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 -

Shear Timing Enterprises Ltd.
(“ Shear Timing” or the “Employer”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/276

DATE OF HEARING: July 7, 2000

DATE OF DECISION: September 25, 2000

DECISION

APPEARANCES

Ms. Dorothy-Jean O'Donnell	on behalf of the Employer
Ms. Kim Christianson	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on March 22, 2000. In the Determination, the Director's delegate found that the Employer had terminated Ms. Kim Christianson's employment when it laid her off and did not recall her and that she was entitled to compensation for length of service. The delegate determined that Christianson was entitled to $4,128.81.

ISSUES

The Employee appeals the Determination and says, among others, that the hourly rate upon which the Determination is based is incorrect, that Ms. Sabine Wiese, the former owner of the Employer, and Christianson colluded to defraud the Employer and Ms. Elisabeth Burton, the current owner, by misrepresenting the wages, the amount of time Christianson worked with Wiese (as opposed to the business generally), and that they colluded to arrange for the layoff of Christianson.

FACTS AND ANALYSIS

As mentioned in many cases of this Tribunal, the appellant, in this case the Employer has the onus to satisfy me that the Determination is wrong. For the reasons set out below, I am not satisfied that the Employer has met that burden.

The material facts are relatively straightforward. Shear Timing operates a hairdressing business in Langley, British Columbia. Christianson was employed by Shear Timing as a hair stylist and shop assistant between August 8, 1991 and September 14, 1999. The Determination states that she was paid at the rate of $13.00 per hour. The business was purchased (by way of share purchase) by Burton from Wiese on or about April 28, 1999. She explained that she bought the business "up and running" and she wanted a smooth transition from Wiese to herself.

After the purchase of the business, Wiese continued in the employ of the Employer. It appears that she continued to do some of the "paperwork" such as payroll in May and June. However, it soon became clear to Burton that the business was not doing as well as she had anticipated. She had to go into debt and set up a line of credit with her bank. From her standpoint, something had to be done. Specifically with respect to Christianson, Burton's accountant suggested to her that Christianson's wages were too high relative to the revenue she was bringing in to the business.

Burton was also of the view that Christianson was working too much for Wiese, assisting with her clients, as opposed to those of the business generally. Burton asked Wiese, the former owner, if he would "book time off" for Christianson to work for her. In other words, Wiese would be carrying part of the cost of Christianson. Wiese said she would think about it. Ultimately, there was no such agreement. In any event, the Employer ultimately controls the work place. Had the Employer wanted to have Christianson do less work with Wiese it could simply have instructed her in that regard. In my view, there is no substance to the argument that Christianson "really" worked for Wiese (for part of the time). While Christianson received a percentage of the tips earned by Wiese from her, she was an employee of Shear Timing as is confirmed by the Record of Employment issued by the Employer on September 15, 1999. Wiese, as well, as I understand it, was an employee of the Employer. The Employer cannot, in my view, rely on its own failure to control the work place and direct its employees as a means to avoiding its liability under the *Act*. The reason Burton permitted Christianson to keep assisting Wiese—as she had in the past—during the initial period of her ownership was, in my view, that she wanted a "smooth transition" and did not want to "rock the boat."

In any event, Burton also discussed with Christianson if she would be willing to be paid on a 50% commission basis, rather than being paid by an hourly rate. Christianson was not receptive to that idea. On September 2, 1999, Burton wrote a letter to Christianson. In the letter she told Christianson that "effective immediately" she would be paid on commission basis. There was no agreement to change the compensation—the proposal was rejected by Christianson—and on September 15, she was laid off. The Record of Employment indicated layoff with an unknown return date. Burton testified that Christianson agreed to the lay off rather than work on the basis of 50% commission. Christianson testified that the commission proposal would cut her pay in half. Burton also testified that she "decided to do the layoff". Christianson, on the other hand, accepted the layoff on the basis that "she [Burton] could not afford to pay [her]". Christianson also candidly admitted that she proposed the layoff. On the evidence, it is clear to me that Christianson was laid off. While the Employer argues that there was merely a discussion, *i.e.*, the reduction in salary did not actually occur because Christianson took the layoff before the pay cut came into effect, it was clear to me on the evidence that—in practical terms—the choice presented to Christianson was that she would either take the cut in pay or be laid off. If the Employer had unilaterally altered her terms and conditions of employment substantially, she may well have been constructively dismissed. The point of the instant case, however, is not whether that was the case. As it happened, there were no substantial alterations to Christianson's terms and conditions of employment. The issue in the instant case is whether she was laid off. Even if I accept the Employer's submissions that this simply was a "genuine attempt" to solve a financial problem for the Employer, it is still a layoff.

A short time later, the Employer terminated Wiese. She subsequently opened a new hairdressing salon in the vicinity of the salon operated by Shear Timing. As well, the Employer advertised in the local newspaper for a hair stylist who would work on a commission basis.

If I accept, as I do, that Christianson was laid off on September 15, 1999, the inquiry then turns to the issue of whether or not Christianson was recalled to work? She says that she was not. Christianson says that her hairdressing licence was sent Wiese's residence in a box and she got the sense that she was "not welcome back." She stated that she started to look for work. When

Wiese opened her new salon, Christianson explained that she was offered a position there which she accepted. Christianson testified that she first heard of the new salon at the end of September 1999. She denied that she knew that Wiese was going to open the salon prior to the layoff. On October 24, 1999, an ad in the Langley Times announced that "We're back", indicating that Wiese and Christianson "formerly of Shear Timing have opened shop", and that the salon—New Look Hair Design—would open on November 2, 1999. Sometime in late November 1999, Burton met Christianson outside the new salon, having "a smoke"—and testified that she felt that Christianson had "moved on" and "quit". She also explained that if Christianson had wanted to come back, she could. Burton also testified that in November a set of keys, which she explained was Christianson's, were left at the door of Shear Timing. In short, Burton felt that Christianson had no intention of coming back. With respect to the keys, Christianson was able to produce them at the hearing. In the circumstances, I do not accept that there was a recall. Burton's "feelings" that Christianson had "moved on" and found other employment (or business opportunities) are not relevant. The Employer seeks to characterize Christianson's conduct as a "constructive refusal" to return to work. I am of the view that there is little basis for this. The question simply is whether the Employer recalled her. Even on the Employer's own evidence, it did not. The situation could have been clarified by the Employer in a fairly simple manner: the Employer could have recalled Christianson within the time permitted under the temporary layoff provisions of the *Act*. The Employer did not do that. That would have presented Christianson with a choice to return or not. If she had chosen not to return to work, she would have resigned. In the result, I find that the Employer is liable for compensation for length of service.

The Employer takes issue with the hourly rate and the amount awarded to Christianson. As part of the material made available to Burton in the course of the purchase of the business was a letter from Wiese explaining he duties of each of the employees, including Christianson. The letter also explains certain of the terms and conditions of employment of each of these employees, including Christianson, whose hourly rate is described as $13.00. Christianson testified that she generally worked 39 hours per week. Burton agreed that she worked 39 hours "on average". Burton explained that, in her view, Christianson was not earning $13.00, rather she was earning $10.00 per hour plus $3.00 "under the table", something, she says contravenes the purchase and sale agreement between her and Wiese. Christianson denied this suggestion and explained how her wages were $10.00 until September 1998, when she got an increase of $1.00. Her rate was increased to $13.00 in February 1999. In the circumstances, I am prepared to accept that the hourly rate was $13.00. Even if Wiese misrepresented Christianson's wages in the purchase of the business, that, in my view, is a matter between her and Burton. I decline The Employer's invitation to apportion liability under the purchase and sale agreement. In my view, that is not within my jurisdiction.

With respect to the overall question of the amount awarded in the Determination, I am, as well, not satisfied that the Employer has met the burden to show that the amount is wrong. In the circumstances, 8 consecutive years of employment, Christianson would be entitled to 8 weeks compensation for length of service. One of the documents submitted by the Employer, Christianson's T4 for 1999 (up to September 15), broadly confirms that Christianson's earnings were on *average* $427.46 (the Employer's calculations). Taken together with the information, supplied in the Employer's appeal submission, which is that the earnings were somewhat lower between January and April, 1999 when the *average* earnings were $399.91 (the Employer's

calculations), it follows that the average earnings for the period May to September must have been higher. In my view, therefore, the amount arrived at by the delegate–$471.46–was not an unreasonable amount. It is important, in that respect, that the relevant period for the calculation of compensation for length of service is the "last 8 weeks in which the employee worked normal or average hours of work" (Section 64(4) of the *Act*). In brief, I am not persuaded that the delegate erred in the amount awarded to Christianson.

In my view, the appeal really reflects the dispute between the former owner of the business, Wiese, and the present, Burton. The Employer submits that there was a scheme—collusion—by Wiese and Christianson to cause the layoff and to set up a business in competition with Shear Timing. There was not much evidence in support of that. The Employer suggests that I ought to draw an adverse inference from the fact that Wiese, who was present at the hearing, did not testify. I specifically decline to do so. In my view, the Employer could have called Wiese to testify. She was present at the hearing and, therefore, could have been called. There was no evidence before me to support the argument that Christianson and Wiese colluded to set up a business in competition with the Employer. Christianson's evidence was that she did not know prior to her lay off that Wiese was planning to set up a new salon. Rather the evidence supports the conclusion reached in the Determination, that Christianson was laid off and was not recalled to work. The fact that she sought (and found) employment after her layoff is not material. If she had not, she probably would not have been eligible for Employment Insurance. In my view, even if she became a business partner with Wiese in the hairdressing business, or set up some other business, after the layoff, she is entitled to compensation for length of service unless she refuses a recall to work. In this case, there is no evidence that she did that.

Having considered all the circumstances, I am not persuaded that the appeal can succeed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 22, 2000 be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal