Employment Standards TRIBUNAL

An appeal

- by -

Sol Station Body Bar Inc. and Cal-Terra Developments Ltd.
(the "Appellant")

- 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:** Elena Miller

**FILE No.:** 2015A/58

**DATE OF DECISION:** July 15, 2015

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Terry Magnus | on behalf of Sol Station Body Bar Inc. and Cal-Terra Developments Ltd. |

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Sol Station Body Bar Inc. and Cal-Terra Developments Ltd. (the "Appellant") appeals a determination (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards on April 8, 2015. The Determination found the Appellant had contravened the *Act* by failing to pay wages, annual vacation pay and compensation for length of service to a complainant, Pilar Hunter ("Ms. Hunter").

2. The Delegate conducted a hearing on November 21, 2014, at which both Ms. Hunter and Terry Magnus ("Mr. Magnus"), the Appellant's sole director and representative, testified. The Delegate found Ms. Hunter was an employee of the Appellant and that the Appellant owed wages to her under the *Act*. He assessed the total wages owing, including interest accrued to the date of the Determination, at $11,352.85. In addition, he imposed $2,500.00 in mandatory administrative penalties, for a total amount payable of $13,852.85.

3. The Appellant takes issue with the Delegate's findings that Ms. Hunter was an employee of the Appellant and that the Appellant owed wages to her under the *Act*. He also takes issue with the Delegate's decision to treat the Appellant as an associated employer for purposes of the *Act*.

## FACTS

4. The factual background is set out in some detail in the Determination and can be summarized as follows.

5. The Appellant is comprised of two corporate entities, Sol Station Body Bar Inc. ("Sol"), incorporated on April 9, 2013, and Cal-Terra Developments Ltd. ("Cal"), incorporated some years earlier. Mr. Magnus is the sole director of both Sol and Cal, and represented both entities at the hearing before the Delegate.

6. Through Cal, Mr. Magnus owns and leases out several retail spaces on the main floor of a strata building in Langford, BC. In early 2013, one of the retail spaces that had been leased as a salon became vacant. Mr. Magnus initially advertised the space for lease, but when that did not produce a result, he placed an advertisement in the employment section of a Victoria website for a salon manager.

7. Ms. Hunter, who had previous experience running a salon, saw the advertisement for a salon manager and contacted Mr. Magnus. She told him she would be interested in running a new salon at his space in the Langford building, but she did not have sufficient funds for needed renovations of the space, equipment and supplies.

8. Mr. Magnus then established Sol as a new company to lease the space from Cal. He prepared a commercial lease agreement dated March 15, 2013, between Cal as the landlord and Sol as the tenant. He had Ms. Hunter sign the agreement on behalf of Sol, even though he was the sole director and owner and she had no ownership interest in Sol. She testified she signed the document because Mr. Magnus told her he needed the lease agreement to show to his bank.

9. Mr. Magnus arranged and paid for the necessary building improvements, equipment and space for the new salon. When Ms. Hunter purchased equipment, supplies and materials for the new salon, he reimbursed her in full. She brought into the salon two pieces of equipment she already owned, a massage table and nail machine, because she preferred to use them when she was servicing clients.

10. Mr. Magnus ordered business cards for Ms. Hunter which indicated she was the "Manager" of Sol. He advertised for other employees and opened a bank account for Sol. Ms. Hunter also had access to the account, but any payments made in excess of $1,000 had to be reviewed by him.

11. The salon opened for business on April 8, 2013. Before the opening date, Mr. Magnus and Ms. Hunter discussed how the business would operate and how she would be compensated. Their evidence diverged to some extent on these points. Mr. Magnus said the arrangement was that Ms. Hunter would operate the salon as if it was her own business, and that he would be the landlord. He also said they were business partners, but because he provided all of the initial financing for Sol, he kept the shares of Sol in his own name.

12. They both agreed it was their mutual intent that, over time, Ms. Hunter would buy out the shares of Sol from Mr. Magnus utilizing the profits from the business. They differed on whether, in the meantime, Ms. Hunter would be paid a guaranteed monthly salary of $3,000 to manage the salon (Ms. Hunter's evidence), or a commission of approximately that amount which could be more or less, however, depending on the salon's monthly revenue (Mr. Magnus' evidence).

13. Ms. Hunter did the bookkeeping and looked after payroll for the salon. She arranged to pay suppliers and other vendors. She arranged for the payment of employees and herself on a bi-monthly basis. For April and May 2013, she was paid $3,000 each month less normal statutory employee deductions. She said she worked 9 to 5, Tuesday through Saturday (the salon was closed Sunday and Monday). She said she kept Mr. Magnus apprised of the general financial situation of the business, including the fact that the salon was struggling financially.

14. After April and May 2013, Ms. Hunter said she was paid $500 in August and $2,500 in October, but received no other wages due to the poor financial situation of the business. She did keep tips earned from the customers she serviced, and she said this money, along with her hope that things would improve, kept her going. The salon continued to operate until December 2013, when Mr. Magnus presented her with another agreement to sign, and she did not sign it. Ms. Hunter said she asked Mr. Magnus for payment of some wages, and he proposed that she go on full commission with no wage guarantee. She turned down the offer and the salon closed December 15, 2013.

15. The Delegate noted that Ms. Hunter argued she was an employee within the meaning of the *Act* who should have been paid monthly wages of $3,000 during her period of employment from April 1 to December 15, 2013. Mr. Magnus argued Ms. Hunter was not an employee but rather a business partner with Sol, and was not promised a monthly salary of $3,000 but rather commission on a sliding scale depending on sales and the profitability of the salon.

16. The Delegate noted the broad definition of "employee" in the *Act* and that there are a number of factors which must be considered when deciding whether a person falls within the statutory definition or not. In this case, the Delegate noted, Ms. Hunter had been hired as a "manager" in response to an advertisement placed in an employment section. The business card Mr. Magnus provided her said she was the manager, and although she was given a relatively large degree of freedom in the day-to-day operation of the salon, Mr. Magnus maintained overall direction and control over Ms. Hunter's running of the business. Mr. Magnus (though his companies Cal and Sol) provided the space for the salon, paid for the needed renovations before

the salon opened, and paid for almost all the equipment, tools and supplies used by workers in the salon, including Ms. Hunter. After considering some other relevant factors in light of the facts, the Delegate concluded:

> I find that when all of the factors are considered together that Ms. Hunter was an employee of Sol. She was not a self-employed business partner, and was not a self-employed independent contractor.
>
> Pursuant to Section 4 noted above, any agreement to waive the requirements of the Act is without effect. As a result, there has been a contravention of the Act. (Determination, p. R15)

17. With respect to whether wages were owed under the *Act*, the Delegate rejected Ms. Hunter's claim that the parties had agreed she would be paid a monthly salary of $3,000. The Delegate found instead their agreement was she would be paid a commission based on monthly revenues, with no guarantee of a minimum salary. The Delegate further found there was not sufficient evidence to determine what commission she should have been paid. However, employees hired on commission must under the *Act* be paid at least the minimum wage for all hours worked in each wage period. On that basis, and her evidence as to the hours she worked, the Delegate calculated the wages owing. The Delegate also found Ms. Hunter was entitled to one week compensation for length of service under section 63 of the *Act*, and vacation pay. He imposed administrative penalties for Sol's failure to keep payroll records for Ms. Hunter and other failures to comply with the *Act* arising from his finding that she was in fact Sol's employee.

18. Finally, the Delegate found that Sol and Cal should be associated under section 95 of the *Act* on the basis that they were both carrying on the business, had common control and direction of it, and there was a statutory purpose for treating them as one employer. With the closure of the salon Sol was no longer in business, and it was therefore "necessary to bring both companies which were involved with the salon into the Act's purview to ensure the minimum standards required by the Act are met": Determination, p. R18.

## ARGUMENT

19. In his appeal submissions, Mr. Magnus for the Appellant states he has five "items in dispute" with respect to the Determination.

20. First, he submits Ms. Hunter was an owner, not an employee. In this regard, he cites a lease agreement he had Ms. Hunter sign on May 22, 2013, which he submits "created an ownership position for Ms. Hunter" and by which he says she "guaranteed the rent would be paid and agreed to the terms".

21. Second, he submits that various moneys were paid to Ms. Hunter during the course of the time she worked at the salon which were in excess of the amount of wages that the Delegate found were owing to her under the *Act*. These moneys include approximately $9,500 Mr. Magnus alleges she took "based on the bank account spreadsheet" and cash he estimates she received of approximately $4,000 over the eight months she worked.

22. Third and fourth, he submits no penalties should have been assessed because the reason for dismissal was "fraud and embezzlement" and because Ms. Hunter was supposed to "keep the books and do reporting" and she "did neither", and because Ms. Hunter improperly took "coupon funds" of approximately $16,000.

23. Fifth, he submits Cal is "a separate financial entity acting as landlord", which only provided financing for tenant improvements by Sol as a new tenant but otherwise has "no financial ties" with it. He says Cal was "only ever a landlord and no other association with Ms. Hunter.

24. Mr. Magnus further submits there is evidence which he says was not available at the time of the determination, namely, "evidence for a claim of fraud against the claimant". It appears, however, that the fraud claim relates to money Ms. Hunter received from a coupon company during her time at the salon, but Mr. Magnus says in his submissions that it was eventually determined "the funds had been deposited to the salon account" and "only at this point were the processing of fraud charges dropped".

25. In addition to his written submissions, Mr. Magnus included with his appeal a copy of the Determination which he has annotated with handwritten comments on various statements and findings made by the Delegate.

## ANALYSIS

26. Under section 112(1) of the *Act*, a determination may be appealed on the grounds that (a) the director erred in law, (b) the director failed to observe the principles of natural justice in making the determination; or (c) evidence has become available that was not available at the time the determination was being made. Mere disagreement with the facts found by the delegate of the Director is therefore not a ground for appeal, unless the alleged error of fact rises to the level of constituting a reviewable error of law. As explained in *Rose Miller, Notary Public*, BC EST # D062/07 at para. 48:

> In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06). (emphasis added)

27. In the present case, I find the Appellant's submissions do not establish the key factual findings in the Determination were inadequately supported or wholly unsupported by the evidentiary record, such that there is no rational basis for those findings. That is, the Appellant's submissions do not establish palpable and overriding error or errors of fact by the Delegate in concluding Ms. Hunter was an employee within the meaning of the *Act*. Nor am I persuaded that no reasonable person, acting judicially and in accordance with the relevant law, could have come to that determination on the evidence that was before the Delegate. Accordingly, I find no error of fact which rises to the level of constituting a reviewable error of law.

28. With respect to the Appellant's first "item in dispute", I find the May 22, 2013, lease agreement (referred to as "Lease #2"in the Determination) does not establish the Delegate erred in concluding Ms. Hunter was an employee of Sol within the meaning of the *Act*, and not an "owner". The Delegate noted that Lease #2 was "much the same as Lease #1 signed in March" except that Mr. Magnus had made "a number of handwritten changes and additions in Lease #2" (Determination, p. R6). The Delegate further noted that Ms. Hunter testified she "did not believe the handwriting was on Lease #2 when she signed it" and "Mr. Magnus said it was possible the handwriting was added sometime after May 22, 2013" but that "Ms. Hunter would have seen the changes" (Determination, p. R7). On appeal, the Appellant does not dispute these observations.

29. It is also evident, on the face of the documents, that Mr. Magnus had Ms. Hunter sign two "lease agreements" between Cal and Sol as the representative of Sol, yet Ms. Hunter had no ownership interest in or directorial control over Sol. Both Sol and Cal were wholly owned and solely directed by Mr. Magnus. Through his companies Cal and Sol, Mr. Magnus provided the retail space for the salon, paid for the renovations, equipment and supplies (except for a massage table and nail machine Ms. Hunter brought in because she already owned them and preferred to use them). He hired Ms. Hunter to manage the salon and hired other employees. He provided the bank account and operating funds for the salon. As manager of the salon, Ms. Hunter had access to the bank account for purposes of making withdrawals and deposits, but any amounts over $1,000 were subject to Mr. Magnus' review, thus ensuring the business remained under his overall control and direction.

30. Mr. Magnus and Ms. Hunter had originally intended that, when the salon became profitable, Ms. Hunter would use her commission earned on the profit to buy Mr. Magnus out of his ownership of Sol. However, the salon never became profitable and Ms. Hunter never acquired any ownership interest in Sol. Their mutual intention that she become the owner of the salon was never realized. There is no allegation or evidence that Mr. Magnus and Ms. Hunter entered into a legally binding contract of purchase and sale with respect to the salon, or that Mr. Magnus was otherwise legally bound to sell Sol to her or Ms. Hunter to buy it from him. Simply, their mutual intention did not come to pass as the salon turned out not to be profitable, and Mr. Magnus, exercising his prerogative as the sole owner and director of Sol, decided to close the business.

31. Mr. Magnus never added Ms. Hunter as a director or officer of Sol; he remained its sole director throughout. Despite her complete lack of ownership and directorial control over Sol, Mr. Magnus had Ms. Hunter sign the May 22, 2013, lease agreement between his two companies, Cal and Sol, purportedly on behalf of Sol. He then sought to rely on that document to argue that she was an "owner" of Sol, not an employee. In these circumstances I am not persuaded the May 22, 2013, lease agreement establishes any error of law in the Delegate's conclusion that Ms. Hunter was an employee of Sol within the meaning of the *Act*.

32. With respect to Mr. Magnus' second, third and fourth "items in dispute", I find these do not establish a reviewable error of law or relevant evidence which has become available that was not available at the time of the hearing. To the extent Mr. Magnus alleged Ms. Hunter took money from the salon in excess of the amounts the Delegate found were owing to her as wages under the *Act*, this allegation does not establish the Delegate erred in finding wages were owing to her under the *Act*. An employer may not deduct or set off, from wages owing, moneys which it claims the employee owes it: see section 21 of the *Act*. The employer must pay wages owing under the *Act* and separately pursue any monetary claims against an employee.

33. The appeal submissions and documents indicate Mr. Magnus did so, by asking the police to investigate his claims Ms. Hunter defrauded or embezzled money from Sol, and by pursuing a claim in Provincial Court for the moneys he said she owed Sol. However, as noted in the Determination, by the time the hearing took place before the Delegate, "Mr. Magnus acknowledged that Ms. Hunter did not take Couvon and Groupon funds as was originally alleged at her termination in December 2013" (p. R17). The Appellant further acknowledges, in a document headed "Notes of response to determination" included with his appeal, that "the processing of fraud charges dropped" when it was determined through a court hearing in November 2013 that "the funds had been deposited to the salon account".

34. I find nothing raised in the second, third or fourth "items in dispute" provides a basis for interfering with the Determination.

35. Nor do any of the documents submitted with the appeal constitute relevant new evidence which would provide a basis for overturning the Determination.

36. To the extent the Appellant objected to the completeness of the record provided by the Delegate under section 112 of the *Act*, I find it is not established the record provided was not complete. In any event I find any alleged lack of completeness of the record provided has not affected the Appellant's ability to pursue its appeal or my ability to assess its merits. The completeness of the record provided by the Delegate under section 112 is therefore a moot point in this appeal.

37. With respect to the Appellant's fifth "item in dispute", I am not persuaded the Delegate erred in law in associating Cal and Sol under section 95 of the *Act*. Mr. Magnus was the sole owner and director of Cal and Sol. He utilized both of these corporate entities to house the salon and finance its start-up and operations, including salaries and all other operating expenses. I am satisfied the Delegate made no error in law in finding that the Tribunal's established test for associating corporate entities under section 95 was met with respect to Cal and Sol in this case.

38. The Delegate also made no error in concluding just cause for Ms. Hunter's termination was not established and accordingly she was entitled to compensation for length of service in the ordinary course under the *Act*, as well as vacation pay on wages earned, as required by the *Act*.

39. I find no error in the Delegate's conclusion that the Appellant's contravention of several provisions of the *Act* or the *Employment Standards Regulation* (the "*Regulation*") required the imposition of mandatory statutory penalties. In the appeal document headed "Notes of response to determination", the Appellant queries: "I can only see 4 X $500 of penalty charges but the total shows $2500?" The Appellant is correct that, in the cover letter to the Reasons for the Determination, the Delegate lists four amounts of $500, yet shows a total administrative penalty amount of $2,500. The four $500 amounts are identified as being for breaches of sections 16, 17 and 18 of the *Act* and section 46 of the *Regulation*, respectively. In the Reasons for the Determination, however, at p. R17, the Delegate identified a fifth breached provision: section 58 of the *Act* (vacation pay). I therefore find the Delegate made a clerical error in the covering letter by failing to list the fifth $500 for the breach of section 58. I confirm $2,500 is the proper amount of mandatory administrative penalty in this case.

## ORDER

40. For the reasons given, pursuant to section 114 of the *Act*, the appeal is dismissed. Pursuant to section 115 of the *Act*, the Determination is confirmed.

**Elena Miller**
**Member**
**Employment Standards Tribunal**