Employment Standards TRIBUNAL

An appeal

- by -

538968 B.C. Ltd. operating as Esperanza Spa
("Esperanza")

- 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 L. Roberts

FILE No.: 2006A/59

DATE OF DECISION: July 20, 2006

DECISION

SUBMISSIONS

Peter Price, Director	on behalf of 538969 B. C. Ltd.
Ian MacNeill	on behalf of the Director of Employment Standards
Rebecca Simon	on her own behalf

OVERVIEW

1. This is an appeal by 538969 B.C. Ltd. operating as Esperanza Spa. ("Esperanza"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued April 10, 2006.

2. Rebecca Simon worked as a certified body worker for Esperanza from July 2004 until October 16, 2004. She filed a complaint alleging that Esperanza owed her wages and annual vacation pay. She also sought compensation for length of service, alleging that her employment had been terminated as a result of a substantial change in her terms and conditions of employment, and that there were insufficient funds in Esperanza's account to enable her to cash her pay cheque.

3. Following an investigation into the complaint, the delegate determined that Esperanza had contravened Section 18 of the *Employment Standards Act* in failing to pay Ms. Simon wages and annual vacation pay in the amount, with interest, of $934.27. The delegate found that Ms. Simon was not entitled to compensation for length of service, as he concluded that there was no change to the terms and conditions of her employment.

4. The delegate also imposed a $500 penalty on Esperanza for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

5. The grounds of Esperanza's appeal are that the delegate erred in law, failed to observe the principles of natural justice in making the determination, and that new evidence has become available that was not available at the time the Determination was being made.

6. Esperanza disputes the calculation of holiday pay owing and the payment for training hours, as well as the imposition of the administrative penalty.

7. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUES

8. Although Esperanza has checked off all the statutory grounds of appeal on the appeal form, the arguments relate largely to alleged calculation errors. These are largely factual issues, and not subject to appeal

unless the calculation error can be considered a legal error. I will address that issue below. Also at issue is whether the delegate erred in imposing an administrative penalty on Esperanza.

FACTS AND ARGUMENT

9. Although the facts of this case are rather complex, for the purposes of this appeal they may be stated rather briefly.

10. Ms. Simon had been employed at Esperanza at various times since December 2000. Her latest period of employment commenced May 25, 2004 at which time it was operated by Ms. Bermudez. Ms. Bermudez sold the business to Mr. Price in July 2004, and Ms. Simon continued working in the same capacity. Mr. Price, who lives in Australia, met with Ms. Simon in mid August, and hired her as the spa manager.

11. Ms. Simon contended that the parties agreed she would be paid $35 per hour for massage therapy/bodywork, and $20 per hour for time spent on management duties. Ms. Simon alleged that she asked Mr. Price for a written agreement but he felt it unimportant.

12. Mr. Price said that, shortly after meeting Ms. Simon, he sent her an email laying out the terms and conditions of her employment. He provided the delegate with a copy of an August 15, 2004 email which established Ms. Simon's remuneration based on her billing 50% of her time as a massage therapist at $35 per hour. The gross receipts received for her services was to cover her wages, and the balance went to pay for hours worked managing the business, with a maximum of 40 hours per week for all duties.

13. Ms. Simon denied receiving the August 15 email, but acknowledged that a formula similar to this had been discussed at the mid August meeting. She took the position before the delegate that she would not have agreed to this method of calculating her remuneration. Ms. Simon maintained her own hours of work, prepared the payroll records for all the employees including herself, and calculated her pay based on her understanding set out in paragraph 11 above.

14. The delegate found that Mr. Price's email of August 15, 2004 had been sent and received, and that it established Ms. Simon's conditions of employment. He found that Ms. Simon had not followed that formula when calculating her wages. The delegate calculated the wages owed to Ms. Simon for the period October 4 – 16 as $264.30. The delegate noted that Esperanza did not issue Ms. Simon's cheque for this period until November 4, 2004, and found it in contravention of section 18 of the Act. The delegate calculated Ms. Simon's annual vacation pay on the wages and commissions earned and reflected on pay statements commencing July 10, 2004, as well as additional wages found owing in the Determination.

15. Mr. Price contends that Ms. Simon incorrectly calculated her own wages, and thus, also the holiday pay she was entitled to. He submits that the delegate erred in relying on those incorrect calculations in arriving at Ms. Simon's annual vacation pay even after noting that Ms. Simon had overpaid herself according to the terms of the employment.

16. The delegate submits that Ms. Simon's vacation pay entitlement was based on the gross wages paid to Ms. Simon on each pay statement commencing July 10, 2004. He further says that the pay statements contain what appears to be an accruing vacation pay calculation on the right side of the statement, and that these statements were provided to Mr. Price during the investigation. The delegate says that vacation pay is based on gross earnings, and although Ms. Simon may have been overpaid, Mr. Price has to accept the liability for that since it was his obligation to monitor the Esperanza payroll account. He submits that,

to go back and recalculate her wages, and thus her vacation pay, would amount to an indirect deduction from her pay in contravention of section 21 of the *Act*. The delegate says that as an employer operating in the province, Mr. Price has an obligation to be aware of the *Act*.

17. In reply, Mr. Price says that Ms. Simon's holiday pay should be based on what she was entitled to be paid, not what she took "improperly".

18. Ms. Simon resigned her employment on October 16, 2004, as her October 8 cheque was still outstanding. In her letter of resignation she indicated that she would contact Mr. Price's daughter regarding training the new spa manager. Ms. Simon contended that she worked with the new manager for 10 hours after her employment ended so that the new manager understood the computer programs and was able to take over the spa. Ms. Price stated that Ms. Simon never contacted her about training the new manager, and, in any event, had no authority to approve the training. The new manager advised the delegate that Ms. Simon came by the spa after her resignation to train her how to use the computer and show her how to prepare sales and cash reports. The new manager estimated that Ms. Simon spent 8 hours training her over 3 different days.

19. The delegate found Mr. Price's evidence on this issue contradictory, first claiming that the new manager said that she was not shown anything she did not already know, and that Ms. Simon's time was misrepresented. He later advised the delegate that he did not pay the 10 hours claimed for training as the new manager told him it had not been done.

20. The delegate was more persuaded by the evidence of Ms. Simon and the new spa manager on this issue, and concluded that Ms. Simon was entitled to additional wages in the amount of $160 for 8 hours spent training. He did not find that Ms. Simon's employment was continuous. He found that these wages were owed within 6 days of termination, and that the employer had complied with this requirement by issuing a cheque on November 4, 2006.

21. Mr. Price also objects to the imposition of the administrative penalty for not paying Ms. Simon by October 22 on the basis that Ms. Simon's timesheet for the period October 4 -17 purportedly included time spent on training on October 25, 28 and 29. He says that there is no way the timesheet for the time period ending October 17 included time worked two weeks later. He contends that the November 4 pay cheque was well within the 6 day period provided in the *Act*, and that the administrative penalty ought to be cancelled.

22. The delegate says that Ms. Simon advised Mr. Price that she was terminating her employment on October 16, 2004. He says that section 18 provides that she was to be paid within 6 days, and that she was not. He submits that he has no discretion in imposing a penalty once a contravention has occurred. The delegate says that the time Ms. Simon spent training the new manager took place 9 days after she terminated her employment.

23. Mr. Price contends that, having accepted that the new spa manager would have been treating clients during part of this time, the delegate erred in concluding that Ms. Simon spent the entire 8 hours training. He asks the delegate to "please investigate exactly how much of the "8 hours" that was spent in the [spa], were actually spent 'training the other employee, and how much time was spent doing 'other things'." Mr. Price contends that the delegate's decision in this respect is "against the principles of natural justice".

24. Ms. Simon submits that the Appeal ought to be denied. She agrees with the delegate's findings on these issues.

ANALYSIS

25. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(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

26. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the Act, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal found that appeals should not be "mechanically adjudicate[d]… based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off." Although Esperanza checked off the second and third grounds of appeal and made no substantive submissions on those grounds, I have considered the appeal submissions in light of the three statutory grounds of appeal.

27. The burden of establishing the grounds for an appeal rests with an Appellant. Esperanza must provide persuasive and compelling evidence that there were errors of law in the Determination, that the delegate failed to observe the principles of natural justice, or that there is new evidence. For the following reasons, I find that Esperanza has failed to discharge that burden.

Natural justice

28. Principles of natural justice are, in essence, procedural rights that ensure parties a right to know the case against them, to respond fully, and to have the case heard and decided by an independent decision maker.

29. There is no evidence Mr. Price was denied the opportunity to know Ms. Simon's case, and to respond to it. Mr. Price suggests that it is against the principles of natural justice to "penalize him" in essence, for hiring Ms. Simon to ensure that he was in full compliance with the *Act*. I find that the principles of natural justice have been complied with, and that Mr. Price's complaint about being unfairly treated is not a natural justice issue. I dismiss the appeal on this basis.

New Evidence

30. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential 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.

31. Mr. Price's appeal submission does not specify what new evidence he seeks to introduce, nor does it specify how the "new evidence" would have led the delegate to a different conclusion. I find no merit to this ground of appeal.

Errors of law

32. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd*., BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

33. Mr. Price takes issue with some calculations, which are, in essence, factual errors. Therefore the test is whether the delegate's calculations are based on no evidence, or that are inconsistent with and contradictory to the evidence.

34. I have reviewed the record and the submissions, and am satisfied that there was some evidence for the findings made by the delegate. More particularly, Mr. Price has not established that the findings of fact are perverse or inexplicable (see *Britco, supra*).

35. While it is clear that Mr. Price is unhappy with the delegate's conclusions, an appeal is not an opportunity to re-argue a case that has already been made before the delegate.

36. Mr. Price attempts to shift the burden of his obligation to comply with the *Act* on Ms. Simon on the grounds that he hired her to do that function. That Mr. Price exercised due diligence in hiring a "highly paid manager" to ensure that compliance is not an answer. While Mr. Price may have exercised due diligence in assessing Ms. Simon's management experience, there is no evidence that he assessed her familiarity with the *Act*. Furthermore, whether Ms. Simon's failure to complete the payroll information correctly was intentional or inadvertent is irrelevant, as it is the employer who must ultimately bear responsibility for non-compliance.

37. I am unable to find that the delegate erred in finding that Ms. Simon worked an additional three days after she quit. Although I appreciate that Mr. Price seeks to have the delegate "deem" continued employment in order that he avoid the administrative penalty, there is no basis in law for such a conclusion. Once a contravention is found, the delegate has no discretion whether or not to impose a penalty (see *Douglas Mattson* (BC EST #RD647/01) and *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04))

38. I also find no basis to conclude that the delegate erred in his calculation of vacation pay. While Ms. Simon may have incorrectly calculated her wages, vacation pay is determined on wages earned. As the delegate correctly notes, to now calculate vacation pay on what should have been earned would amount to an unauthorized deduction from her pay.

39. The appeal is dismissed.

ORDER

40. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated April 10, 2006, be confirmed in the amount of $1,434.27, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal