

An appeal

- by -

Paradigm Management (B.C.) Ltd., operating as Expressions Hair Design
("Expressions Hair")

- and by -

Catherine Richard
("Richard")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/301 and 2002/302

DATE OF HEARING: August 28, 2002

DATE OF DECISION: September 19, 2002

DECISION

APPEARANCES:

Blair Christie, Officer/Director	for Paradigm Management (B.C.) Ltd.
Catherine Richard	on her own behalf
Rose C. Halendy	Official Court Reporter

OVERVIEW

I have before me two appeals both filed pursuant to section 112 of the *Employment Standards Act* (the “Act”). Paradigm Management (B.C.) Ltd. operating as “Expressions Hair Design” (“Expressions Hair”)--EST File No. 2002/301--and Catherine Richard (“Richard”)--EST File No. 2002/302--each appeal a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 7th, 2002 (the “Determination”).

These two appeals, together with a third appeal of a \$300 penalty determination (EST File No. 2002/300), were heard at the Tribunal’s offices in Vancouver on August 28th, 2002. At the appeal hearing, Mr. Blair Christie testified on behalf of Expressions Hair and Ms. Richard testified on her own behalf. No other witnesses appeared before me nor was the Director represented at the appeal hearing. In addition to the witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

I might add, for the sake of completeness, that I am addressing the appeal of the penalty determination (EST File No. 2002/300) in separate reasons for decision that are being issued concurrently with these reasons.

THE DETERMINATION

Ms. Richard was employed by Expressions Hair (and its predecessors) as a stylist from April 1991 to August 6th, 2000. Ms. Richard’s compensation was in the form of a commission.

The Director’s delegate initially concluded that Expressions Hair owed Ms. Richard an additional \$237.92 on account of statutory holiday pay and accrued section 88 interest. Although Mr. Christie, Expression Hair’s principal, apparently never accepted the delegate’s calculations, in late November 2001 he nonetheless provided the delegate with a cheque payable to Ms. Richard in the amount of \$237.92. The delegate, in turn, provided that cheque to Ms. Richard (several months prior to the issuance of the Determination) and thus this particular matter was never formally adjudicated since it had been resolved.

The other issue that the delegate addressed in the Determination was whether Ms. Richard terminated her employment and thus was not entitled to any compensation for length of service. The delegate concluded that since Ms. Richard “abandoned” her job she was not entitled to any compensation under section 63 of the *Act*. In light of that finding, the delegate did not find it necessary to consider whether Expressions Hair had just cause for termination.

In the end result, a Determination--addressed to Expressions Hair--was issued in the amount of \$0

ISSUES ON APPEAL

The appeal by Expressions Hair is somewhat unusual in that it is appealing a Determination pursuant to which it has not been ordered to pay any monies. Although Expressions Hair paid Ms. Richard the additional statutory holiday pay the delegate concluded was owing (this latter payment was made while the delegate's investigation was ongoing), Expressions Hair now wishes to challenge its liability for any additional statutory holiday pay by way of the present appeal proceedings.

Ms. Richard, by way of her appeal, challenges the delegate's conclusion that she abandoned her job. Rather, she says that her employment was unlawfully terminated and she is thus entitled to 8 weeks' wages as compensation for length of service payable under section 63 of the *Act*.

FINDINGS

Since each appeal raises quite separate issues, I propose to address each appeal in turn commencing with the Expressions Hair appeal.

Expressions Hair Appeal

In my view, this appeal is not properly before the Tribunal. It should be recalled that in late November 2001 (*i.e.*, nearly 6 months prior to the issuance of the Determination) Expressions Hair delivered to the delegate a cheque payable to Ms. Richard representing additional statutory holiday pay as calculated by the delegate. As recorded by the delegate, at page 6 of the Determination, it was not until late April 2002 that Expressions Hair wrote to the delegate querying why its cheque for statutory holiday pay had been delivered to Ms. Richard. In my view, the delegate acted entirely appropriately in delivering the cheque to Ms. Richard; the delegate was not told to hold the funds nor was the cheque made payable to the Director in trust for Ms. Richard. Surely, when Expressions Hair provided a cheque payable to Ms. Richard it should not have been surprised when that cheque was actually delivered to the named payee.

At this late stage, if the appeal with respect to the matter of statutory holiday pay was to go forward and succeed on its merits, Ms. Richard, presumably, would be obliged to repay the monies that were paid to her nearly a year ago. If Expressions Hair did not agree with the delegate's calculations, it could have provided the funds to be held in the Director's trust account pending this appeal; Expressions might have refused to pay any monies and, in that case, presumably a Determination would have been issued for the amount in issue that Expressions Hair could have appealed in the ordinary course.

However, in my view, employees ought to be able to rely on payments made to them by their former employers in order to discharge the employer's statutory obligations. This is not a case where the employer's payment was tainted by fraud, forgery, misrepresentation or the like. It is simply a case where, long after the fact, the employer has decided that perhaps it ought not to have paid out the funds in question.

I might add that I would take the same view if it was an employee who, long after having accepted a final payment on account of some statutory claim, decided that he or she wanted to press for an even larger payment (see *e.g.*, *Dacre*, BCEST # D306/98; *Small*, BCEST # D032/98; *Alnor Services Ltd.*, BCEST # D199/99; *Golden Day Cake House Ltd.*, BCEST # D282/01; *Robert Tower*, BCEST # D343/01).

This appeal is dismissed pursuant to section 114(1)(c) of the *Act*. I now turn to Ms. Richard's appeal.

Catherine Richard Appeal

As noted above, the delegate concluded that Ms. Richard abandoned her job and thus was not entitled to any compensation for length of service. Ms. Richard says that she did not quit and was, in effect, terminated. It is common ground that if Ms. Richard's employment was unlawfully terminated, she is entitled to 8 weeks' wages as compensation for length of service.

Before me, Mr. Christie, on behalf of Expressions Hair, once again took the position that Ms. Richard abandoned her job. Section 63(3)(c) of the *Act* states that an employer is not obliged to pay any compensation for length of service if the employee terminates their employment. Thus, employees who voluntarily resign or who abandon their position (*i.e.*, a "constructive" resignation) are not entitled to any compensation.

However, both the common law and Tribunal jurisprudence clearly establish that a "quit" must be clearly and unequivocally established. In this latter regard, an employer must show that the employee intended to quit (the subjective element) and carried out that intention by some positive act (the objective element):

To be a valid and subsisting resignation, the employee must have clearly communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside observer" must be satisfied that the resignation was freely and voluntarily given and represented the employee's true intention at the time it was submitted. [*RTO (Rentown) Inc.*, BCEST # D409/97]

In this particular case, Ms. Richard never formally resigned her position. The issue is whether her conduct amounts to a resignation. It should also be noted that Expressions Hair does not take the position that it terminated Ms. Richard for cause. Thus, this case turns solely on the evidence regarding Ms. Richard's "abandonment" of her position.

The facts regarding the termination of Ms. Richard's employment are not seriously contested; the dispute between the parties concerns the legal consequences of those facts.

In the summer of 2000, the Expressions Hair salon in Guildford (Surrey) employed about 11 stylists (including Ms. Richard) and was managed by Ms. Karin Jeskay. Mr. Christie, for his part, resided in Alberta and rarely attended at the Guildford salon. He had very little, if any, day-to-day involvement with the salon or with any of its stylists.

On or about July 20th, 2000 Ms. Richard learned that her mother was ill with cancer. The next day, Ms. Richard spoke with Ms. Jeskay, informed her about the situation and asked to be given time off work so that she could visit her mother in Moncton, New Brunswick. Ms. Jeskay confirmed to Ms. Richard that she would be able to take time off from August 12th to August 25th. A few days later, Ms. Richard asked that her leave be extended to September 9th and, once again, Ms. Jeskay authorized that period of leave. It should be noted that at this point in time, Ms. Richard was working part-time hours, typically 6 or 6 1/2 hour shifts on Saturdays and Sundays.

Having received Ms. Jeskay's authorization to take time off, Ms. Richard then proceeded to book her flight on a nonrefundable ticket (in order to reduce the overall cost of the trip). A few days later, and after Ms. Richard had already booked her flight, Ms. Jeskay telephoned Ms. Richard and informed her that the authorization to take the time off was now being rescinded because other stylists would be away at the same time thus leaving the salon "short-staffed". Ms. Richard believed that this explanation was a pretext since the salon's appointment book did not show that other stylists would be away during Ms. Richard's proposed leave. When challenged on this point, Ms. Jeskay only said that she should not have initially authorized Ms. Richard's leave request (even though in the past Ms. Richard's leave requests had always been approved only by Ms. Jeskay).

At this point, it perhaps should be noted that Ms. Richard concluded that Expressions Hair was searching about for some excuse to terminate her employment. She had previously filed a complaint with the Employment Standards Branch which had resulted in a determination (which was subsequently unsuccessfully appealed by Expressions Hair) in her favour [see *Paradigm Management (B.C.) Ltd.*, BCEST # D420/00; reconsideration refused BCEST # RD291/01]. For his part, Mr. Christie did not deny that he wished to terminate Ms. Richard. He acknowledged during his testimony that he might have said to Ms. Richard words to the effect that he had been looking for a reason to terminate her for some three years.

Mr. Christie faxed a letter to the salon, dated July 29th, 2000 and addressed to Ms. Richard, that Ms. Jeskay in turn provided to Ms. Richard. In this letter, Mr. Christie indicated that her leave request was being denied since "it would be unfair to your co-workers to ask them to forgo their summer holidays on your behalf, in order to maintain adequate staffing of the salon".

In my view, four points need to be highlighted at this juncture. First, Ms. Richard, as a commissioned employee, was not seeking paid leave--while she was away she would not be earning any income (and since vacation pay is based on earnings, Ms. Richard's leave would not have resulted in any direct financial impact to Expressions Hair). Second, since she was only working weekends, the impact on staffing levels was obviously less significant than would have been the case for a full-time employee. Third, the material before me does not disclose that other stylists had booked time off so that a staffing problem would have materialized. Indeed, when questioned about this point by Ms. Richard, Mr. Christie stated that he had "no idea" if other stylists had in fact booked vacation time when he faxed his July 29th letter to Ms. Richard. Fourth, this is not a case where a leave request was denied; rather, the leave was *approved* by the salon manager and then *rescinded* by Mr. Christie (and only after Ms. Richard had already made travel arrangements and had incurred nonrefundable costs--these latter facts were known to Ms. Jeskay and, quite possibly, to Mr. Christie as well).

Ms. Richard's last working day was August 6th by which time she knew that her original leave request had first been approved and then subsequently rescinded. A leave for the period from August 7th to 18th was apparently approved by Mr. Christie. Nevertheless, Ms. Richard left for Moncton on the 7th and did not return to the lower mainland until August 25th (consistent with her initial leave request that Ms. Jeskay approved). Ms. Richard attended at the salon on August 25th and had a brief conversation with Ms. Jeskay at which time the latter produced a letter from Mr. Christie in which he took the position that Ms. Richard had quit. Expressions Hair also issued a record of employment ("ROE")--as required by federal law--which stated that Ms. Richard had "quit" her employment (code "E" on the ROE). Upon receiving the ROE in the mail, Ms. Richard spoke with Mr. Christie by telephone and asked that the ROE be changed from a "quit" to a "dismissal" (code "M") but Mr. Christie refused.

On August 6th, prior to leaving for Moncton, Ms. Richard did not state that she was quitting. She travelled to Moncton to visit her mother who was ill. Prior to leaving for Moncton she did not clear out her stylist's "stall" nor gather up her personal tools and equipment--tools with a replacement cost of \$1,000. It must be remembered that the employer has never taken the position that it had just cause for termination; in fact, the employer says that it *never* terminated Ms. Richard. Thus, whether or not the employer had just cause for dismissal is not an issue before me.

This appeal turns on whether or not Ms. Richard quit her employment. As noted above, she never formally quit. There is no evidence before me of any subjective intention on her part to quit. Neither is there any objective evidence--apart from her taking leave--that she "abandoned" her employment. There is no evidence before me that she was unequivocally informed by her employer that if she did not return to work after August 18th her employment would be at an end. As for the leave, it must be remembered that the leave was originally authorized by a person in apparent authority. Ms. Richard relied on the authorization to her detriment (in the form of her purchase of a nonrefundable airline ticket). This latter circumstance raises, at the very least, a promissory estoppel situation such that the employer was not entitled to unilaterally withdraw its promise after the fact (see *Conwest Exploration Co. v. Letain*, [1964] S.C.R. 20).

Further, I fail to see how taking the leave amounts to objective evidence of a quit when she failed to remove her personal effects from the employer's premises. Perhaps, had it wished to do so, the employer might have meted out some discipline to Ms. Richard. Perhaps the employer might have had cause for termination (although this issue is not before me, I rather doubt that the employer would have had just cause for termination based on the circumstances of this case).

However, the employer--on its own evidence--never disciplined Ms. Richard nor did it terminate her employment. Expressions Hair has always maintained that Ms. Richard quit (recall the evidence regarding the "confirmation of quit" letter and the ROE). Expressions Hair has never conceded that it actually terminated Ms. Richard. That being the case, this appeal turns on whether or not Ms. Richard "constructively" resigned her position.

I find that the evidence before me falls well short of proof of a lawful quit. There is no evidence of a subjective intention to quit and I do not find that the circumstances surrounding Ms. Richard's leave (particularly when the leave was initially authorized) constitute unequivocal evidence that she abandoned her position. The evidence overwhelmingly shows that Ms. Richard did not quit and had every intention of returning to her position--consistent with her initially authorized leave--after visiting her mother in Moncton. Indeed, immediately upon her return to the lower mainland, she attended at the salon, an act that I find to be inconsistent with the notion that she had previously abandoned her job.

To summarize, I am dismissing the appeal of Expressions Hair and allowing the appeal of Ms. Richard. The Determination will be varied accordingly.

ORDER

The appeal of Expressions Hair is dismissed; the appeal of Ms. Richard is allowed.

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be varied to indicate that Expressions Hair must pay Ms. Richard 8 weeks' wages as compensation for length of service together with additional interest to be calculated in accordance with section 88 of the *Act*.

I am unable to determine, based on the material before me, Ms. Richard's precise monetary entitlement. Accordingly, this latter matter is referred back to the Director solely for the purposes of calculating Ms. Richard's monetary entitlement.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal