

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 -

Jill S. Elliot
("Elliot")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/14

DATE OF HEARING: June 6, 1997

DATE OF DECISION: June 9, 1997

DECISION

APPEARANCES

Glen Elliot For Jill S. Elliott

No one For Kenneth Cook

OVERVIEW

This is an appeal by Jill Elliott (“Elliott”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination Letter dated December 16, 1996 of the Director of Employment Standards (the “Director”). In this appeal, Elliott claims that the Director's delegate wrongly concluded that Kenneth Cook (“Cook”), operating as Lonsdale Physiotherapy Clinic, had just cause to dismiss Elliott from her position as a bookkeeper/massage therapist. She also claims that the Determination incorrectly determined the sum owed her for unpaid wages, holiday pay and statutory holiday pay.

Cook did not appear at the hearing. By a letter dated May 17, 1997, he advised the Registrar of the Tribunal that he resides in Calgary and that the expense of traveling to Vancouver and closing his business in Calgary would be prohibitive. Cook purchased the Lonsdale Physiotherapy Clinic (“Lonsdale”) from Nancy Charland (“Charland”) effective as of December 1, 1995. Submitted for consideration was a copy of the agreement between him and Charland, purporting to agree that Charland would give notice to all of her employees. I note that the signature page of the agreement was not included in the package of materials. Also submitted was correspondence pertaining to an audit performed by Revenue Canada of the Lonsdale Physiotherapy Clinic (“Lonsdale”). It is unclear how the latter evidence was relevant to the issue before me and thus it was not considered by me.

ISSUE TO BE DECIDED

The issue is whether Kenneth Cook had just cause to dismiss Jill S. Elliott pursuant to section 63 of the *Act*.

FACTS

Elliott is a massage therapist who was employed in that capacity and as office manager/bookkeeper for Lonsdale for the six and a half years prior to May 12, 1996. (It had two previous owners during her tenure there.) She had just returned from a three week Hawaiian vacation and on Saturday May 11, 1996 went to the office to prepare the massage room for her return to work on the following Monday. She was surprised to learn

that her key did not work in the lock and subsequently telephoned the receptionist at home to find out why the locks had been changed. As a result of that conversation, Elliott had reason to believe that her employment was being terminated by Cook. This suspicion was confirmed in a telephone conversation the next day with Cook who claimed he was not firing her, but rather that she had quit as she had neglected to notify him about having gone on vacation. He also made some negative comments about the clinic being responsible for laundering some of her massage items.

Elliott filed a complaint with the Employment Standards Branch, alleging wrongful dismissal and claiming unpaid wages, vacation pay and statutory holiday pay. In the Determination Letter under appeal here, the Employment Standards Officer (ESO) concluded the following with respect to the dismissal:

Cook alleges that Elliott was terminated as a result of several issues that surfaced during her vacation from April 21 to May 9, 1996 inclusive. These issues included:

- [1] Elliott's vacation was cancelled because she had not taught another employee on the use of computer
- [2] Elliott misrepresented herself as a physiotherapist during Cook's absences
- [3] Elliott billed the Worker's Compensation Board for physiotherapy treatments (sic)
- [4] Elliott misrepresented (sic) herself as a qualified health care professional to the law firm of Russell & DuMoulin
- [5] Elliott issued receipts for physiotherapy instead of massage treatments
- [6] Elliott set the burglar alarm after she departed (sic) on April 20, 1996.

It was also claimed that Elliott "trashed" the massage room in the clinic on May 10, 1996, upon her return from vacation and had taken supplies, equipment and/or furniture belonging to the clinic. The ESO concluded that while Cook could not substantiate his allegations of fraud, theft and misrepresentation, there was evidence of a "discrepancy" of \$473.34:

The documentation supplied by Cook does not substantiate his allegations of fraud, theft of office supplies or equipment and misrepresentation. In spite of that, the payroll records support the allegation of an overpayment for the period of December 9-22, 1995. The payroll records show a discrepancy of \$473.34 paid to Elliott for that period. The records do not indicate that this \$473.34 was for secretarial work performed or for massage therapy treatments.

I find the facts as disclosed on the payroll records reasonably supported the suspicion of theft and her discharge was justified.

Given that a "suspicion" of theft had been established, the ESO upheld Cook's decision to terminate Elliott's employment.

With respect to the statutory holiday pay, the ESO concluded that the payroll records showed that Elliott was compensated 8 hours for December 25, 1995 in the pay period ending January 5, 1996. It was also concluded that the employer did not pay Elliott for the January 1 or April 5 (Good Friday) statutory holidays and that Elliott was owed \$155.00 for 7 out of 20 massage clients seen from April 13-20, 1996.

Elliott argues that the Determination with respect to just cause is incorrect and that the employer had no basis to terminate her employment. She also complains that the ESO failed to hear her side of the story and that several of the "grounds" for termination were a surprise to her and she saw them for a first time in the Determination Letter. Moreover, none of the witnesses identified by Elliott as having critical evidence to refute Cook's allegations were contacted. She claims 6 weeks severance pay in the amount of \$2,902.80, plus annual vacation pay of 6%. She also argues that the Determination is wrong with respect to the amounts owed. Rather than \$462.36, she claims \$170.00 for wages and \$446.03 massage therapy fees for the period of April 13-20 and unpaid Statutory Holiday pay for December 25, 1995, January 1, 1996 and April 5, 1996 (Good Friday). Finally she claims 6% annual vacation pay.

ANALYSIS

Before proceeding with an analysis of the legal issues in this case, I would like to comment on the testimony of Elliott and the witnesses testifying on her behalf. I found Elliott to be forthright, honest and open in her response to any question put to her and have no hesitation in relying on her testimony. Her testimony was consistent with other documentary evidence on file and the testimony of the eight witnesses who appeared on her behalf. Those testifying on her behalf included Nancy Charland, Edna Sewell, Teresa Romero, "Jack" Downs, Janine Harris and Jane Ellis. These witnesses had personal knowledge of many of the items relied on by the Employment Standards Officer to make her Determination and shed valuable first hand light on the events at issue here.

After considering the Determination Letter and evidence presented by Elliott and Cook, I find that the employer did not have just cause for dismissal and that Elliott is owed severance pay of 6 weeks, in keeping with her six years of employment with Lonsdale. She is also owed unpaid wages for April 13-20; massage fees for 20 massages given in the April 13-20 period; statutory holiday pay for the four statutory holidays noted above; and vacation pay of 6% on these sums.

A careful reading of the Determination Letter shows that the ESO rejected Grounds 2 and 4; this leaves grounds 1, 3, 5 and 6. The ESO also accepted suspected theft as grounds for dismissal. They will be dealt with in turn.

Ground 1: cancellation of vacation because Elliott had failed to teach another employee how to use the computer.

Elliott takes issue with this ground as she said she offered to train another employee to complete electronic billings while she was on vacation, but Cook said it was not necessary. Elliott says that she found this response rather unusual and asked Cook again, but once again, he assured her that this was not necessary. She said that all of the billings were up to date when she left on vacation. Although I find no evidence to substantiate this allegation, even if it was not true, by itself, it is not just cause for termination.

Ground 3: billing the WCB for physiotherapy treatments:

Elliott takes issue with this and I can find no evidence to substantiate that this ever took place. The Determination lacks any details of this so that it is difficult to discern precisely what was wrong with this action or how it provided Cook with just cause for dismissal.

Ground 4: issuing receipts for physiotherapy instead of massage treatments:

As in the case of Ground 3, Elliott had difficulty responding to this as it is unclear from the Determination exactly what circumstances led to this conclusion. Elliott led extensive evidence which indicated that she was not the only person in the office to issue receipts and that this function was performed by whomever was at the desk. This included the receptionist and from time to time physiotherapists.

Ground 5: setting off of burglar alarm on April 20, 1996.

Once again, the vagueness of this ground for dismissal left Elliott in a difficult position to explain her position as she was uncertain what it meant. She said that when Cook first took over the clinic in December of 1995, he did set off the alarm which Elliott had set on her way out of the clinic, but she could not think of another incident. Nancy Charland testified that Cook disconnected the alarm shortly after taking over the clinic. Thus, this allegation appears to be totally without foundation. This trivial incident, even if it did take place and is referring to the incident as described by Elliott, certainly does not provide just cause for dismissal.

Alleged Theft

This was the most serious of all of the allegations and the allegation which caused Elliott the most personal grief. She thought that this allegation cast a pall over her professional reputation and is very anxious to clear it up. It is useful to review the conclusion set out by the ESO in the Determination Letter:

Cook changed the locks to the building prior to Elliott's return to work on or about May 13, 1996. While he was in Calgary, Elliott came in on May 10 to prepare for work and allegedly trashed the room and stole items from the Clinic.

Shahin Danes, the former receptionist at the Clinic confirms that Elliott's work room was messy - it took her about 10 minutes to clean it up. She did not know what supplies, equipment or furniture belonged to Cook or Elliott therefore was unable to state if anything had been taken.

Even though these "incidents" were not found to substantiate Cook's allegation of fraud or theft, I would like to dispel any lingering suspicions about Elliott's conduct. She unequivocally denies stealing anything from the clinic or damaging anything in the massage room. She says that all of the items (except for a plinth) in the massage room were her personal property. Her items were packed in boxes by someone else (Elliott does not know who) and ready for her to pick up when she returned from vacation. Thus she had no opportunity to "trash" the room as alleged.

Even without Elliott's denial, this aspect of the Determination cites internally contradictory evidence and does not justify dismissal. It states that Cook had changed the locks prior to Elliott's return to work but that after the lock was changed Elliott entered the clinic and "trashed" the massage room. It is difficult to understand how Elliott could have gained access to the clinic at all since her keys no longer worked. Even if she did gain access to the clinic after this, another person must have been present (someone had to let her in) who would have witnessed Elliott's unauthorized actions and yet no such witness was produced. Assuming that Elliott's work room was messy, it is difficult to understand precisely what relevance this had to an allegation of theft. Presumably this was intended to show that the room had been "trashed", but the evidence fails to convince me that any room which can be cleaned in 10 minutes had been "trashed". Moreover, the "witness" could not say who had "trashed" the room and was unable to identify even one item that had been taken. The inadequacy of such evidence is self-evident but where the allegation is theft and personal reputations are at stake, this type of evidence is thoroughly inadequate to come to the conclusion that anything untoward had happened, much less something as serious as workplace theft.

The Determination concluded that there was some evidence which "reasonably supported the suspicion of theft and her discharge was justified." This is a misstatement of the standard of proof necessary to justify a termination on the basis of theft. Theft is a serious allegation that can seriously damage professional reputations and must be investigated with the utmost care and vigilance. The degree of probability should be commensurate with the incident and in the case of an allegation as serious as theft, something more than a balance of probabilities is required. Only clear and cogent evidence will substantiate such a serious allegation. Certainly, it requires more than a suspicion to justify discharge for theft. Moreover, Elliott said that many of the witnesses who she identified as having evidence to exonerate her were not contacted.

The specifics of the allegation are that certain payroll records showed an overpayment of \$473.34 paid to Elliott for December 9 to 22. Elliott unequivocally denies having overpaid herself for that period. She testified that Ken Cook's wife had done the books for the first time in the previous pay period and that the additional money was owing from that period. Cook and his wife had changed the pay period a monthly payment (with a mid-month advance) to a bi-weekly payment system, with deductions taken for each two week period. Elliott pointed out notations which she placed in the Lonsdale bookkeeping records to explain why the additional sum was being paid. It is difficult to understand why Elliott would have taken the trouble to point out why she was receiving an additional sum of money, if it was her intention to steal it. Thus, I also find this allegation to be without foundation.

In the absence of just cause, Elliott is owed severance pay for the full period she was employed by Lonsdale. Lonsdale had been sold at the beginning of December, 1995 to Cook from Charland who testified that all of the employees, except Elliott, were terminated at the time of the sale and that Elliott's employment was specifically excluded from this aspect of the agreement. A letter dated December 9, 1995 from Charland to Cook confirms this fact. Cook submitted a portion of an agreement with Charland in which Charland purports to agree to terminate all employees; Charland indicated that that agreement was never signed. I also note that the "agreement" produced by Cook lacked a signature page. Cook advised the ESO that he and Elliott had entered into negotiations to alter her terms and conditions of employment, but that these negotiations were outstanding as of the date of termination. Elliott denies seeing a letter dated December 31, 1995 from Cook purporting to confirm that her employment had been terminated as of November 15, 1995. I accept her evidence on this point without qualification.

Statutory Holiday Pay

The ESO found that Elliott had not been paid for January 1st or Good Friday, but had been paid for Christmas Day. Elliott pointed out an "8 hour" entry for the week following Christmas in Lonsdale records which she presumes was the basis for the ESO's conclusion that she had been paid for Christmas. Elliott had made this entry to indicate a notional number of hours agreed to between her and Cook for which she would be paid for the week between Christmas and New Years. The office was closed for the holidays and Cook had asked her to come in from time to time to pick up phone messages and deal with the mail.

She came in four times that week and was to be paid for 8 hours. (I note that this breach of section 34 the *Act* was not dealt with in the Determination.)

Unpaid Wages and Massage Therapy Fees

The ESO found that Elliott had not been paid for 7 massages during the week of April 13-20; Elliott said that the correct number is 20. She indicated that the ESO had based her conclusion on the receipt book but this is not the best source of information on the number of patients seen at the clinic. She said that not all persons wanted a receipt and that many of the massages during that week were given under gift certificates so that receipts would not be issued. (The gift certificates were prepaid by the donor by cheques to "Ken Cook". The recipient would then book a date for the massage and Elliott would only get paid after she had given the massage.) Normal office procedure did not issue receipts for massages given in this way. Cook has in his possession or destroyed the 1995 daybook which would have the precise records pertaining to gift certificates and other aspects of this part of the claim. (The daybook is a complete record of the clinic's dealings and includes such items as appointments, cancellations, employee hours, etc.) She also showed that she had not been paid for the week of April 13-20 for bookkeeping duties in the order of \$17.00 per hour for 10 hours.

In summary, I allow this aspect of the appeal and find that Elliott is entitled to statutory holiday pay for Christmas Day, 1995, for New Years Day and for Good Friday, 1996. She is also entitled to wages for April 13-20 for bookkeeping work and 20 massages and to vacation pay.

ORDER

Pursuant to section 115(1) of the *Act*, I order that the Determination Letter dated December 16, 1996 be varied.

**Lorna Pawluk
Adjudicator
Employment Standards Tribunal**