

**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 -

Diane Routly operating Merle Norman - Penticton  
("Routly")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 98/297

**DATE OF HEARING:** July 30, 1998

**DATE OF DECISION:** August 18, 1998

## DECISION

### APPEARANCES

for the appellant

Diane Routly  
Heather Routly

for the individual

no one appearing

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by the Diane Routly operating Merle Norman - Penticton (“Routly”) of a Determination which was issued on April 20, 1998 by a delegate of the Director of Employment Standards (the “Director”). The Director concluded Routly had contravened Section 63(1) of the *Act* in respect of the employment of Lisa Hembroff (“Hembroff”) and ordered Routly to pay an amount of \$146.61.

Routly says the Determination is wrong because Hembroff quit her employment.

The hearing into this appeal was originally set for July 10, 1998. At the request of Hembroff, that date was changed to July 9, 1998. The hearing was unable to start on July 10 and was adjourned. One of the reasons for the adjournment was that Hembroff, who had indicated she intended to be present at the hearing, had not received notice of the changed date. The matter was adjourned and re-scheduled for July 30, 1998. At the time scheduled for the hearing Hembroff was not present. As is customary, the start of the hearing was delayed for 10 minutes. She failed to appear after that period of grace and the hearing commenced, continued and concluded in her absence. Her absence was somewhat surprising because both the complaint and the appeal have been characterized by significant differences about the facts. Four witnesses gave evidence, Jean Vericki, Marivic Eda, Heather Routly and Routly herself. Even though the individual was not present to cross-examine on the evidence, I have carefully reviewed the evidence for consistency, plausibility and reasonableness.

### ISSUES TO BE DECIDED

The first issue is whether Routly has established the conclusion of the Director that Hembroff was entitled to length of service compensation was wrong and that Hembroff quit her employment. There is a second issue, depending on how the first is resolved, about whether the 8 weeks used by the Director to calculate the amount owing for length

of service compensation was representative of Hembroff's "normal or average hours of work".

## **FACTS**

Hembroff was employed by Routly as a beauty advisor (sales person) at Merle Norman - Penticton on November 1, 1996. Merle Norman - Penticton is a beauty and cosmetics salon located in Penticton's Cherry Lane Shopping Plaza. She worked part time, averaging 6 to 8 hours a day, 2 days a week until July, 1997 when the mall in which the salon is located went to summer (extended) hours and Hembroff's hours increased somewhat. In August, Hembroff's hours and days of work increased again due largely to the absence of one of the other employees and she worked several hours more than she normally worked in a week. The extended hours at the mall continued until the end of August. For first two weeks of September Hembroff worked only 2 days, 6 hours each day.

The Director concluded that Routly told Hembroff on September 11, 1997 that she was being laid off:

The evidence is that on September 11, 1997 at 7:30 pm Ms. Routly advised Ms. Hembroff, that as the mall was now off summer hours she was going to have to lay off Ms. Hembroff. Ms. Routly would only be able to give Ms. Hembroff work on Tuesdays. As Ms. Hembroff had some personal matters to take care of, it was agreed that Ms. Hembroff's next shift would be September 30, 1997.

Routly disagrees with several aspects of the above statement, including whether she told Hembroff on September 11 that she was laid off. Based on the evidence I received in the hearing, I conclude the above statement is wrong in one key respect: Routly did not tell Hembroff she was laid off. I intend to expand on this conclusion later in this decision. Otherwise, I do not intend to perform a lengthy analysis of all the areas of dispute in the above statement. To the extent it is relevant, Routly has not established the Director erred in concluding the discussion took place September 11. I also conclude, in light of evidence given by Heather Routly, it is more probable that the discussion described above took place before, rather than after, September 14.

In do not accept that the two letters written by Jean Vericki ("Vericki"), an employee in the mall's Food Court and a friend of Hembroff, are a reliable source of deciding the question of the date of the discussion. She wrote one of the letters for Hembroff and one for Routly, but said in her testimony that when Hembroff and Routly asked her to write the letters, she did not recall the specific date of the discussion she was referring to in the letters and the dates she gave in the letters were dates suggested to her by Hembroff and

Routly, respectively. I do accept Vericki's recollection under oath of the contents of the discussion. She said it took place at a table in the Food Court and she, Hembroff and Routly were present. Routly did tell Hembroff she could only give her one day of work a week and Hembroff asked Routly to be laid off. Routly said she would look into it but that she needed Hembroff to work for at least 2 more weeks; Hembroff refused, giving no reason. Vericki also said there was no discussion or agreement about September 30 or Hembroff's "next shift".

Vericki said that on several occasions after the discussion Hembroff would come to the mall, sit in the Food Court watching the salon. When Routly left the salon, Hembroff would go in. Marivic Eda ("Eda") testified that on one or two occasions Hembroff called the salon to ask if there were any papers for her. She saw Hembroff in the Food Court some time in late September or early October. Routly was in the salon at the time and Eda suggested Hembroff go in and talk to her but Hembroff said she didn't want to. Eda also denied she had ever phoned Hembroff and said her hours had been erased from the schedule by either Routly or Heather Routly.

Heather Routly is Routly's daughter and an employee at the salon. She testified that she was working on Sunday, September 14. During her shift she had looked at the work schedule and had noticed that Hembroff was scheduled to work the following Tuesday, September 16 but for the remainder of the month her Tuesday shifts (September 23 and September 30) had been erased and the total hours scheduled for each of those weeks had been marked in as "0". She recognized the writing of the "0" as Hembroff's. The same day, Hembroff came into the salon and wanted to see the schedule. She told Heather Routly that one day a week "wouldn't work for her" and said that Heather Routly's mom should lay her off because of a shortage of work. She then erased her upcoming shift and the "0"s from the schedule. She said she could possibly come back over Christmas if things got busy. Heather Routly said she would talk to her mom about it. She also placed her name down for the September 16 shift that Hembroff had erased, although that was later reassigned to another employee later.

Routly prepared a Record of Employment for Hembroff dated September 19, 1997. Heather Routly was in the salon when Hembroff came in to pick up the envelope containing the Record of Employment in October. Hembroff opened the envelope in her presence and stated, "It's wrong", and circled the Code placed beside the "REASON FOR ISSUING THIS ROE", which was "E" (quit). Hembroff then said, "We had talked". She asked Heather Routly to have her mom correct it and Heather Routly agreed to give it to her mom to sort out, but it was not changed.

## **ANALYSIS**

The first issue raises an interesting point. There is no argument that, for the purposes of the *Act*, Hembroff was laid off by Routly. That lay off occurred as a result of the

reduction in Hembroff's hours of work after August 28, 1997 to a level where she earned less than 50% of her weekly wage, averaged over the previous 8 weeks. Section 62 of the *Act* says:

62. *In this Part, "week of layoff" means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks.*

Under the *Act*, if an employee is laid off for longer than a temporary period of layoff, which in this case would something exceeding 13 weeks of layoff in a period of 20 weeks, the employee is deemed terminated effective the first day of the layoff. However, the fact of a layoff does not determine the issue, which is whether Hembroff quit her employment. An employee on lay off may still terminate, or quit, their employment. The test the Tribunal applies to determine 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 #91/96:

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.

I conclude that Hembroff did quit her employment. I reach that conclusion for the following reasons:

it was Hembroff who removed her hours from the September schedule;  
she told Heather Routly that "one day a week would not work for her";  
she asked Routly for a lay off and re-iterated that request to Heather Routly during their discussion on Sunday, September 14;  
if there was some confusion on Hembroff's part about why she was not working or scheduled to work, she had a number of opportunities to raise that matter with Routly, but instead she consciously avoided her; and  
she misled the Director on a number of points, including whether Eda had phoned and said her hours had been removed from the shift schedule by Routly or Heather Routly, that it was agreed with Routly September 30 would be her next shift and that Routly had told her she was laid off.

Hembroff's decision to remove herself from the schedule is sufficient to satisfy the objective element of the test and her failure to ask Routly about her alleged removal from the schedule or to indicate in any way that she wished to continue working for Routly is sufficient to satisfy the subjective element of the test.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated April 20, 1998 be canceled.

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**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**