.

The delegate documented that he had given Coll an opportunity to provide records but Coll did not do so. The delegate’s findings of fact were based on his assessment of the credibility of Conway’s evidence and the fact that it was uncontradicted by Coll.

ARGUMENT

Coll submitted that he did not understand the delegate was going to make a decision based on the evidence before him. Rather, he understood the delegate was investigating. Accordingly, Coll asked that the Tribunal consider the records he submitted with the appeal. He claimed that his payroll records

indicated a total difference of \$375.20. Coll also submitted that Conway's claim should be reduced to offset free tanning sessions which he submitted were provided as part of her wage package. He also provided a calculation of income tax expense accrued on her behalf. Coll submitted that although Conway's claim was for \$2,276.03, his claim was for \$2,431.91.

In response to the appeal, Conway submitted that Coll's payroll records were similar to hers, but reduced by ½ hour for her Sunday shifts. She maintained that his records were incorrect based on the fact of her shifts, which required her to be present on Sundays from opening to closing, 12:00 p.m. until 6:00 p.m.. She also submitted that she was permitted two free tans per week.

In response to the appeal, the delegate submitted that he had given Coll three opportunities to present documents. The first was a telephone conversation on August 30, 2002; the second was in a letter dated September 18, 2002; and the third was a personal visit the delegate made to the worksite, when he spoke directly with Coll who said the documents were misplaced but he would provide them. The delegate submitted that new documentation should not be accepted and that the tribunal should dismiss the appeal.

The delegate noted what amounts to a typographical error in the body of the determination. At page 4 of the Determination, there is a reference to "her regular hourly rate of \$70.00/hr." The delegate asks that the Determination be varied to correct this error by substituting "\$7.00/hr."

REASONS AND DECISION

An appeal to the tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. The tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on Coll to demonstrate that there are grounds for dismissing or varying the determination.

Coll has provided evidence that was not presented to the Director. In the past, the tribunal has held that it would not normally, without good reason, accept new evidence that could have been submitted during the delegate's investigation (see *Kaiser Stables Ltd.*, BC EST #D058/97). In this instance, Coll has presented documents that contain dates and hours worked and a record of the tans allegedly taken by Conway. There is nothing to suggest those documents were made contemporaneously with the salary payment or tanning sessions. The records are disputed.

If Coll had submitted these records during the delegate's investigation, the delegate could have investigated further and come to factual findings based on submissions from both parties. That is the normal course. Coll failed to produce the records and has not provided reason for not having provided them earlier. This is not new evidence that was not available at the time of the delegate's investigation. In his appeal he says that between his records and his accountants records, the documents are extensive. There is no indication of extensive documentation presented in the appeal. I do not accept that as good reason for accepting this evidence.

One of the purposes of the Act, as set out in the Determination, is to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act. In my view, it would not be fair nor efficient to allow an appellant to present documents such as this in the appeal when he had ample opportunity to do so in the delegate's investigation.

Coll challenged the delegate's findings of fact. I find that the delegate's findings were reasonable and supported by the evidence. I find that the delegate was conscientious in his attempts to obtain information from Coll. There is nothing in the evidence or submissions before me to support a suggestion, which I take from Coll's letter of February 10, 2003, that the delegate somehow protected the employee's rights at the expense of the employer's. In my view, the delegate gave a thorough statement of the evidence and the law, and drew appropriate and supported findings and conclusions.

The tribunal's jurisdiction is to hear appeals from the decisions of the Director. There is no jurisdiction to hear counterclaims.

I dismiss the appeal.

Variation

There having been no submissions contrary to the Director's request that I vary the determination to correct a typographical mistake, I will do so.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated November 21, 2002, be varied on page 4 to substitute "\$7:00" for "\$70.00" and, in all other respects, I order that the Determination be confirmed in the amount of \$2,276.03, together with any interest that has accrued pursuant to section 88 of the *Act*.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal