

An appeal

- by -

Suzanne Ashley operating as Body & Soul Spa and Wellness 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.: 2002/177

DATE OF DECISION: June 10, 2002

DECISION

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

OVERVIEW

Tamara Tice filed a complaint with the Director of Employment Standards ("the Director") alleging that Body & Soul Spa and Wellness 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 March 8, 2002, issued a determination finding Body & Soul in contravention of sections 18(1), 45, 58(1) and 63(1) of the *Employment Standards Act* ("the Act"). The Delegate determined that Ms. Tice did not receive wages or compensation for length of service. Body & Soul was ordered to pay Ms. Tice \$1,369.554 in wages, compensation and interest.

ISSUE TO BE DECIDED

Whether the Delegate erred in concluding that Ms. Tice was terminated without notice, just cause or compensation for length of service, and that she was owed outstanding wages. Ms. Ashley contends that Ms. Tice fabricated her hours and stole from her, and that she is not owed any money.

FACTS

Ms. Tice worked as a hairdresser for Body & Soul, a day spa, from February 17, 2002 to May 31, 2001. She claimed she was owed regular wages for work performed between May 14 and May 31, 2001, and was terminated without written working notice. Ms. Tice alleged that Ms. Ashley accused her of theft, terminated her employment, and refused to issue her final paycheque.

Ms. Ashley provided the Delegate with no information during her investigation of this complaint.

Based on the evidence provided, the Delegate concluded that Ms. Tice was terminated without notice, just cause or compensation for length of service. She found that Ms. Tice was entitled to one week's wages in compensation. She also concluded, based on the information provided, that Ms. Tice was entitled to wages, vacation pay and statutory holiday pay.

ARGUMENT

Ms. Ashley argues that Ms. Tice lied about the days she worked, and that she stole \$2000 from her. She alleges that Ms. Tice did not work the final two weeks in May, that her final pay period was May 12, and that Ms. Tice was paid in full for that pay period. Ms. Ashley also made submissions on Ms. Tice's conduct while an employee, which I have not referred to here, as they are not relevant to the issues on appeal. Ms. Ashley acknowledged not paying Ms. Tice her holiday pay because of her belief that Ms. Tice stole funds from her.

The Delegate contends that no information was provided to her during the investigation of the complaint, and that it ought not be considered now. She submits that the Determination should be upheld.

Ms. Tice denies all of Ms. Ashley's allegations regarding her conduct.

ANALYSIS

On August 13, 2001, after receiving Ms. Tice's complaint, the Delegate sent Ms. Ashley a letter setting out the details of Ms. Tice's complaint. She asked Ms. Ashley to provide her with any information that she wished to be considered in the investigation, and issued a Demand for Records. On September 10, Ms. Ashley replied to the delegate, indicating that the documents for Ms. Tice were "not yet ready. It involves a police investigation with charges pending for theft. I am still in the process of compiling my documents and will forward them to you and [sic] soon as possible."

The Delegate issued another Demand for Records on November 28, 2001. On January 8 or 9, 2002, the delegate sent another letter to Ms. Ashley indicating that Ms. Tice claimed that wages in the amount of \$700 were owed to her, and that Ms. Ashley had provided no records to her, despite her letter of September 10 indicating that she would. The delegate noted that it was Ms. Ashley's final opportunity to participate in the investigation of the complaints, and that a Determination would be issued after January 23, 2002.

On February 21, the Delegate received a facsimile from Body & Soul's accountant indicating that Ms. Tice's ROE would be prepared shortly.

The Tribunal will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables* BC EST # D058/98, and *Tri West Tractor Ltd.* BC EST # D268/96). Ms. Ashley had numerous opportunities to provide the Delegate with the information she submitted on appeal. She provided none of that information, despite being issued two demands for records and many letters setting out Ms. Tice's allegations, and the preliminary findings of the Delegate. On that basis alone, I would dismiss the appeal.

However, even if the new information was accepted, it contains no evidence supporting Ms. Ashley's refusal to pay Ms. Tice wages owed, vacation pay or statutory holiday pay. The information in support of Ms. Ashley's failure to pay compensation for length of service consists simply of allegations of theft, which Ms. Ashley contends was the basis for the dismissal. There was no evidence of a police investigation, charges being laid, or of a conviction. This information does not provide persuasive or compelling evidence that the determination is in error.

The appeal is dismissed.

ORDER

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

Carol L. Roberts
Adjudicator
Employment Standards Tribunal