EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Dianna Lucas
(“ Lucas ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/620

DATE OF HEARING: April 19, 2000

DATE OF DECISION: May 4, 2000

DECISION

APPEARANCES

Helene Walford, Articled Student	for Dianna Lucas
Nicole R. Howell, Barrister & Solicitor	for Regis Hairstylists Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Dianna Lucas ("Lucas") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 20th, 1999 under file number ER 029910 (the "Determination").

The Director's delegate determined that Ms. Lucas' former employer, Regis Hairstylists Ltd. ("Regis" or the "employer"), had "just cause" for terminating her employment and, accordingly, was not obliged to pay her compensation for length of service [see section 63(3)(c) of the *Act*].

I heard this appeal in Victoria, B.C. on April 19th, 2000; each party was represented by legal counsel--I would like to express my appreciation to both counsel for their thorough presentations. Ms. Lucas testified as the sole witness on her own behalf; Regis called one witness, the current manager of the hair salon in question, Ms. Carol Moerike.

ISSUES TO BE DECIDED

Ms. Lucas, in her appeal documents, advanced several grounds of appeal including:

- her termination was an act of racial discrimination;
- her conduct did not give Regis just cause for termination; and
- the delegate did not give proper weight to a favourable Board of Referees' decision regarding her claim for employment insurance.

In addition, at the appeal hearing Ms. Lucas' counsel, Ms. Walford, raised two new issues, namely, that Regis failed to pay Lucas wages in accordance with her written employment contract and that, further, this failure amounted to a "constructive dismissal" by Regis which, in turn, triggered its obligation to pay Ms. Lucas compensation for length of service.

PRELIMINARY MATTERS

I am not able to conclude on the basis of the evidence before me that Ms. Lucas' termination was an act of racial discrimination. Ms. Walford, for Ms. Lucas, did not pursue this issue at the appeal hearing and I understand that a separate complaint has been filed with the B.C. Human Rights Commission. I do not intend to address the merits of this latter complaint, however, I do wish to reiterate that, *based on the evidence before me,* I cannot conclude that Regis terminated Ms. Lucas due to any racial bias towards her. Of course, that is not the same thing as concluding that Regis had just cause to terminate Lucas' employment, a matter that I shall more fully address shortly.

As for the Board of Referees' decision (which overturned the Employment Insurance Commission's denial of employment insurance benefits due to Lucas' "misconduct"), again, this was a matter that was not pressed at the appeal hearing. In any event, I note that the employer did not appear before the Board of Referees--not surprisingly since it had no direct pecuniary interest in those proceedings--and the issue before that tribunal (whether Ms. Lucas had engaged in "misconduct") is not the same issue that I must address (whether Regis had "just cause" for termination). Accordingly, and given that the Board of Referees' decision does not give rise to the application of the doctrine of issue estoppel, I am of the view that the delegate quite properly ignored this latter decision in rendering a decision with respect to Ms. Lucas' unjust dismissal claim under the *Act.*

The last "preliminary matter" I wish to address is the constructive dismissal allegation. An employee is said to be "constructively" dismissed:

> "Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes...By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract." (*Farber v. Royal Trust Co.* [1997] 1 S.C.R. 846 at para. 24)

An employee is not constructively dismissed unless the employer *unilaterally* effects *substantial* changes to the *essential* terms and conditions of the employment contract. An employer's unilateral change to a comparatively minor term of the employment contract is a breach of contract; however, such minor breaches do not constitute a constructive dismissal [see *e.g., Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 43 D.L.R. (4th) 56 (BCCA)].

The common law doctrine of constructive dismissal has been codified in section 66 of the *Act:*

> 66. If a *condition* of employment is *substantially altered,* the director may determine that the employment of an employee has been terminated. (*italics* added)

A "condition" of a contract is to be contrasted with a contractual "warranty"; the former is an essential or fundamental term whereas the latter is of lesser importance. A breach of a condition entitles the party not in breach to treat the contract as having been terminated. A breach of warranty, on the other hand, does not amount to a termination of the contract and the innocent party's only remedy is an action for damages for breach of contract. Thus, under section 66, an

employee may be presumed to have been terminated only if the employer unilaterally altered, in some substantial fashion, a fundamental term of the employee's employment contract (see *Stordoor Investments Ltd.,* B.C.E.S.T. Decision No. D357/96).

In the instant case, Lucas was to be paid a 40% commission on her sales; in the event that her commissions did not generate at least the equivalent of $8 per hour, she was to be paid the latter hourly rate. There is some evidence before me indicating that Lucas, at least in a few pay periods, was paid at an hourly rate of $7 rather than $8 per hour (*i.e.,* a $1 per hour shortfall). Ms. Walford was not able to provide me with a precise calculation as to Lucas' "underpayment" but conceded that the amount was a comparatively small sum particularly given that, in most pay periods, Lucas' earnings exceeded her guaranteed hourly wage.

Accepting, but only for the sake of argument, that Lucas was underpaid by $1 per hour in a few pay periods, I do not consider that underpayment to amount to a substantial alteration of a condition of her employment contract. As our court of appeal noted in *Poole, supra.,* at page 64:

> "The non-payment of a relatively minor portion of the consideration to be paid for services which are to be performed over a prolonged time period, would not by itself, usually meet such criteria and hence would not qualify as a fundamental breach. Damages could be expected to afford a complete remedy."

I am further fortified in my conclusion that this minor underpayment did not amount to a constructive dismissal by the fact that Ms. Lucas, in her original complaint filed with Employment Standards Branch, did not even mention the matter (the only claim particularized in the complaint was for termination pay). Nor was this issue raised during the delegate's investigation or even in the appeal documents filed with this Tribunal. Obviously, this was *not* a significant issue insofar as Ms. Lucas was concerned. Accordingly, it hardly seems appropriate to characterize this underpayment as a fundamental breach going to the very root of her employment contract. Finally, given that this issue was not raised in the initial complaint, or during the delegate's investigation, or even in the appeal documents filed with the Tribunal, I do not think it appropriate for this issue to be addressed by the Tribunal at this late date.

I now turn to the one remaining issue raised by this appeal, namely, whether Regis had just cause to terminate Lucas' employment.

FACTS AND ANALYSIS: JUST CAUSE

Lucas was employed as a hair stylist in the Regis salon situated in the Eaton Centre in Victoria from July 1996 to mid-January 1998 when her employment was terminated for an alleged failure to comply with certain employer rules and directions. The Record of Employment issued to Lucas by Regis indicated that Lucas was "dismissed" for "violation of company policy".

It is conceded that certain written terms and conditions governed Ms. Lucas' employment with Regis including:

> **Company Security Regulations**

> The following conduct is against the best interests of the Company, its employees and its customers. Any employee who engages in any of the conducts [sic] listed below will be subject to discipline up to and including dismissal...
>
> 9. Failure to charge for products, supplies or services rendered for ***ANY*** reason without the prior approval of either the manager or a supervisor...
>
> 11. Charging customers for salon services at prices other than those posted on the salon's price list or as ticketed, unless such price is authorized by an appropriate Company supervisor...
>
> 12. Rendering free or discounted services to anyone other than a Company employee without the prior approval of a supervisor or manager.
>
> * * * * *
>
> **Licensing**
>
> All salons and stylists must have appropriate, current licenses...
>
> **Individual Stylist/Operator Cosmetology License**
>
> All stylists must hold a current cosmetology license...Each stylist is responsible for maintaining a current license. *No stylist will not be allowed to perform any service without a valid license and will be subject to termination...* [sic]
>
> **Product and Service Use**
>
> ...In addition to trying products and services, Managers and stylists may perform one free service a month in the salon for a relative. The employee must perform this free service during their time off and with their manager's permission.
>
> (*italics* and underlining in original)

Mr. Jim Vance--who did not testify before me--was a maintenance worker employed by the Eaton Centre Mall. He apparently was on good terms with the salon manager and Ms. Lucas. According to Ms. Lucas, there was an unwritten policy that Mr. Vance would receive free haircuts as a form of "thank you" for his help and assistance to the salon. Lucas says that these free haircuts were authorized by the salon manager but that individual, no longer employed by Regis, did not testify before me.

On October 2nd, 1997, the area supervisor, Jacqueline Wright, met individually with each salon stylist and impressed upon them the need to follow company rules and procedures. In Ms. Lucas' case, Ms. Wright handed her a two-page handwritten letter addressed to her. This letter begins: "Regis Corporation is very concerned with cash handling procedures in our salon #5930 by you". The letter continues: "Please follow corporate instructions--no exceptions--as explained by area supervisor..."; "All clients will be charged the correct Regis price list for all services. There are no free services unless authorized by area supervisor..."; "Failure to follow these guidelines will result in your immediate dismissal with no further notice...".

Lucas read and understood the contents of this letter; in my view, the contents could not be clearer. In any event, on January 10th, 1998, Lucas performed an "eyebrow waxing" procedure on a young woman even though Lucas was not licensed by the provincial government to perform this procedure. Lucas knew that she could not lawfully perform the procedure given that she was not licensed. The procedure resulted in the young lady suffering burns which required medical treatment. The client's mother complained to the salon, apparently threatened legal action, and certain compensation was paid to the client by Regis.

On the morning of January 17th, 1998--and while on-duty--Lucas gave Mr. Vance a free haircut and he, in turn, gave her a $5 "tip" which she kept. In light of these two events, Regis--after consulting the local employment standards branch office--decided to terminate Lucas' employment for cause.

According to Lucas, "all of us in the salon did waxing", but this assertion has not been corroborated by any *viva voce* evidence and, of course, stands in stark contrast to the specific company rules set out above (which were reinforced on October 2nd, 1997, in writing, by Ms. Wright, the area supervisor).

When questioned by Regis' legal counsel about the free haircut, Lucas acknowledged that she did not have the proper authorization to cut Mr. Vance's hair for free and that her failure in this regard was a simple "human error". She had earlier testified that she could not obtain proper authorization because Ms. Wright was not in the salon at the time. On the other hand, Lucas also testified that she understood it was a salon "policy" to offer Mr. Vance free haircuts and thus no authorization was necessarily required. These two positions are not consistent; indeed, Lucas' evidence on this particular matter has not been consistent throughout these proceedings.

In March 1998, Lucas testified before the Board of Referees that:

> "With respect to the free haircut [Lucas] stated that all staff were allowed to do free family haircuts, she herself had no family here but that she had taken the free haircut for her boyfriend. She also stated that money had indeed changed hands but that was money from a man to his girlfriend." (Board of Referees' March 17th, 1998 decision, at page 2).

In a letter dated June 18th, 1999 submitted to the delegate during his investigation, Lucas stated that: "I only performed free service to my boyfriend and following practice in the salon I thought it was not inappropriate" (at page 2) and "I submit that the mall maintenance employee was my boyfriend and on Saturday January 17, 1998, I performed a free haircut for him. This was not inappropriate as it is the practice and policy of Regis to allow stylists to perform free haircuts for family, boyfriends included." (at page 3)

In her appeal documents, Lucas no longer contended that she had any romantic link to Mr. Vance but, rather, asserted that it was a "salon policy" to offer Mr. Vance free haircuts:

> "Jim Vance is a maintenance man in the Eaton's mall. Hairdressers in the salon commonly provide hair cuts to Jim free of charge because he provides staff with assistance. This was common policy and I was acting in a typical manner when I cut his hair. I had no idea I needed permission to do this." (Letter, dated October 15th, 1999, appended to Lucas' notice of appeal, at page 2)

It should be noted that Lucas' testimony before me was that she knew she needed authorization to cut Mr. Vance's hair without charge but neglected to obtain the requisite authority due to "human error" and because Ms. Wright was not in the salon. I think it reasonable to conclude that Lucas initially took the position that the free haircut offered to Vance fell within the "free haircuts for relatives" exception and has since changed her position when that argument proved untenable.

In my view, Ms. Lucas is an unreliable witness. Given the total absence of any independent *viva voce* corroboration for Lucas' current position--namely, that all stylists did "waxing" procedures even though none held a licence and that it was "salon policy" to offer Mr. Vance free haircuts--I must conclude that these actions on her part were carried out without authorization and, indeed, in clear contravention of express employer rules. As noted by our court of appeal in *Stein v. British Columbia Housing Management Commission* (1992), 65 B.C.L.R. (2d) 181 at page 185 (per Southin, J.A.):

> "...an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
>
> It is not an answer for the employee to say: 'I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it'."

With the foregoing comments of Madam Justice Southin in mind, it should be recalled that Regis established reasonable and lawful work rules about employees providing free services or carrying out procedures that they were not licensed to undertake. These rules were set out, in writing, and provided to all employees. Lucas was well aware of these particular rules and, indeed, she was forcefully reminded about the importance of the rules (and the severe consequences that would follow a contravention of these rules) in early October 1997. And yet, only 3 1/2 months later, she breached both the "free services" rule and the "unlicensed procedures" rule. In my opinion, either breach standing alone might have justified termination; certainly, the combined effect of those two contraventions provided Regis with just cause for termination.

It follows from the foregoing discussion that I am of the view the delegate correctly determined that Lucas was terminated for cause. Accordingly, this appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal