EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Marlene McIntyre Holdings Ltd. operating as Shear Pleasure
(“ McIntyre ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE No.: 2000/115

DATE OF HEARING: June 2, 2000

DATE OF DECISION: August 21, 2000

DECISION

APPEARANCES:

For the Appellant:	Michael Shaw
The Respondents:	Tamara Hummel, Melody Morrison, Rosalina Hertel
For the Director of Employment Standards:	no appearance

OVERVIEW

This is an appeal by Marlene McIntyre Holdings Ltd. ("McIntyre") pursuant to s. 112 of the *Employment Standards Act* ("the Act"). The appeal is from a Determination issued by Kevin Molnar as a delegate of the Director of Employment Standards on February 4, 2000. The Determination found McIntyre liable to pay wages, holiday pay and vacation pay to three former employees in the total amount of $9,131.33. McIntyre filed an appeal on February 25, 2000. An oral hearing was held at Prince Rupert, B.C. on June 2, 2000.

FACTS

McIntyre operates a hair salon and employed Tamara Hummel ("Hummel"), Melody Morrison ("Morrison") and Rosalina Hertel ("Hertel") as hairstylists. After they each left this employment, these employees filed a complaint with the Director alleging McIntyre owed them wages and vacation pay. The dispute between the parties centres on the amount of hours worked by each employee and whether their written employment agreement to be paid a 55% commission is modified by the Act's minimum wage provisions. Hummel alleged she worked 5 days per week between 9:30 AM and 5:30 PM, and disputed McIntyre's assertion that her vacation pay was included in the 55% commission. Morrison alleged she worked 4 days per week between the same hours, and that McIntyre expected her to be at work promptly at 9:30 AM and required her to remain at work until 5:30 PM each day. Hertel alleged a work regime similar to Morrison's, and alleged she was not allowed to leave work early even if business was slow. All three employees alleged that a large proportion of the salon's business was comprised of walk-in customers, which is why the employees were required to be at the shop during its hours of business.

McIntyre alleged each employee had been properly paid for the hours worked, based on the 55% commission on all services performed in the salon, which was to have included statutory vacation pay at 4%. McIntyre takes issue with the employees' allegation they were required to be at work for 8 hours each day; according to McIntyre, the employees were allowed considerable flexibility as to when they started and ended each work day. McIntyre alleges all three employees would know from an appointment book when their first customer would be coming each day, and so would not arrive at the salon until just prior to their first customer. McIntyre alleged all three employees would then leave the salon after their last customers of the day. In support of its

version, McIntyre presented the appointment book, written employment agreements with each employee regarding vacation pay, payroll records and also the Record of Employment for each employee showing total hours worked.

The Director's delegate rejected McIntyre's contention that all three employees would leave the salon after their last customer, chiefly because Marlene McIntyre stated for the company that the last employee to leave the salon would be responsible for closing and locking it for the day. The Director's delegate determined from the appointment book tendered by McIntyre that frequently the last scheduled appointment was well prior to the 5:30 PM closing time. Finding it difficult to accept that the salon would be closed prior to the regular closing time, the Director's delegate found the employees' claims of working 8-hour days were true on a balance of probabilities.

The Director's delegate found that Hummel's commission did not include vacation pay, and so she was entitled to an additional 4% of her wages. Morrison and Hertel, however, had apparently signed a written agreement with McIntyre after Hummel complained about her vacation pay entitlement, and so the latter two employees were not entitled to vacation pay beyond the 55% commission. The issue was moot for these employees, however, as the commission earned by them did not ever reach the minimum wage. At the appeal hearing, McIntyre's counsel abandoned the appeal as it relates to the vacation pay issue.

ISSUE TO BE DECIDED

This appeal requires me to decide whether McIntyre is liable for wages for the hours of work alleged by each employee.

ANALYSIS

At the commencement of the appeal, I advised counsel for McIntyre that the appeal would not necessarily be a hearing *de novo*, and that I would hear oral evidence only if I was satisfied that the Director's delegate had made an error that cast some doubt on the Determination, however slight that doubt may be. McIntyre's chief complaint with the Determination is that the Director's delegate preferred the employees' version of hours worked over McIntyre's version. In this regard, McIntyre sought to adduce some evidence before me that might impugn the credibility of all three employees. This "new" evidence, however, was available to McIntyre at the time of the Director's investigation, but McIntyre decided not to make use of it and did not present it to the Director's delegate. An appellant cannot in these circumstances challenge the Determination on a matter of credibility when its concerns in that regard were not placed before the Director's delegate.

As nearly all of the points raised by McIntyre in the appeal dealt with the credibility of Hummel, Morrison and Hertel, I ruled that I would not embark on a hearing *de novo* and instead invited McIntyre to present argument and review the material before the Director's delegate that could indicate some error was made in arriving at the Determination. Mr. Shaw then led me through a thorough review of the material that was put before the Director's delegate. We reviewed McIntyre's payroll records for each employee, which consisted of monthly accounts of the dollar value of services performed each day. Each employee's commission would be calculated from

these records. The services performed by each employee, however, were not tallied in these records on a daily basis; instead, Marlene McIntyre computed the dollar value of each employee's services by taking the same from cash register receipts, in which each employee was identified by a number. Daily earnings for each employee were determined by adding till receipts bearing that employee's identification number.

McIntyre emphasized the record of hours made in the margins of these same monthly accounts, and argued that the handwritten figures "4", "6" and "5" seen therein were payroll records of the hours worked by each employee. Marlene McIntyre explained that she had recorded these hours herself. It was highly significant to discover that Ms. McIntyre had recorded these hours quite some time after the monthly accounts had been done, and that she had reconstructed each employee's daily hours based on the salon's appointment book. I took from Ms. McIntyre's explanation that she had arrived at these calculations of hours worked by identifying the time of each employee's first and last customers as recorded in the appointment book, and then imputing to each employee their hours of work between those two times each day. If McIntyre had any hope of succeeding on points of credibility, that hope was dashed by Marlene McIntyre's disclosure as to how she arrived at each employee's hours of work. McIntyre kept no regular records of hours worked, and appears to have attempted a reconstruction of those hours only after a complaint was made to the Director.

In these circumstances, I have difficulty accepting that McIntyre's calculation of the hours worked by each employee could be reliable at all. I share the skepticism of the Director's delegate that the salon would not likely have closed prior to 5:30 PM each day and that it would likely have opened at 9:30 AM as posted. I accept as probable that a fair proportion of the salon's business each day would consist of walk-in customers who do not appear in the appointment book. McIntyre's calculation of each employee's hours of work, in fact, is restricted to Marlene McIntyre's use of the appointment book, as no contemporaneous records of hours worked exist. McIntyre's calculation of hours worked, therefore, cannot include walk-in customers, which is the chief weakness in its appeal. In the absence of contemporaneous time-keeping records, and in the absence of a reliable calculation of each employee's hours of work, there is very little on which I could conclude the Director's delegate made some error in preferring the employees' version of hours worked to that of McIntyre's.

Most fatal to McIntyre's appeal is a letter sent to the Director's delegate by McIntyre's counsel on November 24, 1997, in response to a question from the Director's delegate as to Hummel's hours of work. This letter was mentioned in the Determination, and the relevant passage reads as follows:

> "The following were the terms and conditions of Ms. Hummel:
>
> 1. The normal working hours were 9:30 AM to 5:30 PM during the week and 9:30 AM to 5:00 PM on Saturday. The employee normally worked four of the five weekdays and Saturday. She was supposed to record times when she was not working during her normal hours, and some of these records are contained in a daily diary which is in the possession of the R.C.M.P. If there is a problem with the minimum wage, we will have to obtain a copy of this diary to credit the employer for hours not worked."

This explanation of Hummel's hours of work was made to the Director's delegate in the course of his investigation of her complaint. There is not even the suggestion in this explanation that Hummel's hours of work were flexible and were tailored around her first and last scheduled customers. The suggestion, instead, is that Hummel worked the same regular hours each day. The Determination found that each employee worked a 7.5 hour day and McIntyre has not raised any doubt in my mind as to the correctness of that decision.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Molnar is correct and the appeal should be dismissed. Pursuant to section 115 of the Act, I order that the Determination dated February 4, 2000 be confirmed, with interest pursuant to section 88 of the Act.

Ian Lawson
Adjudicator
Employment Standards Tribunal