

An appeal

- by -

The Style Eyes Optical Ltd.
("Style Eyes")

- 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: Sheila McDonald

FILE No.: 2001/59

DATE OF HEARING: July 30, 2001

DATE OF DECISION: September 10, 2001

DECISION

APPEARANCES:

Linda Hawes on behalf of the Employer The Style Eyes Optical Ltd.

Din-Yi Coosemans the Employee

OVERVIEW

Ms. Coosemans was employed as an optometric assistant with Style Eyes from July 16, 1997 through to March 31, 2000, at which time she resigned her employment. The sole director of Style Eyes was Victor Philip Hawes who was deceased at the time of the Determination. Ms. Cooseman took an extended vacation of 5 weeks in early 2000 in order to take a trip to China. Ms. Coosemans claimed that she had not been paid for her final two weeks of employment and further that she is owed for 53.5 hours of hours in her time bank.

ISSUE

There are two issues in the case. The first issue is whether Coosemans is owed wages for her final two weeks with the Employer. The second issue is whether Coosemans is owed wages from her time bank.

EVIDENCE

Linda Hawes by teleconference Ms. Hawes stated that she was essentially acting as a caretaker of the business following the death of her husband Victor Phillip Hawes. She said that it was a very confusing time after his death. She said that in her opinion the vacation granted to Ms. Coosemans was in excess of that given to any other employee and that it must have been Dr. Hawes intention that Ms. Coosemans should apply her time bank hours towards her vacation. Ms. Hawes said that she did request clarification in writing from Ms. Coosemans, however, she did not reply.

Ms Hawes said that Ms. Coosemans took two weeks between December 1999 and January 2000 to go to New York and then 3 weeks between January and February 2000 to go to China. She stated that she firmly believed that Ms. Coosemans owed money to the Employer and that Dr. Hawes would never award extra vacation. She further stated that she felt the time bank was meant to be used towards the five weeks vacation. She said she was willing to pay her for her last two weeks of work but she did not believe all the facts were being represented here. She said that the company had not been doing well financially and was \$20,000 plus in the red. Given that fact she stated that in her opinion it would not make sense that Dr. Hawes would have granted extra vacation.

Ms. Coosemans She stated that she gave two weeks notice on March 17, 2000. She said that she worked very hard for the company. She said that she took only one week vacation for New York and two weeks vacation for China. She said that the rest of the time were dates the business was going to be closed and her days off. She indicated that her passport was stamped December 20, 1999 as the date of arrival in New York. She said there was no stamp for the return date to Canada. She said she had gone to China on January 29, 2000 and had returned on February 14, 2000.

She said that since July 1998 she had worked many hours of overtime. She said that Dr. Hawes had asked to write down her overtime hours. She said that she had worked the overtime and should be paid for it. She said that Dr. Hawes had never asked her to apply her time bank against her vacation.

THE DETERMINATION

A determination was issued on December 21, 2000 by Mr. John Dafoe, the Delegate of the Director of Employment Standards, which found that Style Eyes had contravened Section 18(2) of the *Act* and owed Ms. Coosemans wages for the pay period ending March, 31 2000 in the amount of \$711.00. He further found that the Employer had contravened Section 42(5) of the *Act* and owed Ms Coosemans \$659.34 for 53.5 hours of banked time.

During the investigation the Employer provided no evidence to suggest that Ms. Coosemans did not work the 60 hours shown on the statement for the pay period ending March 31, 2000. At the time the Employer questioned the vacation period granted to Ms. Coosemans, however, Mr. Dafoe concluded that the death of Victor Hawes, the owner of the business made it impossible to determine what arrangement he had actually made with Ms. Coosemans with respect to her vacation.

THE FACTS AND ANALYSIS

Linda Hawes, as Administrator to the Estate of Victor Hawes and Style Eyes, appealed the Determination. She stated that the documentation of Ms. Coosemans overtime was not submitted to her until Ms. Coosemans final day of employment. She pointed out that Ms. Coosemans was given many opportunities both verbally and by letter to clarify the overtime. Ms. Hawes stated that based on her discussions with the Employer's accountant Mrs. Clark, Ms. Coosemans must have been granted a portion of the vacation leave against her time bank. In Ms. Hawes evidence given at the hearing she said she was sure that this had been Dr. Hawes intention.

Ms. Hawes stated in her appeal that with the three extra weeks paid vacation calculated by her to be 105 hours and allowing for the 53.5 overtime hours, which she called, unsubstantiated, adding to it the 60 hours of semi-disputed regular time that Ms. Coosemans was at best owed 8.5 hours. She further points out in her appeal that Mr. Dafoe made his determination based solely on the

word of Ms. Coosemans and he did not contact the corporate bookkeeper, Mrs. Clark, the Manager, Mrs. McEwan or Ms. Coosemans fellow staff member, Ms. Fleury. She suggested in her appeal that the Tribunal should contact these people.

In Mr. Dafoe's submission dated March 22, 2001 to the Tribunal he points out that if Ms. Hawes was aware that other former employees had relevant information to add to his investigation Ms. Hawes should have sought out the information or at least requested that he as the Delegate contact those individuals. In a submission to the Tribunal by Mr. Dafoe dated February 5, 2001 he states that at no time during the course of the investigation did the Employer submit statements, letters, affidavits or any other written evidence from Mrs. Clark, Ms. McEwan or Ms. Fleury. He further points out that the Employer did not at any time in the investigation even supply to the Delegate the names of these or any other employees of the business.

After Ms. Coosemans left the Employer Ms. Hawes wrote to Ms. Coosemans on three occasions April 12, April 26 and May 8, 2000 requesting clarification on the banked time, holiday allotments and hours worked. Ms. Coosemans did not reply to the letters. On June 6, 2000 Mr. Dafoe sent a letter to Ms. Hawes advising her of the complaint by Ms. Coosemans. Ms. Hawes replied on June 8, 2000 in a letter along with accompanying records. On June 30, 2000 Mr. Dafoe requested by letter full payroll records illustrating hours of work on a daily basis and all vacation paid or taken over Ms. Cooseman's period of employment. In addition, he asked for any evidence on file with respect to the extended vacation taken in early 2000.

Mr. Dafoe did not receive an answer to his June 30th letter and subsequently wrote to Ms. Hawes again on July 17, 2000 requesting a cheque to Ms. Coosemans as settlement or as an alternative a request to forward all relevant payroll records in the event a settlement could not be reached. Ms. Hawes replied on July 20, 2000 stating that she did not have legal access to any documents prior to February 1, 2000. Mr. Dafoe wrote to Ms. Hawes again on December 7, 2000 requesting that she review the payroll records and determine whether there was any additional evidence that would be helpful in his reaching a fair resolution of this case. Ms. Hawes subsequently appealed the determination on January 10, 2001.

As Mr. Dafoe points out in his February 5, 2001 submission to the Tribunal the Employer was given several opportunities to provide evidence to support their position and at no point provided any evidence which they sought to rely on in their appeal. The individuals whom Ms. Hawes mentioned in her appeal, whom she felt had evidence relevant to the case, were not mentioned to Mr Dafoe during the investigation. Mr. Dafoe points out that the Tribunal has been consistent in taking the approach that it will not allow appellants to "sit in the weeds", failing or refusing to participate or cooperate in the investigation by the Director and later file appeals against the conclusions of the Director.

In *Tri-West Tractor Ltd.* (BC EST # D268/96) the adjudicator states:

An appeal under Section 112 of the *Act* is not a re-examination of the complaint. It is an appeal of the decision already made for the purpose of determining

whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have or could have been given to the delegate in the investigative process.

Mr. Dafoe, the Delegate in this case was not provided with evidence by the Employer, which might have been different than the facts presented by Ms. Coosemans. Ms. Hawes in her appeal speaks to other employees, which should have been interviewed to investigate the complaint, however, she choose not to give their names to the Delegate nor did she supply any payroll records as requested.

As Mr. Dafoe points out in the Determination given Dr. Hawes death it is absolutely impossible to determine what agreement was made between the Employer and Ms. Cooseman with respect to her vacation. There was also no evidence given by the Employer to dispute Ms. Coosemans record of her time bank.

Given the above, the Employer has not established that the Determination is wrong.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination 080-939 be confirmed.

Sheila McDonald
Adjudicator
Employment Standards Tribunal