

An appeal

- by -

514504 B.C. Ltd. operating as Sir 101 Hair Restoration
(the "Employer")

- and by -

Dylan D. Crozier
(the "Employee")

- 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: Ib S. Petersen

FILE No.: 2001/695 and 2001/696

DATE OF HEARING: January 7, 2002

DATE OF DECISION: January 9, 2002

FINAL DECISION

APPEARANCES:

Mr. Paul Fairweather	on behalf of the Employer
Mr. Dylan Crozier	on behalf of himself
Ms. Adele Adamic	on behalf of the Director

OVERVIEW

This deals with two appeals by the Employer and the Employee pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director issued on September 12, 2001. The Determination concluded that the Employee was owed \$1,691.55 by the Employer on account of compensation for length of service.

The Employee filed a complaint against the Employer, the operator of a hair restoration business, where he had been employed from August 5, 1999 to September 5, 2000, claiming for unpaid wages, unauthorized deductions, vacation pay and compensation for length of service. He had been employed as a hair restoration consultant on the basis of salary and commissions.

The Delegate concluded that Mr. Crozier, the Employee, was not owed any commissions and, as well, dismissed his claim for unauthorized deductions. He found, however, in the Employee’s favour with respect to compensation for length of service. He found that Crozier had been terminated. The Employer appeals that Determination and says, *inter alia*, that Crozier resigned.

Mr. Crozier, on the other hand, takes issue with and appeals what he considers erroneous conclusions on the part of the Delegate: (1) that the Employer is not entitled under the employment contract to “split” commission payments between Mr. Crozier and other employees, and (2) that the Delegate erred when he allowed deductions for days not worked.

The Delegate concluded that there was no basis in the employment contract for the “split” commissions. Importantly, however, he noted that even if he adjusted for split commissions and other matters, Mr. Crozier was overpaid by some \$1,769.81. Concerning the issue of deductions for days not worked, the Delegate noted that pay records indicate that adjustment was made for days missed and that Mr. Crozier did not provide contrary evidence. In the result, he dismissed that claim.

FACTS AND ANALYSIS

A hearing was held in the Tribunal's offices on January 7, 2002. The Employer was present. The Employer brought two witnesses, the principals of the Employer. The Director was also represented. The Delegate also attended with counsel, Ms. Adamic. The purpose of the Director's attendance was a narrow one, pertaining to an interim decision made in this matter on December 18, 2001. Mr. Crozier participated via telephone conference.

I turn first to the issue raised by the Director.

In my December 18, 2001 interim decision, I made the following orders:

1. The Sir 101 List be treated as confidential and used only and exclusively for the purposes of the proceedings before the Tribunal.
2. The names of clients on the Sir 101 List must be "blacked out."
3. Upon the conclusion of these proceedings, the Sir 101 List and all copies must be returned to the Employer.

The Director requested that I amend item 3. of my order to allow the Director to maintain copies of the documents in question in the Director's file. This request was not opposed by any of the other parties. The Employer's concern was primarily that Mr. Crozier not have these documents and that they be returned. There is no reason not to grant the Director's request and I amend the order accordingly.

As mentioned both the Employer and the Employee appeals the Delegate's Determination. As Appellants, both bear the onus of showing that the delegate erred on the balance of probabilities. For the reasons set out below, I am of the view that the Employer has met the burden, and that the Employee has not. In the result, the Employer's appeal is upheld and Crozier's appeal is dismissed.

I turn first to the Employer's appeal. The Employer submitted, among others, that Mr. Crozier resigned his employment. It is clear from the Employer's submissions that Mr. Crozier would have been terminated for "cause", based on obtaining employment with a competitor, had he not resigned. It is fair to say that the Employer took issue with the Delegate's findings that it had not provided reasons for the termination. Mr. Crozier candidly admitted that he resigned at the conclusion of a meeting with the principals of the Employer on or about September 5, 2000. Mr. Crozier explained that he had other job offers and sought to negotiate his remuneration. He stated that at the end of the meeting he "just lost confidence and couldn't continue." I questioned Mr. Crozier with respect to this admission but he maintained quite firmly that he resigned. In the result, I uphold the Employer's appeal.

I now turn to Mr. Crozier's appeal. Based on the evidence before me, I consider that there is no merit to his appeal.

Mr. Crozier's primary ground of appeal was that the Employer was not entitled to "split" his commissions. He pointed to his employment contract with the Employer. This contract provided, *inter alia*, for commission payments on a sliding scale. Mr. Crozier was entitled to "7.5% of net revenues received from the sale of hair systems, hair transplants [and] hair treatments." If total monthly sales exceeded \$21,000, the rate was 10%; if monthly sales exceeded \$32,500, the rate was 12.5% etc.

The Delegate agreed with Mr. Crozier that the contract did not provide for "split" commissions and, on the evidence before me, in fact, adjusted the amount Mr. Crozier was entitled to in his favour. In short, it appears to me that the Delegate, in fact, took "split" commissions into account. Mr. Crozier also maintained, at the hearing, that he was entitled to commissions on the full price on hair transplants. This ignores the fact that the Employer, on his own evidence, did not perform those services but paid a physician, who obviously was paid, to do that. While I appreciate Mr. Crozier's point of view, his contract clearly speaks to "net revenues from sales". He received the commission on the 30% paid to the Employer of these procedures. His interpretation of his employment contract is not one that can reasonably be maintained.

The Delegate based his decision of sales and payments received by the Employer on the Employer's records. It is fair to say that Mr. Crozier disagrees with those numbers and suggest that the records were "doctored". At the hearing, however, he did not point me to any document--despite the large volume of copies of contracts, invoices etc. attached to his appeal--that would contradict the Employer's assertions to the Delegate in the course of his investigation. A list of commissions and sales, that forms part of the record before me, shows that Mr. Crozier's monthly sales never exceeded \$21,000 and that he, therefore, is not entitled to the higher commission rate. Counsel for the Employer took Mr. Crozier through a list of commissions and sales and allowed him every opportunity to explain the basis for his disagreement with the Delegate findings. In my view, Mr. Crozier failed to show that the Delegate erred and, accordingly, I dismiss his appeal on this point.

I would like to add, as well, that Mr. Crozier, in his final summation acknowledged that there had been a "serious lack of communications" and, in effect, that this was the first time that "split" commissions had been explained to him and stated that he "would never have taken it this far" [had he understood]. While this is not entirely correct, in view of submissions by the Delegate exactly on that point, it underscores, in my view, the lack of merits to his appeal on this point.

With respect to the final issue before me, deductions for days missed, the Delegate's findings were based on payroll records. There was precious little evidence at the hearing to challenge the Delegate's conclusion on this point. The extent of the evidence before me is Mr. Crozier's explanation that he worked 40-60 hour weeks and "did not punch a time card." He

acknowledged that the days missed were recorded on his pay stubs. Mr. Crozier took issue with the number of days but he did not provide me with any supporting documentation. In the circumstances, I find that he has not met the burden to show that the Delegate erred and dismiss his appeal on this point as well.

Finally, at the conclusion of the hearing, the Employer made note of the fact that Mr. Crozier at the outset of the hearing stated that he did not have any document containing the Employer's clients' names. It became clear to me that, in fact, Mr. Crozier had in his files at the time of the hearing, at least the document referred to above--the list of commissions and sales which contains the names of clients. Mr. Crozier explained that this was inadvertent, that he had shredded other documents in his possession, and that he would forward the document in question to the Employer's counsel.

ORDER

Under Section 115 of the Act, I order:

- The Employer's appeal of the Determination of the Determination dated September 21, 2001 be upheld, and the order for compensation for length of service is cancelled and set aside; and
- The Employee's appeal be dismissed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal