

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.:** 2002/176

**DATE OF DECISION:** June 10, 2002

## DECISION

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

### OVERVIEW

Veronica Janzen filed a complaint with the Director of Employment Standards ("the Director") alleging that Body & Soul Health and Beauty Centre, operated by Suzanne Ashley owed her vacation pay and compensation for length of service. A delegate of the Director investigated her complaint, and on March 8, 2002, issued a determination finding Body & Soul in contravention of sections 58(3) and 63(1) of the Employment Standards Act ("the Act"). The delegate determined that Ms. Janzen did not receive either vacation pay or compensation for length of service. Ms. Ashley operating as Body & Soul Spa and Wellness Centre, and Body & Soul Health & Beauty Centre ("Body & Soul"), was ordered to pay Ms. Janzen \$787.66 in vacation pay, compensation and interest.

### ISSUE TO BE DECIDED

Whether the delegate erred in concluding that Ms. Janzen was terminated without compensation, and that she was owed vacation pay. Body & Soul declared bankruptcy in December, and Ms. Ashley contends that Ms. Janzen was laid off due to that bankruptcy. Ms. Ashley also contends that Ms. Janzen was overpaid, which entitled Body & Soul to offset the overpayment from her vacation pay.

### FACTS

Ms. Janzen worked as a receptionist for Body & Soul, a day spa, from May 31, 2000 to December 2000. She claimed she was laid off and was not recalled to work, and was thus entitled to length of service compensation. Ms. Janzen also alleged that she earned, but was not paid, annual vacation pay.

Ms. Ashley operated Body & Soul Health and Beauty Centre until December 19, 2000. She filed an assignment in bankruptcy effective December 20, 2000, but the spa continued to operate in that location until the end of December. It then relocated, and now operates under the name Body & Soul Spa and Wellness Centre.

Ms. Janzen alleged that Ms. Ashley told her that the spa would be closed from December 29 for a week so that the new location could undergo renovations. She alleged that she asked Ms. Ashley for a Record of Employment ("ROE") so that she could collect employment insurance ("EI"). Ms. Janzen further contended that, when she collected her ROE, Ms. Ashley told her she would not be returning. The ROE indicated the reason for the layoff as a "shortage of work", and set out an unknown date of return. The ROE, which was issued by Body & Soul Health & Beauty Centre, indicated that Ms. Janzen's last day of work was December 29, 2000.

Ms. Ashley advised the delegate that Ms. Janzen asked to be laid off so she could collect EI because Body & Soul was shutting down. Ms. Ashley further contended that Ms. Janzen was laid off because of Body & Soul's bankruptcy.

Ms. Ashley further contended that Ms. Janzen contacted Body & Soul in March to determine whether there were any positions available, and that she asked for her vacation pay at that time. Ms. Ashley submitted to the delegate that Ms. Janzen's vacation pay was a claim from the bankrupt business. She also submitted that, because the former business laid Ms. Janzen off due to bankruptcy, she was not entitled to length of service compensation.

The delegate concluded that Ms. Janzen was owed compensation for one week's wages. She found that Ms. Janzen was laid off on December 29, and that the temporary lay off became a termination when Ms. Janzen was not recalled, in contravention of s. 63(1) of the Act. The delegate also concluded that Ms. Janzen earned vacation pay in the amount of \$360.53, as indicated on the ROE, and that it was not paid, in contravention of s. 58(3).

## **ARGUMENT**

Ms. Ashley argues that the delegate erred in concluding that Body & Soul's bankruptcy eliminated both its obligation for vacation pay as well as compensation for length of service. She further argues that Ms. Janzen is not entitled to length of service compensation because she was employed by another employer within a 3 month period. She also contends Ms. Janzen was overpaid in any event.

Ms. Ashley submitted that Ms. Ashley approached her on December 15, asking to be laid off in advance of the business shutting down. Ms. Ashley says she agreed with this, and advised Ms. Janzen she was to pick up her documents on January 2, 2002. She says that she did not want to tell Ms. Janzen the real reason for the business shutting down (bankruptcy) or that she would not be coming to work for the new company, because she did not want to spoil her Christmas. Ms. Ashley contends that the new business commenced operations on January 22, 2002.

Ms. Ashley argues that the vacation pay is part of the debt of the bankrupt company, and that it is not owed by Body & Soul Spa and Wellness Centre.

Ms. Ashley further contends that Ms. Janzen is not entitled to length of service compensation because Ms. Janzen she became employed elsewhere prior to the three month recall period, the debt (compensation for length of service) is also part of the debt of the bankrupt company. She further argues that, in any event, the amount Body & Soul overpaid Ms. Janzen is greater than the amount owing for compensation.

The delegate alleges that documentation provided in support of the appeal is not only being disclosed for the first time, but that some of the documents have been altered. Specifically, the delegate says that a letter sent to her by Ms. Ashley on September 10 indicated that Ms. Janzen approached her on December 17 to inquire about getting EI. The letter provided with the appeal sets out a date of December 15.

## **ANALYSIS**

Included with Ms. Ashley's appeal were documents that suggested that Ms. Janzen's last day of work was December 22. Also enclosed was a letter from Ms. Ashley's accountant stating that the payroll records had been split between the pre and post-bankruptcy periods, which in turn resulted in changes to the payroll deductions. The accountant also suggested that Ms. Janzen had been overpaid in the amount of \$368.43. Attached to the accountant's letter was a payroll analysis showing that a cheque in the amount of \$401.75 had been issued to Ms. Janzen on January 12, 2002. The final pay stub which Ms. Janzen

enclosed with her complaint is in the amount of \$401.75, and is dated January 2, 2001. It was issued by Body & Soul Spa and Wellness Centre, purportedly for work performed between December 16 and December 29, 2000.

On the basis of the information provided, it appears that Ms. Janzen worked for the bankrupt enterprise as well as the non-bankrupt enterprise. The delegate found that Body & Soul was assigned into bankruptcy before Ms. Janzen was laid off. The ROE prepared by Ms. Ashley's accountant indicated that Ms. Janzen's last day of work was December 29. Ms. Janzen contended that she worked until December 31. Ms. Ashley advised the delegate that Ms. Janzen worked at least until December 22. It would appear that Ms. Janzen was laid off by Body & Soul Spa and Wellness Centre, which continues to operate, and was not recalled to work. Indeed, Ms. Ashley acknowledged that she had no intention of asking Ms. Janzen to do so. I conclude that the delegate did not err in finding that Ms. Janzen was entitled to length of service compensation.

There are no particulars of the bankruptcy before me. There is no evidence of a trustee in bankruptcy being appointed. If there was, the trustee did not file an appeal. On a bankruptcy, the bankrupt's property vests in the trustee who is given, for the most part, exclusive authority to deal with the property. If in fact Body & Soul Health & Beauty Centre is bankrupt, Ms. Ashley has no authority to deal with the property, and the appeal on its behalf is not properly before the Tribunal. (see Re Fyfe, BC EST #D080/00)

The same, however, would not be true of any liability Ms. Ashley herself might have for vacation pay or compensation for length of service.

I find that Ms. Ashley is responsible, along with Body & Soul Spa and Wellness Centre and/or Body & Soul Health and Beauty Centre, for payment of the amount stated in the determination.

The appeal is dismissed.

## **ORDER**

I Order, pursuant to section 115 of the Act, that the Determination, issued March 8, 2002, be confirmed.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**