

An appeal

- by -

Mamta Randev, a Director of Antiquity Spa & Salon Inc.  
(“Ms. Randev”)

- 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.:** 2013A/75

**DATE OF DECISION:** November 8, 2013

## DECISION

### SUBMISSIONS

Rajesh Randev on behalf of Mamta Randev, a Director of Antiquity Spa & Salon Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Mamta Randev, a Director of Antiquity Spa & Salon Inc. (“Antiquity”), has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 28, 2013.
2. On May 28, 2012, the Director issued a Determination (the “Corporate Determination”) finding Antiquity to be in contravention of Section 18 of the *Act* in failing to pay wages to five former employees, and ordered Antiquity to pay \$13,116.32 in wages and accrued interest. The Director also imposed administrative penalties in the total amount of \$1,500 for the contraventions, pursuant to section 98 of the *Act*. The date for appealing the Determination was July 5, 2013.
3. On August 28, 2013, the Director’s delegate found that the Corporate Determination had neither been satisfied or appealed. The delegate determined that as Ms. Randev was a Director and Officer of the company at the time the complainants’ wages were earned and payable, she was personally liable to pay \$10,413.30, representing not more than two months’ unpaid wages for the employees, pursuant to section 96 of the *Act* (the director Determination). The delegate concluded that there was insufficient evidence that Ms. Randev authorized, permitted or acquiesced in Antiquity’s contraventions, and found her not personally liable for the administrative penalties.
4. Ms. Randev filed an appeal of the Determination on October 7, 2013, on the grounds that the Director had failed to observe the principles of natural justice in making the Determination. Ms. Randev also contended that evidence had become available that was not available at the time the Determination was being made.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. I find that this appeal can be decided based on the parties’ written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made, the Determination and the Reasons for the Determination.

### ARGUMENT

7. The May 28, 2013, Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to Antiquity with copies to the registered and records office and to Antiquity’s directors and officers.
8. The Determination contained the following “Notice to Directors/Officers”:

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

- 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
- 2) That the calculation of the director/officer's personal liability is incorrect; and/or,
- 3) That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.

9. Ms. Randev says that one of the employees was paid in full before she quit and that "we have the proof." Attached to the appeal form were a number of bank statements highlighting specific cheque numbers. There was nothing in the appeal submission that identified what these cheques were for, who they were paid to, or how they related to the grounds of appeal.

## ANALYSIS

10. 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;
- (c) evidence has become available that was not available at the time the determination was made.

11. Section 115(1) of the *Act* provides that, after considering whether the grounds of appeal have been met, the Tribunal may, by order

- (a) confirm, vary or cancel the determination under appeal; or
- (b) refer the matter back to the director.

12. Once corporate liability has been established, directors cannot, through an appeal of a determination of director liability, reargue the issue of a company's liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue (*Steinemann*, BC EST # D180/96).

13. Ms. Randev did not file an appeal of the Determination finding Antiquity liable for the employees' wages. Therefore, she must be able to establish fraud or fresh evidence that is decisive to the merits.

14. Section 96 of the *Act* provides as follows:

- (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
- (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
  - (a) any liability to an employee under Section 63, termination pay or money payable in respect of an individual or group terminations, if the corporation is in receivership,

- (b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency *Act*,

...

15. Ms. Randev does not deny that she is, or continues to be, a Director or Officer of Antiquity. She appears only to suggest that one of the employees was paid wages, although the evidence supporting that assertion does not satisfy me that the employee was in fact paid wages owed to her. Furthermore, she does not argue, or present any evidence to suggest that any of the provisions of subsection 96(2) apply.
16. Although Ms. Randev's grounds of appeal are that the Director failed to observe the principles of natural justice and that evidence has become available that was not available at the time the Determination was being issued, nothing in her submissions addresses either of these grounds of appeal.
17. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Ms. Randev has not established that the Director's delegate failed to comply with principles of natural justice. I am satisfied that she was served with the Corporate Determination and was aware of the potential liability as a director if that Determination was not satisfied.
18. I am also not persuaded that evidence has become available that was not available at the time the Corporate Determination was being made.
19. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four part test for admitting new evidence on appeal:
  - (a) 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;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) 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.
20. The bank statements were available to present to the delegate investigating the initial wage complaints. The "new" evidence on appeal appears to be relevant only to the Corporate Determination. If Ms. Randev did not feel that the Corporate Determination fairly reflected payments made to employees, she ought to have appealed that Determination.
21. In any event, the documentation submitted on appeal is unexplained. If the bank statements are to represent payment of wages, there are no associated cheques to indicate to whom the cheques were issued or for what pay period.
22. I find no merit to the appeal.

**ORDER**

23. Pursuant to Section 115(1)(a) of the *Act*, I Order that the Determination, dated August 28, 2013, be confirmed in the amount of \$10,413.30 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**