



An appeal

- by -

Astrit Anton Kashari carrying on business as Monaco Hair Salon
("Mr. Kashari")

- 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: Carol Ann Hart

FILE No.: 2008A/4

DATE OF DECISION: April 11, 2008

DECISION

SUBMISSIONS

Anton Kashari	on his own behalf (Anton Kashari, carrying on business as Monaco Hair Salon)
Angelle Holmes	on her own behalf
Ian MacNeill	on behalf of the Director

OVERVIEW

1. This is an appeal by Anton Kashari, carrying on business as Monaco Hair Salon (“Mr. Kashari”), pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), of a Determination of the Director of Employment Standards (“the Director”) issued on December 14, 2007 (the “Determination”).
2. The Delegate of the Director (the “Delegate”) determined that Mr. Kashari had contravened sections 17, 18, 28, 46, and 83 of the *Act*, and that Angelle Holmes was entitled to wages, annual annual vacation pay, statutory holiday pay, compensation for termination of her employment, and interest in the total amount of \$1111.44. The Delegate imposed five penalties of \$500.00 each under section 29(1)(c) of the *Employment Standards Regulation* in the total amount of \$2500.00.
3. Mr. Kashari seeks to have the Determination cancelled on the basis that the Delegate failed to observe the principles of natural justice and erred in law in making the Determination.
4. Mr. Kashari did not request an oral hearing on the Appeal Form. The Tribunal has concluded that an oral hearing is not required, and that the appeal can be properly addressed through written submissions.

ISSUES

5. The issues in this case are the following:
 1. Did the Delegate fail to observe the principles of natural justice in making the Determination?
 2. Did the Delegate err in law in making the Determination?

BACKGROUND

6. According to the Determination, Angelle Holmes began working on March 2, 2008 as a trainee and hair stylist in Monaco Hair Salon, which was operated by Mr. Kashari. The Delegate concluded that Ms. Holmes was an employee covered by the *Act*, who was entitled to be paid at the minimum wage for her training, and the hours she worked as a stylist. The Delegate further determined that when Ms. Holmes asked to be paid for all of the hours she had worked, her employment was terminated on May 25, 2007.

7. Mr. Kashari was ordered to pay termination compensation under section 83(1)(a) of the *Act* for refusing to continue to employ Ms. Holmes when he learned that she might file a complaint under the *Act*.

ARGUMENT

For the Appellant

8. Mr. Kashari raised nine concerns in a document entitled *Monaco Hair Salon Appeal* which was stamped as being received by the Employment Standards Tribunal on January 17, 2008. Under each of the first eight points, Mr. Kashari outlined an area of concern with what was written in the Determination by the Delegate, and then wrote “*That is a lie*” under each point. He then proceeded to explain for each of his points of contention why he disagreed with the Delegate.
9. Mr. Kashari maintained that the findings and conclusions of the Delegate were “*unjust*” because they were based on what he referred to as “*lies*” and “*fraud*” perpetrated by Angelle Holmes.
10. In his final submissions, Mr. Kashari reviewed his evidence as to what had occurred between the parties, and outlined what he contended was untruthful and fraudulent about the evidence of Ms. Holmes.

For the Respondent

11. Ms. Holmes submitted that the Determination should be upheld. The Delegate had considered the evidence presented by both parties at the hearing, and had produced a fair Determination.

For the Director

12. The Delegate submitted that the appellant had not identified any error of law in the Determination. Rather, he was attempting to re-argue issues which had been addressed in the hearing, and in the Determination.
13. It was the position of the Delegate that none of the issues set out in the Appeal addressed the contention of the appellant that there had been a denial of natural justice. The appellant had been given the opportunity to respond to the allegations, and the arguments of the appellant had been considered. A hearing was conducted, during which Mr. Kashari was given the opportunity to hear the evidence of Ms. Holmes, cross-examine her, and present his own evidence.
14. The Delegate addressed in some detail each of the areas raised by Mr. Kashari in his numbered points set out in the document entitled *Monaco Hair Salon Appeal*. The Delegate also pointed out that some of the attachments Mr. Kashari submitted with the appeal were not documents that formed part of the record which was before the Delegate at the time of the Determination. He maintained that such evidence should not be considered as part of the appeal.

ANALYSIS

15. Section 112(1) of the Act sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

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.

16. The appellant has filed his appeal based on the grounds set out in section 112(1)(a) and (b) of the *Act*, as set out above. Although Mr. Kashari has only ticked boxes on the Appeal Form in respect of the grounds set out in sections 112(1)(a) and (b), it is apparent from the documentation filed with the appeal that section 112(1)(c) must also be addressed. I will address each of these grounds in turn below.

1. Did the Delegate err in law in making the Determination?

17. In a number of decisions of the Employment Standards Tribunal, panels have adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the 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.

18. Mr. Kashari has not argued that the Delegate erred in the legal analysis applied to the facts as found, and I cannot conclude that this was the case. In reality, the appellant contends that the Delegate erred in the findings of fact against which the legal analysis was applied.

19. The Tribunal has accepted that errors on findings or conclusions of fact can amount to error of law in some circumstances. In this regard, an appellant must show either there was no evidence to support the findings of fact made, or that a view of the facts was taken by the Director that could not reasonably be entertained based on the evidence that was before the Director (see *Gemex*, *Supra.*).

20. In each of the first eight concerns outlined in the *Monaco Hair Salon Appeal* document, Mr. Kashari disputes points written in the Determination by the Delegate. For each point, Mr. Kashari indicated “*That is a lie*”, and then provided his reasons for this assertion. Mr. Kashari takes issue with some of the areas in which the Delegate preferred the evidence of Ms. Holmes to that of Mr. Kashari.

21. Points numbered 1-3 in the *Monaco Hair Salon Appeal* document were all addressed by the Delegate in the *Findings and Analysis* section of the Determination, at pages 11 to 13. The Determination shows that in making findings and conclusions, the Delegate considered the evidence of both parties.
22. In point 4, the concern raised by Mr. Kashari on appeal was also considered by the Delegate in the Determination, and a decision with reasons was set out at page 13 of the Determination.
23. In point 5, Mr. Kashari appears to take issue with the conclusion of the Delegate that he had failed to maintain records of hours worked and wages paid during the training period. He notes that the records were kept “*by Angelle herself*”. Pursuant to section 28 of the *Act*, the duty is on the employer to keep these records.
24. Similarly, in point 6, Mr. Kashari indicated that Ms. Holmes was to ensure that annual vacation pay calculations were done. As set out at page 19 of the Determination, it is the employer who is obligated under section 58 of the *Act* to ensure that the employee receives annual vacation pay.
25. In Mr. Kashari’s point number 7, he raises the matter of the manner in which Ms. Holmes was to be paid. At pages 14 and 15 of the Determination, the Delegate considered the evidence and arguments of both parties in this regard in arriving at reasoned conclusions. Mr. Kashari simply disagrees with the findings and makes the same submission on appeal that he made to the Delegate.
26. In point 8, Mr. Kashari maintained that the Delegate had not believed him regarding a promise to give Ms. Holmes a plane ticket as a bonus. Although the fact that the parties had discussed the plane ticket was raised at pages 8 and 14 of the Determination, the Delegate did not make any specific findings about the plane ticket. Consequently, this point is not relevant to this appeal.
27. In Mr. Kashari’s final point, number 9, he asks for a “*higher government office to take this case...*”. This appeal to the Tribunal is the remedy which Mr. Kashari chose to pursue in the circumstances.
28. Mr. Kashari has done nothing more in this appeal than re-assert the facts as he presented them to the Delegate, and seek to have the Tribunal reach a different conclusion on those facts. As the Tribunal indicated in *Britco Structures Ltd.*, BC EST #D260/03, that kind of circumstance alleges an error in findings of fact - a matter that is not included as a ground of appeal in Section 112 of the *Act*.
29. As the Tribunal has indicated on many occasions, an appeal is not an opportunity to re-argue a case. The role of this Tribunal is not to re-weigh the evidence before the Delegate simply because Mr. Kashari takes the position that it is wrong, and accuses Ms. Holmes of being a liar. He must provide persuasive evidence that the conclusion reached by the Delegate is unsupported by the evidence which was before him.
30. It is not appropriate for the Tribunal to interfere with the findings of fact made by the Director even if the Tribunal might not have reached the same findings of fact, unless they amount to the kind of errors contemplated by s.112. Clearly there was evidence, the material on record which is identified in the Determination, that reasonably supported the conclusions of the Delegate.
31. I am not satisfied that Mr. Kashari has met the onus of establishing that the view of the facts taken by the Delegate was one that could not be reasonably entertained from the evidence that was presented to him. I dismiss the appeal as brought on the ground of error in law.

2. Did the Delegate fail to observe the principles of natural justice in making the Determination?

32. 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.
33. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).
34. There is no evidence of a denial of natural justice on the Appeal Form, or in the materials filed with the appeal. There is also no evidence that the process, including the oral hearing conducted on October 4, 2007 by the Delegate, was unfair. The parties had the opportunity to present documents and explain their positions. The appellant did not allege that the Delegate had refused to consider his evidence or submissions, or was not an independent decision maker. Clearly, the appellant takes issue with the findings which were made by the Delegate in the Determination. It was not shown that there was a denial of natural justice, and the appeal, as brought on this ground is dismissed.
35. Finally, although Mr. Kashari has not specifically alleged that there is new and relevant evidence as one of the grounds for his appeal, he did provide some new documentation with the appeal. Under section 112(1)(c) of the *Act*, an appeal may be brought on the basis that evidence has become available that was not available at the time the Determination was made. However, the appellant provided no reason as to why the new documentation he submitted would constitute new and relevant evidence which was not available at the time the Determination was made. Mr. Kashari also did not provide any convincing argument that the result in the Determination would have been different had the Delegate been given the new evidence submitted with the appeal before he made the Determination.
36. The appellant has failed to establish that there was a denial of natural justice, or an error in law. The appeal is dismissed.

ORDER

37. I order pursuant to Section 115 of the Act, that the Determination dated December 14, 2007 is confirmed, together with any interest which may have accrued.

Carol Ann Hart
Member
Employment Standards Tribunal