

An appeal

- by -

Spadirect Inc.

- 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:** John E. D. Savage

**FILE No.:** 2007A/109

**DATE OF DECISION:** December 11, 2007

## DECISION

### SUBMISSIONS

Audrey Hlembizky, for Spadirect Inc.

Rod Bianchini, for the Director of Employment Standards

### INTRODUCTION

1. The Appellant Spadirect Inc. (“Spadirect”) engaged Wendy Shim (“Shim”) to perform mobile spa services for customers at their homes or on site in hotels. A dispute arose between Spadirect and Shim. Shim filed a complaint with the Director alleging that she was an employee and had not been fully paid for her services. Spadirect took the position that Shim was an independent contractor.
2. Hearing dates were set several times and a mediator was assigned. According to Spadirect, Shim’s conduct resulted in an adjournment of earlier scheduled proceedings. The contact person from Spadirect, Audrey Hlembizky, also fell ill and requested and received an adjournment of a hearing scheduled for May 9, 2007.
3. Shortly thereafter there ensued settlement discussions between the parties through a mediator appointed by the Employment Standards Branch. Spadirect says that a settlement was achieved, with Spadirect agreeing to pay Shim \$1300.00. Hlembizky, who was ill, advised the mediator to deal with someone else from Spadirect thereafter as she was ill.
4. The mediator subsequently emailed Hlembizky, but Hlembizky says, because of her illness, she did not receive the email until later. The email required that the sum of \$1300.00 be paid within 5 days. No payment was received.
5. On May 29, 2007, a rescheduled hearing commenced without any participation from Spadirect. Spadirect says, *inter alia*, it did not attend because it thought the matter was resolved.
6. The Delegate of the Director heard evidence only from Shim, and issued a Determination dated August 10, 2007 finding that Shim was owed unpaid regular wages of \$1,814.00, business costs of \$395.00, compensation for length of service in the amount of \$563.35, and vacation pay in the amount of \$565.04.
7. In addition to the above amounts, the Delegate imposed three administrative penalties of \$500.00 each for alleged breaches of section 17, 18 and 46 of the *Employment Standards Act*.
8. Spadirect appeals saying the matter was resolved through mediation with Shim agreeing to accept the sum of \$1300.00.
9. The Tribunal determined to hear the appeal through written submissions. Submissions were received from Spadirect and the Director. No submission was received from Shim.

## ISSUES

10. The issues in the appeal are (1) whether there was an agreement to resolve the complaint, and (2) if there was not a settlement of the complaint, was there a breach of natural justice in hearing the complaint in the absence of Spadirect in the circumstances of the case.

## WAS THERE A SETTLEMENT OF THE COMPLAINT?

### *The Facts*

11. In the Determination of the Delegate there is little discussion of the circumstances surrounding the alleged settlement. The Delegate says only that “The branch officer proceeded to engage Shim and Spadirect in settlement discussion but this was unsuccessful”.
12. In its submissions to this Tribunal the Delegate does not take issue with Spadirect’s position. The Delegate says of Spadirect’s submission “Points 25 through 35 deal directly with attempted settlement discussion of which the Delegate was not part”.
13. On the other hand, Spadirect through Hlembizky is unequivocal in their position which is that the Branch “...called me and said that Wendy Shim has agreed to \$1300.00, which was the original amount that I had agreed on...”. Spadirect by an email dated May 11, 2007, says:

“...we will except (sic) payment of \$1300.00. I am passing this on to someone who can look after finalizing this with you as I am not able to (sic). They will contact you”.
14. Later that afternoon the Branch contacts Hlembizky with the following email:

“Thank you Audrey and hope you get better”.
15. On May 14, 2007, the Branch sends an email to Hlembizky advising “To settle this matter, all I need is a bank draft or money order from you for \$1300.00 made payable to Wendy Shim within the next 5 days”. The email concludes with courier instructions.
16. In Spadirect’s submission, they were surprised when they learned of the later email correspondence. Hlembizky was indisposed because of illness and only learned of this later. It also came as a surprise that a hearing had preceded on the May 29, 2007. Hlembizky and Spadirect thought the matter was resolved.
17. There is no suggestion in the material before me that Hlembizky was not ill, or that she actually received in a timely way the later email purporting to impose a requirement for payment within 5 days, or that she received in a timely way the email enclosing the Notice of Hearing.
18. During this period Hlembizky had offered to provide a physician’s note regarding her illness, but none was requested, and had advised that she was too ill to complete the matter herself.
19. Neither the Director nor Shim has taken issue with Spadirect’s submissions regarding the settlement although they were given the opportunity to do so.

### *Offer and Acceptance*

20. A settlement is simply a form of agreement or contract that resolves an issue, proceeding, action or claim. Resolving matters through settlement is one way of expeditiously dealing with claims under the Act, which is to be encouraged.
21. In order that there be a contract it is necessary that the terms and conditions of the contract be known. A contract can fail for uncertainty, but certain terms may also be implied. There must be an offer and an acceptance and communication of the same. Once there is an offer and an acceptance there is contract. Once there is a contract then the parties must rely on the contract and generally their remedy is a contractual one, namely, to enforce the terms of the contract.
22. Was there a contract here? In my opinion, based on the evidence and submission before me, there was. As I read the correspondence and submissions Hlembizky, on behalf of Spadirect, made an offer to resolve the matter for payment of \$1000.00. The offer was made through an officer of the Branch who was seeking to mediate the dispute.
23. The offer to resolve the matter for \$1000.00 was not accepted but was countered by the mediator, who, on behalf of Shim, proposed \$1300.00 to resolve the dispute. That offer was accepted by Hlembizky, who sent a confirming email regarding the same at 10:02 a.m. on May 11, 2007. The mediator thanked Hlembizky and wished her well in a reply made at 1:54p.m. on May 11, 2007.
24. On Monday, May 14, 2007, the following week, the mediator imposed a new condition. The conditions was that there be a bank draft made payable to Shim “within the next 5 days” and it be couriered to him. By this time, however, agreement had been reached to pay the sum of \$1300.00. In my opinion it was not open for a new condition to be unilaterally added to the agreement.
25. I note that there is an exchange of email on record between Hlembizky and the mediator on May 29, 2007. My interpretation of those emails is that Hlembizky and Spadirect continued to assert there was a settlement, although the mediator referred to the condition he had imposed. In my opinion, however, it was not open to either party to unilaterally resile from the settlement that had been achieved.
26. While, no doubt, payment was required to be timely, it was not open to the mediator or Shim to impose a further condition on the resolution after resolution had been reached. Moreover, it is not clear that this condition was effectively communicated to Spadirect, since the email seeking to impose the term was directed to Hlembizky who was ill. Because there was no discussion of when payment was required to be made, the time for payment was not a pre-condition to there being agreement.
27. At common law time was considered to be “of the essence”, but Courts of Equity reversed that rule, which has been codified in the *Law and Equity Act*, RSBC 1996, Chap. 253, section 31:
31. Stipulations in contracts, as to time or otherwise, that are not deemed to be or to have become of the essence of the contracts according to the rules of equity, must receive the same construction and effect as they would receive in equity.
- R.S.B.C. 1979, c. 224, s. 27.
28. In this case, there was no stipulation as to time of payment when the agreement was reached. It is possible to make time for payment the essence of a contract, and for such to be enforced, but to do so it

must be made clear before the agreement is reached that the time for payment is an essential condition for reaching agreement. That was not done here.

29. In my opinion, a court would require that there be payment made within a reasonable period of time, and interest would accrue from the time of the agreement if the contractual debt remained unpaid. However, once the bargain had been reached, it was not open for any party to unilaterally impose a new term as a condition, and then proceed with the complaint in the absence of the new term being satisfied.

### **BREACH OF NATURAL JUSTICE**

30. In this case the Delegate proceeded with the hearing in the absence of Spadirect in the circumstances I have described.
31. Spadirect is not blameless in this regard. Hlembizky advised the mediator that someone from Spadirect would be in touch with the Branch. It is not at all clear that this actually took place, indeed, the opposite inference seems warranted. Nevertheless, Hlembizky in her email to the mediator advised that she was ill and that someone else from Spadirect would have to be involved to complete the matter. There is no evidence before me that any effort was made to do that.
32. In my opinion it was not appropriate for the mediator to send his email to Hlembizky imposing a new condition as to time for payment, and, in the absence of a response, advise the Branch to proceed to adjudication. Nor was it adequate to send a new Notice of Hearing to Hlembizky by email on Tuesday May 22, 2007, imposing a new hearing date of May 29, 2007, when Hlembizky had through illness requested that the matter be dealt with by another person from Spadirect from May 11, 2007. At the material times Hlembizky was in Toronto.
33. My findings regarding the settlement resolve the appeal. If I am wrong in this matter, in my opinion, proceeding on May 29, 2007, in the absence of Spadirect, was a breach of natural justice in these circumstances, where one party was ill and had reasonable grounds to consider the matter resolved.
34. However, since I have found that the parties resolved the issue through agreement, the Delegate had authority to adjudicate the complaint, by confirming the terms of settlement, which he could have and should have done: *Re Small*, BCEST #D032/98, *Re Golden Day Pancake House Ltd.*, BCEST #D282/01, *Re Fraese*, BCEST #D131/03. Of course, by confirming the terms of settlement in its determination, the Delegate would ensure that all of the machinery of the Act is available for enforcement, including provisions regarding payment from Directors.

### **DISPOSITION**

35. Spadirect in its submission by Hlembizky to this Tribunal says it is prepared pay the sum of \$1300.00. Indeed, as I have found, it is bound to do so. In the circumstances the appeal is allowed and the Determination is varied to impose the terms of settlement, namely, payment of the sum of \$1300.00 plus interest from May 11, 2007. The penalties are cancelled.

**ORDER**

- <sup>36</sup>. The appeal is allowed and the Determination of the Director is varied pursuant to section 115 of the Act to require that Spadirect pay to the Director, on behalf of Shim, the sum of \$1300.00 plus interest from May 11, 2007. The penalties are cancelled.

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**John E. D. Savage**  
**Member**  
**Employment Standards Tribunal**