

**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 -

His & Hers Hairstyling Ltd.  
("His & Hers")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE No.:** 2000/301

**DATE OF DECISION:** August 11, 2000

## DECISION

### APPEARANCES

Rudi Pinkowski, Shari Guest and Zahra Hamidi for His & Hers Hairstyling Ltd.

Seervan Daniel Dowlati for Rosa Rastegar

### OVERVIEW

This is an appeal by His & Hers Hairstyling Ltd. (“His & Hers”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on April 5, 2000. The Director’s delegate found that His & Hers dismissed Rosa Rastegar (“Rastegar”) and therefore owed her compensation for length of service. His & Hers appealed on the ground that Rastegar quit her employment and therefore it is not liable for compensation.

### ISSUE TO THE DECIDED

Did the Director’s delegate err in concluding that Rastegar was dismissed and accordingly is owed compensation for length of service.

### FACTS

His & Hers operates a hair salon. Rastegar worked at the salon as a stylist from June 15, 1998 to June 25, 1999.

On Saturday, June 26, 1999, Rastegar failed to show up for work in the morning.

According to Rudi Pinkowski (“Pinkowski”), the owner of His & Hers, he called Rastegar several times on Saturday and left messages on her machine, but she never called him back. At 4 p.m., one of his stylists, Liz, reached Rastegar by phone. Liz gave the phone to him and he asked Rastegar why she wasn’t at work as it was quite busy. She replied that she was sick. He asked her why she had not called him and she replied that she had been sleeping as she had taken some pills for arthritis. He reminded her that she had a client scheduled on Sunday and asked if she would be coming in on Sunday. He said Rastegar was evasive in her answer so he didn’t book any other clients for her on Sunday.

On Sunday, Rastegar again failed to report to work. Pinkowski said that Rastegar’s client also did not show up and he believes Rastegar called the client and told her not to go to the salon. Pinkowski said he tried to reach Rastegar by phone but was unsuccessful. At 2 p.m. Rastegar called him and he asked her why she wasn’t at work. Pinkowski said he couldn’t remember her exact excuse but he thinks she said she was still sick. By the end of their conversation they had agreed to meet after work on Sunday. Pinkowski said at this point several of his other staff told

him that Rastegar probably had quit as she had mentioned to them she was unhappy and was going to quit.

Pinkowski further testified that during their meeting on Sunday evening Rastegar told him that if she wanted to, she could work in another salon in the mall. Pinkowski told Rastegar he heard that she quit and he was disappointed that she did not give notice. Rastegar replied that she wanted her UIC form to indicate she had not quit but was laid off. Pinkowski refused and told Rastegar that she had been off work for two days and had quit. Rastegar then said "You are firing me" and he replied "No". Pinkowski believes that the reason Rastegar filed her complaint is because he put "quit" and not "laid off" on the UIC form which prevented her from getting a "better opportunity at UF".

Pinkowski said that Rastegar did not look sick on Sunday. Indeed, after he told her he would not put "laid off" on the UIC form she got strong and aggressive. Pinkowski said Rastegar's tools were moved from her station into his office on Tuesday. He assumes this was done at the request of Rastegar. He said he next talked with Rastegar on Wednesday and, although she insisted she had not quit, he told her she had quit her job.

Pinkowski argues that Rastegar quit her employment because:

- She did not come to work for two days.
- (Unnamed) staff told him she was quitting.
- On January 23, 1999 she requested, and was paid, all her vacation pay up to her last day of work on January 25, 1999.
- He had a suspicion she was working at another job on Saturday.
- He had doubts she was really sick. She didn't look sick on Sunday and a medical report submitted by Rastegar dated July 3, 1999 said that she didn't have arthritis. Further, his wife has arthritis and she is not aware of any pills that knock you out.

Rastegar testified that she did not quit her job or tell anyone she wanted to quit. She further said she had no new job to go to on Saturday or Sunday and she never asked Pinkowski to put "laid off" on her UIC form.

Rastegar said she had an operation on her left hand 10 years ago and since then she has had pain in her hand. Her doctor assumed it was arthritis and she was given pills. Subsequent to her dismissal, she was sent for a x-ray that indicated she did not have arthritis. On Saturday, June 26, 1999, at about 7:00 a.m. she took 2 pills for pain in her fingers. She fell asleep and woke up at 10 a.m. She immediately called the salon and Carol answered the phone. Rastegar asked to speak to Pinkowski and Carol said, "Are you quitting?" Rastegar replied that she wasn't quitting, she was sick. She then talked to Pinkowski and told him she was sick and couldn't come to work. He was not happy and asked if she could come for half a day. She explained she had taken two pills for her arthritis and the pills made her worse and she really couldn't come to work. Pinkowski then hung up the phone.

Rastegar said that afternoon Rita, one of her co-workers, called and advised her to phone Pinkowski because Carol was spreading rumours that she had quit. Additionally one of her customers phoned her and said she heard she had quit. Rastegar then phoned Pinkowski around 6 p.m. and asked him why he was telling her clients that she had quit when she had not quit. She also informed him that she would not be at work on Sunday as she had too much pain in her hand. She requested they meet the next day at 5 p.m. at the shop. She then phoned two of her customers to advise them that she would not be working on Sunday, but she was not able to get through to one of them, by the name of Helen. Around noon on Sunday, Helen phoned Rastegar and said she went to the shop at 11:30 a.m. and was told that Rastegar had quit.

According to Rastegar, when she met Pinkowski at 5 p.m. he said he assumed she was quitting as she had not come to work for 2 days and she could come next week to pick up her pay cheque and ROE. She replied that she was not quitting and that she was sick and had told him this on Saturday. He complained that he had been busy on Saturday and said her excuse for not showing up was ridiculous and further, she had asked for her vacation pay, which meant she was quitting. Rastegar said she told him at her former workplaces she got her vacation pay every month and had just learned (during a conversation with several staff, including Zahra Hamidi (“Hamidi”) and Shari Guest (“Guest”)) she could ask for it once a year. Her anniversary date was June 15 and that was the reason she asked for it at that time. Pinkowski repeated he had been busy on Saturday and he said he would have Janice phone her when her cheque and ROE were ready. He suggested she go look for a job, because she was quitting. Rastegar said she told him “No I am not quitting, you are making me quit. I will come to work on Wednesday”.

Monday and Tuesday were Rastegar’s regular days off. On Tuesday Elizabeth called her and said Pinkowski put all of her equipment in the office and another stylist had been moved to Rastegar’s station. Rastegar then went to the salon and picked up her equipment. She told the staff that Pinkowski had fired her and they all felt sorry for her. On Wednesday she phoned Pinkowski because she thought there might be a chance to get her job back. Pinkowski was mad and said she quit and her ROE was ready for pickup. She reiterated that she was not quitting her job.

Pinkowski called Hamidi and Guest as his witnesses. They said that Pinkowski, via Liz, finally reached Rastegar around 4 p.m. on Saturday. Guest said she overheard part of the conversation and understood that Rastegar said she had fallen asleep or was sick. Hamidi said she asked Pinkowski what was happening and he said Rastegar was sick and couldn’t come to work. Hamidi said she asked Pinkowski if Rastegar quit and he replied she did not give a clear answer, but he expected her still to come to work on Sunday. Neither Hamidi nor Guest heard Rastegar say she was quitting. Rather, other staff told them Rastegar was quitting. Both Hamidi and Guest are still working at His & Hers. Neither can recollect any conversation with Rastegar about vacation pay.

At the hearing, Pinkowski also entered an undated letter signed by Liz which states in part: “I remembered being concerned when Rosa did not come in to work. I have no way of knowing if in fact she called in.” As well, Rastegar submitted a letter from Rita Thomas (“Thomas”) and a transcript of a taped conversation between her and Liz. Thomas writes that after she made inquiries regarding Rastegar’s whereabouts on Saturday morning, one of her colleagues, Randy, said Carol told him Rastegar had quit. Thomas said she was then advised by Pinkowski that

Rastegar had called in sick and that was around 10 a.m. The transcript consists of Rastegar's efforts to get Liz to say that Rastegar spoke with Carol and not Liz at 10 a.m. on Saturday.

I attach no weight to these letters or the transcript. The information contained in the letter from Liz is not definitive and none of the authors were produced for cross-examination. Further, the transcript is simply not clear. Moreover, as will be seen below, the issue of when Rastegar and Pinkowski spoke on Saturday, who initiated the call, and who Rastegar spoke to prior to talking to Pinkowski, does not affect my decision on whether Rastegar quit or was dismissed from her job.

It should be noted that Rastegar also taped her Wednesday conversation with Pinkowski. Although Rastegar submitted the tape to the Director's delegate, she did not submit it or a transcript to the Tribunal and, therefore, I have not considered it in my decision. In any event, from the description of the taped conversation as outlined in the Determination, it appears there is nothing different on the tape from what I heard directly at the hearing, and the latter is the preferred evidence.

## **ANALYSIS**

The onus is on the Appellant, His & Hers, to show that the Determination should be cancelled or varied.

In this appeal the issue is whether Rastegar quit her job. If she did, she is not entitled to compensation for length of service.

The position the Tribunal takes on the issue of whether an employee has quit is now well established. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. - and - Zoltan Kiss*, BC EST #D91/96:

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment.

In this case, I find there are no "clear and unequivocal facts" to support a conclusion that Rastegar quit her job. Rather, I agree with the Director's delegate that she was dismissed by His & Hers.

I am not satisfied that Rastegar formed an intent to quit. Pinkowski's own evidence supports this conclusion. He said Rastegar *insisted* (my italics) on Wednesday that she was not quitting. Furthermore, Pinkowski and his witnesses at the hearing concede they were never told directly by Rastegar that she was quitting. They said other staff told them Rastegar was quitting. The other staff did not testify before me (where their evidence could be tested by cross-examination) and thus the evidence is hearsay and of little, if any, value. As a result, Rastegar's evidence on this point was not directly contradicted. I find no basis to reject her direct evidence and

consequently, I accept that Rastegar never said to anyone that she was quitting or wanted to quit her job.

I further find that Rastegar did not carry out some act which was inconsistent with her wanting to remain employed at His & Hers. There is no proof Rastegar had another job on Saturday or Sunday. I am not persuaded that she asked Pinkowski on Sunday to be "laid off" given she insisted on Wednesday that she was not quitting her job. Furthermore, her request for vacation pay is not in itself conclusive evidence that she was quitting her job. I agree that when an employee requests all his/her vacation pay this may be indicative of conduct consistent with quitting, but in the circumstances of this case, as outlined by Rastegar, she had a reasonable explanation for the timing of her request. That is, her anniversary date occurred near the time of the request. Pinkowski did not challenge this explanation. As well, there is the issue of Rastegar's tools or equipment. She never removed her equipment from the salon until Tuesday. If she did not intend to return to work after Friday, and particularly if she had a new job on Saturday or Sunday, I would have expected that she would have taken all her equipment out of the salon at the end of her shift on Friday. Finally, there is no definitive evidence that Rastegar was not sick as she claimed to be on Saturday and Sunday. Rastegar's explanation that she believed she had arthritis at the time because that is what her doctor assumed is not unreasonable and it was not disputed by Pinkowski. Being sick, and thus not being able to report to work, is not conduct indicative of quitting.

I am more than satisfied based on the evidence before me that Rastegar was dismissed from her job. Despite her insistence that she was not quitting, Pinkowski refused to allow her to continue her employment and in essence terminated her employment. Rastegar did not voluntarily quit her employment.

There is a conflict in evidence about who initiated phone calls on Saturday, the time when Rastegar and Pinkowski spoke on that day, and who Rastegar spoke to prior to talking to Pinkowski. However, even if I was to accept Pinkowski's evidence that Rastegar did not answer his calls until 4 p.m. on Saturday, this does not affect my decision because both the subjective and objective factors indicative of a quit are still absent in this case.

In light of the above, Rastegar is entitled to two week's compensation for length of service.

## **ORDER**

I order pursuant to Section 115 of the *Act* that the Determination dated April 5, 2000 be confirmed.

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