

An appeal

- by -

Star Touch Enterprises Inc. and Lloyd Betschova operating as Salon 41
("Star Touch" and "Betschova")

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/202

DATE OF DECISION: June 10, 2002

DECISION

This is a decision based on written submissions by Monica Wynn, Barrister and Solicitor for Star Touch Enterprises Inc. ("Star Touch") and Lloyd Betschova operating as Salon 41 ("Salon 41"), Christopher Elder, Roberto Mercado and Sharon Cott for the Director of Employment Standards.

OVERVIEW

This is an appeal by Star Touch Enterprises Ltd. and Lloyd Betschova operating as Salon 41 ("Salon 41"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 20, 1999. The Director's delegate found that Star Touch and Salon 41 had contravened Sections 17, 18, 40, 58 and 63 of the Act in failing to pay 7 former employees wages, overtime wages, vacation pay and compensation for length of service. Star Touch and Salon 41 were ordered to pay the employees a total of \$17,494.24.

ISSUE TO BE DECIDED

At issue is whether the delegate erred:

1. in finding Star Touch and Salon 41 were associated corporations under s. 95 of the Act;
2. in determining entitlement to compensation for length of service;
3. in determining that the complainant Herrera was entitled to overtime pay; and
4. in determining that the complainant Mercado was entitled to compensation for wages for the period June 16, 2001 to June 30, 2001.

FACTS

Star Touch is a film and television production company. The seven complainants worked in various capacities for Star Touch for periods of time between January 29, 2001 and July 12, 2001.

Lloyd Betschova operates Salon 41. The delegate found that Mr. Betschova was associated with Jamie Stathis of Star Touch. The evidence is that Mr. Betschova signed Salon 41 cheques for the wages of Star Touch employees. Based on this information, the delegate concluded that Salon 41 and Star Touch were associated corporations under s. 95.

The seven complainants provided the delegate with documents related to their complaints. These documents included NSF cheques, wage statements, ROE's, timesheets and copies of certified cheques.

On December 11, 2001, Star Touch and Salon 41 were notified of the complaints and the determination that they were associated corporations under s. 95, and served with Demands for Employer Records. On January 7, Mr. Stathis left a telephone message for the delegate advising her that the records would be provided. There was no further communication between the delegate and either Mr. Stathis or Star Touch. Salon 41 did not communicate with the delegate.

The delegate made her determination on the basis of the information provided by the complainants, as neither Star Touch nor Salon 41 provided her with any information. The Determination concluded that the employees were owed wages for the month of July, as well as compensation for length of service, vacation pay, and overtime pay.

ARGUMENT

Star Touch contends that Salon 41 and Star Touch do not carry on business, trades or undertakings together, or through one another and are not under common control or direction. It says that Salon 41 is in the business of cutting hair, and Star Touch is in the business of television and film commercial production. It submits that there has never been an employer -employee relationship between Salon 41 and Star Touch employees. It further submits that Jamie Stathis of Star Touch entered into a verbal and written agreement with Lloyd Betschova to loan Star Touch funds by writing payroll cheques. It further contends that neither Salon 41 nor Lloyd Betschova have ever had a proprietary interest in Star Touch, or served as officers or directors of Star Touch. Similarly, it contends that neither Star Touch nor Mr. Stathis ever had a proprietary interest in Salon 41.

Star Touch further contends that none of the complainants are entitled to length of service compensation because they were not dismissed from their employment; rather, Star Touch contends that the employees quit. In support of that argument, Star Touch refers to the ROE for one of the employees that states that she left her job "due to unpaid wages". On this basis, Star Touch also contends that the awards for 5 of the 7 employees should be adjusted, subtracting the vacation pay on the severance from the awards.

Star Touch further submits that the complainant Herrera is not entitled to overtime pay, since the Star Touch employee manual clearly specified that all overtime had to be authorized in advance by the manager. Counsel for Star Touch concedes that, although the events complained of precede the production of the Star Touch employee manual, the manual is a true reflection of the conditions of employment at all relevant times. Star Touch submits that Herrera was never authorized or permitted to work overtime.

Finally, Star Touch argues that the complainant Mercado cashed a cheque issued on June 20, 2001 in the amount of \$823.94, and that this amount ought to be deducted from the award.

The Director's delegate argues that the evidence supports the conclusion that Star Touch and Salon 41 are associated. She notes that one of the complainants filed her complaint against both Star Touch and Salon 41, and that two others refer to Mr. Betschova as "the employer's partner".

The delegate contends that the ROE for complainant Dadwal indicates that he was temporarily laid off on July 10, with an unknown date of recall, and notes that a temporary layoff becomes a termination when a layoff exceeds 13 weeks in a period of 20 consecutive weeks.

Further, the delegate contends that employees were forced to quit because they had not been paid wages for almost two months. She states that the quitting was not voluntary, but made necessary by Star Touch's actions.

The delegate further contends that the employee manual was not effective at the time the complaints were employed, and that it is new evidence and ought not be considered.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Star Touch has failed to discharge this burden.

1. Are Star Touch and Salon 41 associated corporations?

Section 95 provides that

If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act...

The evidence of the complainants is that Mr. Stathis and Mr. Betschova are partners and that they reside together. While that is not necessarily indicative of a business relationship, there is also evidence that Star Touch employees produced documents for Salon 41 on Star Touch's computer systems. Those documents include Salon 41 voicemail code access sheet, advertising, memos, announcements and notices to employees, stock list and cleaning schedules. Wages for Star Touch employees for the period March 2001 to July 2001 were paid by Salon 41 cheques, signed by Mr. Betschova. Although counsel for Star Touch argued that Mr. Betschova lent money to Mr. Stathis for the purpose of wage payments, no evidence of any agreement, either written or oral, between Mr. Stathis and Mr. Betschova of a loan from Salon 41 to either Star Touch or Mr. Stathis was provided.

Both Salon 41 and Star Touch were notified of the complaints against them, and that she concluded they were associated corporations on December 11. Neither responded to the delegate within the time frame provided. I am unable to conclude that the delegate erred in treating Star Touch and Salon 41 as one person for the purposes of the Act. There is sufficient evidence to determine that Star Touch and Salon 41 were carried on under the common control or direction by or through more than one individual.

2. Are the complainants entitled to severance pay?

Section 63 of the Act creates a liability to pay compensation for length of service in respect of employees employed for over three months. That liability is discharged if notice is given, the employee quits, retires or is dismissed for just cause. I do not accept Star Touch's argument that the complainants are not entitled to compensation for length of service because they quit. The evidence is that Salon 41 issued the employees cheques for wages for the months of June and July that were not honoured at the bank. Star Touch relies on an ROE that states that an employee "left her job due to unpaid wages from June 16 to July 10."

Section 17 provides that an employer must pay to an employee all wages earned by the employee in a pay period at least semi-monthly and within 8 days after the end of the pay period. Star Touch fundamentally breached the employer-employee relationship by failing to pay the employees as required by the Act.

Section 66 of the Act provides that where a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. Failure to pay wages earned in a timely manner is a fundamental condition of employment. If Star Touch and Salon 41 failed or refused

to pay the employees, that amounted to constructive dismissal. Employees cannot quit employment they have been dismissed from.

3. Is Herrera entitled to overtime pay?

There is no evidence to support Star Touch's assertion that the employee manual was "a true reflection of the conditions of employment at all relevant times", and I dismiss the appeal in this respect.

4. Is Mercado entitled to compensation for wages for the period June 16, 2001 to June 30, 2001?

The evidence is that two cheques issued to Mr. Mercado, one dated June 15, 2001 in the amount of \$823.94 (#0128) was not accepted by the bank. The cheque stub clearly indicates that the item "may not be cleared again unless certified". A second cheque in the same amount dated June 20, 2001 (#0548) was also not honoured. Although Star Touch alleges that the second cheque was cashed, the evidence is that it was not. I find no basis to conclude the determination should be varied in this respect.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated March 20, 2002, be confirmed, together with whatever interest which has accrued since the date of Determination, pursuant to Section 88.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal