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 -

Theona Hunter
(" Hunter ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/191

DATE OF HEARING: June 15 and 21, 2000

DATE OF DECISION: July 5, 2000

DECISION

APPEARANCES:

Donald W.J. Specht, Barrister & Solicitor	for Theona Hunter
Steven C.S. Tam, Barrister & Solicitor	for D. Nowitsky and Co. Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Theona Hunter ("Hunter") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 25th, 2000 under file number ER 44-350 (the "Determination").

Ms. Hunter appeals the delegate's finding that her former employer, D. Nowitsky and Co. Ltd. ("Nowitsky and Co." or the "employer"), had just cause to terminate her employment and, accordingly, was not obliged to pay her any compensation for length of service [see section 63(3)(c) of the *Act*]. More particularly, the delegate concluded that Hunter was competing with her former employer by operating an "in-home" hair salon business that served at least a few former Nowitsky and Co. clients. In dismissing Hunter's complaint the delegate observed: "In making my [final] decision in this matter, I [am] relying on the law that states very clearly that competing in the Employer's business, even slightly, is grounds for Termination." (Determination, page 4)

The appeal was heard at the Tribunal's offices in Vancouver on June 15th and 21st, 2000. Hunter testified on her own behalf and, in addition, called two further witnesses, Ms. Kim Deutsch and Ms. Theresa Maxwell. The employer's principal, Ms. Deanne Nowitsky, and Ms. Julie Dezordo and Ms. Maureen Okino all testified on behalf of Nowitsky and Co. The Director was not represented at the appeal hearing.

THE EVIDENCE

Nowitsky and Co. is a hair salon located in Richmond, B.C. Ms. Hunter worked as a stylist at the salon (there was a change of ownership during her tenure) from 1984 until her dismissal on April 3rd, 1998. She was paid--as, I understand, are all of the salon's stylists--a 55% commission based on the retail price of the services rendered to her clients; she was responsible for paying the cost of any hair products used such as hair colour treatments, "perm chemicals" and the like and also for the wages of any salon "assistants" whose services she utilized.

Ms. Nowitsky acquired the salon assets in 1990, undertook some minor renovations and changed the name of the business. In all other respects the salon continued more or less as it had before the asset sale with the same staff and clientele. When the renovations were carried out, Ms. Hunter purchased from Ms. Nowitsky a hydraulic chair and a hair-dryer chair--these items were

used by Ms. Hunter in her home where she provided hair styling services for so-called "friends and family".

In the summer of 1997 Hunter had foot surgery and was away from work from mid-June to mid-September 1997. According to Hunter, prior to her extended sick leave, she notified her existing clients (some 300 to 400 in number) and recommended that another salon stylist, Ms. Julie Dezordo, might look after their needs during her absence.

Ms. Nowitsky testified that in late 1997 she noticed that certain salon clients were seemingly no longer attending at the salon. Some time later, in February 1998, Ms. Nowitsky specifically asked Ms. Hunter about a few particular clients only to be told that these clients were continuing to come to the salon and that they may have been in the salon on days when Ms. Nowitsky was not working. Ms. Hunter, for her part, acknowledged that a) she was asked about certain clients and did say that they may have been in the salon on Ms. Nowitsky's days off and b) her statement to Ms. Nowitsky was not true at least as it related to one client, namely, a Ms. Myers who was at that time (as she had for several months) having her hair done by Ms. Hunter at Ms. Hunter's home.

According to Ms. Nowitsky, on the morning of April 3rd, 1998, she asked Ms. Dezordo if she (Dezordo) was aware if Ms. Hunter was seeing salon clients at her home. Ms. Dezordo confirmed her understanding that Ms. Hunter was seeing Ms. Myers at Hunter's home. When asked why Ms. Dezordo did not voluntarily disclose this information, Ms. Dezordo apparently stated that she did not want to "fink" on a fellow employee.

In the afternoon of April 3rd, Ms. Nowitsky called Ms. Hunter aside and asked her if she was seeing salon clients at her home; Ms. Hunter replied that she was seeing "a few". Ms. Hunter testified that she admitted seeing two clients at her home, Ms. Myers and a Ms. Nouvelle. Ms. Nowitsky testified that she told Ms. Hunter that she felt "betrayed" and told Ms. Hunter that she was very "disappointed" in her behaviour. Ms. Nowitsky told Ms. Hunter that, in her view, Ms. Hunter's actions were "unethical". Ms. Hunter replied that she was "sorry that [Ms. Nowitsky] felt that way" and asked if the two of them might "try and work this thing out". Ms. Hunter was dismissed at the end of the day.

Ms. Dezordo--who left the salon's employ in August 1999--testified that she knew Ms. Myers to be a salon client prior to 1990 when she first joined the salon and that a Ms. Berni Connors was her stylist. When Ms. Connors left the salon, Ms. Hunter then became Ms. Myers' stylist. In early February 1998, Ms. Dezordo was updating the salon's appointment book (client appointments for the next three months are usually recorded in the book) and mentioned to Ms. Hunter that Ms. Myers was apparently no longer attending at the salon to get her hair done. Ms. Hunter replied: "I do her hair at my home now". Ms. Dezordo confirmed that she did have a conversation with Ms. Nowitsky on the morning that Ms. Hunter was terminated relating to Ms. Hunter seeing Ms. Myers at the her home salon. At that point, according to Ms. Dezordo, Ms. Nowitsky seemed quite upset and said words to the effect: "that's it; it's over".

Ms. Dezordo also testified that when she attended at Ms. Hunter's home in 1992 she noticed, among other things, a "price list" handwritten in calligraphy script. In 1997, Ms. Dezordo visited Ms. Hunter at her new residence while Ms. Hunter was off work recuperating from her foot surgery. During this visit, Ms. Dezordo noted that a room of the house (off the kitchen) had been

converted into a "home salon" although she did not see any posted "price list" at that time. Ms. Dezordo stated that there was "a lot of equipment" in the room and that it appeared as if Ms. Hunter "was doing a lot of hair". Ms. Dezordo also testified that Ms. Hunter instructed her, before she went on leave for her foot surgery, that if her clients telephoned the salon asking for her, Ms. Dezordo was to give the client Ms. Hunter's home telephone number.

Ms. Kim Deutsch testified that she was a Nowitsky and Co. client in 1997 and that Ms. Hunter was her stylist although, when Ms. Hunter was not working, say, due to vacation, she saw another salon stylist. Ms. Deutsch continued with this other stylist when Ms. Hunter went on sick leave following her foot surgery. Ms. Hunter gave Ms. Deutsch some two to three weeks' notice of her impending foot surgery and extended leave. While Ms. Hunter was on leave, Ms. Deutsch called into the salon to book an appointment with the other stylist who, it turned out, was away on holidays. The receptionist, Ms. Dezordo, told Ms. Deutsch to call Ms. Hunter at home and Ms. Deutsch subsequently attended at Ms. Hunter's home and had her done by Ms. Hunter. Ms. Deutsch paid Ms. Hunter for her services (at a reduced fee). Ms. Deutsch stated that this was the only occasion when she attended at Ms. Hunter's home to have her hair done and when Ms. Hunter returned from her leave, Ms. Deutsch continued to see Ms. Hunter at the salon.

Ms. Maxwell, a former salon stylist, testified that she occasionally saw salon clients at her home (and charged these clients a reduced fee) but her testimony is tempered by her admission that she never told Ms. Nowitsky about this practice and it certainly does not appear to have been authorized, either expressly or tacitly, by Ms. Nowitsky.

The evidence before me suggests that it was generally understood that salon stylists could provide hair styling services to their "friends and family". In many instances, the stylists provided these services in their own homes although "friends and family" would also attend at the salon. In the latter instance, the individuals so characterized as "friends and family" were not charged any fee other than the cost (if any) of chemicals used (for example, if the "friend" or "family member" was getting her hair coloured or a "perm" treatment).

Ms. Hunter was terminated because she was operating a "competing business" in which she provided hair styling and related services to the salon's clients in her home. Other than Ms. Deutsch, none of these alleged "salon clients" testified before me. As noted above, Ms. Deutsch acknowledged one--and only one--occasion when she saw Ms. Hunter at her home and only because the stylist she was seeing during Ms. Hunter's leave was herself away on vacation.

However, in her own testimony, Ms. Hunter did make certain admissions with respect to seeing "salon clients" at her home. Although Ms. Hunter characterized both Ms. Myers and Ms. Nouvelle as longtime "friends" (and I do not doubt that assertion), it is also evident that both women were, at one time, salon clients who paid regular salon prices for hair styling and "aesthetic" services. In addition, Ms. Hunter admitted providing hair styling services, for a fee and at her home, to a Mr. Setynski and a Ms. Larson while Ms. Hunter was employed by Nowitsky and Co. Neither Mr. Setynski nor Ms. Larson had any familial or other personal relationship with Ms. Hunter before she started providing them with hair styling services. Ms. Hunter kept the monies paid to her by all of these four individuals; she did not remit any portion

of the funds to the salon and did not advise Ms. Nowitsky at any time that she was seeing these individuals at her home.

I am also troubled by the evidence of Ms. Deutsch--her evidence was, as noted above, that she only saw Ms. Hunter at Hunter's home on one occasion (when Ms. Hunter was on leave following her foot surgery). Ms. Deutsch paid Ms. Hunter on that occasion. Ms. Deutsch was subject to an exclusion order and thus did not hear Ms. Hunter's evidence. Ms. Hunter testified that Ms. Deutsch was a "shop client" who had "a barn with horses" and that "we traded horse clothing for hair services" which suggests that Ms. Hunter saw Ms. Deutsch at Ms. Hunter's home on more than one occasion. Indeed, as I understood Ms. Hunter's evidence on this point, there were several instances where Ms. Deutsch attended at her home but there was no conflict of interest because their arrangements were in the nature of barter and thus her employer did not suffer any financial harm.

ANALYSIS AND FINDINGS

Under the *Act* an employer is not obliged to pay compensation for length of service to an employee who is dismissed "for just cause" [subsection 63(3)(c)]. "Just cause" is not defined in the *Act* and thus one must look to the common law for guidance. There is a myriad of circumstances that might constitute "just cause" in any given case ranging from theft and dishonesty to insubordination to incompetent performance to even repeated tardiness and absenteeism. In all cases, however, the conduct of the employee must amount to a repudiation of the employee's obligations under his or her employment contract before such conduct will justify summary termination without notice or compensation.

As was noted by the Supreme Court of Canada in *Ng v. Bank of Montreal*, [1989] 2 S.C.R. 429 (quoting, with approval, from another text):

> "The employee...is expected to give loyal and indeed faithful service...This duty of loyalty clearly implies that the employee will devote all his efforts during working hours to the undertaking; *if he works outside those hours, he should avoid competing with his employer directly of indirectly.* In general, any act of unfair competition with the employer (such as clandestine cooperation with a representative of another business, luring an employee away to another company and so on) would make the employee liable." (*italics* added)

Our court of appeal in *Cariboo Press (1969) Ltd. v. O'Connor* (1996), 61 A.C.W.S. (3d) 290 has observed that the prohibition against an employee competing with his or her employer is "an absolute, or almost absolute, prohibition".

In my view, there certainly is enough evidence before me to show that Ms. Hunter was, while employed by Nowitsky and Co., engaged in a competitive business enterprise. I might add that Ms. Hunter's home was located in Richmond, the very same locale as that of her employer. Ms. Hunter's home salon may well not have produced significant revenue--or the revenue may well have been quite significant (I simply have no evidence either way)--but that, in my view, is of no particular import. Ms. Hunter was seeing salon clients in her home and she did not have (nor did

she ever seek) her employer's permission to do so. She did not share the revenues of her "home salon" with her employer thus causing at least some actual pecuniary loss to her employer.

When questioned about the matter in February 1998, she did not truthfully advise her employer about her activities--she was dishonest and admitted as much during her cross-examination. Her dishonesty places her in a much different position than that of the plaintiff in *Segin v. Hewitt* (1993) 1 C.C.E.L. (2d) 5 (Ont. H.C.), relied on by Ms. Hunter's counsel. Unlike the plaintiff in *Atkins v. The Windsor Star* (1994) 2 C.C.E.L. (2d) 229 (Ont. H.C.)--another case relied on by Ms. Hunter's counsel--Ms. Hunter took active steps to conceal the operation of her home salon from her employer and her home salon business did, in all probability, result in an economic loss to her employer. I am of the view that Ms. Hunter's failure to disclose the true nature of her activities reflects her understanding that she ought not to have been seeing salon clients in her home and she knew that her employer would take a very dim view of such activity. I do not doubt that Ms. Nowitsky--following her discovery that Ms. Hunter had established a competing business and had lied about that business to her--lost the requisite faith and trust that all employers must repose in their employees.

In my view, the Director's delegate correctly concluded that Nowitsky and Co. had just cause to dismiss Ms. Hunter.

Finally, I think it appropriate to observe that I do not believe that Ms. Hunter was motivated by avarice or by any particular ill-will toward her employer. From what I can gather, she was a competent, hard-working and well-liked stylist. However, she nonetheless breached her duty of loyalty to her employer and thus her employer was entitled to dismiss her. As noted by Madam Justice Southin in *McPhillips v. B.C. Ferry Corp.* (1994), 94 B.C.L.R. (2d) 1 (B.C.C.A.) once cause has been established "it is the employer's choice whether to dismiss or to forgive". In this instance, obviously, the employer was not in a forgiving mood.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal