

An appeal

- by -

546310 B.C. Inc. OP as Westside Physiotherapy
(‘Westside Physiotherapy’)

- 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: Cindy J. Lombard

FILE No.: 2001/147

DATE OF DECISION: May 11, 2001

DATE OF DECISION: June 11, 2001

DECISION

APPEARANCES

The Appellant/employer 546310 B.C. Inc. operating as Westside Physiotherapy (“Westside Physiotherapy”) was represented by its owner, Gwen Torgunrud (“Torgunrud”).

The Respondent/employee, Karen Hawryluk, appeared on her own behalf.

OVERVIEW

This is an appeal by the employer, Westside Physiotherapy, pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by a delegate of the Director of Employment Standards on February 2, 2001.

The Determination found that the employee, Karen Hawryluk (“Hawryluk”) was entitled to the following:

| | | |
|----|--|----------------|
| 1. | Compensation in lieu of notice (two weeks wages) | \$899.48 |
| 2. | Wages due | \$102.93 |
| 3. | Vacation pay | <u>\$40.10</u> |
| | | \$1,1075.32 |

ISSUES TO BE DECIDED

Is the employer, Westside Physiotherapy, liable to pay compensation in lieu of reasonable notice or is Westside Physiotherapy excused from liability pursuant to Section 63(3)(c) on the grounds that the employer had just cause for terminating Hawryluk’s employment;

Is Hawryluk due wages for the period August 16, 2000, to September 1, 2000, in the amount of \$102.96 or at all.

FACTS

Hawryluk was employed by Westside Physiotherapy to do medical billings and computer backups, MSP billings and some cleaning of treatment rooms and washrooms. Her official position was Medical Office Assistant and she was employed from January 4, 1999, until September 1, 2000, at a wage of \$11.00 per hour.

According to the Employer, Westside Physiotherapy:

Torgunrud, on behalf of the employer Westside Physiotherapy, says that it had just cause for dismissing Hawryluk, namely as set out in her September 1, 2000, letter to Hawryluk (which was not received by Hawryluk until September 11, 2000):

1. Failure to issue month end billing statements to clinic clients for the entire period of her employment and in failing to advise Torgunrud of the problem in order that it could be rectified.

Torgunrud says that she asked Hawryluk on a weekly basis how everything was going and she was assured that it was fine. Torgunrud says that she did not realize until after 20 months of employment i.e., at the time of Hawryluk's departure, that the month end billing statements had not been done. Torgunrud says that she was deliberately misled by Hawryluk.

2. The hours that Hawryluk submitted on September 1, 2000, to the bookkeeper were false, namely, Torgunrud says that Hawryluk submitted overtime hours for:
 - a) working over lunch hour and travel time on the 31st, i.e. the day worked a split shift (8 a.m. to 12 p.m., 1 p.m. to 2 p.m. and 6 p.m. to 9 p.m.) at the request of Torgunrud to train a replacement

Torgunrud says that she always made it clear that Hawryluk was not to work over her lunch hour.

- b) On August 23, 2000, billing for 8:00 a.m. to 5:00 p.m. when Hawryluk noted hours on the calendar on which she kept daily track of hours of 8:30 a.m. to 4:00 p.m.

Torgunrud says as well that the fact that Hawryluk produced copies of the calendar for other months but not August is indicative of dishonesty, i.e. that she is hiding the truth about her hours.

It is only the last paycheque that Torgunrud complains of.

According to Hawryluk:

Hawryluk says that her relationship with her employer was a good one. In July 2000 Hawryluk began considering moving to the lower mainland. In early August she says she listed her home for sale and on August 15 gave notice to Torgunrud that she would be leaving her employment one month hence, that is on September 15, 2000.

On August 17, 2000, Hawryluk says that Torgunrud told her to run an ad in the Courier Newspaper for a replacement.

On August 30, 2000, Torgunrud advised Hawryluk that she had hired a replacement who was to start work September 17, 2000, after Hawryluk's departure and further that on August 31, 2000, she would have to work a split shift from 8 a.m. to 2 p.m. with an hour lunch break from 12 to 1 and 6 p.m. to 9 p.m. The evening hours were to be the training period for the replacement.

It was a busy time in addition to training as it was MSP billing cut off time. On the 31st Hawryluk worked the split shift with the exception that she had to stay until 9:30 p.m.

When Hawryluk submitted her hours for the pay period ending August 31, 2000, she was asked by Torgunrud to include her hours for September 1, 2000. Hawryluk also included travel time required for the split shift on August 31st and the ½ hour worked from 9:00 p.m. to 9:30 p.m.

At 9:00 a.m. Hawryluk says that she submitted her hours to the bookkeeper. Hawryluk then observed Torgunrud go to the parking lot and have a conversation with her replacement. Torgunrud then came into the office and accused Hawryluk of being a liar. Hawryluk says that she was shocked and offended and said "if you feel that way you should let me go". Torgunrud replied to get out immediately but changed her mind and asked Hawryluk to finish the transmission of billings to MSP that she was in the middle of.

Hawryluk left with her paycheque but Torgunrud telephoned her a short while later at home and told her that she put a stop payment on the cheque in the amount of \$846.27.

Hawryluk did not receive her final paycheque until September 11, 2000. The amount was reduced to \$775.36 and was accompanied by the September 1, 2000, letter of Torgunrud stating that she had been dismissed for failure to carry out her job duties.

With respect to Torgunrud's allegation, Hawryluk responds as follows:

1. Month-end Statements

She did send out month end statements. As the accounts were paid, the statement was deleted from the computer; however, copies of unpaid statements remained on the computer and could have been produced by Torgunrud. In addition, Hawryluk kept notes in binders, ie: Status of Account Receivables.

2. Travel Time

Hawryluk admits that she did not request payment in advance for time travelling to and from her home on the 31st when she worked the split shift. The travel time was 1 hour return.

3. Lunch Hour

Hawryluk says that she did not charge for any lunch hour worked in the subject pay period, i.e. August 16 to September 1, 2000.

ANALYSIS

Under the *Act*, an employee is entitled to be paid compensation for length of service on termination of employment. An employer's liability for compensation is discharged in certain circumstances, for example if there was just cause for the dismissal.

Section 63(3) of the *Act* states as follows:

The liability is deemed to be discharged if the employee

- a) is given written notice of termination as follows:
 - i) one week's notice after 3 consecutive months of employment;
 - ii) 2 week's notice after 12 consecutive months of employment;
 - iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment to a maximum of 8 weeks' notice.
- b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
- c) terminates the employment, retires from employment or is dismissed for just cause.

(emphasis is ours)

The onus is on the Appellant to show on a balance of probabilities that there was just cause for Hawryluk's dismissal.

Just cause is proved only where:

1. reasonable standards of performance have been set and communicated to the employee;
2. the employee was clearly warned that his or continued employment was in jeopardy if such standards are not met;
3. a reasonable period of time was given to the employee to meet those standards.

The facts here do not meet that test.

I accept Hawryluk's evidence as credible that she did the month end statements. It seems unlikely that Torgunrud would not notice that they had not been done for twenty months. Furthermore, no clients were produced as witnesses to say that they had not received the month

end statements. In any event, even if Hawryluk had not sent out the statements the first time it was raised with Hawryluk was after she was dismissed and therefore is not grounds for dismissal.

With respect to Torgunrud's complaint that Hawryluk billed for working over lunch hour and travel time, a single act does not justify dismissal unless of such a serious and continuing nature to repudiate the employer/employee contract.

We accept Hawryluk's evidence that during her term of employment her hours were flexible and although she agrees that it was preferred that she not work through her noon hour, on the odd occasion that she did she was paid for it.

With respect to billing for the one hour travel time on August 31st, the *Act* defines "work" to mean "labour or services an employee performs for an employer whether in the employee's residence or elsewhere".

In driving to and from home Hawryluk was not performing work. As there was no agreement by Torgunrud to pay for that time, 1 hour of wage i.e. \$11.00 plus vacation time and interest should be deducted from the award.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be varied to deduct the sum of \$11.00 plus vacation pay on that amount of \$.44 (4%) and less interest pursuant to Section 88 of the *Employment Standards Act*.

The balance of the Determination is confirmed as issued plus whatever interest may have accrued pursuant to Section 88 of the *Act* since its issue.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal