



An appeal

- by -

Dejavu International School of Cosmetology Inc., also known as: Déjà vu International Hair Studio Inc., Déjà Vu International School of Cosmetology Inc., Dejavu International School of Hairdressing & Esthetics, Dejavu International School of Cosmetology Inc.; Dejavu International Hair & Beauty Studio; Dejavu International Hair Studio Inc.; Dejavu International Hair Studio; Dejavu International Inc.; and Dejavu International
("Dejavu")

- 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: Michelle Alman

FILE No.: 2000/759

DATE OF DECISION: April 18, 2001

DECISION

OVERVIEW

This is an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Dejavu International School of Cosmetology Inc., also known as: Deja Vu International Hair Studio Inc.; Deja Vu International School of Cosmetology Inc.; Dejavu International School of Hairdressing & Esthetics; Dejàvu International School of Cosmetology Inc.; Dejavu International Hair & Beauty Studio; Dejavu International Hair Studio Inc.; Dejavu International Hair Studio; Dejavu International Inc.; and Dejavu International ("Dejavu"). Dejavu appeals from a Determination issued October 10, 2000 by a delegate of the Director of Employment Standards ("the Director"). The 32-page Determination referred to 17 attachments, most of which were multi-paged. The Determination concluded that Dejavu had violated the *Act* in regard to the employment of its former employee, Emebet Asrat Belay ("Belay") between August, 1996 and June, 1998.

Specifically, the Director's delegate found that Dejavu failed to meet the following portions of the *Act*: section 18(2) (payment of all wages owing within 6 days of quit date); section 19 (payment to the Director of wages owed to an employee who cannot be found); section 27 (wage statements--dealt with in a separate Determination); section 44 (entitlement to statutory holiday); section 46(1) and (2) (payment and time off requirements for employees required to work on statutory holidays); and section 58(1) (vacation pay requirements). The Determination ordered Dejavu to pay Belay \$2,541.07, composed of \$2,198.35 in wages and \$342.72 in interest. A different delegate of the Director also assessed a \$0.00 penalty against Dejavu for contravening the above-noted sections of the *Act*.

The Director's delegate was unable to find sufficient corroborating evidence to support Belay's complaints concerning Dejavu's failure to pay wages owing within 8 days of the end of the pay period, failure to pay overtime wages, or failure to pay compensation for length of service. The delegate further determined that the evidence did not support Belay's complaint concerning her employment's termination by reason of Dejavu's alteration of a condition of employment, to wit, repeated wage payments by NSF cheques, because the situation had been ongoing since the outset of Belay's employment.

Dejavu and the Director made written submissions in this appeal; Belay did not participate. Dejavu focussed on its contentions that Belay lacked credibility, and that it did not owe Belay wages more than, at most, the \$233.58 it attempted to pay her in June, 1998, which Belay rejected. Dejavu made further submissions in this vein in reply to the Director's response to the appeal.

ISSUES

I have summarized the following as the errors Dejavu alleges in the Determination:

- 1) Dejavu's use of variations on the business name is in no way improper;
- 2) Belay's start and end dates of employment, and her rate of pay, are correctly recorded on her Record of Employment ("ROE"), but not in the Determination;
- 3) Belay did not return to employment with Dejavu following her car accident in October, 1997; or alternatively, there was a break in Belay's service after the car accident;
- 4) Belay's pay raises were not correctly noted as to either dates or amounts in the Determination;
- 5) Belay is not owed the calculated amount of vacation pay; and
- 6) Belay is not owed the calculated amount of statutory holiday pay and wages.

THE FACTS AND ANALYSIS

Company Name in the Determination

Dejavu consists of a hairdressing and cosmetology school, as well as a hair salon, at a single address on Commercial Drive in Vancouver. Dejavu's active principal, Deloris Cross ("Cross"), employs her son and daughter to assist her in running the business. Cross admits in Dejavu's appeal and reply submissions that she uses the listed variations of the enterprise's name on business cards, letterhead, signage, etc.. The Director's delegate found that Dejavu's employees answer the operations' telephones using one or more of the shortened name variations. Dejavu issued records of employment for Belay in the name, "Dejavu International Inc.". Only the name, "Dejavu International School of Cosmetology Inc.," appears in the records of the City of Vancouver Business License Office and those of the Province's Registrar of Companies. For this reason the Determination issued in the registered name despite Belay's not having been employed at Dejavu's school. In her appeal Cross makes no objection to the issuance of the Determination in the registered name of the enterprise, and indeed contends that she knows full well what the correct registered name of her company is. Because Cross in no way contests that Dejavu, the registered entity, was Belay's employer at all material times, I find that Dejavu was, in fact, Belay's employer and is properly named as such by the Determination.

There are a number of evidentiary conflicts that I must resolve in finding the necessary facts to dispose of the further issues in this appeal. In deciding which facts are to be preferred, I rely not on the style of the written assertions of the interested witnesses presenting their accounts, but on

my assessment of which facts were most likely to have occurred in all of the circumstances. I must determine which story was most probable in each of the then-existing circumstances, and "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

Belay's Dates of Employment

Several factual disputes between the parties exist concerning the dates of Belay's association with Dejavu's school and salon, but it is agreed that Belay was a student at Dejavu's school in 1995 and not a Dejavu employee while a student. It is further agreed that Belay began employment with Dejavu's salon at some point in 1996. The specifics of Belay's 1996 start date are disputed. Belay alleged in her complaint that she began work for Dejavu's salon as a stylist in April, 1996, but she also alleged orally to the Director's delegate that she began work in August, 1996. Cross alleged initially that Belay was an employee only beginning on April 6, 1998, but later agreed that April 6, 1998 date was when Belay resumed working at the salon after a six-month hiatus. The Director's delegate concluded from the 1996 salon payroll records provided by Cross that Belay began employment with Dejavu on June 1, 1996. The delegate used that date in the Determination's wage calculations for the start of Belay's employment. Cross does not appeal the use of that date for Belay's commencement of employment at Dejavu's salon, and in fact states in Dejavu's appeal submissions at p. 3 that:

"Her date of employment is clearly stated. She worked partime from June 1, 1996." [sic]

I therefore find that Dejavu employed Belay starting on June 1, 1996.

Belay was injured in a car accident on October 13, 1997 and told the Director's delegate that she ceased working for Dejavu after going in to work on October 14, 1997 and being unable to carry on due to pain. Dejavu objects in its appeal submissions at p. 3 that Belay did not work on or after October 13, 1997, yet states in its reply submissions at p. 5:

"11. Belay is not up front; when Belay came to me on October 14th she was in no pain she was happy that now she will get her ROE and get paid from ICBC also." [sic]

Dejavu recorded in its 1997 payroll records that Belay's third work week in October ended on October 14, 1997, a Tuesday. No hours of work are recorded for any day in that work week. Instead, the word, "Accident," appears on the payroll record throughout that week and the last two in October, as well as for the entire month of November. There is no "Accident" notation in the December, 1997 or any of the 1998 Dejavu payroll records.

The question of a break in Belay's service is appealed by Dejavu. The Director's delegate concluded in the Determination that Belay was employed continuously by Dejavu between June

1, 1996 and June 9, 1998. The Director's appeal submissions indicate that the delegate accepted Belay's view that she was an employee on sick leave during the period between October 14, 1997 and her return to work on April 6, 1998. The delegate states in the Determination at p. 21 that:

"Cross made no issue about the lengthy break in Belay's service,"

and in the Director's appeal submissions at p. 1 that:

"She [Belay] said that it was understood that she was on sick leave and that her employment was not terminated."

This conclusion would appear to disregard the evidence that the Director's delegate recorded in the Determination at p. 15 from Belay's husband, Berag Abraham ("Abraham"):

"Abraham said that from the time he and Belay went to Ethiopia in December, 1997 until March 23, 1998 when they returned to Canada, they had stopped the UI sick benefits. He said that Belay received one cheque when she returned to Canada which was a payment for the balance owed to her by UI for sick benefits (relating to the car accident)."

Ordinarily Belay could only have obtained Employment Insurance ("EI"), then called "UI," sick benefits in 1997 if she had filed an ROE from Dejavu. Dejavu's October, 1997 payroll record notes that Belay's work week ended on October 14, 1997, the day after the accident. This supports Dejavu's contention that it issued an ROE for Belay in October, 1997. (It is unfortunate that Dejavu appears not to have supplied a copy of that ROE to the Director's delegate during her investigation.) I find it most likely in all of the circumstances that Belay did, in fact, get an ROE from Dejavu in October, 1997. That, however, is not the end of the question of whether there was a true break in Belay's service.

The continued notation in the payroll records for Belay of "Accident" in latter half of the October, 1997 and the month of November, 1997 implies some ongoing scheduling expectation at Dejavu for Belay. It is most likely that there is no "accident" notation for December, 1997 or for the first three months of 1998 because Cross knew of Belay's plan to travel to her country of origin, Ethiopia in December, 1997. Belay planned the trip apparently to visit her father, who was ill. Cross also alleges that Belay's husband had asked Cross to supply Belay with an ROE the month before Belay's car accident occurred so that Belay could seek EI benefits while in Africa.

To clarify the situation one must consider Cross's statements in Dejavu's reply submissions, point 11 at p. 5, quoted above, and point 12 at p. 6:

"12. I did not report any of these activities to ICBC. that was my fault. I was wrong." [sic]

These statements taken together strongly imply that Cross provided Belay with an ROE in October, 1997 to assist Belay in collecting EI while she was also collecting money from ICBC, and that she was aware of Belay's travel plans. The Dejavu 1997 payroll record notations after October 14, 1997 would not have been made if Dejavu believed that the employment relationship had come to a complete end in October, 1997. Cross also alleges at several points in Dejavu's submissions that she often provided her new immigrant employees with cash when they needed to travel abroad to visit their families or to send support to their families. I find it is more likely that Cross supported Belay's absence from Dejavu as a sick leave for recovery and for return to visit her father than that the employment relationship ended in October, 1997. I accordingly conclude that Cross agreed with Belay that she was on sick leave from Dejavu after October 14, 1997 until after her return from Ethiopia. There is no error, therefore, in the Determination's finding that Belay was employment continuously from June 1, 1996 until June 9, 1998.

Dejavu's 1998 payroll register and the June 15, 1998 ROE issued by Dejavu for Belay both indicate that Belay returned to work at Dejavu on April 6, 1998. Belay's June 15, 1998 ROE from Dejavu also indicates June 9, 1998 as her last day of work. I accept that Dejavu issued a second ROE for Belay after her return to work in 1998, but not that this fact alone amounts to a true break in Belay's service. I accordingly find that April 6, 1998 was the first day of Belay's resumption of Dejavu employment after her sick leave, and June 9, 1998 was the final date of her employment.

Cross, through her various allegations about Belay and her husband having EI and ICBC misdealings, plainly wishes to upset the Determination's findings by casting doubt on Belay's credibility. Belay denies Cross's allegations. While the issue of Belay's credibility is of interest in this appeal, Belay's dealings with either the EI authority or ICBC are irrelevant to her Employment Standards complaint. Accordingly, I draw no conclusions or inferences regarding Belay's credibility further to Cross's allegations.

Belay's Rates of Pay

Dejavu alleges in its reply submissions, point 1, at p. 4, that the Determination's wage calculation is wrong because the Director's delegate accepted Belay's statement that she was earning \$9.00 per hour from February, 1997 to June 9, 1998. The Determination's calculations for wages owing to Belay for 1996 to 1997 utilized Dejavu's payroll records for that period. The Dejavu payroll records for 1997 indicate in a box entitled, "Rate of Wages and Revisions," that Belay was paid \$8.50 per hour starting January 29, 1997 and \$9.00 per hour starting February 29, 1997. 1997 was not, however, a leap year and there was no February 29, 1997. There are some scattered hourly wage notations also on the 1997 payroll records in an "Other Earnings" column. The notation "\$9.00" first appears as an entry in the first week in February, 1997's "Other Earnings" column, while "\$8.50/hr." appears in parentheses above it for the last week in January, 1997. A letter in Cross's handwriting titled, "Info Sheet," appended as Attachment #16 to the Determination states that Belay received \$9.00 per hour starting on January 29, presumably

1997, and \$9.50 starting April 29, presumably 1998. That last raise is not reflected on the Dejavu payroll records for 1998, and Belay told the Director's delegate that her pay never went that high.

There are internal contradictions and inconsistencies between Dejavu's appeal submissions, payroll records and Cross's hand-written letter. To resolve the contradictions, I prefer Dejavu's payroll records, except where they contain a plain error such as the existence of a leap year where there is none, in which case I prefer Cross's "Info Sheet" letter to her later submissions. The Director's delegate assessed Belay's wage rates using Dejavu's payroll records and Cross's own "Info Sheet" supplied to the Director's delegate. In the result, I find that there is no error in the Determination's rates of pay for Belay. There do appear to be two typographical errors in the raises' year dates on p. 21 of the Determination. Instead of "1996" the Determination should state that Belay was paid \$8.00/hr. between June 28, 1996 and January 4, 1997, and was paid \$8.50/hr. between January 5 to 31, 1997. There is no significance in these typographical errors because the Determination calculations clearly show that the Delegate applied the pay rates to the correct dates when assessing the wages owed to Belay. Other than those two legally insignificant errors, I find that there is no error in the Determination's findings of the dates on which the increased rates of pay applied to Belay's employment with Dejavu.

Belay's Vacation Pay

Belay alleged in her complaint that she was never paid any vacation pay by Dejavu. Cross alleges in Dejavu's appeal submissions at p. 3 that Belay took two weeks' paid vacation to Los Angeles from July 7 to July 21, 1997. Dejavu's July, 1997 payroll records have "Paid Holidays" written in across the entries for the weeks ending July 19 and 26; the payroll records contradict Cross's allegations in Dejavu's appeal submissions.

Cross also alleges in Dejavu's appeal submissions that after Belay's employment ended, Cross tried to pay Belay for 14 hours of work plus holiday pay for Belay's employment for two months and six days. Cross alleges that Belay refused to take the offered cheque for \$233.58, and that Belay was really only owed \$209.88. Dejavu's May and June, 1998 payroll records do not support Cross's allegations in this regard either. According to the payroll records, Belay was paid bi-weekly. Dejavu recorded that Belay was owed \$630 in "total earnings" for 70 hours of work in the last two weeks in May, 1998. Those total hours and wages paid were in the payroll record, despite Belay's being marked "A," presumably for "absent," on two days in the last week in May, 1998, with a total of 21 total hours for that week noted in the week's "regular hours" column. Belay's next bi-weekly pay period was to end after the second week in June, 1998. The payroll records indicate that Belay had worked for 35 hours (or, alternatively, for 33 hours if the notation of "A/5" means Belay was absent for two of five hours for which she was scheduled) in the first week of June. The records indicate that Belay worked for 14 hours in the second week in June. Belay therefore could not have been owed on her final paycheque for only the 14 hours of her last work week, when her last pay cheque should have included also either 33 or 35 hours for the first week in June, 1998.

Given the contradictions in Dejavu's payroll records and Cross's representations, I prefer Belay's evidence that she was not paid for any vacation pay during her Dejavu employment between June 1, 1996 and June 9, 1998. This was also the conclusion of the Director's delegate. There is no error in the Determination in this regard.

Belay's Wages Owed

Statutory Holidays

Dejavu alleges that the Director's delegate erred in her calculation of the amount owing to Belay for statutory holiday pay. Dejavu denies that it operated its salon at all on any statutory holiday, so Belay could not have performed any work on a statutory holiday. To counter the findings in the Determination that its salon operated on statutory holidays, Dejavu offers evidence in the form of two letters from former students/employees. These letters were not provided to the Director's delegate during the course of the complaint's investigation, although Dejavu did have one other employee provide a letter at that stage. Because a section 112 appeal is not in the nature of a *de novo* hearing of a complaint's merits, the Tribunal generally has not considered new evidence if offered for the first time at the appeal stage: *Tri-West Tractor Ltd.*, BC EST #D268/96; *Kaiser Stables Ltd.*, BC EST #D058/97. This is in keeping with the *Act's* purpose stated in section 2 (d) of providing fair and efficient procedures for resolution of disputes over the *Act's* application and interpretation. Dejavu offers no reason why it did not provide the new evidence to the Director's delegate during her investigation of Belay's complaint, and I therefore do not consider it in this appeal.

Belay alleged in her complaint that she worked on some statutory holidays because the salon was open on all statutory holidays other than Christmas and New Year's Day. Belay also alleged that she was not paid overtime or compensated with a day off with pay for those statutory holidays on which she worked. In deciding that Belay's complaint was valid in this regard, the Director's delegate worked with: Dejavu's payroll records and calendar schedules for April to June, 1998; a written statement from a current Dejavu employee plus a follow-up telephone interview with that employee; telephone interviews with witnesses for Belay who were a former Dejavu student and a former student/employee; and interviews with neighbouring businesses' staff. Dejavu asserted to the Director's delegate that it did not operate on statutory holidays.

Dejavu's own contradictory payroll records and a one-month schedule provided by Dejavu's witness (which was nearly identical to the copy of the same supplied to the delegate by Belay) appear to have persuaded the Director's delegate that Dejavu operated on statutory holidays. Those items also appear to have persuaded the delegate that Belay worked on some of those statutory holidays without receipt of payment and time off as required by sections 44 and 46 of the *Act*. Dejavu's payroll records state that on some statutory holidays Belay is marked as "H" for holiday, while for others she is marked as "7," both of which Dejavu claimed meant it paid Belay for seven hours without her working at all. This explanation did not convince the Director's delegate, who assessed Dejavu as owing Belay statutory holiday pay. Dejavu's

witness provided a copy of the May, 1998 schedule; on it Belay appears to be scheduled for an eight-hour shift, but with the word "off" written next to Belay's name. That word does not appear on the copy provided to the Director's delegate by Belay.

Dejavu on appeal seeks to overturn the Determination by re-asserting it did not operate on statutory holidays, and by trying to discredit by personal attacks the information of Belay's two witnesses whom the Director's delegate interviewed by telephone. While those witnesses provided some confirmation of Belay's assertions that Dejavu did operate on statutory holidays and that Belay did work on some of them, it does not appear to me that the Determination's conclusion relies heavily on those witnesses' evidence. I am of the view that the main evidence against Dejavu's case was and is its own payroll records and schedules. Cross says in Dejavu's reply submissions at p. 3 that,

"Since this incident I have learned to put 'H' for holiday rather than '7' hours."

And at p. 5:

"The Delegate has insulted me in front of Belay + her husband Regarding that the pay stubs I used is not legal, my record keeping is no good. I sat there and took the insults; because I know I do not keep my books like an accountant but that's O.K. she is right." [sic]

I take these statements by Cross as admissions that Dejavu did not keep proper payroll records concerning Belay's hours of work, pay, and statutory holidays. Dejavu offers nothing to convince me that the Director's delegate was in error in using Dejavu's records and schedules, or in preferring Belay's evidence to Cross's. I therefore find that there is no error in the Determination's conclusion that Belay is owed the statutory holiday pay stated in the Determination calculations.

Belay's Days and Hours Worked, and Wages Received

Dejavu alleges that Belay is not owed the calculated amount of wages for ordinary working days. Cross asserts in Dejavu's appeal and reply submissions that Dejavu paid all amounts owed to Belay save for her last 14 hours' (two days') pay, plus vacation pay owed for Belay's hours worked between April 6, 1998 and June 9, 1998. Cross's total for the amount she agrees Dejavu owes Belay varies at different points in Dejavu's appeal. Dejavu's payroll records contradict its appeal and reply submissions on this point, as I have noted previously. I conclude, as did the Director's delegate, that Dejavu owed Belay wages from May 29, 1998 to June 9, 1998, which dates encompassed her last pay period.

Dejavu's 1996, 1997 and 1998 payroll records, together with Dejavu's written witness statement and its April to June, 1998 calendar schedules, show that Belay normally was scheduled to work eight hours per day. The witness's written and oral statements support Dejavu's contention that employees were given at least the 30-minute paid meal breaks required by the *Act*. Considering

carefully all of the evidence, including Belay's, the Director's delegate accepted Dejavu's payroll records, schedules and written and oral witness statements as evidence that Belay ordinarily only worked seven-hour shifts, but often for fewer than 35 hours per week. The delegate did not accept that Belay worked eight-hour shifts without any breaks. The wage calculations were made on the basis of Belay's being paid for only seven hours per day, when she was clearly scheduled for eight-hour shifts. I find that there is no error in the Determination in this regard.

The Director's delegate accepted Dejavu's payroll records as evidence of the total wages paid to Belay. Because the records indicated a lesser total for paid wages than the delegate's own total of the individual pay periods amounts, she gave Dejavu credit for payment to Belay of the larger amount. The Director's delegate credited Dejavu with payments by cheques which Belay acknowledged signing, but did not accept, Dejavu's claim that it had paid Belay by cheques which Belay had not signed. The delegate also did not accept Dejavu's claim to have paid Belay in cash without receipts for all wages owed which had originally been paid by NSF cheque or cheques. The payroll records and cancelled cheques, signed and unsigned, and the single NSF cheque from Belay, contain numerous contradictions. Dejavu has no further records to clarify or confirm its contention that it paid all amounts other than Belay's last two days' wages and vacation pay owed for her work between April 6 and June 9, 1998. In the absence of proper payroll records or other clear evidence, the Director's delegate preferred Belay's evidence to that of Dejavu. Dejavu has shown nothing on appeal to convince me that this was an error on the part of the Director's delegate.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued October 10, 2000, plus the statutory interest owed pursuant to section 88 of the *Act*. Dejavu's appeal is dismissed.

MICHELLE ALMAN

**Michelle Alman
Adjudicator
Employment Standards Tribunal**