

An appeal

- by -

Sandra A. MacKenzie  
(the “Employee”)

- 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:** Sheldon Seigel

**FILE No.:** 2008A/101

**DATE OF DECISION:** November 13, 2008

## DECISION

### SUBMISSIONS

Sandra A. Mackenzie	the Employee
Barry J. Promislow	on behalf of Champers Enterprises Ltd. carrying on Business as champers Hair Design
Gagan Dhaliwal	on behalf of the Director

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by the Employee, of a Determination that was issued on August 5, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Employer was a beauty salon, and the Employee a hair stylist. The Determination found that the Employer had not contravened sections 21 or 63, of the *Act*, and did not take unauthorized deductions from the Employee’s wages. The Director found that the Employee was not entitled to compensation for length of service in respect of the employment and made no order.
2. The Employee submits that the Director erred in law or failed to observe the principles of natural justice in making the Determination.
3. The Employee seeks a variation of the Determination or a referral back to the Director for reconsideration.

### ISSUE

4. The issue in this appeal is whether the Director erred in law or failed to observe the principles of natural justice in making the Determination?

### ARGUMENT

5. The Employee submits that the determination process was faulty as the adjudicator was biased and the process was unfair. In particular, she says:
  - The adjudicator allowed the Employer’s witnesses into the hearing room for the introduction to the hearing, while the Employee’s witnesses were excluded.
  - During the introduction to the hearing, the adjudicator indicated that she had reviewed the file and the notes of the mediator, and the mediator’s notes indicated that the mediator provided inadequate guidance.
  - The adjudicator positioned the Employer’s witnesses outside the hearing room where they were able to hear previous testimony, thus allowing them the opportunity to tailor their evidence to the Employer’s.

- The adjudicator failed to advise the parties prior to the hearing that she recognized one of the Employer's witness' name from the file, and she continued with the hearing even though she had a relationship with the Employer's witness.
6. The Employer submits that the Appellant's appeal does not challenge the adjudicator's ruling. The Employer also provides considerable argument critical of the Employee's testimony at the original hearing and supports the contextual ruling made in the Determination. With respect to the Employee's submissions on appeal, the Employer argues:
- The Employer's witnesses were not in the hearing room except when testifying.
  - If there was conversation between the Employee's witness and the Employer's witness outside of the hearing room, the Employee should not be able to complain of it, as she ought not to have allowed her witnesses to discuss testimony outside of the hearing.
  - The Employer's witnesses did not change their testimony as a result of overhearing any prior testimony from outside the hearing room.
7. The Director makes no submissions with respect to the allegation that she made an error in law. The Director provides answers to each of the allegations of lack of procedural fairness that the Appellant submitted:
- When she arrived in the hearing room, the Employer's witnesses were already there. She introduced herself, obtained the identities of the persons in the room and then excluded the Employer's witnesses until their testimony.
  - At the outset of the hearing, the Director indicated that she had read the file-not the mediator's notes, which she did not have, and offered the services of another mediator. The parties refused.
  - Although the Employer's witnesses were positioned outside of the hearing room door, she has no knowledge of whether they could hear the testimony inside the hearing room. The Director adds considerable contextual detail about the evidence on which the decision was made and indicated that nothing significant turned on the evidence of the Employer's witnesses as it related to matters they might have heard prior to testifying.
  - The Director acknowledges that she recognized one of the Employer's witnesses as a person whom had styled her hair some ten years previously. The Director indicates that she did not recognize the witness's name prior to the hearing and disclosed the association prior to commencing the hearing. She says she asked the parties if they had any objection to her continuing as adjudicator and the parties indicated that they did not.

## ANALYSIS

8. There are two grounds for appeal put forth by the Employee. One is that the Director erred in law. The appeal documents and submissions of the Employee disclose no argument or factual information with respect to this claim. The Employer makes no specific reference to this allegation. The Director says without specific submissions on the point she is unable to address this ground of appeal. I find

insufficient evidence to establish that the Director erred in law in making the Determination. This ground of appeal is dismissed.

9. The Employee submitted that the Director failed to conduct a fair hearing and was biased. I will address each point in the order that it was submitted:
10. I accept the Director's evidence of the events prior to the commencement of the hearing. She entered the hearing room where there were individuals already in attendance. In introducing herself and identifying the individuals, she did speak with the Employee's witnesses, but this was a reasonable consequence of their attendance. In an ideal environment, an adjudicator would not set eyes on a witness prior to the introduction of that witness's testimony. The world of administrative law, is not expected to be an ideal environment. The relevant question is whether the facts as they unfolded worked against a fair hearing. I find that the Director acted properly and prudently by requesting that the witnesses excuse themselves from the hearing room at the first reasonable opportunity.
11. The Director offers a description of her usual introduction to the hearing including reference to a review of the file and the noted previous involvement of a mediator. The Employee indicates that the Director commented on the lack of success of the mediator. I have insufficient evidence on which to make a finding with respect to precisely what the Director said. I find that any comments she made on the actions of the mediator are entirely irrelevant to whether or not the hearing was conducted in accordance with natural justice. I would be surprised if the file contained the mediator's notes, and absent evidence that the notes were prejudicial to the interests of a party, the notes, if existent, would have no impact on a fair hearing.
12. The Employee submits that the Employer's witnesses were "positioned" outside of the hearing room in a location from which they could overhear the testimony of the Employer. The Director says she excluded them from the hearing room and they may have seated themselves outside the hearing room door. She has no idea what they may have heard. The Director says that she did not decide the matter based on the testimony of those witnesses. The Employer says that the witnesses did not change their testimony as a result of overhearing evidence from the hearing room. The Employer does not deny that the witnesses may have overheard testimony but says that doing so would not have provided any advantage given the context of the evidence. There is no evidence contradicting the Employee's claim that these witnesses could hear the Employer's testimony. I find that the substance of that prior testimony is not relevant. The issue is whether the matter prevented a fair hearing. Natural justice requires that fairness be actual and perceived. In the event that a circumstance leads one to reasonably believe that a fair hearing has been compromised, natural justice is not served whether or not that apparent compromise turns out to be actual. Accordingly, I find it irrelevant whether the witnesses actually heard prior testimony, or if they testified differently than they would have but for the fact that they overheard it. If these witnesses were put in or allowed in a position that could reasonably have been perceived to provide an advantage to one party, then there is a breach of natural justice. However the evidence is equivocal in that regard. The Employee says that the witnesses were in the hallway outside the hearing room. There is no evidence that the door was open or ajar. In the event that the door was closed and these witnesses were in a position to hear through the door or a wall, that circumstance could have been shared by the Employee, or brought to the attention of the adjudicator for immediate redress. It is not acceptable for a party to merely note a potential irregularity and pocket it pending the possibility of a negative outcome. I find that if there was any apparent advantage obtained by the Employer's witnesses, the Employee had an obligation to act reasonably to put a stop to the apparent advantage or at the minimum to bring the matter to the attention of the adjudicator immediately.

13. Finally, there is the matter of the hairstylist that the Director once patronized. While the Employee complains that the Director did not disclose a conflict in advance of the hearing, the Director submits that she did not recognize the witness's name while preparing for the hearing. I accept the Director's evidence in that regard. The Director says that she went to the witness for hair styling three or so times more than ten years before the hearing. The Employee says that once the Director recognized the witness, the Director had an obligation to discontinue the hearing due to the relationship of trust that a hairstylist has with her client. The Employee does not provide specific evidence of the relationship between the Director and the witness hairstylist. The Director says that she recognized the stylist when she appeared prior to the commencement of the hearing and that the Director then disclosed her familiarity with the witness to the parties. The Director says she asked the parties if they had any objection to her continuing with the hearing and neither of the parties objected. There is no evidence to suggest that the Employee did anything but acquiesce with the Director continuing with the hearing and there is no evidence to suggest that the Director failed to adequately disclose her association with the witness. I find that under the circumstances, the Director acted reasonably and no unfairness was imposed on the Employee.
14. I find that natural justice was served by the procedures relating to the hearing leading up to the Determination. The Appeal fails.

### **ORDER**

15. Pursuant to section 115 of the *Act*, I confirm the Determination.

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**Sheldon Seigel**  
**Member**  
**Employment Standards Tribunal**