

**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 -

Benito Palmeri  
operating The Hair Place  
("The Hair Place")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE No.:** 2000/303

**DATE OF HEARING:** July 25, 2000

**DATE OF DECISION:** August 3, 2000

**DECISION**

**APPEARANCES**

Benito Palmeri, owner of The Hair Place

Mary Ann Hood, manager of The Hair Place

No appearance by Sabine Traeder or the Director of Employment Standards

**OVERVIEW**

This is an appeal by Benito Palmeri operating as The Hair Place ("The Hair Place") pursuant to Section 112 of the Employment Standards Act (the "Act") of a Determination issued by the Director of Employment Standards (the "Director") on April 7, 2000. The Director found that The Hair Place dismissed Sabine Traeder ("Traeder") without just cause and therefore owed her compensation for length of service in the amount of \$343.05. The Hair Place appealed on the ground that it had just cause to dismiss Traeder.

**ISSUE TO BE DECIDED**

Did the Director err in concluding that Traeder is owed compensation for length of service?

**FINDINGS AND ANALYSIS**

Traeder was employed as a hair stylist at The Hair Place from August 6, 1998 to February 2, 1999. Her employment was terminated on February 3, 1999.

The Director found that The Hair Place did not have just cause to dismiss Traeder and, as a result Traeder was owed compensation for length of service in the amount of \$343.05.

In the Determination, the Director set out the evidence of the parties as follows:

**Employer's Evidence**

Prior to these events, Traeder's shift on Wednesdays had been 1pm to 9pm. Sometime in late January of 1999, the employer advised Traeder that her shift would be changed on Wednesdays to 9:30 am to 5pm. Traeder and the employer discussed this change and Traeder initially refused to work the early shift. After some discussion, Traeder agreed to work the earlier shift, and did so on Wednesday, January 27, 1999. The following Tuesday, February 2, 1999, Traeder and the employer again discussed the shift on Wednesday when the employer noticed that Traeder had crossed her name off the shift schedule for the following day. A somewhat heated discussion ensued and it is the employer's position that

Traeder had not agreed to come in to work the 9:30 am shift the next day by the end of the discussion.

On Wednesday, February 3, 1999 the employer states that Traeder did not come in for her shift and did not call. The employer requested that his manager call Traeder to advise her that her employment was terminated. When the manager did so, Traeder advised the manager that she was sick.

**Complainant's evidence:**

Traeder agrees that when the employer initially re-scheduled her Wednesday shifts, she did not want to change because she did not make any money working that particular shift. However, she eventually agreed to change and worked the first Wednesday, January 27, 1999. The following Tuesday, Traeder removed her name from the shift schedule because she had an important medical appointment the following morning. Traeder states that she told the employer that she wasn't able to work the early shift Wednesday because of her medical appointment, and confirms that their discussion was somewhat heated.

The following morning, Traeder states that she called in to work to remind the employer that she would not be in, and was then told that her employment was terminated.

The Director then concluded:

If the employer's version were to be accepted, then I believe there would be just cause to terminate Traeder's employment without notice or payment of compensation for length of service. The refusal to attend at work would constitute gross insubordination. However, the complainant has supplied a different version of events. She explains that she had an important medical appointment and that she informed the employer of it the day before the shift in question. If Traeder's version of events were accepted, there would not be just cause for dismissal.

The burden is on the employer to establish just cause for termination of employment. In matters where there are conflicting versions of events and each version is plausible, as in this case, the employer must provide further evidence to strengthen their position. In this case, the employer has no further evidence to provide beyond his statement. As such, I must prefer the evidence of the complainant and find that the employer did not have just cause to terminate Traeder's employment without notice or payment of compensation for length of service.

Benito Palmeri ("Palmeri"), owner of The Hair Place, filed an appeal of the Determination on April 25, 2000. The appeal was set down for an oral hearing on July 25, 2000. A Notice of Hearing was mailed to the parties on June 27, 2000. The Notice of Hearing indicated that if the Appellant failed to attend the hearing, the Tribunal would consider the appeal to be abandoned. The Notice also said: "For any other party, non-attendance may or may not be fatal depending on

the circumstances of the case, the issues on appeal and whether the Appellant meets the burden to persuade the Adjudicator to vary or cancel the Determination".

Palmeri attended the hearing with his manager, Mary Ann Hood ("Hood"). The Director and Traeder did not attend the hearing.

According to Palmeri and Hood, when Traeder first started at The Hair Place she worked the morning shift. Later, at her request, she was given the afternoon shift, but she was told she would have to return to the Wednesday morning shift in February because another employee would be returning to work the afternoons on that day. The first morning shift for Traeder occurred on January 27, 1999. Initially, she refused to work the shift, but eventually she was persuaded to do so. The next morning shift was scheduled for February 3, 1999. On February 2, 1999, Traeder crossed her name off the schedule. When Palmeri checked the schedule, he put her name back on it, as he had no one else to work the morning shift. He then went to the back of the shop for coffee. When he returned, he looked at the schedule and saw that Traeder's name was again crossed out. He asked her why she crossed her name off the schedule and she replied she did not want to work that shift. Palmeri said he told her she had to work that shift as he had no one else to open in the morning and if the shop wasn't open on time the management at the mall would kick him out. Traeder replied that she didn't care. Palmeri then told if she didn't show up in the morning, she would be dismissed, to which she again replied that she did not care. At no time, during their discussions, did Traeder indicate that she had a medical appointment on Wednesday or that she was ill.

On Wednesday, Hood phoned Palmeri at home at 9:45 am and said Traeder did not show up for work. Palmeri told Hood to phone Traeder and tell her to pick up her equipment as she was dismissed. Palmeri then went to the shop to fill in for Traeder. Hood said she phoned Traeder and asked her why she wasn't at work. Traeder said she was sick and was not going to report to work. Hood said she didn't believe her and told her she was finished and she was to come in and pack up her stuff. A few days later Traeder came to the shop and picked up her equipment. Palmeri and Hood were not in the shop at the time. They said they have not spoken to Traeder since she was dismissed.

Hood and Palmeri do not believe Traeder was sick on Wednesday. They believe it was an excuse. Traeder did not want to work the morning shift and had twice booked herself off the day before and she made no mention she will ill or had a medical appointment on Wednesday. Palmeri also said that it was known by all staff, including Traeder, that when they got sick, they would call either him or Hood at home in advance of their shift so they could find a replacement. Palmeri said that had Traeder been legitimately sick he would not have terminated her employment. He said her absence was unacceptable because she was the only one scheduled to work on the morning of February 3, 1999 and as a result the shop opened late. Although Palmeri did not say that the late opening caused an actual problem with the management at the mall, he did say if his shop is not opened on time, the mall management can have him removed from the mall.

As the Appellant, The Hair Place bears the onus of showing the Determination is incorrect. In this case, I am satisfied that The Hair Place had just cause to dismiss Traeder and therefore the Determination should be cancelled.

Palmeri and Hood said that Traeder made no mention of a having a medical appointment on Wednesday. They also said Traeder was told that if she didn't report to work on Wednesday she would be dismissed. Moreover, Traeder did not call them in advance on February 3, which was the practice at the shop when an employee was ill and this resulted in a late opening. They believe the real reason Traeder did not report to work was because she did not want to work the morning shift.

As indicated above, neither the Director nor Traeder attended the hearing. Further, Traeder made no written submissions on the appeal. Although the Director did submit a written reply to the appeal, she did not address Palmeri's denial that Traeder told them she had a medical appointment. Considering all the evidence and materials before me, I am satisfied on balance that the reason Traeder failed to report to work on Wednesday was not due to illness or a medical appointment. I find the uncontradicted testimony of Hood and Palmeri to be credible and persuasive. Their testimony is supported by the undisputed fact that Traeder did not want to work the morning shift and had on at least one occasion removed her name off the February 3 work schedule. Furthermore, there is no document, such as a medical note, to confirm a medical appointment. In my view, Traeder intentionally refused to work on February 3 because she did not like the morning shift. I accept that she was aware of the consequences of her decision not to report to work, both for herself, in terms of a dismissal, and for the shop, in terms of a late opening. Under these circumstances, The Hair Place had just cause to dismiss Traeder. Accordingly, she is not entitled to compensation for length of service.

**ORDER**

I order under Section 115 of the Act that the Determination dated April 7, 2000 be cancelled.

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**Norma Edelman**  
**Vice-Chair**  
**Employment Standards Tribunal**