Employment Standards TRIBUNAL

An appeal

- by -

The French Room Art De Coiffures Ltd.
carrying on business as Richard Jeha Hair Company
(the "Appellant")

- 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: Philip J. MacAulay

FILE No.: 2006A/110

DATE OF DECISION: December 5, 2006

DECISION

SUBMISSIONS

Richard Jeha	on behalf of The French Room Art De Coiffures Ltd. carrying on business as Richard Jeha Hair Company
Rubyrose Alcalde	on her behalf
Ian MacNeill	on behalf of the Director of Employment Standards

OVERVIEW

1. This is the appeal of The French Room Art De Coiffures Ltd. carrying on business as Richard Jeha Hair Company (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against determination ER#: 034-270 (the "Determination") issued by the delegate of the Director of Employment Standards (the "Delegate") on August 16, 2006.

2. The Delegate found that the Appellant had contravened sections 21, 27, 28, 45 and 46 of the Act and ordered that the Appellant pay:

1) To the former employee Rubyrose Alcalde

Annual Vacation Pay (s. 58(3))	$ 32.98
Statutory Holiday Pay (s. 45 and 46)	824.50
Unauthorized Deductions (s. 21)	1,376.55
Accrued interest under the Act (s. 88)	67.11
A. Wages payable to the employee	$2,301.14

2) Administrative Penalties for first contraventions of the Act regarding:

Section	Contravention	Amount
Section 21	(unauthorized deduction)	$ 500.00
Section 27	(failure to provide wage statement)	500.00
Section 28	(failure to keep time records)	500.00
Section 45	(failure to pay for statutory holidays)	500.00
Section 46	(failure to pay correct statutory holiday pay)	500.00
B. Total Administrative Penalty Amount		$2,500.00
C. Total amount payable		$4,801.14.

3. The Appellant was also ordered to cease contravening the sections of the *Act* determined to have been contravened and to comply with all the requirements of the *Act* and the *Employment Standards Regulations*.

4. In the exercise of its authority under section 36 of the *Administrative Tribunal Act*, as incorporated in section 103 of the *Act*, the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

BACKGROUND

5. The Appellant, The French Room Art De Coiffures Ltd. carrying on business as Richard Jeha Hair Company (the "Appellant") operated a hair salon in Vancouver, B.C., at which Rubyrose Alcalde (the "Employee") was employed as a stylist from October 2001 to January 26, 2006 at a commission rate of 50% of the service provided.

6. In January of 2006, the Employee gave written notice of termination of employment with the Appellant in order to move to a different salon.

7. Upon receiving her last pay cheque, she learned $1000.00 had been deducted without her authorization.

8. She subsequently filed a complaint under section 74 of the *Act* alleging that the Appellant had contravened the *Act* by failing to pay her for statutory holidays and for the $1000.00 deduction from her pay without her written authorization.

9. The two issues before the Delegate were:

(a) had the employee been paid correctly for statutory holidays?

(b) were deductions made from her pay cheque without the employee's written authorization?

10. The Appellant argued before the Delegate that the initial terms of the Employee's employment with the Appellant included a term that she would not be paid for statutory holidays.

11. The Delegate concluded that, if there were such an agreement, it would be prohibited under section 4 of the *Act* which states:

> "The requirements of this Act and the regulation are minimum requirements and an agreement to waive any of these requirements, not being an agreement referred to in section 3(2) or (4) has no effect."

12. Sections 3(2) and (4) address the scope of the *Act* in how it applies to Collective Agreements and is not relevant to this situation.

13. In the result, the Delegate concluded that the Appellant had both failed to pay for specified statutory holidays as required under section 45 of the *Act* and had also failed to pay the appropriate rate as required under section 46 of the *Act* on certain statutory holidays when the Employee had worked. The Delegate found that the Appellant had contravened both of these sections and ordered the total payment of $824.50. As well, an administrative penalty of $500.00 was assessed for contravention of each of sections 45 and 46.

14. In the course of dealing with the Employee's allegations concerning vacation pay and the appropriate pay for statutory holidays, a Demand for Employer Records had been sent to the Appellant requesting any and

all payroll records relative to wages, hours of work and conditions of employment as specified in section 28 of the *Act*. Payroll, but no time records, were provided to the Director's office. The Appellant agreed that he did not maintain the required hourly time records. The Delegate therefore determined that the Appellant had thereby contravened section 28. An administrative penalty of $500.00 was assessed for contravention of this section.

15. The Delegate also determined that the Appellant failed to provide statements with its mid month advances which contravened section 27. An administrative penalty of $500.00 was assessed for contravention of that section.

16. The $1000 deduction made by the Appellant from the Employee's last cheque related to monies allegedly due from her toward the costs of an international hair competition she attended in Milan, Italy in November, 2004, which had been paid by the Appellant for which the Appellant claimed a right to be reimbursed.

17. The Employee had previously represented the Appellant's salon in international and national competitions and had regularly won top awards. The Appellant had financed all of these trips.

18. The Delegate found that the practice had been that the Appellant would make all the reservations, pay the bills and then divide the expenses between the staff and deduct their share from their pay cheques over a two-year period of time.

19. Importantly, the Appellant acknowledged that he did not have written authorization for any of these deductions and "that he took the risk of her walking away from these loans at any time". After receiving her notice of termination, the Appellant calculated what it believed was owed by her arising from the Milan Hair Show and deducted $1000 from her last cheque.

20. In his Determination the Delegate also calculated that the Employee had not received all vacation pay due her concluding that $32.98 was still due to the Employee under section 58(3) of the *Act*.

THE APPEAL

21. In its initial Appeal Form dated September 18, 2006, the Appellant had indicated that the grounds for appeal included:

> a) The Director of Employment Standards failed to observe the principles of natural justice in making the Determination, and
>
> b) Evidence had become available that was not available at the time the Determination was being made.

22. The Appellant seeks the cancellation of the Determination.

23. In its attached explanation to the initial appeal the Appellant, through its representative, Richard Jeha, states:

> "I am requesting an appeal because there is new evidence in where [sic] the ex employee has not told the truth, and that the Director of Employment Standards failed to observe the principles of natural justice in making his Determination. I am not happy with his Decision because he failed to

> look at the integrity of the 38 years in business and that I have never had an employee in that time complain to the Employment Standards. He believed her side of the story when I know she has not told the truth. How can he believe her when she has written the amount she is claiming of her income tax for her education. I would like an appeal."

24. The Employee then filed a brief response of October 11, 2006 and on October 30, 2006 wherein she stated that she had told the truth, that the Appellant "had no real base [sic] evidence to support his allegations" and that what the Appellant had "said in his letter of appeal is irrelevant".

25. As well, the Delegate responded to the appeal by letter of October 12, 2006.

26. The Delegate refuted any suggestion that he engaged in any procedural unfairness in conducting the Hearing. The Delegate notes that there is no evidence to support these allegations. The Delegate notes that the Appellant, being "unhappy with the Decision does not give" the Appellant grounds to appeal on the basis that it had been denied natural justice. The Delegate notes that the Appellant was given ample opportunity to present its evidence at the Hearing and to submit documents it felt would support its position.

27. With regard to the allegations by the Appellant that the Delegate had preferred the Employee's evidence over that of the Appellant, the Delegate responds that he "heard no conflicting evidence where I was required to assess credibility and choose one person's evidence over that of the other".

28. Moreover, the Delegate notes that the Appellant's own evidence helped to solidify the complaint as the Appellant had acknowledged that it had not paid for statutory holidays, had made deductions without written authorization and that documents confirmed that evidence.

29. Finally, the Delegate stated that the Appellant had not provided any new evidence. No documentation was provided with the initial appeal to support the claim that the Employee failed to tell the truth. The Delegate reviewed the record and could find no reference that connected the Appellant's statement that the Employee had claimed an educational deduction from her income tax to any new evidence.

30. The Appellant filed a final submission dated October 30, 2006, which states, in part, as follows:

> "I would like to start by saying that what Mr MacNeill said in his letter to you has been bothering me very much, namely "Being unhappy with the decision does not give Mr Jeha grounds to appeal on the basis that he was denied natural justice"; and in his second last paragraph "I have reviewed the record and can find no reference that would connect this statement to new evidence", resulting "I can see no basis for this Appeal to proceed and believe it should be dismissed". To be fair to me, I feel I should be given the chance to produce further documents to support what I claim even though I did not have those with me at the Hearing before he made his determination.
>
> At the Hearing Rubyrose stated that I did not inform her that she had to pay for the expenses for the Milan Hair Show and the fees for the seminar. As a matter of fact, it was mentioned at our staff meetings that the expenses for attending these were to be shared. This was agreed at the meeting and in fact all the expenses had already been paid by other staff, except Rubyrose. Da Vinci invoice is enclosed herewith which shows that another employee Svetlana has paid in full.
>
> Documents were not provided at the Hearing to support what I said about Rubyrose being not truthful because I only came to know after that from our accountant Eliza Bang that she issued 3 receipts for $200, $176.55 and $$1,000 to her for her income tax return purpose, and Rubyrose

agreed with her for the sums to be deducted in her payroll. Copy of these receipts are enclosed herewith. Rubyrose can be asked to produce her 2005 Income Tax Return to see if these 3 amounts were written off as expenses thus proof of her credibility.

Finally I reiterate that the sums of $200, $176.55 and $1,000 were money that Rubyrose owes me and she is aware that she has to pay for those, that they were deducted from her payroll at her verbal agreement which should also be legally binding. And I hope a fair review to that could be given. Thank you very much for your attention."

ISSUES

a) Did the Director fail to observe the principle of natural justice?

b) Has new evidence become available that was not available at the time the Determination was made?

ANALYSIS

31. The appellate powers of this Tribunal are set out in, and are limited by, section 112 (1) of the *Employment Standards Act* which provides:

"112(1) subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 being made."

32. As stated earlier, the Appellant, on its Appeal Form, has indicated, firstly, that its appeal is brought on the grounds of 112(1)(b) [failure to observe principles of natural justice]. Secondly, it further bases its appeal upon section 112(1)(c) [evidence now available].

33. With regard to ground 112(1)(c), it is clear from the Appellant's submissions that the Appellant is not really alleging that there is any new relevant evidence that has come to light that was not available, or which might have been available, at the time of the Delegate's Hearing but that, on the issue of the permissibility of deductions from wages:

(a) there are documents (receipts issued by the Appellant's accountant for alleged tax deduction purposes, and other expense invoices) submitted with the Appeal for the first time which the Appellant asserts provide evidence entitling the Employer to make deductions from the Employee's wages;

(b) as well, the Appellant submitted with the appeal a copy of its own letter of January 30, 2006 (after the Employee had provided notice she would be leaving the Appellant's employment)

itemizing what the Appellant felt was owed to it and confirming the deduction of $1,000.00 from the last pay cheque.

(c) there is a document also provided with the appeal illustrating that full deductions had been made from another employee's wages.

34. A previous decision of this Tribunal has interpreted section 112(1)(c) as being similar to the ground of appeal available in this Province with respect to appeals to the appellate courts based on "new evidence".

35. In *Davies et al v. The Director of Employment Standards*, BC EST #D171/03, the Tribunal states:

> "We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (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 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."

36. Based on the above, I conclude that none of the documents provided by the Appellant constitute "fresh" evidence under section 112(1)(c). They were all in existence at the time of the Hearing but the Appellant did not present them as evidence at that time.

37. On appeal, the Appellant requested the opportunity to examine the Employee so that she "can be asked to produce her 2005 Income Tax Return to see if these three amounts were written off as expenses thus proof of her credibility".

38. In this regard, it is noted that the Appellant could have made such an inquiry of the Employee at the August 2006 Hearing but did not do so.

39. I have considered the grounds for appeal as outlined by the Appellant and find them to be without merit.

40. There is nothing in the Record, nor, for that matter, in either of in the Appellant's submissions on appeal, to lead me to conclude that the Delegate failed to observe the principles of natural justice.

41. The rules of natural justice concern the procedural fairness of an adjudicative process. The parties are entitled to a neutral (i.e. unbiased) decision-maker who governs a process where the parties are provided an equal opportunity to make their case and respond to the opposite party.

42. In the subject case there is no basis upon which it might be said that the Delegate did not honour his duties to be a fair, impartial arbiter of the issues. The Appellant was aware of the Employee's case which the appellant must meet and was not improperly restricted by the arbiter in presenting his reply. There were no steps taken in the process which inhibited the appellant's ability to present evidence or argue its position.

43. The Appellant's initial statement that the Delegate overlooked "the integrity of 38 years in business in which the Appellant says no employee ever complained to the Employment Standards" does not provide any evidence of procedural unfairness and is, frankly, irrelevant to this Employee's complaint. This Employee's allegations were specific, were explicitly considered by the Delegate and determined upon the evidence presented at the Hearing. There is no hint that the Appellant was prevented from providing any evidence helpful to its case in this process.

44. The Appellant's initial complaint that the Delegate believed the Employee's "side of the story" is hardly relevant when the documentary and oral evidentiary basis of the Delegate's Determination on each point was acknowledged by the Appellant itself.

45. There was no conflict in the evidence with respect to:

1. no mid-month wage statements had been provided;
2. no time records had been kept;
3. no payment was made for certain statutory holidays;
4. insufficient payment had been made for work done on statutory holidays;
5. no written authorization had been provided by the Employee to permit the appellant to make deductions from pay.

46. The Appellant's final submission of October 30, 2006, does not provide any new evidence that would disrupt these findings as they relate to the provisions of the *Act* and it various contraventions. There is no evidence provided which was not then available and could have been presented at the August 16, 2006 Hearing.

47. No principles of natural justice were breached by the Delegate in that the Appellant had a full opportunity to present its case by way of either documentation or oral evidence at that time.

48. At no point in its appeal does the Appellant dispute the findings that it had not maintained the records required of it under the *Act* which the Delegate concluded were contraventions.

49. Moreover, the Appellant states that the Employee had agreed as a term of her employment that she not be paid for statutory holidays. Even if such an agreement were proven, it would be, as determined by the Delegate, unenforceable as being an impermissible waiver of the *Act*'s provisions under section 4. It was not open to the parties to waive the statutory holiday payment provisions of the *Act* therefore issues of credibility regarding any agreement on that topic are not relevant.

50. Finally, at no point in the Hearing (or in either of its submissions on its appeal) does the Appellant provide any evidence of the Employee's written authorization of deductions from her pay to reimburse the Appellant for any costs associated with the international hair show or otherwise.

51. The general intent of the scope of the protection of employees under the *Act* is revealed in section 4 which stipulates that the requirements of the *Act* and the *Regulation* are minimum requirements and an agreement to waive any of those requirements (except in specific circumstances) has no effect.

52. In protecting employees' wages, section 21(1) specifically provides that :

> "21(1). Except as permitted or required by this *Act* or any other enactment of B.C. or Canada, an employer must not, directly or indirectly, withhold deduct or require payment of all or any part of an employee's wages for any purpose. (my underlining)

53. As interpreted by Tribunal decisions, section 21(4) provides a limited, in my view, exception to the prohibition on deductions from wages in providing:

> "21(4). An employer may honour an employee's written assignment of wages to meet a credit obligation."

54. The Tribunal has previously held that a written contract that provided that a specific amount of an employee's compensation would be allocated to rent constituted a valid "written assignment". *Sophie Investments Inc*. BC EST #D527/97 and #D528/97 (reconsidered in *The Director of Employment Standards*, BC EST #D447/98).

55. In the *Sophie* Reconsideration the Adjudicator stated that:

> "The decisions of the Tribunal dealing with issues of whether an employee had made a written assignment of wages under section 21 of the *Act* have not found that technical perfection is required, only clarity."

56. In my mind, the critical requirement is the "clarity" of the assignment before one is to set aside the protection of the employee provided by section 21(1).

57. The assignment should be sufficiently specific and explicit so as to make it "clear" that the employee has granted her consent to the deduction. An employer who wishes to rely upon a section 20(4) written assignment to justify deductions from wages must provide clear and specific evidence to that effect in order to do so.

58. The documents the Appellant sought to introduce through this appeal are not a clear "assignment of wages" and, in my opinion, do not satisfy the requirements of sections 21(1) and (4) so as to justify deductions being taken from wages in this case. As well, they do not constitute "evidence that has become available that was not available at the time the Determination was being made".

59. None of the accountant's receipts, copies of invoices, evidence of deductions made from another employee and, even, the subject Employee's own Income Tax returns would, in my view, satisfy the requirement for a clear and specific assignment of wages. Therefore, there was no legal basis to make the deduction. There are no issues of credibility or of preferring the evidence of one party over the other with respect to deduction from wages. Simply put, the *Act* requires a clear written authorization by the

employee to allow the assignment of any portion of wages to satisfy a credit obligation and no such written assignment exists in this case. The *Act* prohibits such deductions and the Delegate's decision in this regard is confirmed.

60. It may be that, in another legal forum, the Appellant may pursue what it believes is a debt due from the Employee. However, this *Act* is not the appropriate method by which such an alleged debt might be collected and the deduction from wages made in this case was not lawful.

61. In my view, for the reasons aforesaid, the Delegate has observed the principles of natural justice in making his Determination. As well, the Appellant has not successfully shown that evidence has become available that was not available at the time the Determination was made as is set out in section 112(1)(c) of the *Act*.

62. Given this result, and the mandatory requirements of the *Act* where contraventions of its provisions have been found, the administrative penalties assessed by the Delegate are appropriate.

ORDER

63. Pursuant to section 115 of the *Act*, I order that the Determination dated August 16, 2006, be confirmed.

Philip J. MacAulay
Member
Employment Standards Tribunal