Employment Standards TRIBUNAL

An appeal

- by -

Shohreh Amiri operating as Visio Hair and Skin Care
(the "Employer")

- 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 (as amended)

TRIBUNAL MEMBER: Yuki Matsuno

FILE No.: 2006A/131

DATE OF DECISION: February 2, 2007

DECISION

SUBMISSIONS

Shohreh Amiri	for the Employer
Amanda Welch	for the Director of Employment Standards

OVERVIEW

1. Shohreh Amiri, operating as Visio Hair and Skin Care, appeals a Determination of the Director of Employment Standards dated October 5, 2006 (the "Determination"). In the Determination, a Delegate of the Director (the "Delegate") found that Ms. Amiri, carrying on business as Visio Hair and Skin Care, contravened sections 21 and 58 of the *Employment Standards Act* (the "*Act*") with respect to the employment of Chloe McKinnon. The Delegate ordered Ms. Amiri to pay Ms. McKinnon $2,204.41, representing unpaid wages, vacation pay, and accrued interest. The Delegate also assessed administrative penalties totaling $1,000.00 for breaches of sections 21 and 58 of the *Act*.

2. Ms. Amiri appeals the Determination on the ground that evidence has become available that was not available at the time the Determination was being made. The Tribunal has determined that this matter will be determined on the basis of the parties' written submissions and the record.

3. In her appeal form dated November 12, 2006, Ms. Amiri also indicates that she required a suspension of the Determination. By letter dated November 14, 2006, the Tribunal informed Ms. Amiri of the requirements for a suspension to be carried out under section 113 of the Act, and asked her to for a reply by December 6, 2006 for the suspension request to proceed. No reply was received from Ms. Amiri and therefore the Determination has not been suspended.

BACKGROUND

4. Ms. Amiri, carrying on business as Visio Hair and Skin Care, operated a hair and skin care salon where Ms. McKinnon worked as a hair stylist from January 11 to August 1, 2006. For January and February 2006, Ms. McKinnon was paid on a 50% commission basis; from March 2006 to the time she left the salon, she was paid on the basis of a chair rental system, in which she paid Ms. Amiri $900.00 per month in chair rental fees. This amount was deducted monthly from Ms. McKinnon's pay. Ms. Amiri also made other deductions from Ms. McKinnon's pay: both the employer's and the employee's portion of EI premiums; 15% of the revenue from clients that Ms. Amiri referred to Ms. McKinnon; and the cost of any product used by Ms. McKinnon in the salon. On Ms. McKinnon's last paycheque, Ms. Amiri also made a deduction of $668.75, which was one-third of the cost of an advertising campaign for the salon.

5. McKinnon filed a complaint with Employment Standards Branch on January 16, 2006, claiming that she was owed monies for the 15% commission for referrals, the employer portion of EI premiums, the cost of product used by her in the salon, and the cost of the advertising campaign.

6. There was a hearing held into the matter on April 24, 2006. Both Ms. Amiri and Ms. McKinnon attended the hearing and gave testimony. No other witnesses were called to testify, although Ms. Amiri entered

into evidence letters from two stylists. The main issue to be determined was whether Ms. McKinnon was an employee or a contractor. Ms. Amiri argued that Ms. McKinnon was a self-employed contractor, as is standard in the industry. She alleged that all deductions were explained to Ms. McKinnon before she started working and Ms. McKinnon agreed to those deductions. With respect to the 15% commission on referrals, Ms. Amiri said that Ms. McKinnon was not disclosing referred clients who paid in cash, and therefore Ms. Amiri deducted 15% of the revenue for all clients who paid by credit card or debit. Ms. Amiri admitted that she was mistaken to deduct the employer premiums from Ms. McKinnon's pay; no deductions for EI premiums should have been deducted at all. She argued that Ms. McKinnon agreed to pay for a portion of the advertising campaign; this was supported by the stylists' letters she submitted in evidence. Ms. Amiri also argued that Ms. McKinnon still owed her one month's chair rental.

7. On the other hand, Ms. McKinnon argued that she was Ms. Amiri's employee. She said that she agreed to pay for product at the beginning of her work at the salon because she was new to the industry and did not know any better. She also agreed to the referral commission, but said that many of the deductions were incorrect, and that in any case the deductions were not allowed under section 21 of the *Act*. She also argued that the deduction for the employer's portion of EI premiums is also disallowed under section 21. Ms. McKinnon denied agreeing to pay for the advertising campaign and argued that, again, those costs cannot be deducted form her pay under section 21. Ms. McKinnon denied that she owed any chair rental fees to Ms. Amiri.

8. In the Determination, the Delegate found that Ms. McKinnon was an employee of Ms. Amiri. The Delegate applied the definitions in the *Act* and tests for determining whether a person is an employee or a contractor, and found that there was no evidence to support the assertion that Ms. McKinnon was a contractor, other than Ms. Amiri's testimony that contractor arrangements are common in the industry. The Delegate found, as a result, that some of the deductions made by Ms. Amiri were not allowed under the *Act*. The Delegate found that Ms. Amiri contravened section 21(2) of the *Act*, which prohibits employers from passing on the costs of the business to the employee, by deducting the cost of product and advertising from Ms. McKinnon's pay. The *Act* operates regardless of whether the employee consented to those deductions or not. The Delegate also found that Ms. Amiri's practice of charging a 15% commission for referrals, as well as her deduction of the employer's portion of EI premiums, contravened section 21(1) of the *Act*, which prohibits the withholding of wages. In addition, the Delegate made a finding that Ms. Amiri did not pay Ms. McKinnon vacation pay during her employment, in contravention of section 58 of the *Act*. The Delegate also found that Ms. McKinnon did not owe Ms. Amiri any chair rental fees.

9. In response to Ms. Amiri's appeal of the Determination, the Delegate argues that Ms. Amiri is merely rearguing the merits of her case. Ms. McKinnon also wrote a response to Ms. Amiri's appeal, dated November 30, 2006. Ms. Amiri wrote a final submission dated January 3, 2007. I have considered all of these submissions in my decision, below.

ISSUE

10. Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?

ARGUMENT AND ANALYSIS

11. Most, if not all, of Ms. Amiri's submissions express disagreement with the Delegate's factual findings in the Determination, and in effect invite the Tribunal to find errors of fact. However, to do so is beyond the jurisdiction of the Tribunal. An appeal of a determination is not an opportunity to have the case re-heard on the merits. Section 112(1) of the *Act* outlines the grounds on which a person may appeal a determination:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

12. Ms. Amiri appeals on the third ground, i.e. that evidence has become available that was not available at the time the Determination was being made. The burden is on Ms. Amiri to establish the basis of her appeal. Tribunal jurisprudence has established that in order for an appeal to succeed on this ground, all of the following four conditions must be met before the evidence will be considered:

> 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> 2. the evidence must be relevant to a material issue arising from the complaint;
>
> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> 4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

(*Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*., BC EST #D171/03).

13. Ms. Amiri does not specify in her appeal form what evidence she is referring to when she claims that evidence has become available that was not available at the time of the hearing. The evidence submitted by Ms. Amiri in her appeal can be described as follows: (a) the information contained in her written submission, dated November 12, 2006, with attachments (the "Written Submission and Attachments"); (b) a letter dated January 3, 2007 written by Ainslie Koopmans (the "Koopmans letter") and (c) a letter dated January 2, 2007 written by Eva Wilk (the "Wilk letter"). Both the Koopmans letter and the Wilk letter were attached to Ms. Amiri's final submission, dated January 3, 2007. I have assessed this evidence against the *Davies* conditions and after careful consideration, I find that none of the evidence meets all four conditions outlined in *Davies*.

14. The Written Submission reiterates Ms. Amiri's version of events (as she writes, "To help you understand my position I am going to recap the chronology of events") and does not appear to offer any new information with respect to the issues in the case. In my view, this is not new evidence. Clearly, Ms.

Amiri could have presented this evidence at the time of the hearing, if not before. Further, the Attachments were all entered into evidence before the Delegate in the hearing

15. The Koopmans letter is written by a manager of the hair salon at which Ms. Amiri has been renting a chair. The letter says, in part: "As is common practise [*sic*] in the salon business, chair rentals are required to be independent contractors and to pay both portions of their EI. This means both the employer and the employee portions. Chair rentals are also responsible for purchasing their own products for use with their clients, including colour. Finally, chair rentals must cover their own advertising costs, including the cost of business cards." This evidence of industry practice could have been presented to the Director prior to the Determination being made. Ms. Amiri does not indicate any reason why she did not do. Ms. Amiri, as a practitioner in industry herself, appears to have presented similar evidence at the hearing in any event. This evidence also fails to fulfil the first condition, it certainly fails to fulfil the fourth condition. The Koopmans letter could not, on its own or considered with other evidence, have led the Delegate to another conclusion on the material issue of whether Ms. McKinnon was an employee or a contractor. That issue was decided by the Delegate by applying the appropriate legal tests to the evidence regarding Ms. McKinnon's conditions of work at the salon, and was not based on any general assertions about industry practice.

16. The Wilk letter is written by Ms. Eva Wilk, who worked as a stylist at Ms. Amiri's salon at the same time as Ms. McKinnon. Ms. Wilk also wrote one of the letters presented by Ms. Amiri at the hearing. Some of the contents of the Wilk letter cover the same ground as the letter written by Ms. Wilk for the hearing. The Wilk letter fails the first condition, as this evidence clearly could have been presented to the Director at the time of the hearing or before.

17. As a result, the new evidence cannot be considered. The Employer's appeal on this ground is dismissed.

ORDER

18. Pursuant to Section 115 of the *Act*, I order that the Determination dated October 5, 2006 be confirmed in the amount of $3,204.41, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal