BC EST #D585/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of appeals pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, c. 113

- by -

Dorothy Ann Chabra
("Chabra")

and

Cheryl Lynn Pettersen
("Pettersen")

- of Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Sherry Mackoff
FILE NOS.:	97/747 and 97/759
DATE OF HEARING:	December 1, 1997
DATE OF DECISION:	January 5, 1998

DECISION

OVERVIEW

This decision addresses two separate appeals brought by Dorothy Ann Chabra ("Chabra") and Cheryl Lynn Pettersen ("Pettersen") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from Determinations, dated September 22, 1997, issued by a delegate of the Director of Employment Standards.

Ms. Chabra and Ms. Pettersen ("the appellants") both claimed compensation for length of service from their former employer, Ms. Judy Ann Vix ("Vix" or the "employer") who carries on business as B & J's Studio for Hair. The delegate found that the employer had just cause to terminate the employment of the appellants. Accordingly, he dismissed their claims for compensation for length of service.

The appellants seek to have the Determination cancelled. Ms. Chabra claims eight weeks' wages less the amount of $448.00 that she has already received. Ms. Pettersen claims five weeks' wages less the amount of $560.00 that she has already received.

It is the position of Ms. Vix that the Determination should be confirmed.

Since both appeals are based, to a large degree, on the same facts and both appeals raise the same issue, they were heard together. A hearing was held at the Vancouver office of the Employment Standards Tribunal on December 1, 1997. Ms. Vix appeared on her own behalf. She gave evidence and called one witness, Ms. Elaine Dyck. Ms. Chabra appeared on her own behalf and gave evidence, as did Ms. Pettersen.

ISSUES TO BE DECIDED

1) Was Ms. Chabra dismissed for just cause?
2) Was Ms. Pettersen dismissed for just cause?

FACTS

Ms. Vix is the owner of a small hair salon called B & J's Studio for Hair ("B & J's") that is located at 33655 Essendene Avenue, Abbotsford. The salon is open six days a week, Monday through Saturday, from 9 a.m. to 5 p.m. each day.

Ms. Chabra has been a hair stylist since 1959. She began working at B & J's in early May, 1989. When she started working for Ms. Vix, Ms. Chabra was an experienced, established

stylist and she brought her own clientele with her. At the time she began employment at B & J's she had a large enough clientele to keep her busy on a full-time basis. She was not reliant on walk-in customers.
In 1989 when Ms. Chabra started working for Ms. Vix, she brought her client cards with her. Client cards are index cards that contain important client information. A client card contains a client's name, a client's telephone number, the dates on which a service is provided and the type of service. The cards contain important information about hair colouring and perms, in effect providing a "chemical history" of the client.

At the time that Ms. Chabra started at B & J's she brought three boxes of client cards with her. She had purchased the boxes in which the cards were stored and she had entered the information on the cards and maintained the cards. Two of the boxes of client cards were for perms: A through H and K through Z. The third box was for colour and it contained clients A through Z. Ms. Chabra testified that during the years she worked at B & J's she would sometimes use index cards that Ms. Vix provided at the salon and sometimes she would use cards that she purchased herself. Ms. Chabra testified that over the eight years at B & J's she took her client cards home many times. She cleaned and washed out the boxes, updated the cards and used the cards to send Christmas cards to her clients.

Ms. Pettersen began working at B & J's on April 21st, 1992. Prior to working for Ms. Vix, she had spent six years at another salon. When she started with Ms. Vix, Ms. Pettersen was an experienced stylist with an established client base. She stated that at the time she was fired by Ms. Vix, seventy to seventy-five percent of her clients had been clients from her previous salon or were referrals from those clients.

At the time Ms. Pettersen started at B & J's she brought one box of client cards with her. Like Ms. Chabra, she had purchased the box in which the cards were stored and she had entered the information on the cards and maintained the cards. Ms. Pettersen purchased all of her own index cards. She uses a larger index card, not the "recipe" size card that Ms. Vix kept at the salon. Ms. Pettersen testified that during the time she worked at B & J's she had taken her client cards home for cleaning, updating and sending out Christmas cards.

At the time the appellants were hired neither one was ever told that the client cards they brought with them would become the property of Ms. Vix. Moreover, at no time during the course of their employment did Ms. Vix tell the appellants that client cards were the property of the salon. Nor did Ms. Vix tell the appellants, either orally or in writing, that if they removed client cards from the premises they would be fired.

I would also note that there was no general filing system at the salon. The appellants were never asked to enter the information contained on their client cards into a centralized filing system.

Both of the appellants were fired on Monday, June 23, 1997. At the time of her termination, Ms. Chabra was working four days a week: Tuesday through Friday. Ms. Pettersen was working five days a week: Monday through Friday.

The events leading up to the dismissals can be summarized as follows. As of June 1st, 1997, Ms. Vix's salon had been in business for 10 years. At that time, Ms. Vix decided that it would be a good idea to implement a no-smoking policy in the salon because, as she testified, most of the clientele were senior citizens and had breathing problems. Therefore, on June 5th, Ms. Vix posted notices in the shop that advised there would be no smoking in the salon starting on June 15, 1997.

At the time that the no-smoking policy went into effect, there were four people working at the salon: Ms. Vix, the owner, Ms. Chabra, Ms. Pettersen, Ms. Dyck and one part-time employee.

The institution of the no-smoking policy created a negative change in the relationship between the appellants and Ms. Vix. The atmosphere became tense and strained. Both appellants smoked and they had clients who smoked.

Although Ms. Chabra strongly disagreed with the way the no-smoking policy was implemented, she did not disagree with the policy itself. She testifed that the policy would not stop her clients from coming to the salon.

Ms. Pettersen was upset about the no-smoking policy because she could no longer smoke in the shop during short unscheduled breaks (for example, while a client's perm was processing) and she would have to leave the shop in order to smoke. The need to leave the shop for a smoke break would take up time that could be spent seeing clients. Ms. Pettersen said she was unhappy because "she felt like a second class citizen because she smoked." She was not concerned, however, that her smoking clientele would go elsewhere.

In an effort to resolve the bad feelings created by the new no-smoking policy, a meeting was held on June 16th. Everyone who worked in the salon, except for the part-time employee, attended. Unfortunately no solution was found to ease the tense atmosphere that had developed.

Ms. Vix testified that as soon as the no-smoking signs went up things started to change at the salon. The relationship between the appellants and Ms. Vix deteriorated. The appellants stopped coming to work early. Ms. Pettersen, who always arrived one hour early at 8 a.m. to fold towels, make coffee, and prepare for the day, started to come to work a few minutes before the 9 a.m. start time. Ms. Chabra also stopped coming to work early. Ms. Vix testified that after she posted the signs, the appellants marked coffee and lunch breaks in the appointment book for the month of June. Ms. Vix stated that the appellants were "whispering" with their clients and that Ms. Pettersen did not remove cigarette butts that were left outside the salon.

Ms. Vix stated that when she returned to work on Thursday, June 19th (after her days off on Tuesday and Wednesday) she noticed that the appellants' personal belongings had been removed from the staff room at the back of the shop. Those personal items consisted of some boxes and a bag or so. She testified that much later on that same day, a customer called for Ms. Pettersen. The customer asked Ms. Vix, who was working late, to check the

date of her last perm. When Ms. Vix went to check Ms. Pettersen's client cards, all of her original cards were gone. To paraphrase Ms. Vix all that was there were a few cards in pencil, not completely filled out, and the rest were blank. The card for the customer who called was not there. Ms. Vix testified that as of the end of that day, June 19th, she felt that the appellants were about to quit. On the following day, Friday, June 20th, Ms. Vix testified that she was alone in the salon at the end of the day closing up. When she walked by Ms. Chabra's station she noticed that her three boxes of client cards were gone.

That night Ms. Vix made her decision to fire the appellants. Ms. Vix stated that she fired them because they removed all of their client cards. She stated that she needs the cards because they contain all the client information. Ms. Vix said that the appellants had never taken their cards home before.

On the weekend Ms. Vix and her accountant prepared records of employment for the appellants. She stated that she gave them two weeks' pay in lieu of notice.

It is convenient at this point to set out the appellants' evidence on the issue of the removal of their client cards and on the issue of removal of their possessions from the staff room.

Ms. Chabra testified that shortly before she was fired she was in the process of again cleaning her client card boxes and updating/replacing her client cards. She stated that on the Friday night before she was fired (June 20th), she took home all three boxes, half of her perm cards and all of her colour cards. She left half the perm cards at the shop because she had already completed updating them.

Ms. Pettersen testified that she was inspired by Ms. Chabra to update her client cards. Ms. Pettersen stated that she decided to separate her cards into "colour" and "perms" like Ms. Chabra, rather than keeping both types of cards in one file box. To carry out her plan, Ms. Pettersen bought another box at the drugstore and began a process of separating the cards and updating the cards so that each card would contain only the client's most recent treatment. This project started in approximately late May or early June.

Ms. Pettersen stated that on Friday, June 20th, she left her new card box at the salon, with the new, updated cards. It contained very few cards. She said that she took everything else home to work on.

With respect to her items in the back room, Ms. Pettersen stated that her only possessions in the back room were old half-empty boxes containing some old hair-dressing items. She stated that she did not remove the boxes but that Ms. Vix used them (and other boxes) to pack up all her equipment at her station. Ms. Chabra testified that, prior to the smoking dispute, she had taken home a box of books. She stated that the one other box, contained empty boxes, and she threw it in the garbage. She also transferred a bag of rollers to her tray at her work station.

I now return to the chronology of events. When Ms. Pettersen came to work on Monday, June 23rd, with her client cards, she was dismissed at the front door. All of her tools and

equipment had been taken from her work station and were packed up in boxes. Ms. Vix gave her a record of employment, a cheque, and a "statement of earnings", that had been prepared by Ms. Vix and her accountant. Ms. Vix did not tell Ms. Pettersen that she was being dismissed for removing the client cards. Nor did Ms. Vix ask that the cards be

returned. At the hearing Ms. Pettersen stated that she was "unclear" why she was dismissed.

On the same day, Monday June 23rd, which was Ms. Chabra's day off, Ms. Chabra found out about her termination from a client's message that had been left on her home answering machine. Ms. Chabra then called Ms. Vix and went to the salon to pick up her things. All of her equipment had been taken from her station, packed up and put by the door. She received a record of employment, a cheque and a "statement of earnings". Ms. Vix gave no reason for her termination. There was no mention of the client cards.

At the time of termination, Ms. Vix thought that the appellants had positions somewhere else. However, that was not the case. Ms. Chabra testified that she was not planning to quit B & J's. To prove this, she pointed out the following: 1) she had left some of her perm cards at the salon; 2) she had a holiday booked for the end of July and had paid for airline tickets; 3) she was already taking bookings at B & J's for the month of August; and 4) on the day following her firing, namely, June 24th, she applied for unemployment insurance and began seeking new employment. On Wednesday of that week, Ms. Chabra found employment at Jerico's Hair Design, which is also a no-smoking shop. Ms. Chabra testified that she had never met her new employer until after she had been dismissed by Ms. Vix.

Ms. Pettersen also testified that she had not intended to leave B & J's and that she had not searched for another job. After she was fired, Ms. Pettersen went to work at her previous employer's salon until August 5th. Subsequently she began working, by herself, at home.

When customers called for the appellants after the terminations, Ms. Vix gave out their home telephone numbers. Both of the appellants contacted their clients to let them know their new work locations.

While in the employ of Ms. Vix, the appellants were paid one-half of their gross monthly earnings. For statutory holidays, the appellants were paid $56.00: $7.00 per hour for eight hours. In addition, each appellant received ten percent of the gross value of products (such as shampoo) that they sold in the shop.

According to Ms. Vix each of the appellants received two weeks' pay in lieu of notice. However, what the statements of earnings show is that the appellants each received the equivalent of $7.00 per hour for the number of hours that they would have worked during the two week period beginning June 23rd and ending July 4th, 1997. Thus Ms. Chabra, who worked a four day week received, in gross, for the period June 24th to July 4th the sum of $448.00 (64 hours at $7.00 per hour.) Ms. Pettersen, who worked a five day week received, in gross, the sum of $560.00 (80 hours at $7.00 per hour.) However, as Ms. Pettersen pointed out she always earned more than $7.00 per hour and, therefore, if she had worked during the two week period (June 23rd to July 4th) she would have earned more than minimum wage. Ms. Chabra made a similar point in her written submission.

Before concluding this summary of the evidence, I would note that the appellants and Ms. Vix hold differing views on the issue of who owns the client cards. Both the appellants feel strongly that the client cards belong to them. As Ms. Chabra put it in her written submission: "... a hairdresser works their entire career to establish their file boxes, namely a clientelle." And as Ms. Pettersen testified (and I am paraphrasing) "if the salon wants a copy of the cards, they should make a copy of their own." According to Ms. Vix, the client cards belong to "the shop". Ms. Dyck, who was called as a witness by Ms. Vix, and who works as a stylist at B & J's, testified that her client cards belong to both herself and Ms. Vix. It would be safe to say, however, that everyone agreed that client cards should be left at the salon when a stylist is on vacation or away sick. That way the substituting stylist will know what type of colour treatment or perm should be given to the absent stylist's clients.

ANALYSIS

Section 63 of the *Act* provides that after three consecutive months of employment, an employer who wishes to terminate an employee becomes liable to pay compensation for length of service. This statutory liability may be discharged if the employer gives the employee adequate notice of termination, pays wages equal to the notice period to which the employee is entitled, or provides a combination of appropriate notice and wages. The employer may also be discharged from its statutory liability to pay compensation for length of service if the employee quits, retires or is dimissed for just cause. (See: section 63(3)(c) of the *Act.*)

It is clear and settled that the onus is on the employer to establish, on a balance of probabilities, that there was just cause for dismissal.

After carefully reviewing the evidence and the submissions of the parties, I am of the view that Ms. Vix has not met the onus of showing that she had just cause to dismiss either Ms. Chabra or Ms. Pettersen.

Ms. Vix testified that she terminated the appellants' employment because they had removed the client cards. However, I have concluded that the appellants' actions in taking home their client cards did not amount to any wrongdoing, let alone the type of serious misconduct that is required to establish just cause on the basis of a single incident. The appellants had taken their client cards home in order to work on them. Ms. Chabra had left half of her perm cards in a plastic bag in a basket at her station. Ms. Pettersen was coming to work, with her old box of filing cards, when she was fired.

I would go on to add that, in my opinion, the appellants were legitimately entitled to consider the client cards their own. In the case of both appellants, a large number of the cards were brought with them when they started employment at B & J's. They had purchased the file boxes in which the cards were stored and they created and maintained the client cards. They had taken the client cards home before. Not once did either appellant ever receive a warning that the removal of client cards from their work stations would

result in dismissal. Moreover, the employer never created a central filing system where the appellants were asked to record the information that was contained on their client cards.

Ms. Chabra was employed by Ms. Vix for eight years. Pursuant to section 63(2)(b) of the *Act* she is entitled to eight weeks' wages less the amount of $448.00 that she has already received. Ms. Pettersen was employed by Ms. Vix for five years. Pursuant to section 63(2)(b) she is entitled to five weeks' wages less the amount of $560.00 that she has already received. The appellants' wages should be calculated in accordance with section 63(4) of the *Act.*

I would add for clarity that the amount of $448.00 that Ms. Chabra received and the amount of $560.00 that Ms. Pettersen received are not equivalent to two weeks' wages because those amounts were not calculated in accordance with the provisions of section 63(4) of the *Act*.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determinations, dated September 22, 1997, be cancelled. Both Dorothy Ann Chabra and Cheryl Lynn Pettersen are entitled to compensation for length of service as set out above. I refer the calculation of their wages, as well as the calculation of interest thereon, back to the Director.

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Sherry Mackoff
Adjudicator
Employment Standards Tribunal