

An appeal

- by -

Anne Matthews operating as Clean House

- 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: John M. Orr

FILE No.: 2002/295

DATE OF HEARING: September 16 and October 11, 2002

DATE OF DECISION: October 16, 2002

DECISION

APPEARANCES:

Anne Mathews	On her own behalf (by conference call)
Candace Young	On her own behalf

OVERVIEW

This is an appeal by Anne Mathews (“Mathews”) operating as Clean House pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a Determination dated May 8, 2002 by the Director of Employment Standards (“the Director”).

A delegate of the Director determined that Candace Young (“Young”) was employed by Mathews for two days in January 2002 as a cleaner. The delegate also determined that Mathews terminated the employment because of Young’s pregnancy. The delegate determined that Mathews had contravened section 54 of the Act and awarded Young \$7,514.00 in compensation.

Mathews appeals the Determination on several grounds. Firstly, Mathews alleges that the business was operated by a corporation and not by her personally. Secondly, Mathews alleges that Young was never actually employed by the company, as she never got past a try out period. Thirdly, there were bona fide occupational requirements that prevented Young from carrying out the required duties of the job. Fourthly, there is no rational basis set out in the Determination for the amount of compensation ordered.

ANALYSIS

I have concluded that the Determination must be cancelled and this matter referred back to the Director for the reasons set out below.

The only essential facts and statement of issues are set out in the overview above. At the hearing Mathews provided documentary evidence from the corporate solicitor that the business was incorporated in September 2001. Mathews says, and I accept, that she was never asked about the corporate status of the business and had not realised the significance of incorporation in regards to her personal liability for any amount found owing to Young. This is significant evidence that should have been discovered during the investigative stage by the delegate

The corporate status of the business is significant but also raises the issue of director’s liability under section 96 of the *Act* for unpaid wages. This also raises the issue as to whether the amount ordered was compensation for wages or payment of expenses. The Determination does not specify the basis for the amount ordered. The definition of wages specifically excludes "allowances", “expenses” or “penalties” and yet section 96 creates director’s liability for "wages" only.

It is also apparent that the delegate did not address adequately the other issue raised by Mathews that Young had not commenced employment with the business. Mathews submits and Young also agreed that there was an orientation period agreed to by both parties to allow Young the opportunity to observe

other cleaners working to see if it was the sort of job that she would like to do. There is certainly some dispute as to the length of this period and whether Young actually commenced employment. I do not intend to reach a conclusion on that point in this decision in light of my conclusion that the matter should be re-investigated. But, I do note that Young was paid for her time. The commencement of employment is an essential issue as the *Act* only deals with termination of employment and not the failure to employ as in the *Human Rights Code*.

The determination is also lacking in analysis of the evidence submitted. It is not adequate to simply say as the delegate did that: "I prefer the statement from Ms Young over that of Ms Mathews." Her personal preference is not a sound basis for a decision without an analysis of the factual basis and legal test applied.

The delegate also did not address the issue raised by Ms Mathews of *bona fide* occupational requirements that would have prevented the employment of Ms Young. It is also essential that the Determination set out the rational basis for any financial order made pursuant to section 79(4) of the *Act*.

For the above reasons I've reached the conclusion that the Determination in this case should be cancelled. The Director may reinvestigate the matter as the Director sees fit.

ORDER

Pursuant to section 115 of the Act I order that the Determination dated May 8, 2002 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal