

**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 -

Elsa Fontana's Hair Studio  
(“Elsa”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** James Wolfgang

**FILE NO.:** 96/070

**DATE OF HEARING:** **June 25, 1996**

**DATE OF DECISION:** **July 9, 1996**

**DECISION**

**APPEARANCES**

Elsa Fontana	Elsa's Hair Studio
Sheila Butt	Representing herself
Peter F. Glemnitz	Delegate of the Director of Employment Standards

**OVERVIEW**

This is an appeal by both the employer, Elsa's Hair Studio (Elsa's) and the employee, Sheila Butt (Butt), pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination CDET No. 00095 issued by the Director of Employment Standards on February 12, 1996. The Employer seeks the Determination be set aside claiming she does not owe Butt any money. The Employee seeks to increase the amount awarded.

**ISSUE TO BE DECIDED**

Does Elsa's owe any wages to Butt and if so how much?

**FACTS**

Butt was employed by Elsa's Hair Studio from August 20, 1994 to August 12, 1995. Butt left on vacation on August 12 to August 30. Upon her return to work August 30, 1995 she was told she was no longer employed and sent home.

Butt filed a complaint with the Employment Standards Branch on September 7, 1995 claiming Elsa's owed her \$504.00 for nine days pay.

The Branch denied her complaint on December 19, 1995.

Butt filed an appeal dated January 6, 1996 claiming the Branch had erred.

The Director found the Employer had contravened the *Act* in terminating the employment of Butt and failing to pay severance. The Determination awarded Butt six days pay in lieu of notice in the amount of \$314.91.

Elsa's filed an appeal against the Determination on February 17, 1996.

Butt appealed the Determination by letter dated April 8, 1996 but did not file another appeal form.

## **ARGUMENTS**

Elsa's denies receiving a letter of resignation from Butt. She claims on August 5, 1995 Butt gave her only five days verbal notice of her intention to take her vacation commencing on August 12. It was during this conversation that Butt also gave notice of her intention to resign. She said Butt offered to work for one week after returning from vacation, if Elsa's wanted her. Elsa's stated she offered Butt a raise and asked her to reconsider her resignation over her vacation but says she made no promises.

Diane Webster, a witness for Elsa's, spoke to Butt on the phone before she left for vacation. Butt indicated to her she was leaving Elsa's for another hair salon and would not be returning to Elsa's after her vacation. Diane Webster then went to Elsa's, applied for Butt's position and was hired.

Elsa's stated Butt telephoned the morning of August 30 claiming she was tired and did not want to start work early. She came to the shop later and found "her personal stuff in a box" and became very angry and loud. There were customers in the shop so Elsa's asked Butt to come outside and Butt left.

Butt claims she gave Elsa's a letter dated August 5, 1995 stating her last day of work would be September 9, 1995. She denies telling Diane Webster she would not be returning to Elsa's after her vacation.

Butt claimed Elsa, another employee and herself, discussed her vacation plans as far back as June to ensure coverage while each would be away. She provided a letter from the other employee supporting that evidence. It also stated Elsa Fontana gave Butt the name of her own travel agent to assist her in making her travel arrangements. Butt went on vacation as planned and returned to work August 30 to be advised she was terminated. All her personal and work related effects were in a box.

Butt claimed, as a single parent, she could not afford to willingly be off work from August 30 to September 11, the date she was to commence work at her new position. A letter from her new employer addressed to the Employment Standards Tribunal dated February 25, 1996 indicates in part:

*"We came to an agreement that she would commence work September 11, 1995 as she wanted to give at least two weeks notice to her employer even though I wanted her to start earlier."*

*"On August 6, 1995, I spoke to Sheila Butt on the phone to see how things had gone when she gave her employer her written notice, she told me [Elsa Fontana*

*had asked me to reconsider her notice while she was on vacation] and that Elsa Fontana was emotionally upset at her giving her notice.”*

## **ANALYSIS**

Although considerable evidence was provided, the only issue to be decided is whether the notice was five days as claimed by Elsa's or until September 9, as claimed by Butt. If it was more than five days, should Butt be entitled to the six days provided in the Determination or nine days as claimed by Butt?

If Butt were to return to her regular schedule, which was five days work per week with Tuesday and Sunday off, until September 9 she would be entitled to nine days rather than six.

In her letter of February 16, 1996 to the Tribunal Elsa Fontana writes in part:

*(3) Employee stated just prior to leaving on vacation (August 12, 1995) that if I wanted her to work for a week upon her return from vacation she would - I replied that I would think about whether I would require her or not and let her know on her return.*

*(4) By the time the employee returned from vacation I had made other arrangements for staff and did not require her.*

*(5) At no time was there a committment (sic) from me to have her return to work after vacation unless it was required so accepted that August 5th was when she gave notice.*

It is my opinion Butt was not terminated on August 12, but was being kept on in an “if required” basis which indicates there was still an employment relationship in effect.

Webster applying for Butt's position and being hired during her vacation took away any need for Elsa's to provide employment to Butt from August 30 to September 9.

Prior to August 30 we have no evidence that Butt was made aware of her termination. Elsa did not tell Butt she was terminated when she phoned on the morning of August 30. It seems the first indication to Butt that she was no longer employed at Elsa's was when she came in and found all her effects in a box.

The employment relationship thus continued until August 30 when it was broken by Elsa's. It is my opinion, based on probability, Butt provided Elsa's with a written notice of her resignation effective September 9, 1995. Therefore, Butt is entitled to payment for the number of days she would have worked up to and including September 9, 1995.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that Determination CDET No. 000955 be varied to add the additional three days at \$51.33 per day for a total of \$461.97 plus interest as determined by the Branch. No other changes are made in the Determination.

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**J.E. Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**

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