Employment Standards TRIBUNAL

An appeal

- by -

Par-Mel Enterprises Inc.
carrying on business as The Maids Home Services
("Par-Mel")

- 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.: 2011A/80

DATE OF DECISION: August 23, 2011

DECISION

SUBMISSIONS

Christina Starkie	on her own behalf
Mica Nguyen	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Par-Mel Enterprises Inc. carrying on business as The Maids Home Services ("Par-Mel") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), against a determination of the Director of Employment Standards (the "Director") issued May 20, 2011 (the "Determination").

2. Par-Mel operated a cleaning service business within the jurisdiction of the *Act* and employed Christina Starkie ("Ms. Starkie") as a cleaner from December 15, 2004, to September 6, 2007.

3. On February 26, 2008, Ms. Starkie filed a complaint with the Employment Standards Branch (the "Branch") alleging that Par-Mel contravened the *Act* by failing to pay her all outstanding wages (the "Complaint").

4. Subsequently, the Delegate of the Director conducted an investigation of the Complaint, which involved, *inter alia*, two fact-finding meetings at the Branch. The first meeting was held on June 27, 2009, and both parties attended with Par-Mel being represented by its two directors and officers, Ronald Joseph Partak ("Mr. Partak") and Bruce Melissen ("Mr. Melissen"). The second meeting was held on March 18, 2010, at the Branch with Ms. Starkie only with a view to affording her an opportunity to respond to the evidence of Par-Mel.

5. It is noteworthy that the Delegate, on September 3, 2008, in advance of both fact-finding meetings, issued a Demand for Employer Records (the "Demand") to Par-Mel requesting the latter to produce its payroll records pertaining to Ms. Starkie by September 24, 2008. However, Par-Mel requested an extension of time to comply with the Demand and the Delegate acceded to the request and gave Par-Mel an extension to October 31, 2008.

6. There appears to be a significant delay in the investigation thereafter and on October 8, 2010, the Delegate issued a second Demand for Employer Records to Par-Mel with a deadline for production set at October 21, 2010. However, Par-Mel again requested and received an extension of time to comply with the second Demand to November 15, 2010, but Par-Mel did not comply with the said deadline and did not deliver to the Delegate any payroll records.

7. Thereafter, on March 10, 2011, based on the evidence and submissions of the parties before her, the Delegate made her preliminary findings (the "Findings") concluding that Par-Mel contravened the *Act* by failing to pay Ms. Starkie all outstanding wages. The Delegate then sent the Findings to both parties, and requested the parties to respond with their comments by March 24, 2011. Both parties acknowledged receipt of the Findings and requested and received an extension of time to respond. In the case of Ms. Starkie, she sought and received a further extension to file her final submissions. Par-Mel, however, responded after the initial extension but only submitted a Certificate of Dissolution evidencing Par-Mel's voluntary dissolution under the *Business Corporations Act* ("*BCA*") on April 4, 2011. However, pursuant to sections 346 and 347 of the

BCA the voluntary dissolution did not have the effect of staying Ms. Starkie's Complaint, since the Complaint was lodged under the *Act* before Par-Mel's dissolution.

8. On May 20, 2011, after the expiry of the period for receiving the parties' submissions, the Delegate issued the Determination finding Par-Mel to have contravened sections 17 (wages), 40 (overtime), 45 and 46 (statutory holiday pay), 58 (annual vacation) and 63 (compensation for length of service) of the *Act* in respect of the employment of Ms. Starkie. The Determination ordered Par-Mel to pay Ms. Starkie a total of $7,813.39, inclusive of accrued interest pursuant to section 88 of the *Act*.

9. Pursuant to section 29(1) of the *Employment Standards Regulation* (the "*Regulation*"), the Determination also imposed on Par-Mel six (6) administrative penalties of $500.00 each for the said contraventions of the *Act*. The total amount of the Determination, including administrative penalties, is $10,813.39.

10. The evidentiary basis for the Determination is delineated in the Reasons for the Determination (the "Reasons"). While I have carefully reviewed the evidence in the Reasons and do not think it is necessary for me to reiterate the evidence in its entirety here, I think it is helpful, for the purpose of this Appeal, to summarize some findings and conclusions of the Delegate in the Reasons, particularly where they are relevant to the issues Par-Mel raises in its appeal.

11. Having said this, in the Reasons, the Delegate made the following noteworthy observations, findings, comments and conclusions:

- the voluntary dissolution of Par-Mel, after the Complaint was filed, does not stay the Complaint under the *BCA*;
- Ms. Starkie's employment with Par-Mel ended on September 6, 2007, and while she seeks wages for the entire period of her employment with Par-Mel, pursuant to section 80 of the *Act*, Par-Mel is only responsible to pay her any wages that became payable in the six-month period from March 7, 2007, to September 6, 2007;
- based on the definition in the *Act*, "assignment of wages" is "a written authorization provided by the employee to allow for the deduction of her wages for items such as credit obligations and serves to benefit the employee";
- a proper assignment of wages must specify the purpose, amount, and duration of the deduction and must also be dated and signed by the employee and must not include an agreement by the employee to pay any of the employer's business costs;
- at the fact-finding meeting of March 18, 2010, at the Branch, Ms. Starkie confirmed she had reviewed Par-Mel's evidence of an assignment of her wages for canteen items she took and agreed that Par-Mel had an assignment of wages for the canteen items;
- during the period March 7, 2007, to September 6, 2007, the canteen items taken by Ms. Starkie totalled $144 and Par-Mel is, therefore, entitled to withhold the said amount from Ms. Starkie's wages pursuant to section 22 of the *Act*;
- Par-Mel gave a warning letter dated July 25, 2007, (the "Letter") to Ms Starkie which Par-Mel claims contains an assignment of wages by Ms. Starkie which the latter signed on July 31, 2007;
- the Letter contains the following provision:

> Please not [sic] we have also attached a list of advances and a list of banked hours for you. There is an outstanding ballace [sic] and that you will be deducted over the next couple of months. If you leave before the amount is paid off you [sic] holiday pay will be used to pay off the balance.
>
> Acknowledged:
>
> _____(Signed C. Starkie)_____ Dated (Dated by Ms. Starkie July 31, 2007)

- Par-Mel failed to submit any evidence to indicate that any records of advances or banked regular hours were provided to Ms. Starkie with the Letter;
- the purported assignment provision in the Letter fails to indicate the purpose of the deduction, the amount considered outstanding, and the duration of the deduction (although it states that the deductions will be made over "the next couple of months");
- "a proper assignment of wages is intended to be a benefit for the employee in respect to fully disclosing the purpose of the credit obligation, the amount associated with each credit obligation, the total amount outstanding, and the specific terms of repayment outlining the specific mount being withheld at a specific date or time.";
- the purported assignment "does not serve to benefit Ms. Starkie in any manner since the terms of the repayment are vague";
- the Letter is not an assignment of wages as defined under the *Act* and Par-Mel is, therefore, not entitled to withhold Ms. Starkie's wages;
- since Par-Mel did not have a valid written assignment of wages from Ms. Starkie, Par-Mel contravened section 21 of the *Act* and is subject to an administrative penalty of $500 under the *Regulation*;
- the parties submitted conflicting evidence with respect to the daily hours worked by Ms. Starkie requiring an assessment of the credibility of the records submitted by the parties;
- in the case of her evidence, Ms. Starkie submitted daily hours of work recorded on her calendar, which hours she said included time worked at Par-Mel's office and on site;
- Par-Mel submitted records of Ms. Starkie's daily hours worked based on Par-Mel's route sheet which only contained Ms. Starkie's start and finish times at the job sites and not at Par-Mel's office;
- Par-Mel's second warning letter to Ms. Starkie dated August 9, 2007, states that she is to be at work no later than 8:30 a.m. and finish work at 5:00 p.m. or earlier;
- While Par-Mel stated, on October 7, 2010, Ms. Starkie only attended at work to change into her uniform (changing its earlier evidence that Ms. Starkie was required to attend work at 8:30 a.m. to change into her uniform, grab route cards and client keys before heading to the first job site), the warning letters it issued to Ms. Starkie indicate that Ms. Starkie was expected to be in her uniform, pick-up client keys and cleaning instructions, and be ready to leave Par-Mel's office and drive to the first job site by 8:45 a.m.;
- based on the foregoing, Par-Mel required Ms. Starkie to perform work as defined in the *Act* starting at 8:30 a.m.;
- while Par-Mel stated, on October 7, 2010, Ms. Starkie was not required to return back to work after working at her last job site because the employer drove her to the bus stop and she

changed out of her uniform in the car on the way to the bus stop (changing its earlier evidence that Ms. Starkie was required to return to work to change out of her uniform, drop-off route cards and client keys and do laundry), Par-Mel's warning letter of July 25, 2007, indicates the employer was not in the practice of being on site with the complainant. The letter directs Ms. Starkie to call the employer at the office or on the cell phone if she was lost which, together with Par-Mel's earlier statement that the employer rarely went to job sites with their employees (unless when an employee was absent from work), supports Ms. Starkie's evidence that she was required to return to work to drop-off her uniform, keys, paperwork, supplies and do laundry;

- Par-Mel's evidence regarding Ms. Starkie changing out of her uniform in the vehicle while the employer drove her to the bus stop after her last job is difficult to believe in light of Par-Mel's evidence that employees worked in teams of three and each team travelled in one (1) company car which suggests that Ms. Starkie would have had to change out of her uniform in a moving vehicle in front of two (2) fellow employees and the employer;
- Ms. Starkie provided credible evidence of her daily hours of work as well as her work at the office at the start and the end of her day; her evidence is preferred over Par-Mel's evidence on the subject which dramatically changed over the course of the investigation, and Par-Mel also failed to produce a copy of the route sheets upon which it based its calculation of Ms. Starkie's daily hours worked when requested;
- both parties agreed that banking of Ms. Starkie's hours of work started in March 2006 and only a portion of her hours worked - about 50 - were submitted to payroll and paid semi-monthly, and the remaining were banked or to be cashed out by her upon request;
- while the *Act*, in section 17, allows for banking of overtime wages, it does not allow for the banking of regular wages;
- while Par-Mel states that Ms. Starkie agreed to the banking arrangement, section 4 of the *Act* prohibits waiving the minimum requirements of the *Act* even if both parties agree;
- Ms. Starkie agreed that she received all cheques produced by Par-Mel in the investigation but the following three (3):

    (i) cheque #0940 dated March 22, 2007, for $500.00;

    (ii) cheque #0998 dated May 8, 2007, for $1,000.00; and

    (iii) cheque #2063 dated June 13, 2007, for $500.00.

- the fronts and backs of these three (3) disputed cheques show Ms. Starkie as the payee, but the cheques are not endorsed by Ms. Starkie nor stamped by any financial institution as cashed by the payee, unlike the other cheques Par-Mel submitted;
- with respect to cheque #0998, Ms. Starkie did not receive it, nor did she cash it, and in light of the employer's representation that it withheld a portion of Ms. Starkie's wages from her time for renting the employer's apartment, the said cheque, while issued by the employer, represented wages deducted from Ms. Starkie's regular time bank;
- in light of the foregoing evidence, none of the disputed cheques were paid to Ms. Starkie, nor cashed by her;

- based on Ms. Starkie's record of her daily hours worked, Ms. Starkie has not been paid regular wages for all hours worked, pursuant to section 17 of the *Act* and she is owed regular wages totalling $3,312.50 plus interest;
- with respect to its contravention of section 17 of the *Act* an administrative penalty of $500 under the *Regulation* is levied against Par-Mel;
- based on the finding that Ms. Starkie's employment was continuous from December 15, 2004, to September 6, 2007, and her record of daily hours (which was preferred as more credible than Par-Mel's), Ms. Starkie is entitled to statutory holiday pay totalling $658.04 plus interest, and Par-Mel failed to pay her this amount in contravention of sections 45 and 46 of the *Act*, for which Par-Mel is subject to an administrative penalty of $500 under the *Regulation*;
- section 42 of the *Act* allows for banking of overtime wages upon the written request of the employee to the employer and when employment ends, the employer must pay out any wages banked on the final paycheque, as required by section 18 of the *Act*;
- there is no evidence from either party that Ms. Starkie provided the employer with a written request for the banking of overtime hours, as required by section 42 of the *Act*, and, therefore, the parties did not engage the requisite "steps to properly set up an overtime bank";
- Ms. Starkie is owed overtime wages that became payable in the six (6) months from the last day of her employment which, according to Ms. Starkie's records, total $591.27 plus interest and Par-Mel, for its contravention of section 42 of the *Act*, is subject to an administrative penalty of $500 under the *Regulation*;
- with respect to Ms. Starkie's claim for compensation for length of service pursuant to section 63 of the *Act*, Par-Mel took the position that Ms. Starkie was terminated on September 6, 2007, for just cause as she failed to respond to corrective discipline measures set out in three (3) previous warning letters dated July 25, 2007, August 9, 2007, and August 10, 2007;
- Par-Mel's warning letter of July 25, 2007, to Ms. Starkie identified several areas concerning her performance and attitude and required her to watch training videos no later than July 31, 2007, and improve her behaviour within thirty (30) days;
- Par-Mel's second warning letter to Ms. Starkie dated August 9, 2007, addressed her performance and insubordination;
- Par-Mel's third warning letter to Ms. Starkie dated August 10, 2007, and titled "Final Warning" addressed Ms. Starkie's attitude and failure to call into work when not available to work, and warned Ms. Starkie to change her attitude or her employment would be terminated;
- both Par-Mel and Ms. Starkie agree that the parties were involved in an argument on September 6, 2007, at which time Ms. Starkie's employment was terminated;
- according to Ms. Starkie, on September 6, 2007, when she was getting ready for a shift, she requested vacation time and vacation pay from Par-Mel and while the latter agreed to her request for vacation, it refused her request for vacation pay stating that no vacation pay was owed to her as she had several outstanding credit obligations to Par-Mel and had signed an assignment agreement allowing Par-Mel to withhold her wages;
- subsequently, an argument arose between Par-Mel and Ms. Starkie, and the latter claimed that Par-Mel terminated her employment;

- while Par-Mel agreed that Ms. Starkie was granted her vacation time request on September 6, 2007, Par-Mel neither agreed, nor denied, that the argument with Ms. Starkie was over vacation pay;
- Par-Mel contended that Ms. Starkie had previously been warned about her attitude and performance by way of three (3) warning letters and Par-Mel properly applied corrective discipline measures and terminated her employment because of her insubordination and attitude, together with other performance issues identified in Par-Mel's termination letter dated September 11, 2007 (the "Termination Letter");
- the Termination Letter identified seven (7) issues, in addition to referring to the three (3) warning letters previously issued to Ms.Starkie, as the basis for the termination of her employment;
- on the basis of the following analysis and weighing of the evidence of the parties, the Delegate preferred Ms. Starkie's evidence that the termination of her employment on September 6, 2007, arose as a result of the argument between herself and Par-Mel regarding vacation pay and did not have anything to do with any reasons previously identified in the warning letters:

> Both parties agree the employer granted Ms. Starkie vacation time request [sic]. Reviewing Ms. Starkie's pay statements, I find no evidence of vacation pay already paid to Ms. Starkie leading me to find it reasonable to conclude the complainant inquired to her employer about vacation pay since her request for vacation time was also approved on this date. Further, reviewing the termination letter dated September 11, 2007, I find evidence to reasonably indicate the issue of vacation pay was most likely discussed on September 6, 2007 as Ms. Starkie claims since the employer references specifically at the end of the letter Ms. Starkie's vacation pay would be withheld in order to pay off her credit obligations to the employer. I find this conclusion is further supported by the fact the central component of this investigation which I have previously dealt with is the question of whether Par-Mel had a proper written assignment to withhold Ms. Starkie's wages for credit obligations she had to the employer. I acknowledge Par-Mel states in the termination letter dated September 11, 2007 Ms. Starkie was terminated for performance and attitude related issues and goes on to identify 7 issues which the employer stated was in addition to the issues identified in the previous 3 warning letters. However, I find it difficult to accept Par-Mel discussed all issues identified in the termination letter with Ms. Starkie on September 6, 2007 given that both parties have agreed Ms. Starkie was only at work on September 6, 2007 for a total of 10 to 15 minutes before she was terminated and asked to go home. Further, I find Ms. Starkie to be a credible witness. I find the complainant's testimony to be detailed, consistent and forthright. On the contrary, I find Par-Mel's lack of details regarding the specifics of the argument on September 6, 2007 leads me to suspect Par-Mel has not been forthright. Further, I have previously found Par-Mel's testimonies regarding other matters in this investigation have not been credible. Therefore, I find Par-Mel's credibility has been compromised.
>
> While I am not finding Par-Mel did not have legitimate concerns around Ms. Starkie's performance and attitude as identified in the 3 warning letters, I find the surrounding circumstances and evidence before me sways me to reasonably accept Ms. Starkie's testimony that she was not terminated for any issues related to the matters which gave rise to the employer's previous disciplinary efforts. Rather, I find the evidence sways me to accept Ms. Starkie's testimony that the only issue addressed by Par-Mel when they terminated her was a dispute over whether Ms. Starkie would be receiving her vacation pay. As such, I find Ms. Starkie's inquiry and request for vacation pay does not constitute as insubordination as argue by Par-Mel. Rather, I find it reasonable Ms. Starkie inquired about her vacation pay since she was about to take vacation time. Given the above

> evidence, I find Par-Mel has failed to substantiate the employer has properly applied corrective discipline. As such, I find Par-Mel does not have just cause to terminate Ms. Starkie.

- in the result, Par-Mel contravened section 63 of the *Act* by terminating Ms. Starkie's employment without cause and failing to pay her compensation for length of service;
- as both parties agree that Ms. Starkie worked for Par-Mel from December 15, 2004, to September 6, 2007, she is entitled to two (2) weeks' average wage for compensation for length of service, totalling $696 plus interest;
- Par-Mel is levied an administrative penalty of $500 pursuant to the *Regulation* for contravention of section 63;
- with respect to Ms. Starkie's claim for vacation pay, she submitted she had not received any vacation pay for the entire period of her employment; Par-Mel indicated that it withheld Ms. Starkie's vacation pay;
- as Par-Mel did not have a proper or valid assignment of wages to legally withhold Ms. Starkie's vacation pay, Ms. Starkie is entitled to her vacation pay, limited to that which became payable from March 7, 2007, to September 6, 2007, totalling $1,361.80 plus interest;
- Par-Mel is subject to a further administrative penalty of $500 pursuant to *Regulation* for contravention of section 58 of the *Act*.

12. As previously indicated, Par-Mel, through its counsel, has filed an appeal of the Determination on two (2) grounds available in section 112(1) of the *Act*; namely, the Director erred in law and breached the principles of natural justice in making the Determination.

13. Par-Mel is seeking the Tribunal to change or vary the Determination or to cancel it or to refer it back to the Director.

14. Pursuant to section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated in the *Act* (s 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

15. Should Par-Mel's appeal be allowed and the Determination changed, varied or cancelled or referred back to the Director on the basis that the Director erred in law or failed to observe the principles of natural justice in making the Determination?

ANALYSIS

16. I have very carefully reviewed the appeal submissions of Par-Mel's counsel as I have the submissions of the Director and Ms. Starkie. I propose only to address those submissions of the parties relevant to the grounds of appeal advanced by Par-Mel.

17. Having said this, in the case of Ms. Starkie's appeal submissions, I note most of what Ms. Starkie has submitted was previously adduced by her during the investigation of her Complaint and considered by the Delegate in the Reasons and I do not find it helpful to reiterate that evidence here. It also appears that

Ms. Starkie has further elaborated on the evidence she submitted during the investigation of the Complaint and, again, I do not find it necessary to reiterate that evidence here.

(i) Error of Law

18. With respect to Par-Mel's submissions on the error of law ground of appeal, I will summarize briefly, counsel's submissions under descriptive subheadings below and also review relevant responses of the Director.

1. The Delegate should have questioned the credibility of Ms. Starkie based on the evidence of Ms. Starkie in her employment insurance claim and the decision of the Employment Insurance Board of Referees that she was dismissed from her employment due to her own misconduct

Counsel for Par-Mel submits:

19. The Delegate should have questioned Ms. Starkie's credibility based on her inconsistent or "totally different" explanation for the termination of her employment by Par-Mel to the Board of Referees in her Employment Insurance claim compared to her explanation to the Delegate in context of her Complaint. The Delegate should also have considered the decision of the Board of Referees that Ms. Starkie was terminated from her employment with Par-Mel due to her own misconduct when considering Ms. Starkie's credibility.

The Director responds:

20. The Director is not bound by the decision of other boards.

21. Further, the Director notes that the Board of Referees pointed out in its decision that Ms. Starkie "had asked [Par-Mel] for two weeks of vacation time off, and cited the Employment Standards Branch guidelines in support of her request, which angered the employer and caused her to be fired". This statement is consistent with the evidence of Ms. Starkie in her Complaint under the *Act*.

22. The Director also submits that the Board of Referees, in making its decision, considered the question of whether Ms. Starkie's behaviour constituted "misconduct" under the *Employment Insurance Act* and not under the *Act*. Therefore, the findings of the Board of Referees and its decision "hold[s] little to no weight" in the Delegate's Determination, according to the Director.

23. The Director further submits that the Delegate examined and weighed the totality of the evidence of the parties on the issue of the termination of Ms. Starkie's employment and, although Par-Mel provided Ms. Starkie with warning letters previously, it failed to substantiate that Ms. Starkie's employment was terminated for the reasons delineated in the warning letters.

24. I am persuaded with the Director's argument here. More specifically, the Board of Referees is a federal tribunal mandated to interpret an entirely different statute; namely, the federal *Employment Insurance Act*, and its finding or conclusion that Ms. Starkie was dismissed as a result of her own misconduct has no binding precedential value or effect on the Director or this Tribunal under the *Act*.

25. I also note that Par-Mel's allegations challenging the credibility of Ms. Starkie or her evidence is effectively a challenge of the Delegate's weighing of the evidence and findings of fact. The grounds for appeal do not

include a challenge based on a question of fact or error of fact. In *Re Rose Miller, Notary Public*, BC EST # D062/07, the Tribunal succinctly summarized when an error of fact amounts to an error of law as follows:

> 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 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).

26. In my view, the Delegate's decision to accept or prefer the evidence of Ms. Starkie over Par-Mel's with respect to her hours of work and the reasons why Par-Mel terminated her employment on September 6, 2007, involved weighing of the evidence of the parties on the part of the delegate, and it is not for this Tribunal, on an appeal of the Determination, to disturb the Delegate's findings of fact, particularly where, as in this case, there is sufficient evidence on which the Delegate could have made the findings she did. In the circumstances, I find Par-Mel's argument under this heading without any merit.

2. The Delegate should have questioned the credibility of Ms. Starkie's evidence that it was Par-Mel's idea to bank a portion of her hours worked and she did not agree to the arrangement or was not given a choice.

Counsel for Par-Mel submits:

27. The credibility of Ms. Starkie ought to have come into question when she stated that it was Par-Mel's idea to bank her hours worked, and that she never agreed to the arrangement, nor was she given a choice in the matter. Counsel states that while Par-Mel may have suggested to Ms. Starkie, to avoid her obligation under the Family Maintenance Enforcement Program, Par-Mel would track the hours she worked and make payments directly to third parties or to her, if Ms. Starkie objected to this arrangement she could have left her employment at any time and found alternative employment for $11/hour. According to counsel, Ms. Starkie participated in the arrangement with Par-Mel with a view to escaping her maintenance obligations and for no other reason.

The Director responds:

28. The Delegate did not make a finding in the Determination that Ms. Starkie's statements regarding this issue were credible. Instead, the Director notes that the Delegate simply found Par-Mel was in contravention of section 17 of the *Act* since Par-Mel was banking Ms. Starkie's regular hours and the *Act* does not allow for the banking of regular hours.

29. The Director further submits that section 4 of the *Act* provides that the requirements of the *Act* are minimum requirements and cannot be waived. It is not relevant whether Ms. Starkie agreed to the banking scheme or

what her reasons for doing so were, as the banking scheme, in this case, contravened section 17 of the *Act*, according to the Director.

30. I am again persuaded with the Delegate's position. I note that there is uncontroverted evidence that Par-Mel, whether or not with Ms. Starkie's agreement, established a time bank and banked some of Ms. Starkie's regular hours worked. Section 1 of the *Act* exclusively defines time bank as follows:

> 'Time Bank' *means* (italics mine) a time bank established under section 42 at the request of an employee.

31. Section 42(1) states:

> (1) At the *written request* (italics mine) of an employee, an employer may establish a time bank for the employee and credit the employee's *overtime* (italics mine) wages to the time bank instead of paying them to the employee within the time required under section 17.

32. In this case, there was no evidence of a "written request" from Ms. Starkie to Par-Mel to establish a time bank. Furthermore, section 42 allows for banking of "overtime wages" and not any other wages such as regular wages.

33. I agree with the Director that it matters not whether Ms. Starkie agreed to the banking scheme or what her reasons were for doing so because the banking scheme did not comply with section 42 of the *Act*. In the result, Par-Mel contravened section 17 of the *Act*, which requires "wages" to be paid at least twice each month, and within eight (8) days of the end of each "pay period".

3. The Delegate misinterpreted section 22 of the *Act* governing employee's written assignment of wages.

Counsel for Par-Mel submits:

34. The Delegate erred in law in interpreting section 22 of the *Act* when she stated:

> …I find an assignment of wages is a written authorization provided by the employee to allow for the deduction of her wages for items such as credit obligations and serves to benefit the employee. A proper assignment of wages must specify the purpose, amount, and duration of the deduction. The assignment must be dated and signed by the employee.

35. Counsel submits that the Delegate in so interpreting "assignment of wages" has written her own legislation as "there is no such requirement" when one reads the definition of "assignment of wages" in section 1 of the *Act*. Counsel also submits that the definition of "assignment of wages" in section 1 is not an exclusive definition as the word "includes" is used. While written authorization is one form of "assignment of wages", "there are other manners in which wages can be assigned", argues counsel.

36. Counsel appears to argue that section 22(1) is the only section that makes reference to "written assignment of wages" and should be read separately from the definition of "assignment of wages" in section 1 which is broader in scope and allows for other forms of assignments of wages, namely, unwritten such as in this case between Par-Mel and Ms. Starkie.

The Director responds:

37. While the definition of "assignment of wages" in the *Act* assists in defining what assignment of wages could include, section 22(4) of the *Act* "is the enabling component of the legislation" and it delineates the requirements for a valid assignment of wages "in order to honour a credit obligation". According to the Director, section 22(4) expressly requires the employer to have a "written assignment of wages" from the employee in order to legally withhold wages for a credit obligation. As Par-Mel, in this case, failed to show that it had an assignment of wages as defined by the *Act*, Par-Mel contravened section 21 of the *Act* when it made deductions from Ms. Starkie's wages, argues the Director.

38. I am once again persuaded by the Director's argument under this heading. While I agree that the definition of "assignment of wages" in section 1 of the *Act* is not an exclusive definition because the word "includes" is used in the definition, in the context of this particular case where Par-Mel claims to have an assignment of wages executed by Ms. Starkie in respect of *credit obligations*, section 22(4) of the *Act* of necessity comes into play. This section, in unequivocal terms, requires a "*written assignment of wages*" to exist. It states:

> 22(4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

39. There are numerous cases interpreting this section of the *Act*, which support the Delegate's interpretation above. These cases have stated that an assignment under this section must be clear and unequivocal, and if it is does not state on its face the amount of the credit obligation nor to whom the amount is allegedly owed, then it will not constitute a "written assignment of wages to meet a credit obligation" (see Re *E.V. Townmasters Services Ltd.*, BC EST # D469/97). Therefore, I reject Par-Mel's contention that the Delegate has made up her own definition of "assignment of wages" as counsel does not appear to consider the effect of section 22(4) or the cases that have elaborated on the meaning of that section.

4. The Delegate rejected Par-Mel's accounting of payments made and hours worked and banked as well as advances made and preferred Ms. Starkie's records which could have been made up at any time.

Counsel for Par-Mel submits:

40. The Delegate rejected Par-Mel's evidence of Ms.Starkie's hours worked and banked and payments and advances made on her behalf or to her, and instead preferred Ms. Starkie's records "which could have been made up at any time".

The Director responds:

41. The Delegate relied upon the test for assessing conflicting evidence set out in *Faryna v. Chorny* (1952), 2 D.L.R. 354, B.C.C.A., to assess the credibility of the parties' conflicting records. The Delegate decided to accept Ms. Starkie's records and evidence over Par-Mel's evidence, as the former's records and evidence were consistent and complete. Par-Mel's record of hours worked did not include hours Ms. Starkie worked at Par-Mel's office at the start of her workday or at the end. There is also no evidentiary basis for Par-Mel's contention that Ms. Starkie "could have made up" her evidence or records "at anytime".

42. In my view, the Delegate's finding of credibility in the evidence of Ms. Starkie is a finding of fact and not of law. The Delegate weighed the evidence of the parties before her and in my view it was open to the Delegate to prefer the evidence of Ms. Starkie over Par-Mel's and it is not for this Tribunal to disturb the Delegate's findings of fact in such case.

5. The Delegate made a finding wrong in law, namely, that "regular hours could not be banked" even if both parties agreed.

Counsel for Par-Mel submits:

43. Regular hours of an employee can be banked when the employee and the employer agree, and the Delegate, in concluding otherwise, misinterpreted section 17 of the *Act*.

44. Further, counsel for Par-Mel argues that section 17 of the *Act* is not applicable in this case, as it does not contemplate assignment of wages.

45. Counsel also states that section 17 does not negate voluntary agreements entered into "to defray payments or assignments of wages". It also does not apply to "overtime wages credited to a time bank or vacation pay", states counsel.

46. Counsel further submits that section 23 of the *Act* governs or applies in this case; that is, the employer who deducts an amount from an employee's wages under an assignment of wages must pay it according to the terms of that assignment or within one month after the date of the deduction, whichever is sooner.

The Director responds:

47. The Delegate did not err in law in interpreting section 17.

48. The *Act* does not allow for banking of regular wages and section 17 requires the employer to pay regular wages semi-monthly and within 8 days after the end of the pay period. The exception to this rule arises when overtime wages credited to an employee's time bank or vacation pay is involved.

49. The Director submits that since Par-Mel did not have a valid assignment of wages, withholding of any wages in such case by Par-Mel was in contravention of section 17 of the *Act*.

50. The Director further contends that section 23 of the *Act* only sets out the requirements for when an employer is to pay the properly assigned wages deducted from an employee's pay. In this case, since Par-Mel did not have a valid or proper assignment of wages under the *Act*, section 17 is not displaced and applies.

51. In my view, while the question of the proper interpretation of section 17 of the *Act* is a question of law, I do not agree with counsel for Par-Mel that the Delegate erred in her interpretation of section 17 when concluding that an employee cannot bank regular hours. As mentioned previously, section 42 of the *Act* is the governing provision for banking overtime wages. This section only allows for the banking of "overtime wages" when there is a "written request" from an employee to her employer. In this case, not only was a written request from Ms. Starkie to Par-Mel missing, but also Par-Mel was engaged in banking some regular hours. Section 42 of the *Act*, as previously indicated, only covers banking of "overtime wages". On the basis of the statutory interpretative principle of e*xpression unius est exclusion alterius*, the express mention of "overtime wages" in section 42 excludes other wages not mentioned, such as regular wages. If the legislature had intended for the employees to make arrangements with their employers to bank regular wages, then the legislature would not have prefaced "wages" in section 42 with the word "overtime".

52. With respect to the contention of counsel for Par-Mel that section 17 of the *Act* does not contemplate assignment of wages and cannot apply when the employer is dealing with assigned wages, I agree with the

Director that Par-Mel did not have a valid assignment of wages and, therefore, the withholding of regular wages in such case was in contravention of section 17 of the *Act*.

53. With respect to counsel's contention that section 17 does not apply to "overtime wages credited to a time bank or vacation pay", I note that section 42 requires a "written request of an employee" to an employer to establish a time bank. In this case, there is no evidence of a written request from Ms. Starkie to her employer to establish a time bank. Therefore, in this case, there is not a valid time bank established under the *Act* and thus the exclusion of "overtime wages credited to an employee's time bank" in section 17 does not apply.

6. Additional arguments under the error of law ground of appeal

Counsel for Par-Mel submits:

54. Ms. Starkie and Par-Mel entered into a scheme to avoid payments required under another statute and Ms. Starkie was the beneficiary of that agreement, which involved an assignment of her wages and banking of her hours worked. The Delegate was wrong in law in his interpretation of the *Act* in respect of the creation of assignments and banking of hours worked by Ms. Starkie. On the authority of the British Columbia Supreme Court's decision in *Muyres v. Gauthier* (wherein the Court employed the equitable doctrine of "clean hands" to deny the plaintiff, engaged in an illegal scheme, to successfully advance his claim), the Tribunal should reject Ms. Starkie's claim since she was "engage(d) in nefarious activities in order to avoid legal obligations".

55. Counsel also submits that in July 2007, together with the first warning letter, Ms. Starkie was provided a list of all withholdings, advances and payments Par-Mel made to third parties on her behalf. Counsel states that Ms. Starkie acknowledged receiving this information but later, before the Delegate, claimed that she only signed an acknowledgment because she feared being fired by Par-Mel.

56. Counsel further submits that when a party does not comply with a Court Order, in this case the Family Maintenance Order, and enters into a scheme to avoid enforcement of that Order, she should not be believed.

57. Counsel also submits that the Delegate wrongly denied Par-Mel credit for the payments and advances it made on Ms. Starkie's behalf because of Par-Mel's purported violation of one or another section of the *Act*. Counsel contends that Par-Mel should not lose credit for any payments it made on Ms. Starkie's behalf.

58. Counsel also argues that the Delegate was wrong in imposing excessive administrative penalties.

The Director responds:

59. The reason why parties engaged in the banking arrangement is not relevant and does not change the fact that section 4 of the *Act* prohibits the waiving of minimum requirements of the *Act* even where parties agreed to do so.

60. The Director further submits that section 42 of the *Act* allows for the banking of overtime wages, but, in this case, the parties failed to meet the requirements for banking overtime wages in section 42.

61. The Director also submits the Delegate took into consideration the remittances Par-Mel made on behalf of Ms. Starkie in respect of her Family Maintenance Order obligation, based on the partial hours (approximately 50 hours) she worked semi-monthly and reported to payroll. However, there was no evidence adduced by

Par-Mel showing any remittances by Par-Mel in respect of the Family Maintenance Order from any banked wages of Ms. Starkie.

62. Contrary to Par-Mel's contention, the Director states that Ms. Starkie did not admit or acknowledge in her evidence that she received a document from Par-Mel outlining wages already paid and amounts withheld by Par-Mel; to the contrary, the Director submits that Ms. Starkie stated she did not receive such documentation from the employer.

63. The Director further contends that the Delegate did not find nor accept Ms. Starkie's argument that she only signed the employer's warning letter of July 25, 2007, because she feared she could be fired. This evidence was also not determinative of the issue before the Delegate, namely, whether or not the assignment of wages was valid. The Delegate, in deciding whether the assignment of wages was valid, considered the content of Par-Mel's letter of July 25, 2007, to Ms. Starkie and found the letter did not meet the definition of assignment of wages under the *Act*.

64. With respect to Par-Mel's contention that Ms. Starkie lacks credibility because she participated in a scheme to avoid making remittances under the Family Maintenance Order, the Director argues this is irrelevant to the determination of wages Par-Mel owes Ms. Starkie. The Director also states that if Ms. Starkie is lacking credibility because of her participation in the said scheme then the employer too is lacking credibility for its participation in the scheme.

65. The Director further submits that the decision of the Supreme Court in *Muyres v. Gauthier, supra*, has no application in this case as it did not involve the application of the *Act*. The *Act* delineates the minimum statutory requirements, which include the obligation of the employer to pay wages pursuant to the terms of section 17, and it matters not that both parties agreed to enter into a scheme to bank Ms. Starkie's hours or what the parties' intention was in entering the scheme.

66. With respect to Par-Mel's contention that the administrative penalties levied against it were excessive and wrong, the Director argues that once the Delegate found Par-Mel was in contravention of sections 17, 21, 40, 45, 58 and 63 of the *Act*, there was no discretion on the part of the Delegate but to impose the mandatory penalties set out under the *Regulation*.

67. Having reviewed the additional arguments of Par-Mel under the error of law ground of appeal, I do not find any of them persuasive. I am however persuaded with the merits of the Director's responses in each case. More specifically, I agree with the Director's submission that while Ms. Starkie, together with Par-Mel, may have engaged in an agreement that had the effect of thwarting collections efforts under the Family Maintenance Order, this does not, in any way, reduce or render inapplicable the minimum requirements or obligations of the *Act*, particularly because the minimum requirements of the *Act* cannot be waived by agreement of the parties or otherwise according to section 4 of the *Act*.

68. I also note that with respect to Par-Mel's allegation that the Delegate misinterpreted sections governing assignment of wages, the banking of employee's hours of work and when an employer must pay all wages to an employee, I find no merit in those submissions as I find that the Delegate has properly interpreted the relevant sections as previously noted.

69. With respect to the balance of Par-Mel's arguments challenging the credibility of Ms. Starkie and her evidence, while I have dealt with those arguments earlier, I reiterate that I find no basis to disturb the Delegate's findings and conclusions of fact, as they are not inexplicable or perverse or exhibiting palpable or

overriding error. To the contrary, I find the Delegate's conclusions of fact to be adequately supported in evidence and have a rational basis.

70. Finally, with respect to the administrative penalties of which Par-Mel complains, I am again in agreement with the Delegate that once it is found that an employer has contravened a section of the *Act*, there is no discretion in the Delegate to not impose an administrative penalty pursuant to the terms of section 29 of the *Regulation*. In this case, I find that all administrative penalties imposed for contraventions of the *Act* are justified under the *Regulation*.

(ii) Natural Justice

Counsel for Par-Mel submits:

71. Counsel for Par-Mel has not, in his submissions, set out any specific evidence or argument in support of the natural justice ground of appeal.

The Director responds:

72. The Director contends that Par-Mel has failed to provide a convincing and sufficient argument to substantiate the natural justice ground of appeal.

73. In *607730 BC Ltd. (c.o.b. English Inn and Resort),* BC EST # D055/05, the Tribunal stated that 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.

74. The burden is always on the appellant to show, on a balance of probabilities, that there is a sufficient basis to change, cancel or vary the Determination on any of the grounds appealed.

75. In this case, while Par-Mel has invoked the "natural justice" ground of appeal, it has not adduced any evidence to show that it was denied natural justice at any point in the proceeding. In my view, based on my review of the section 112(5) record and the Reasons, all parties including Par-Mel were afforded all of the constituent elements of natural justice described by the Tribunal in *English Inn and Resort, supra*.

76. In the circumstances, I dismiss Par-Mel's appeal.

ORDER

77. Pursuant to section 115 of the *Act*, I order that the Determination dated May 20, 2011, be confirmed, along with any interest that has accrued pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal