

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 -

Douglas G. Morris operating ColorTime Photolab
("Morris")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 1999/432

DATE OF HEARING: September 30, 1999

DATE OF DECISION: November 15, 1999

DECISION

APPEARANCES

Douglas G. Morris	for himself
Emily Patricia Kinney	for herself

OVERVIEW

This an appeal brought by Douglas G. Morris operating ColorTime Photolab (“Morris”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 18, 1999. The Determination found that Emily Patricia Kinney (“Kinney”) was entitled to payment of regular wages, vacation pay, compensation for length of service and reimbursement of business costs to a total of \$8887.13, including interest through June 17, 1999. Morris appealed the Determination on the basis that Kinney had not worked for him during part of the period for which the delegate found that wages were due, that Kinney was never instructed to use her own funds to meet any costs of the business, that the delegate based the Determination on an incorrect rate of pay, and Kinney had received sufficient notice of termination of her employment to meet the requirements of the *Act*.

ISSUES TO BE DECIDED

The issues to be decided are Kinney’s rate of pay during the period in question, the duties she performed during that time, any entitlement for reimbursement for business costs and the notice she received of termination of her employment.

FACTS

Kinney was employed as the manager of ColorTime Photolab and predecessor companies at the same location in New Westminster from June 1988 to May 22, 1998. There was no dispute that from July 1997 to April 1998 Kinney’s rate of pay was \$600 per week. Morris testified that he had owned the business for some time, but sold it in 1995. When the business did not go well, he regained control in 1997 and offered to sell it to Kinney. He trained Kinney in running the business, and she was to pay bills from the revenues of the business. Morris did not present any evidence of an agreement to sell the business to Kinney. She denied any such agreement, although she stated that the idea had been discussed.

Morris moved to Summerland in August 1997, with the understanding that Kinney would run the business for him until a sale could be completed. The business did not prosper through 1997, and Morris received a bill (or bills) for \$4,000 from Revenue Canada and a bank in January 1998. Kinney agreed to pay the bills from the revenues of the business, and Morris told her that if she did not purchase the business, he would close it.

According to Morris, he informed all employees in the first week of April 1998 that the business would be closed on April 30, 1998. He did not present any evidence of written notice to Kinney or any other employee of termination of their employment. In any case, Morris did not dispute that he owed Kinney \$600 per week for the period April 20 through May 1, 1998, and Kinney did receive a cheque for \$600 on May 1. After examining payroll records, the delegate found that Kinney was paid through April 19, 1998. Kinney produced a diary for April and May 1998. It contained notations for April 15, 28, 29 and May 2 that she met with Morris or that he was in town. Kinney stated that she continued to come to premises of ColorTime until May 22, 1998 to clean up and handle the closing of the business.

Morris stated that he was present at the business during the week of May 4-8, and Kinney was not at work. Kinney's diary contained a notation for a business luncheon on April 29, a meeting on May 2. She further stated that Morris called her on May 6 and instructed her to close the doors of the business on May 8. The other employee of the business finished work on May 8. According to Kinney, Morris was in the area from May 11 or 12 until May 18, and she finished cleaning up on May 22, 1998. She did not answer the telephone during that period on Morris's instructions. Her diary contained the notations summarized above, but no detailed records of hours worked. Kinney did present a list of tasks connected with closing the business that she said that she carried them out between May 8 and May 21, 1998. Morris did not challenge that evidence.

Morris testified that he and Kinney agreed that she would work for \$10 per hour, to be paid in cash, for the time she worked on the clean up of the business for the two weeks after May 8. He wanted records of hours actually worked before he paid her that amount. Kinney denied agreeing to another rate of pay during that period. In her written statement, she said that the rate of \$10 per hour was never discussed, and she "was under the impression" that she would be paid her regular wage. She did acknowledge that Morris offered to pay her in cash without deductions for work during that period. The delegate based her Determination on Kinney's pay as manager, i.e., a gross of \$600 per week.

The Determination found that Kinney had paid \$741.44 in business costs for ColorTime Photolab, net of reimbursements. Morris argued that Kinney had never been instructed to use her own funds to pay for the expenses of the business, and that the money Kinney paid was part of her effort to purchase the business. A third issued one cheque for \$2100 to Kinney. She stated that \$1000 went to the other employee for wages and vacation pay, \$500 to pay her MasterCard bill for business expenses and \$600 for her wages. Kinney provided copies of invoices issued to ColorTime by various parties that she had paid in cash or from her MasterCard account.

In her response to the appeal, Kinney stated that the delegate had erred in crediting a cheque for \$600 issued on May 1 to her wages for April and May. According to Kinney, the cheque covered the period April 6-17, before the dates of the delegate's calculations.

In his appeal, Morris stated that Kinney's compensation for length of service should be 2 weeks' pay. The delegate found that Kinney's employment with ColorTime was continuous from 1988, so that she was entitled to eight weeks' compensation for length of service. In the hearing, Morris stated that he did not dispute Kinney's entitlement to eight weeks' compensation for length of service, although he obviously disagreed with the rate of pay on which it should be based.

ANALYSIS

For an appellant to be successful in his appeal, he (or she) must satisfy the Tribunal that the delegate had erred in her findings concerning the issues under appeal. In this case, however, Morris did not present any evidence that was not before the delegate when she made the Determination. Nor did he argue that the Determination misinterpreted the *Act*. Most of the appeal consisted of re-statements of arguments that had been made to the delegate.

Morris argued that he and Kinney agreed to pay her \$10 per hour for the time she spent winding up the business. According to Morris, taxes were not to be withheld from these wages. Kinney denied such an agreement. Apart from the matter of Morris asking the Tribunal to enforce an agreement that was designed to violate several statutes, Morris did not present any evidence to support his contention. The Director's delegate found that Kinney was entitled to \$600 per week, the rate of pay she had received for more than six months before the business closed. No basis exists for overturning the delegate's conclusions about the appropriate rate of pay for Kinney.

Evidence of Kinney's work during the second and third weeks of May, when the business was being wound down, is lacking. Kinney stated that she came to the business, cleaned the premises up, but did not answer the telephone on Morris's instructions. Morris was apparently in Summerland part of the time and in the Lower Mainland for at least one week. He did not present any evidence of what Kinney had or had not accomplished after May 8, when the business closed. He merely demanded a record of the hours Kinney had worked during that period. Kinney offered no evidence of hours she worked, although she did present the Tribunal with a list of the tasks she completed. In these circumstances, the delegate decided that Kinney should be paid her normal weekly wage for the May 11-22, 1998 period. Morris did not provide any grounds for changing that conclusion other than his statement that he stopped by the premises and Kinney was not there.

Morris based his appeal on reimbursement for business expenses on the argument that Kinney had not been instructed to pay business expenses. He further argued that any money Kinney had put into the business was part of her plan to purchase the business. No evidence was presented to the Tribunal or the Director's delegate of any agreement by Kinney to buy the business, although Morris may have understood differently based on an oral agreement or conversation. Moreover, the evidence before the delegate and the Tribunal indicated that Kinney had paid bills for ColorTime Photolab from her own funds and been reimbursed accordingly prior to May 1998. Based on this evidence, the Director's delegate concluded that Kinney and Morris had an arrangement for her to pay bills for the company, subject to reimbursement. Again, the Tribunal had no grounds for overturning that conclusion.

At the hearing, Morris accepted that Kinney was entitled to compensation for length of service based on 8 weeks' pay, consistent with the Determination. The Determination cited Section 97 of the *Act*, the basis for the Director's delegate's conclusion that Kinney's employment had been continuous. Moreover, Section 63(2) of the *Act* requires that notices of termination be in writing. Morris did not argue at any point that he had given written notice.

In her response to Morris's appeal, Kinney alleged that she was entitled to an additional \$600 in unpaid wages. She did not appeal the Determination. The Tribunal is not an investigative body, so this decision does not deal with that point.

ORDER

For these reasons, the Determination of June 18, 1999 is confirmed, pursuant to Section 115 of the *Act*. Kinney is to be paid the amount of \$8887.13, plus additional interest accrued since the date of the Determination under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal