Employment Standards TRIBUNAL

An appeal

- by -

Hollywood and Vine Hair Company Ltd.
(the "Employer")

- 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: Ib S. Petersen

FILE No.: 2002/224

DATE OF HEARING: June 27, 2002

DATE OF DECISION: July 10, 2002

DECISION

APPEARANCES:

Ms. Susan Caldbeck — on behalf of the Employer

Ms. Sharon Bransema — on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director's Delegate issued on April 5, 2002 in the amount of $2,511.10 (the "Determination"). The Director's Delegate concluded that Ms. Brandsema (the "Employee") was terminated without compensation for length of service when the Employer failed to return her to work.

FACTS AND ANALYSIS

The Employer, as the Appellant, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that the Employer has not met that burden.

It was clear to me that there was considerable animosity between the parties. Though each party--unhelpfully, in my view--pushed the position that the other was untruthful, the basic material facts are not seriously in dispute. The Employer operated a hair salon. Ms. Brandsema worked there as a stylist from November 1990 until she went on maternity leave in November 2000. The parties agree that her maternity leave formally lasted until May 11, 2001. Ms. Brandsema did not return to work on May 12. The Employer considered that she had abandoned her position as she, in the Employer's view, had not requested (or, indeed, received) an extension of her leave.

There was considerable uncertainty as to Ms. Brandsema's return to work. Ms. Caldbeck testified to her belief that Ms. Brandsema did not intend to return to work. Ms. Brandsema contributed to this uncertainty. Some of her clients went to another stylist. She told various people that she might stay at home or find a position nearer to her home (in Chilliwack). I accept that.

In my view, this decision largely turns on the communications between the Employer and the Employee, set out below. In late March there were conversations between Ms. Brandsema and Ms. Caldbeck, including a lengthy telephone conversation on March 28, which was a response to a message left by Ms. Brandsema. From the March 28 conversation I find that Ms. Brandsema was "undecided" as to her return to work. I am mindful, as well, of the fact that her maternity leave was far from over--there was another six weeks. Ms. Caldbeck says she set up a lunch meeting with Ms. Brandsema for March 30. She says that Ms. Brandsema did not show up. Ms. Brandsema says the arrangement was more casual: yes, they were going to have lunch, if care could be arranged for her child. Because Ms. Bradsema did not show up, the Employer says she did not intend to return.

Anyway, there were further communications between the two. There was a conversation on April 14, 2001 during which the topic of return to work came up. In cross examination, Ms. Caldbeck acknowledged that she told Ms. Brandsema "if she wanted extra time, that was OK." As well, Ms.

Brandsema testified that she tried to contact Ms. Caldbeck at the end of April and left a message. I recognize that Ms. Caldbeck denied that a message was left.

Ms. Caldbeck says that her salon did not close, as stated in the Determination. She says that she continued her business on the premises of another salon for a four month period and subsequently re-opened. Ms. Brandsema could, therefore, according to the Employer, have continued her employment. It is clear, however, that she informed the Delegate that the shop closed May 30, 2001. There was uncontradicted testimony that most of the stylists associated with the Employer did not continue their employment. On the balance of probabilities I do not accept the suggestion that the business continued, as is now suggested.

Having considered all the circumstances, I am not persuaded that the appeal can succeed. Under the *Act*, an employer is obligated to place an employee in the same or comparable position upon return from maternity leave (Section 54(3)). As well, an employee's entitlement to compensation for length of service are continued, unless the "employee has, without the employer's consent, taken a longer leave than is allowed under this Part" (Section 56(4)). In my view, on the evidence, the Employer extended the leave in the April 14 conversation, at least to the extent that it would be improper for the Employer to subsequently rely strictly on the return date of May 12. While I recognize that Ms. Brandsema carries some of the responsibility for the uncertainty, the Employer could, in my view, easily have removed any doubt as to Ms. Brandsema's return to work: Ms. Caldbeck could simply have asked her, or written her, stating the expected return date. I think that she did not because she was in the process of closing the salon. In the circumstances, given her emphasis on the March 30 meeting, I do not accept that she expected Ms. Brandsema to show up for work on May 12 as she claimed.

In short, I am not persuaded that the Delegate erred. The appeal, therefore, is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 5, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal