

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

-by-

Liana Elizabeth Gray  
("Gray")

Coriene Marie Tomkins  
("Tomkins")

and

Kenneth Warren Todosychuk  
("Todosychuk")

-of a Determination issued by-

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/154

**DATE OF HEARING:** June 17th, 1996

**DATE OF DECISION:** July 5th, 1996

## DECISION

### APPEARANCES

Liana Elizabeth Gray	on her own behalf
Coriene Marie Tomkins	on her own behalf
Kenneth Warren Todosychuk	on his own behalf
William Cadman	for Expressions Hair Design Ltd.
Theresa Robertson	for the Director of Employment Standards

### OVERVIEW

This matter involves three separate appeals brought by Liana Elizabeth Gray (“Gray”), Coriene Marie Tomkins (“Tomkins”) and Kenneth Warren Todosychuk (“Todosychuk”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from Determination No. CDET 001012 issued by the Director of Employment Standards (the “Director”) on February 6th, 1996. Following an investigation the Director determined that Gray, Tomkins and Todosychuk were all entitled to additional vacation and statutory holiday pay; these monies have now been paid to each of the appellants. The Director determined that none of the appellants were owed any further monies by their former employer Expressions Hair Design Ltd. (“Expressions”) and, accordingly, issued a Determination to that effect.

Each of the appellants maintains that Expressions owes them further monies pursuant to various provisions of the *Act*. Although their claims are independent from one another, much of the evidence is common to all and, accordingly, a single appeal hearing was conducted on June 17th, 1996 in Surrey, B.C.

### FACTS

The appellants formerly worked for a company that carried on business under the name “John Gordon”. This firm operated a hair salon business in the Guildford Mall in Surrey, B.C. On April 14th, 1995, Expressions completed the purchase of the assets owned by John Gordon and arranged for the existing lease to be assigned or otherwise transferred. The John Gordon salon was

continued under the firm name "Expressions Hair Design". Some renovations were undertaken although the business remained open throughout the four- to six-week renovation period. The firm's telephone number remained the same and many of the former John Gordon employees continued on as Expressions' employees albeit under, in some cases, changed terms and conditions. On or about February 5th, 1996, the Guildford Mall "Expressions" salon assets (as well as the assets at two other "Expressions" locations) were sold again in an arm's length transaction.

Expressions maintains that upon the sale of the assets, the appellants' employment relationships with their former employer were terminated and new employment contracts were put in place with Expressions. In due course, the appellants became dissatisfied and either voluntarily (or involuntarily; hence, one of the issues before me) left Expressions and all three appellants are now associated with a new firm, "Rodeo North", which is also located in Surrey (in the "Fleetwood" area of Surrey, about three and one-half miles away from the Guildford Mall). Gray is a partner in the Rodeo North firm; Tomkins and Todosyckuk are now employees of Rodeo North. The particular employment circumstances and claims of each of the appellants is summarized below.

*Liana Elizabeth Gray*

Gray worked for John Gordon for about six years prior to the asset sale. She handled the "front end" duties at the salon--answering the telephone, greeting customers, arranging appointments for the stylists, front-end sales of hair care products, and some bookkeeping (in particular, she was responsible for the firm's payroll). At the time of the asset sale, Gray was earning \$10.50 per hour.

Following the sale to Expressions, Gray's pay was reduced to \$8.00 per hour and some of her former responsibilities were taken away. Gray's employment was terminated, without severance pay or notice, on May 24th, 1995. Gray maintains that she is entitled to severance pay pursuant to section 63 of the *Act*; Expressions maintains that it had just cause to terminate and, therefore, by reason of section 63(3)(c) of the *Act*, is not liable for termination pay. Further, Gray says that she is entitled to compensation for the reduction in her former hourly wage during her period of employment with Expressions (approximately six weeks).

*Coriene Marie Tomkins*

Tomkins worked as a stylist with John Gordon from 1968 to 1984 and again from January 1986 until her employment terminated on May 26th, 1995. There is a dispute between the parties as to whether or not Tomkins was terminated or voluntarily resigned. Tomkins says she was fired without severance pay or notice in lieu thereof and claims eight weeks' wages as termination pay under section 63 of the *Act*. Tomkins' duties and method of remuneration (55% commission) did not change following the asset sale to Expressions.

The Director determined that Tomkins' employment was not terminated by Expressions; rather, she voluntarily quit on or about May 26th, 1995.

*Kenneth Warren Todosychuk*

Todosychuk's employment with John Gordon commenced in April 1984. At the time of the asset sale, he was a stylist who also had some limited managerial responsibilities; I am not satisfied that Todosychuk was a "manager" as defined in the *Regulations* to the *Act*. He was paid on the basis of a 50% commission together with a monthly salary of \$1,000. Following the asset sale, Todosychuk's commission was increased to 55% but his monthly salary was eliminated (along with his former managerial responsibilities).

Todosychuk says he tendered his resignation, with two weeks' notice, on June 14th, 1995. According to Todosychuk, Mr. Earnest Punzo, the operating principal behind Expressions, refused the two weeks' notice and asked Todosychuk to leave immediately. Todosychuk seeks two weeks' pay as well as compensation equivalent to \$1,000 per month for the time worked following the asset sale (this amounts to an approximate claim of \$3,500). Expressions maintains that Todosychuk simply quit on June 14th, 1995 without giving any notice whatsoever.

**ISSUES TO BE DECIDED**

Each of the three appellants' cases raises different issues. These issues are as follows:

Gray:

- i) Is she entitled to an award representing \$2.50 per hour for the hours worked during the entire period of her employment with Expressions?
- ii) Was she terminated for just cause?

Tomkins:

- i) Did she quit voluntarily or was she terminated without just cause and, therefore, entitled to severance pay?

Todosychuk:

- i) Is he entitled to be compensated for the loss of the monthly \$1,000 stipend following the asset sale?
- ii) Is he entitled to two weeks' pay reflecting the notice that was refused by the employer or did he voluntarily quit without giving notice?

## ANALYSIS

I propose to deal with the merits of each of the appellants' cases in turn.

### *Liana Elizabeth Gray*

In my view, Gray is not entitled to be compensated by Expressions for the reduction in her hourly wage following the asset sale. She may well have an action against her former employer, John Gordon, for wrongful dismissal; this is a matter about which I express no conclusion. With respect to her claim against Expressions, the evidence before me is clear that prior to the sale, Gray was offered a new position with Expressions to take effect immediately upon completion of the asset sale. It is true that her former hourly rate was reduced, but then so were her responsibilities. Gray accepted this new offer of employment and thereby created an entirely new contract of employment between herself and Expressions.

As was stated by our Court of Appeal in *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987) 15 B.C.L.R. (2d) 38, in an asset sale the acquiring party is not obliged to continue the employment of the former employees. However, if the purchaser wishes to make new employment offers to the former employees, it is entitled to do so on whatever terms and conditions it wishes. If a new offer of employment is made by the purchaser employer, then, pursuant to section 97 of the *Act*, that employee's tenure is, in effect, retroactive to the date of initial hire by the vendor employer. Section 97 does not, however, create a liability on the part of the purchaser employer for all contractual entitlements (*e.g.*, damages for constructive dismissal) owed by the vendor employer to the former employees [*cf. Helping Hands Agency Ltd. v. Director of Employment Standards* (1995) 96 C.L.L.C. 210-009 (B.C.C.A.)].

In my view, based on the evidence before me, Expressions had just cause to terminate Gray and, accordingly, she is not entitled to termination pay under section 63 of the *Act*. On Gray's own evidence, she and another former John Gordon employee, Palwinder Gill, commenced serious investigations to establish a new salon in late April 1995; a real estate agent was engaged in early May 1995 to locate a suitable location or existing business that could be purchased; a purchase agreement was signed on May 12th, 1995. "Rodeo North" opened for business on July 1st, 1995. Thus, at least two weeks prior to her termination Gray was in a clear conflict of interest by establishing a competing business (in the same general trading area) while still employed by Expressions.

There is conflicting evidence before me as to whether or not Gray solicited clients (and for that matter stylists) for Rodeo North while she was still employed at Expressions. I need not make any finding in that regard as I am satisfied that as a matter of law, by entering into a partnership with Gill and committing to the purchase of a competing business while still employed by Expressions,

Gray breached her fiduciary obligations to Expressions and thereby gave Expressions just cause to terminate her without severance pay or notice in lieu thereof (*cf. Empey v. Coastal Towing* [1977] 1 W.W.R. 673 (B.C.S.C.)).

*Coriene Marie Tomkins*

On the basis of the evidence before me, I am satisfied that Tomkins quit of her own accord and, therefore, is not entitled to termination pay. There are several aspects of the evidence that leads me to this conclusion.

First, if Tomkins was fired on May 26th, 1995 (Friday) why would she leave all of her hairstyling tools at the shop over the weekend and return on the following Tuesday (Monday was a holiday) to retrieve them?

Second, if she had no plans to quit, why was she handing out to her clients her address and/or telephone number where she could be reached? I accept the independent evidence of Cheryl Ann Puckering, who was, and still is, a stylist at the Guildford Mall salon on this point. Further, according to Ms. Puckering, Tomkins told her clients words to the effect: "This is where you can reach me on July 1st". Rodeo North opened for business on July 1st, 1995 with Tomkins as one of its stylists. It should also be noted that Ms. Puckering has nothing to gain or fear from her testimony, Expressions having sold the salon's assets in February of this year.

Third, if Tomkins was fired, why would the employer, in the person of Mrs. Laura Punzo, call her on the Tuesday afternoon of the same day she went to the salon to pick up her styling equipment and ask Tomkins, during the course of what was admittedly a quite lengthy and cordial telephone conversation, to return to work?

*Kenneth Warren Todosychuk*

In my opinion, Todosychuk is not entitled to any compensation for the loss of the \$1,000 monthly stipend following the asset sale. Todosychuk entered into an entirely new employment contract with Expressions which involved the loss of the monthly stipend, but also the loss of certain "management" responsibilities. In other words, he would no longer be required, nor would he be paid, to perform certain tasks. His commission, however, was raised from 50% to 55%. For the same reasons I expressed earlier concerning Gray's claim for compensation for the reduction in her hourly wage, I am dismissing Todosychuk's claim for compensation for the loss of the monthly stipend.

I now turn to Todosychuk's claim for two weeks' pay arising from the employer's failure to allow him to work out a two week notice period.

Todosychuk says that he tendered two weeks' notice; I am satisfied that he did so. There has been no plausible explanation advanced as to why he would not want to work out a two week notice

period. First and foremost, he had no other job to go to until July 1st, 1995 and he wanted to continue working until then. Expressions maintains that prior to Todosychuk tendering his resignation, it had just cause to terminate Todosychuk and was, therefore, free to reject his offer of two weeks' working notice.

If an employee gives notice of termination to the employer, and that notice is *accepted* by the employer, then a binding contract to terminate the underlying employment agreement is concluded. The same result holds if the employer initiates the giving of notice and concludes an agreement regarding notice with the employee (so long as the employer's notice meets or exceeds any applicable minimum statutory notice--see section 4 of the *Act* and *Machtinger v. HOJ Industries* [1992] 1 S.C.R. 986). Any failure on the part of either party to honour the "notice agreement" amounts to a breach of contract and can be remedied by way of an action for damages.

If the parties, at the point of termination, cannot agree on the issue of notice, then either party is legally entitled to terminate the employment relationship so long as that party gives proper notice, or severance pay in lieu of notice. All indefinite employment contracts contain either an express, or alternatively an implied, term regarding the amount of notice that must be given in order to lawfully terminate the employment relationship. If either the employer or the employee gives proper notice to the other, then the party giving notice is entitled to "unilaterally" terminate the employment contract (in effect, however, that party is merely enforcing the express or implied notice provision in the employment agreement).

Employment standards legislation (*e.g.*, section 63 of the *Act*) establishes minimum notice periods, but such legislation only creates a notice "floor", the actual amount of notice called for may well dramatically exceed the minimum statutory notice [*e.g.*, in an appropriate case, as much as twenty-four months' notice may be required, *cf. Sorel v. Tomenson Saunders Whitehead Ltd.* (1987) 15 B.C.L.R. (2d) 38 (B.C.C.A.)].

Thus, if either the employer or the employee gives notice, and such notice is accepted by the other party, both parties are obliged to honour the "notice agreement". If no "notice agreement" is concluded, then either party is nonetheless entitled to terminate the employment agreement by giving proper notice. An employer cannot respond to an employee's notice of termination by immediately terminating that employee without giving notice, or severance pay in lieu of notice, unless that employer has just cause to terminate [*cf. e.g., Oxman v. Dustbane Enterprises Ltd.* (1988) 23 C.C.E.L. 157 (Ont. C.A.)].

Expressions maintains that it had just cause to terminate Todosychuk because he was leaving Expressions to go to work for Rodeo North. However, an employer does not have just cause to terminate an employee who does not possess, or have access to, confidential proprietary information, simply because that employee has made arrangements to become employed by another local firm in the same industry. The employer also asserts that it had just cause because

Todosychuk was giving out his home phone number to some of his clients in the one month period before he was terminated. There is no evidence before me that Todosychuk, while in the employ of Expressions, solicited clients on behalf of Rodeo North. I fail to see how providing a home phone number to one's existing clients constitutes just cause to terminate. No legal authority was put forward in support of that proposition.

Todosychuk lawfully terminated his employment by tendering two weeks' working notice; indeed, there is no statutory obligation on the part of an employee to give any notice whatsoever (although there is, in general, a common law contractual obligation to give reasonable notice). The notice tendered by Todosychuk was reasonable in the circumstances and, therefore, the employment contract was terminated by Todosychuk effective two weeks' after the giving of the notice. Todosychuk's notice of termination was given on June 14th, 1995 to take effect on June 28th, 1995.

Section 18(2) of the *Act* directs that an employer must pay all wages owing to an employee within six days after the employee terminates his or her employment. Todosychuk has not been paid the wages owed for the two-week period immediately prior to the termination of his employment during which he was ready, willing and able to work, but was unable to work due to the wrongful action (in the sense that the employer did not have cause to refuse to allow Todoschuk to work out his notice period) of the employer.

Todosychuk testified (and his evidence was not contradicted) that his pay cheques varied from \$800 to \$1,100 every two weeks. He also earned tips but, in light of the statutory exclusion of "gratuities" from the definition of "wages", his foregone tips cannot be taken into account. I am prepared, therefore, to award Todosychuk the sum of \$1,000 representing the wages (including vacation pay) that would have been earned had he worked throughout the two-week notice period.

## **ORDER**

In light of the foregoing, I am satisfied, as was the Director, that Expressions has fully met its obligations under the *Act* to Liana Elizabeth Gray and Coriene Marie Tomkins. Accordingly, pursuant to section 115 of the *Act*, I order that those two appeals be dismissed and that Determination No. CDET 001012 be confirmed as to those two appellants.

With respect to Kenneth Warren Todosychuk, I order that the Determination No. CDET 001012 be varied and that an amended Determination be issued forthwith as against Expressions Hair Design Ltd. in the amount of \$1,000 together with interest to be calculated by the Director in accordance with section 88 of the *Act*.



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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**