



An appeal

- by -

Studio 1 Hair Design Inc.  
("Studio 1")

- 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:** Shafik Bhalloo

**FILE No.:** 2014A/30

**DATE OF DECISION:** April 29, 2014

## DECISION

### SUBMISSIONS

Randeep Kaur Sidhu

on behalf of Studio 1 Hair Design Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Studio 1 Hair Design Inc. (“Studio 1”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 3, 2014 (the “Determination”). In that Determination, a delegate of the Director ordered Studio 1 to pay its former employee, Navjot Chhina (“Ms. Chhina”), \$4,125.71 in wages and interest. The Director also imposed three (3) administrative penalties in the total amount of \$1,500.00 for Studio 1’s contraventions of sections 17, 18 and 28 of the *Act*, for a total amount payable of \$5,625.71.
2. Studio 1 appeals the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination. Studio 1 is seeking the Tribunal to cancel the Determination.
3. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Accordingly, at this stage, I will assess the appeal based solely on my review of the Reasons for the Determination (the “Reasons”); the written submissions of Randeep Kaur Sidhu (“Ms. Sidhu”), one of the directors of Studio 1, and the “record” that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Ms. Chhina and the Director may be invited to file further submissions. Conversely, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

### ISSUE

4. The issues in this appeal are:
  - (i) Did the Director err in law in making the Determination?
  - (ii) Did the Director breach the principles of natural justice in making the Determination?

### THE FACTS

5. Studio 1 operates a beauty salon and was incorporated on February 28, 2013. Ms. Sidhu and Baljinder Kaur Nahal (“Ms. Nahal”) are its directors.
6. On July 11, 2013, Ms. Chhina filed a complaint against Studio 1, under its former name, The Edge Hair and Skin Studio (“The Edge”), claiming that she was employed as a hairdresser and an aesthetician from April 18, 2013, to June 21, 2013, at the rate of pay of \$10.25 per hour, but her employer failed to pay to pay her all wages (the “Complaint”).
7. The delegate of the Director held a hearing of the Complaint on January 21, 2014 (the “Hearing”). The Hearing was attended by Ms. Sidhu on behalf of Studio 1 and by Ms. Chhina on her own behalf, together with her witness, Kulwinder Kaur (“Ms. Kaur”). Ms. Kaur was also a former employee of Studio 1, who was responsible for introducing Ms. Chhina to Studio 1’s owners.

8. At the Hearing and in the Reasons, the delegate considered the following three (3) questions:
1. Did Ms. Chhina work for Studio 1 from April 18, 2013, to June 21, 2013?
  2. If Ms. Chhina worked, what was her wage rate?
  3. Is Ms. Chhina entitled to wages under the *Act* and, if so, in what amount?
9. With respect to the first question, Ms. Sidhu argued that Ms. Chhina was not employed by Studio 1, but she was a disgruntled customer of Studio 1 bringing a false claim for wages against Studio 1. The delegate, in rejecting Ms. Sidhu's contention and finding Ms. Chhina was indeed an employee of Studio 1 during the material period in question, examined the evidence of both parties, and made the following credibility findings with respect to that evidence at pages R7 to R9 of the Reasons:

Ms. Sidhu contends Ms. Chhina never worked for Studio 1 whereas Ms. Chhina claims to have worked as a hair dresser and aesthetician for just over two months.

In this case the positions of the parties are dramatically in conflict with each other and my decision turns entirely on the credibility of the witnesses.

In assessing credibility, factors to consider include the manner of the parties (for example, if the parties are clear, forthright and convincing or evasive and uncertain). However, of greater significance is the individuals' ability to recall details; the consistency of what is said; the reasonableness of the story; the presence or absence of bias, interest or other motive; and the capacity to know (*Werachai Laoha*, BC EST #370/01).

Ms. Chhina provided detailed testimony in regards to how she found the job, the conversations she had with her Employer, the way she was supposed to be compensated and the way her work would be tracked. Further Ms. Kaur's testimony was consistent with her story. Specifically, Ms. Chhina described the form that was required to be filled out to track revenue and tips almost exactly as Ms. Kaur described it. As well, Ms. Kaur's explanation as to what happened when Ms. Chhina asked for her wages was also very detailed and consistent with Ms. Chhina's testimony.

Ms. Chhina provided phone records showing numerous phone calls to Ms. Sidhu's phone number and Ms. Nahal's phone number. Ms. Sidhu explained that the 69 minute phone call in July was in regards to a service with which Ms. Chhina was not happy, but there was no explanation as to why a client would make numerous phone calls to the personal phone numbers of the salon owners rather than to the salon itself regarding her disappointment in the services she received.

Ms. Sidhu states she would have no need to have long conversations with an employee. It appears that most of the phone calls were short lasting one to two minutes, but the two longer conversations took place on July 9, 2013 and July 11, 2013. On July 11, 2013, Ms. Chhina filed her complaint with the Employment Standards Branch. This would appear to be consistent with her story that the conversation revolved around her unpaid wages.

Ms. Sidhu did question Ms. Chhina's lack of knowledge of the change in the salon's name from The Edge to Studio 1. Although in some cases it would be unusual for an employee to be unaware of their company's name, I find that since the change occurred shortly before Ms. Chhina allegedly started her employment with the salon, it is not completely unreasonable for her to have believed the name of the salon was still The Edge.

On the other hand, Ms. Sidhu's story sounded as if she was concocting it as the hearing progressed. According to Ms. Sidhu, Ms. Chhina bought a \$400.00 package for services but when I asked her what services had been provided to Ms. Chhina, Ms. Sidhu's answer was vague. She simply recited the types of services the salon provided. If Ms. Sidhu had indeed spent 69 minutes speaking to Ms. Chhina in regards to her unhappiness with her service, I would expect that Ms. Sidhu would have been able to provide a

detailed account of the services provided and why Ms. Chhina was unhappy. Only later in the hearing did Ms. Sidhu state Ms. Chhina was unhappy that her nose had peeled as a result of her service.

Further, Ms. Sidhu's explanation as to how Ms. Chhina may have obtained a copy of her salon's key stretches the limits of belief. Ms. Sidhu claims there may be many keys to her salon in the hands of any number of individuals as she provides them to individuals training for positions in her salon. She then demanded the key back due to privacy concerns. These two positions are completely at odds with each other and the fact that Ms. Sidhu basically acknowledged that the key was a key to her salon and demanded that it be returned leads me to believe that the only explanation is that Ms. Chhina was given the key. It is also more likely that a key would be given to Ms. Chhina if she was an employee rather than if she were a client.

I also found it interesting that at one point during the hearing, Ms. Sidhu referred to Ms. Chhina as "Joti" when she asked Ms. Kaur why she wouldn't have paid her wages. This is a nickname that Ms. Chhina claims she was called by at the salon. Ms. Sidhu's use of this nickname suggests a familiarity beyond what Ms. Sidhu claims to have had with Ms. Chhina as a client of the salon.

Lastly, I also find it unlikely that Ms. Chhina would choose to drive to Cloverdale for salon services when the Employer has another location that is located a few minutes from her residence.

For the foregoing reasons, I find Ms. Chhina's testimony to be credible and find that she worked for Studio 1 from April 18, 2013 to June 21, 2013.

10. Having found Ms. Chhina worked for Studio 1 during the material period, the delegate then went on to determine what her wage rate was. In this regard, the delegate noted in the Reasons that there was no evidence with respect to the wage rate that was established between the parties and, therefore, decided to enforce the minimum wage rate established in the *Employment Standards Regulation* (the "Regulation") of \$10.25 per hour.
11. The delegate then proceeded to determine what wages Ms. Chhina was entitled to under the *Act*. Since Studio 1 took the position that it did not employ Ms. Chhina, there understandably was no evidence adduced by Studio 1 of any hours worked by Ms. Chhina. Against that the delegate considered the calendar containing notations on which Ms. Chhina recorded her hours worked and found that information to be a credible source that corroborated Ms. Chhina's own testimony that her shifts at Studio 1 were from 10:00 a.m. to 7:00 p.m. Monday through Friday. In addition to the latter, the delegate also relied upon supportive evidence of Ms. Kaur who was, during the period of Ms. Chhina's employment, also employed with Studio 1. Based then on the testimony of Ms. Chhina, the calendar she produced, and the testimony of Ms. Kaur, the delegate determined that during the period April 18, 2013, to June 21, 2013, Ms. Chhina worked forty 9-hour shifts and was entitled to \$3,280.00 in regular wages and \$615.00 in overtime wages. He also concluded that she was entitled to be paid \$155.80 in annual vacation pay in accordance with section 58 of the *Act*, as well as \$74.91 in interest on the outstanding wages.
12. The delegate also found that Studio 1 failed to establish pay periods at least semi-monthly and failed to pay Ms. Chhina all wages within eight (8) days of the end of the last full pay period ending June 15, 2013, and thereby contravened section 17 of the *Act*. As a result the delegate levied an administrative penalty of \$500.00 against Studio 1 pursuant to section 29(1) of the *Regulation*.
13. The delegate also found Studio 1 failed to pay all wages owed to Ms. Chhina within six (6) days of the latter quitting her employment on June 21, 2013 and, issued an administrative penalty of \$500.00 for contravention of section 18 of the *Act* against Studio 1.
14. Finally, the delegate also levied a \$500.00 penalty under the *Regulation* for contravention by Studio 1 of section 28 of the *Act* for failing to keep payroll records for Ms. Chhina.

## SUBMISSIONS OF STUDIO 1

15. Ms. Sidhu has submitted written submissions on behalf of Studio 1. I have very closely reviewed those submissions and while I do not see the need to reiterate those submissions verbatim here, I note that the submissions contained in numbered paragraphs from 1 to 13, largely contain Studio 1's dispute with the delegate's credibility assessments and findings of fact in the Reasons, with two (2) exceptions.
16. The first exception is in paragraph 2, where Ms. Sidhu indicates that the delegate, during the hearing, unilaterally changed the start date for the "non-payment of wages" indicated on Ms. Chhina's Complaint Form from the 19<sup>th</sup> of April 2013 to the 18<sup>th</sup> of April 2013.
17. The second exception is found at paragraph 11 of the submissions, where Ms. Sidhu states, in response to the delegate's alleged comment that she failed to ask Ms. Chhina "any valid questions", she is in the beauty industry and not a qualified lawyer and, therefore, she does not know "what it takes to ask questions like a lawyer".
18. In the balance of the written submission appearing in the non-numbered paragraphs, under the heading "End Argument", Ms. Sidhu reiterates the argument she made at the Hearing that Ms. Chhina was not an employee, but an unhappy customer of Studio 1, and expresses her disillusionment and disappointment with the outcome in the Determination, stating that she did not know how easy it was "for somebody to just file a complaint and get paid, for something they never earned".
19. On the last page of the written submissions, Ms. Sidhu complains about the first delegate who was involved in the Complaint prior to the Hearing, as well as the second delegate who conducted the Hearing. She felt that the pre-hearing delegate spoke to her rudely and the delegate who conducted the Hearing told her to be considerate when Ms. Chhina "openly told [her] to 'shut-up'" at the Hearing. She felt that there was a double standard in the treatment she was afforded relative to Ms. Chhina and that she was discriminated against by both delegates. She contends that she was not given "a fair chance to be heard" and that neither delegate "paid attention" to what she was saying, and that her "words were twisted and used against [her]".
20. Ms. Sidhu also complains that Ms. Chhina was being given advice by the delegate during the Hearing and questions the fairness of the trial, although she does not explain what advice the delegate was giving Ms. Chhina. She also claims that the delegates threatened her to settle the Complaint, and questions the fairness of the Determination.
21. I also note that Ms. Sidhu makes a further submission dated April 9, 2014 in response to Tribunal's letter of March 27, 2014 asking her to respond if she had any objections to the completeness of the Director's "record". In the latter submission, she states her objections to the "record" "remain the same" as those she described in the appeal sent to the Tribunal initially and then proceeds to reiterate some of the same substantive written submissions she made earlier with the filing of the appeal of Studio 1.
22. I also note that in the same submission of April 9, 2014, Ms. Sidhu, in paragraphs 2 to 7 inclusive, carries on questioning the delegate's findings or conclusions of fact. In paragraph 1, she questions whether Ms. Chhina's witness, Ms. Kaur, should have had a "neutral interpreter". Ms. Sidhu contends that the questioning of Ms. Kaur "looked very well-rehearsed and practiced". It is not clear whether she is referring to questioning of Ms. Kaur by Ms. Chhina in examination in chief or questioning by the delegate.
23. I also note that Ms. Sidhu questions the delegate's note-taking in English because she states that "80% of the conversation with the witness 'Kulwinder' was in Punjabi". She questions the credibility of these notes.

## ANALYSIS

24. Section 112 of the *Act* delineates only three (3) grounds upon which an individual may appeal a determination. It provides:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (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.
25. As indicated previously, Studio 1 has appealed the Determination on the basis of the “error of law” and “natural justice” grounds of appeal. I will deal with each ground of appeal under separate headings below.
- i. Error of Law*
26. The often-quoted decision of the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) describes the following elements as constituting an error of law:
- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  - 2. a misapplication of an applicable principle of general law;
  - 3. acting without any evidence;
  - 4. acting on a view of the facts which could not reasonably be entertained; and
  - 5. adopting a method of assessment which is wrong in principle.
27. Errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law (see *Britco Structures Ltd.*, BC EST # D260/03).
28. Further, it should be noted that the Tribunal does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact, which may amount to an error of law (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05). In *Re Funk*, BC EST # D195/04, the Tribunal expounded on the latter point stating that the appellant would have to show that the fact finder made a “palpable and over-riding error” or that the finding of fact was “clearly wrong” to establish error of law.
29. In the case at hand, it is clear to me that the Ms. Sidhu is dissatisfied with the findings of fact made by the delegate leading to the latter’s conclusion that Ms. Chhina worked for Studio 1. While I have not set out each and every finding of fact made by the delegate in the Reasons and challenged by Ms. Sidhu in her written submissions here, I have reviewed all of Ms. Sidhu’s submissions very carefully and I am not persuaded the delegate made any errors that would come within the definition of error of law expounded in *Gemex*, *supra*. I am also not persuaded that the delegate made any palpable or over-riding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of evidence that could not reasonably be

entertained in this case. To the contrary, I find the delegate's conclusion of fact that Ms. Chhina was employed with Studio 1 at all material times supported by evidence.

30. I find that Ms. Sidhu, in this appeal, is attempting to re-argue the matters that were before the delegate during the Hearing with a view to obtaining a more favourable decision. This is inappropriate and impermissible on appeal of a determination, and contrary to the stated objective of the *Act* in section 2(d), namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. In the result, I find there is no meritorious basis for the error of law ground of appeal advanced by Studio 1.

**ii. Natural justice**

31. With respect to the natural justice ground of appeal advanced by Studio 1, I note that in *Re: 607730 BC Ltd. (c.o.b. English Inn and Resort)*, BC EST # D055/05, the Tribunal explained the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker.

32. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWT Business World Incorporated* BC EST #D050/96).

33. The onus is on Studio 1 to show that the delegate failed to observe the principles of natural justice in making the Determination. I am not convinced, based on Ms. Sidhu's submission, that the delegate violated or infringed any procedural rights of Studio 1. There is no evidence or persuasive evidence that shows that Studio 1 was denied an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

34. I do not find persuasive Ms. Sidhu's bare assertions that both the pre-Hearing delegate and the delegate who adjudicated the Complaint at the Hearing spoke rudely to her or "twisted" her words and "used [them] against [her]" or did not pay attention to what she was saying. I also do not find persuasive Ms. Sidhu's bare assertions that the delegate was giving Ms. Chhina advice during the Hearing nor do I find material her assertion that the delegate was making notes in English when Punjabi may have been spoken by one or another witness during the Hearing.

35. I find at the core of Ms. Sidhu's argument under the natural justice ground of appeal is her disagreement with the credibility assessment and factual findings of the delegate with respect to the penultimate issue of whether Ms. Chhina was employed with Studio 1. On the latter issue, the delegate found Ms. Sidhu's evidence inconsistent and unbelievable and preferred the evidence of Ms. Chhina and her witness, Ms. Kaur, as explained in the passage quoted from the Reasons under the heading "The Facts" above. I find the delegate's credibility determination in this regard consistent with the principles articulated by the British Columbia Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions...

36. It is also not for this Tribunal to second-guess the Delegate's determination pertaining to the credibility of witnesses and their evidence, especially when the delegate is in a more advantageous position to view and assess the witnesses and their demeanour when presenting their evidence.
37. In the circumstances, I do not find Ms. Sidhu and Studio 1 to have made out a sufficient case to establish a breach of natural justice on the part of the Director in making the Determination. I therefore dismiss the appeal of Studio 1.

### **ORDER**

38. Pursuant to section 114(1)(f) of the *Act*, I am dismissing this appeal on the ground that it has no reasonable prospect that it will succeed, and in accordance with subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**