BC EST #D187/99

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 -

Drs. Hughes & Jennings, Optometric Corporation ("Hughes & Jennings" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards (the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/84
DATE OF HEARING:	April 19, 1999
DATE OF DECISION:	May 3, 1999

BC EST #D187/99

DECISION

APPEARANCES/SUBMISSIONS

Dr. Deborah Jennings ("Jennings") on behalf of the Employer

Ms. Rachel Perry ("Perry") on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 22, 1999 which found that Perry had been terminated because she had filed a complaint under the *Act* (Section 83) and, in the result, was entitled to compensation under Section 79 for a total of \$1,763.30, representing 14 weeks' wages and an--additional--amount for statutory holiday pay.

ANALYSIS AND DECISION

The factual background of this appeal may briefly be summarized as follows:

- Perry was employed by the Employer from October 15, 1997 to May 6, 1998 as an optometric assistant, earning \$9.00 per hour.
- According to the Determination, the delegate was of the view that the Employer provided contradictory explanations for the termination:
 - the Employer was dissatisfied with Perry's performance,
 - but, nevertheless, offered her a full-time position (Perry denies this),
 - and stated "lack of work" on the Record of Employment as the reason for the termination.
- Perry generally worked three days per week. Her last day at work was April 21, 1998 when the Employer brought in another employee for training purposes for two weeks. Perry says that the Employer offered her reduced hours of work upon her return to work-two days per week--which she did not accept.
- Perry made a complaint to the Employment Standards Branch (the "Branch") on April 29, 1998 regarding the reduction in her hours and informed the Employer by fax.

- On May 4, 1998 Dr. Hughes ("Hughes") stated to Perry that she was being lad off "because of the situation". In the circumstances of this case, including the employer's explanations, the delegate concluded that the filing of the complaint was the most probable cause for the termination.
- Perry was pregnant and had intended to work until the end of July, but had no intention of returning to work for the Employer after the birth of her child. The delegate awarded compensation for the termination up until the end of July.

The issue to be decided in this appeal is whether the Employer terminated Perry's employment because she filed a complaint with the Branch.

It is trite law that the appellant has the burden to show that the Determination is wrong. In my view, the Employer has failed to meet that burden. While the Employer's appeal submission states that the comment--Perry being laid off because of "the situation"--is taken out of context, Hughes did not appear at the hearing to testify as to whether these words were, in fact, said, and if they were, what they meant and in what context they were said. Perry's evidence--unequivocally--was that Hughes had used those words when he told her that her employment was at an end after she had made the complaint to the Branch. The Employer did not argue that it had cause for the termination. However, the Employer referred its concerns with respect to Perry's performance. In those circumstances, I find it difficult to accept that the Employer offered Perry full-time employment as suggested. Perry denied having been offered full-time employment. In the circumstances of this case, including the timing of the termination, those words make it more probable than not that Perry was terminated because she had made a complaint under the *Act*.

In the result, I dismiss the appeal.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated January 22, 1999 be confirmed.

Ib Skov Petersen Adjudicator Employment Standards Tribunal