

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-

Johanna Harrington

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 97/50

DATE OF HEARING: May 16, 1997

DATE OF DECISION: May 28, 1997

DECISION

APPEARANCES

Johanna Harrington on her own behalf
S. Gismondi for S.F.L. Gismondi Holdings Ltd.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Johanna Harrington an employee of S.F.L. Gismondi Holdings Ltd. from a Determination dated January 15, 1997. Ms. Harrington complained that the employer had changed the conditions of her employment so substantially that the Director of Employment Standards (the "Director") should find that her employment was terminated under Section 66 of the *Act*.

ISSUES TO BE DECIDED

Did the employer violate Section 66 of the *Act*? If so, is the employer liable to pay compensation for length of service?

FACTS

The complainant, Johanna Harrington, is a hair stylist. She was employed at a hair salon in the Surrey Place Mall known as Gismondi's as an operator. Mr. Steve Gismondi is the owner. Ms. Harrington commenced work on April 1, 1992 and quit on September 14, 1996. She is an experienced hair dresser. She had worked at the location for another salon which closed on December 31, 1991. During January, February and March 1992 Ms. Harrington worked at a hair salon in Langley. She testified that when she moved to Langley approximately 40% of her clientele continued to use her. She testified that when she commenced work at Gismond's in the Surrey Place Mall on April 1, 1992 that more of her former clientele began to use her again. It was her position that she had built up relationships with these clients over the years and that the employer, by manipulating bookings, had undermined her income and had so changed the conditions of her employment that her departure on September 14, 1996 should be viewed as a termination.

The operators at Gismondis were paid the greater of 50% commission on sales or \$7.00 per hour. Ms. Harrington testified that she worked full time up to October 5, 1993 when she gave birth to a daughter. Thereafter, she reduced her work to part time. She testified that she always worked Saturdays and would work two other days per week. Those two days fluctuated as they were set to accommodate her husband's work schedule. The complainant testified that she would inform the employer three months in advance of the days that she would be working in any particular week. The schedule was left at the reception desk and the receptionist was instructed to inform the clients of her schedule if they phoned for appointments. It should be noted that Ms. Harrington's daughter was ill quite often during her infancy and when the daughter was ill Ms. Harrington would stay home with her unless her husband had a regularly scheduled day off. The employer was aware of Ms. Harrington's situation and cooperated with her when she required the time off.

Mr. Steve Gismondi testified for the employer. He testified that Ms. Harrington commenced work full time on April 1, 1992 and that at her request she went to part time in October of 1993. He stated that although she worked regular Saturdays the other two days per week fluctuated. This presented some difficulty in maintaining her client base. Mr. Gismondi testified that if clients phoned to book an appointment with Ms. Harrington and she was not working that day that the receptionist was instructed to ask the clients if they would prefer another stylist. Some clients would book with another stylist if they required a cut that day while others would wait for the complainant to come available. The employer also testified that it tried to distribute the "walk in" business evenly amongst the operators. The employer testified that there was no scheme on his behalf to deprive Ms. Harrington of clients and that he would try to service the client base by accommodating them at the time the client wanted a hair cut.

Mr. Gismondi also testified that there had been complaints from clients about Ms. Harrington because Ms. Harrington would over charge for her services. This generally arose in situations when the employer would advertise a sale and Ms. Harrington would not participate in the sale prices but would fail to inform clients of this prior to doing their hair. It would also happen that Ms. Harrington would participate in the base sale price but would charge for extras such as conditioning or blow drying. It was the employer's position that her fluctuating schedule and manner in which she treated clients contributed to her loss of income. The employer further testified that there was no scheme on his behalf to redirect clients from the complainant. He stated that if redirection on a day she was available had occurred it was an honest error due to her erratic schedule.

The employer also presented the appointment books in evidence. Ms. Harrington worked two days in the first week of September of 1996, nine days in August of 1996, and two days in July of 1996. The above dates ranged from Wednesday July 17, 1996 to Wednesday September 4, 1996. It is the employer's position that in that period of seven weeks there was only one week where she worked three days and that there were only two instances where she worked at least two consecutive days. The employer further pointed out that on one of the occasions where Ms. Harrington worked two consecutive days there was only one client that day. The employer testified that was the long August weekend in 1996 which was a very slow period. The employer also gave two examples from the book of the number of clients that were serviced by Ms. Harrington and other operators on two specific days. For example on August 10, 1996 she saw eleven clients while another operator saw ten and two other operators saw seven. On Tuesday September 3, 1996 she saw ten

clients while one other operator saw nine and another operator saw seven. It was the employer's position that it was not redirecting clients from Ms. Harrington. The employer also pointed to the summary of earnings on the Record of Employment to show that her earnings were fairly level during the last ten weeks of employment. It was the employer's position that July and August of 1996 were a very slow business period for the employer.

Ms. Harrington submitted several letters from clients which generally stated problems the clients had experienced when trying to book appointments. Ms. Harrington also called one of the clients, Mrs. Erna Gerbert, as a witness. Mrs. Gerbert testified that she had known Ms. Harrington since 1986 when she met her as a walk in client with a previous employer. Mrs. Gerbert testified that she did not follow her when she transferred to Langley in the early months of 1992. However, she testified that she did begin using Ms. Harrington again when she returned to Gismondis. She testified about one event which occurred approximately one year ago when she stopped into the shop on a week day to ask if Joanna was available to do her hair. She was told that Joanna was not available but that she would be working on Saturday. Mrs. Gerbert returned on Saturday and during the course of having her hair done mentioned that she had been in on Tuesday and was told that Joanna wasn't there. She responded that Joanna told her "I was in on the Tuesday". Upon questioning from Mr. Gismondi Mrs. Gerbert agreed that she didn't think the employer was trying to take customers away from Ms. Harrington and that she didn't believe that she was told that Joanna was not there on purpose.

The employer called Jackie Gibbon as a witness. Ms. Gibbon is the receptionist. She testified that if a customer phoned for Ms. Harrington that she would tell the customer when Ms. Harrington would be available and would ask if the client wanted to wait. She testified that she would also mention that another operator was available if the client needed a cut immediately. Ms. Gibbons stated that she would not tell customers that Ms. Harrington wasn't in when in fact she was in. She stated that she knew that Ms. Harrington's schedule was posted at the reception desk and that she would make notations in the appointment book of the days that she was available. She further stated that often clients were rude to her when they suspected they were being over charged by Ms. Harrington. She also testified that she would try to distribute the walk in work evenly amongst the operators. She stated that at no point was she told by Mr. Gismondi not to direct "walk in" clients to Ms. Harrington.

It is clear that Ms. Harrington raised her concerns with the employer on several occasions from mid July until early September. It is also clear that there was a staff meeting on September 6, 1996 to discuss her concerns. The evidence indicates that the other staff were sympathetic to Joanna's situation with respect to her part time work and the need to care for her daughter. It is equally clear that the other staff thought that she was not being treated unequally by the employer and that her fluctuating schedule made it difficult for her to regularly service clientele.

ANALYSIS

Ms. Harrington gives four reasons for appeal. Firstly, she states that the Director's delegate did not review and consider the evidence of the letters submitted by clients regarding the manner in which the booking of their appointments was handled. Secondly, she complains that the Director's delegate did not deal with her allegations of a scheme to redirect clients to other operators. Thirdly, she alleges that the letters from the clients and her own observations outlined difficulty with management and her fellow workers that the employer knew or ought to have known were contributing to conditions that adversely affected her income. Fourthly, she alleges that a change in revenue income due to commission sales was due solely to factors that were within the control of the employer and the employer's refusal to address these factors despite her having raised the issues with him on several occasions in the weeks prior to her termination constitute a fundamental change to working conditions which should cause the Minister to view her departure from employment as a termination.

For convenience, Section 66 reads:

"If a condition of employment is substantially altered, the Director may determine that the employment of an employee has been terminated."

The question in this case is whether the employer so fundamentally altered the terms and conditions of employment that Ms. Harrington's quitting her job can be classified as a termination giving rise to liability to severance pay on behalf of the employer. I do not agree with Ms. Harrington. It is clear that her income dropped substantially in 1994 due to the fact that she reduced herself to part time employment. I accept the argument by the employer that her fluctuating work days made it difficult for her to service her clientele. I also accept that the employer in an attempt to maintain the clientele in his business, would ask these clients if they wished to see another operator when they called and Ms. Harrington was not available. I also accept the employer's evidence that it tried to equitably distribute the "walk in" business. I do not see where the employer participated in any scheme to redirect clients from Ms. Harrington to other operators. Furthermore, I accept that the employer made bone fide efforts to inform Ms. Harrington's clients of her schedule and that any failures to do so were mere errors rather than deliberate attempts to undermine her income.

Ms. Harrington relies on letters submitted by various clients. However, the only person that submitted a letter that testified at the hearing was Mrs. Gerbert. The evidence submitted in the remaining letters remains hearsay. Although I admitted the letters as evidence I am not prepared to give them any weight. The letters are hearsay and uncorroborated hearsay evidence cannot be used to make critical findings of fact. Finally, I must also refer to the documentation that was entered by Ms. Harrington regarding her appeal before the Unemployment Insurance Commission Board of Referees. That board determined that she had just cause to terminate her employment. However, the findings of the Board of Referees were under different legislation and in a different forum. I am not bound by its findings or its decision. (*Profile Marble & Bath Ltd.* BC EST No. D055/97) For the above reasons I must dismiss the appeal by Ms. Harrington.

ORDER

I hereby order, under Section 115 of the *Act*, that the Determination of the Director dated January 15, 1997 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal