

An appeal

- by -

Suzanne Ashley operating as Body & Soul Health & Beauty Center
("Body & Soul")

- 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: Carol L. Roberts

FILE No.: 2002/126

DATE OF DECISION: June 6, 2002

DECISION

This is a decision based on written submissions by Suzanne Ashley on behalf of Body & Soul, Shawnelle Brandt, and by D. Lynne Fanthorpe, on behalf of the Director of Employment Standards.

OVERVIEW

Shawnelle Brandt filed a complaint with the Director of Employment Standards ("the Director") alleging that Body & Soul Health and Beauty Center, operated by Suzanne Ashley ("Body & Soul") owed her wages and compensation for length of service. A delegate of the Director investigated her complaint, and on February 22, 2002, issued a determination finding Body & Soul in contravention of section 18 of the *Employment Standards Act* ("the Act"). The delegate determined that Ms. Brandt's employment was terminated for cause and dismissed her claim for compensation for length of service, but concluded that Body & Soul owed her wages for work performed during her last week of work. Body & Soul was ordered to pay Ms. Brandt \$518.86 in wages and interest.

ISSUE TO BE DECIDED

Whether the delegate erred in concluding that Ms. Brandt was owed wages.

FACTS

Ms. Brandt worked as an esthetician for Body & Soul, a day spa, from July 1999 to March 29, 2001. She claimed she did not receive all wages owed to her for work performed between March 19 and March 23, 2001. She provided the delegate with a copy of a pay statement indicating that she was to receive pay and commissions in the total amount of \$493.15. The delegate sought proof from Body & Soul that this amount had been paid. Ms. Ashley was given until January 23 to provide that information. Although no information was provided, in January, Ms. Ashley wrote to the delegate advising her that she was facing time constraints because of pressing personal issues, and that she would do her best to provide the information when she could. Ms. Ashley was assessed a penalty for failing to provide records when demanded.

Body & Soul advised the delegate that Ms. Brandt included a 30 minute lunch break in recording her hours of work that she was not entitled to, and, because Ms. Brandt had been overpaid, wages representing 20 hours of work was deducted from her final paycheque.

The delegate did not accept Body & Soul's contention that Ms. Brandt recorded hours she did not work. She found that Ms. Brandt recorded her hours every two weeks, and that Ms. Brandt was paid on the basis of those completed sheets without question. The delegate accepted the time sheets originally submitted by Ms. Brandt as accurate, and reflective of the hours she worked. Based on those sheets, the delegate concluded that Ms. Brandt was entitled to wages pursuant to s. 18 of the Act.

ARGUMENT AND ANALYSIS

Ms. Ashley advances a number of grounds of appeal, some of which relate to the issue of Ms. Brandt's dismissal. As the delegate concluded that Ms. Brandt was terminated for cause, I have not considered those arguments.

Ms. Ashley submitted timesheets filled out by Ms. Brandt as well as separate timesheets she completed purportedly indicating Ms. Brandt's actual hours. She also submitted the spa's appointment book. Ms. Ashley does not explain why she kept her own time sheets for each employee, and why the hours were so different from those recorded by Ms. Brandt, particularly when she contends they were completed contemporaneously. More critically however, Ms. Ashley does not explain why she paid Ms. Brandt based on Ms. Brandt's time sheets, rather than her own, if hers were more accurate, as she suggests. Ms. Ashley argues that her records should be preferred over Ms. Brandt's because Ms. Brandt was dishonest.

Ms. Ashley submitted payroll records, pay stubs and cancelled cheques in support of her appeal. Even though Ms. Ashley contends that she does not owe Ms. Brandt any money, included in those documents was a cheque issued to Ms. Brandt on April 13, 2001 in the amount of \$464.02, representing final net pay of \$349.83 (\$493.15 less statutory deductions and vacation pay of \$114.19). This amount was based on the hours recorded by Ms. Brandt, not Ms. Ashley. Ms. Brandt cashed this cheque on April 18, 2001.

The delegate says the cancelled cheques should not be considered because they were not provided when requested. In my view, to accede to this argument would be unfair to Ms. Ashley. The Tribunal has often held that an appellant cannot "hide in the weeds" and produce documents on appeal that have not been produced during the. However, it is clear from the evidence that, for a number of reasons including family illness, Ms. Ashley had difficulty producing documents requested by the delegate in a timely fashion. Ms. Ashley claims that, had the delegate specifically asked for copies of cancelled cheques, she would have provided them. Although Ms. Ashley ought to have known what to produce, I am satisfied that her failure to provide proof that the final payment was made was not a deliberate attempt to mislead the delegate. Indeed, the documentation clearly demonstrates that Ms. Brandt made a claim for wages that she had already received and was in Ms. Ashley's interest to disclose.

Furthermore, notwithstanding Ms. Ashley's failure to provide the documents when requested, to allow the Determination to stand would unjustly enrich Ms. Brandt.

I allow the appeal.

ORDER

I Order, pursuant to section 115 of the *Act*, that the Determination, issued February 22, 2002, be cancelled.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal