

An appeal

- by -

0830010 B.C. Ltd. carrying on business as VIP Hair Salon & Spa Inc.
(“VIP Hair Salon”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2012A/112

DATE OF DECISION: November 28, 2012

DECISION

SUBMISSIONS

Farshid Milani

on behalf of 0830010 B.C. Ltd. carrying on business as
VIP Hair Salon & Spa Inc.

OVERVIEW

1. This is an appeal by 0830010 B.C. Ltd. carrying on business as VIP Hair Salon and Spa Inc. (“VIP”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued September 26, 2012. In that Determination, the Director ordered VIP to pay its former employee, Hosna Tadayon, \$2,271.36 in wages, statutory holiday pay, annual vacation pay and interest for contravening Sections 18, 45 and 58 of the *Act*. The Director also imposed five administrative penalties in the total amount of \$2,500 for VIP’s contraventions, for a total amount payable of \$4,771.36.
2. VIP appeals the Determination contending that the delegate erred in law and failed to comply with principles of natural justice in making the Determination.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. Although Mr. Milani requested an oral hearing, I am not persuaded that an oral hearing is necessary. These reasons are based only on VIP’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under Section 114 (1), the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

5. Ms. Tadayon worked as a hairstylist at VIP from February 9 to April 28, 2012. On May 14, 2012, she filed a complaint alleging that VIP had failed to pay her wages. A delegate of the Director contacted Mr. Milani, VIP’s sole director, by telephone and email on August 27, 2012. Mr. Milani asserted that Ms. Tadayon was not an employee and that he would be providing the delegate with the information she requested. The delegate also sent Mr. Milani and VIP a Demand for Records, a copy of Ms. Tadayon’s complaint and supporting evidence, as well as relevant Employment Standards Branch information. The package was sent by registered mail to VIP’s operating address, registered and records office; Mr. Milani’s residential address as well as Mr. Milani’s email address. Although all letters sent by registered mail were returned unclaimed, Mr. Milani confirmed receipt of the email.
6. The Demand for Records set a deadline of September 11, 2012, for records and evidence to be provided. The delegate did not receive any of the requested records by that day, and on September 17, 2012, she advised Mr. Milani by email that she had not received the records demanded. The delegate also advised Mr. Milani that in the absence of a voluntary resolution of the complaint, she would issue a Determination based on the evidence presented and that monetary penalties could be imposed. According to the

Determination, Mr. Milani “provided several unintelligible and discourteous responses” which included an assertion that he did not “have any employee contract” with Ms. Tadayon and told the delegate not to contact him further. The delegate confirmed her role and the process and advised Mr. Milani that he had until September 20, 2012, to provide her with any evidence he wished her to consider. The delegate received no records or documentary evidence from VIP.

7. VIP’s position was that Ms. Tadayon worked as an independent contractor and “trainee” and that she was not therefore entitled to the protection of the *Act*. Mr. Milani asserted that Ms. Tadayon signed a “chair rental agreement” and was exempt from the *Act*.
8. Ms. Tadayon said that after she responded to a Craigslist advertisement posted by VIP, she was interviewed by Mr. Milani and hired as a stylist on February 9, 2012. She said that Mr. Milani required her to sign a “Booth Rental Agreement” which indicated that she was leasing a space at VIP for \$1.00 per month and that the space was to be used “solely for the operation of a hair service station”. Ms. Tadayon worked 8 hours per day, Tuesday through Saturday as set by Mr. Milani. All of her clients were provided by VIP and all services and prices were set by VIP. Ms. Tadayon used VIP’s supplies, facilities and salon fixtures and serviced VIP’s customers in accordance with its shop hours. All customer payments were processed through VIP. Mr. Milani and another stylist operated the cash register, took payments from customers and held the proceeds. Mr. Milani provided the debit/credit receipts for Ms. Tadayon’s sales and she was instructed to give them to Mr. Milani each month so her pay could be processed. Mr. Milani reconciled Ms. Tadayon’s net sales and paid her a commission and her tips once per month. Ms. Tadayon was also paid a small commission on the sales of products.
9. Ms. Tadayon said that although the Craigslist advertisement she responded to promised her an hourly wage, after she received her first payment, she discovered she was being paid 60% commissions on sales minus taxes, as well as a set rate for clients referred to the salon through various promotional certificates. Ms. Tadayon said that she agreed to this change. The following month, Ms. Tadayon’s commissions were reduced to 50% and she was charged for products. Mr. Milani explained that he did not have enough money to pay her 60%. Ms. Tadayon did not agree to this change but continued to work as she needed the employment. Ms. Tadayon claims included the 10% difference she was not paid from March 10 until April 10, 2012.
10. Ms. Tadayon provided the delegate with sales summary receipts created by VIP from February 9 to March 9 and March 10 to April 10, 2012. These receipts confirmed Ms. Tadayon’s assertions about how she was paid.
11. After the completion of her shift on April 28, 2012, Mr. Milani’s wife told Ms. Tadayon that she was no longer needed and to collect all her possessions and leave. Ms. Tadayon asked Mr. Milani for her wages and was told her money would be available the following week. Mr. Milani also told her she would have to sign a confidentiality agreement in order to be paid. When Ms. Tadayon refused to sign the agreement, Mr. Milani refused to pay her.
12. Ms. Tadayon provided the delegate with receipts from all sales for which she received no wages. She also advised the delegate that she had never operated her own business and had never advertised herself as, or expressed an interest in becoming, an independent contractor.
13. The delegate considered the definitions of employee, employer and work contained in Section 1 the *Act*. She noted that although Mr. Milani had failed to respond in any meaningful way to her inquiries, he had not disputed that Ms. Tadayon performed work as a hair stylist. She considered Mr. Milani’s argument that VIP’s

relationship with Ms. Tadayon was not covered by the *Act* because they had entered into a chair rental agreement, because Ms. Tadayon was a trainee and because she hired her own assistants.

14. The delegate noted that Section 4 of the *Act* prohibits employees from waiving their rights and entitlements under the *Act* and concluded that the “chair rental agreement” was not determinative of the relationship between the parties. She also noted that although Mr. Milani asserted that Ms. Tadayon hired her own assistants, Ms. Tadayon disputed that assertion and Mr. Milani had provided no evidence to support his position.
15. The delegate found as a fact that Ms. Tadayon responded to a job advertisement posted by VIP with the intent of securing employment, and after being interviewed by Mr. Milani, worked set days and hours to service VIP customers. The delegate further found that Ms. Tadayon was hired to perform stylist work, a position fundamental and integral to the business operations of VIP, and that the salon required her to perform stylist duties on their customers, many of whom had purchased promotional certificates offered by VIP. The delegate found that prices for products and services were set by VIP and payment processed through the salon. Finally, the delegate found that, at the end of each month, Mr. Milani reconciled Ms. Tadayon’s sales and arbitrarily set her rate of compensation. The delegate concluded that Ms. Tadayon’s duties were performed under the control and direction of VIP and that they were fundamental components of VIP’s operation and profitability.
16. The delegate also dismissed VIP’s argument that because Ms. Tadayon was a trainee, she was exempt from the *Act*. The delegate found no evidence that VIP was a training institute or that Ms. Tadayon applied for, or was placed, through any related apprenticeship programs. The delegate noted, more significantly, that the definition of an employee included those persons being trained by an employer for their business.
17. The delegate found that VIP provided and booked all customers, determined what services were available and at what price, supplied the space, tools and products required to perform the work and collected and distributed payment from its customers. The delegate found that Mr. Milani set and repeatedly changed Ms. Tadayon’s wage rate and conditions of payment. Finally, the delegate also noted that it was VIP, as represented by Mrs. Milani, who terminated Ms. Tadayon’s services.
18. The delegate concluded that Ms. Tadayon was an employee of VIP as defined under the *Act*.
19. In the absence of any records or dispute by VIP on issues related to Ms. Tadayon’s rate of pay and hours worked, the delegate found Ms. Tadayon’s detailed and consistent evidence, supported by documentary evidence, persuasive and concluded that Ms. Tadayon was entitled to 60% commissions plus a flat rate for online promotional certificates.
20. The delegate found that even though Ms. Tadayon had worked 40 hours per week, her commission rate of 60% of net sales did not meet the minimum wages set under Section 16(1) of the *Act* and Section 15 of the *Employment Standards Regulation* (the “*Regulation*”). The delegate calculated Ms. Tadayon’s wages, statutory holiday pay and vacation pay in the amounts set out above.
21. VIP’s appeal consists, essentially, of a dispute about the delegate’s factual findings. In his submission, Mr. Milani says, among other things, the following:
 - VIP did not offer a job to Ms. Tadayon;

- Ms. Tadayon provided the delegate with the stylist position advertised on Craigslist rather than the advertisement for the chair rental;
- Ms. Tadayon had her own key to the salon and was able to come and go as she pleased;
- Ms. Tadayon worked independently at the salon;
- Ms. Tadayon hired her own assistant at the salon;
- Ms. Tadayon sold other chair rental retail positions at the salon;
- Mr. Milani had no control over Ms. Tadayon and simply gave her instructions which she had an option to follow or not, in order to assist in her training.

ANALYSIS

22. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
23. Having reviewed the Section 112 record and VIP's submissions, I find no reasonable prospect that the appeal will succeed.
24. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was made.
25. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
26. Although VIP's grounds of appeal are that the Director erred in law and failed to observe the principles of natural justice, there is nothing in the submissions nor in the record that support either ground of appeal.
- Natural Justice
27. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

28. I am satisfied that VIP was provided with information on the hearing process, the law and the issues in dispute as well as significant guidance on its obligation to provide Records as required by the Demand. I am also satisfied that although the delegate repeatedly sought VIP's response, she received nothing other than verbal or emailed responses asserting that Ms. Tadayon was not an employee.
29. I am not persuaded that there is a reasonable prospect the appeal will succeed on this first ground of appeal.

Error of Law

30. Although not expressed as such, VIP's submission is almost entirely a reiteration of the comments made by Mr. Milani during the delegate's investigation of the complaint. The difficulty with VIP's submission is that no evidence was provided in support of its position during the investigation. As the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence that ought to have been provided to the delegate during the investigation. An appeal is also not an opportunity to re-argue a dispute that has already been argued before the delegate.
31. Attached to VIP's appeal is a package of information including sales terminal receipts, emails and Craigslist advertisements. All of this information was available at the time of the investigation. Not only did the Director issue a Demand for Records which VIP failed or refused to provide, Mr. Milani did not provide the delegate with any evidence in support of his assertions. All of the information submitted by VIP on appeal ought to have been provided to the delegate. The record demonstrates that Mr. Milani's responses to the delegate were not only inflammatory and insulting, but entirely without substance.
32. In any event, it is my view that VIP's submission does not establish an error of law.
33. The delegate extensively analyzed the information before her in light of the *Act* and *Regulation* and Tribunal jurisprudence, concluding that Ms. Tadayon was an employee. I find nothing in VIP's submission to suggest that this conclusion is wrong in law.
34. I am not persuaded that there is a reasonable prospect the appeal will succeed on this second ground of appeal.

ORDER

35. Pursuant to Section 114 (1)(f) of the *Act*, I dismiss the appeal on the grounds that there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated September 26, 2012, is confirmed in the amount of \$4,771.36 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal