

An Application for Reconsideration

- by -

Studio 1 Hair Design Inc.
("Studio 1")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2014A/67

DATE OF DECISION: July 2, 2014

DECISION

SUBMISSIONS

Randeep Sidhu

on behalf of Studio 1 Hair Design Inc.

INTRODUCTION

1. This is an application made pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of Tribunal Appeal Decision BC EST # D027/14 issued on April 29, 2014, by Tribunal Member Bhalloo. Tribunal Member Bhalloo summarily dismissed an appeal filed by the present applicant, Studio 1 Hair Design Inc. (“Studio 1”), on the ground that its appeal had no reasonable prospect of succeeding (see *Act*, subsection 114(1)(f)). Studio 1 now asks that Member Bhalloo’s decision be cancelled on the basis, as it was put by Studio 1’s principal, Randeep Sidhu: “I do not believe that justice is been done here” [*sic*].
2. At this juncture, I am assessing whether this application passes the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98). If the application passes the first stage of the *Milan Holdings* test (discussed in greater detail, below), the respondent parties will be notified and will be given an opportunity to provide written submissions (and Studio 1 will be given a final right of reply). If the application does not meet the first stage of the test, it will be dismissed and Member Bhalloo’s decision will stand.

THE DETERMINATION AND APPEAL

3. Studio 1 operates a beauty salon in Surrey, B.C., and the complainant, Ms. Navjot Chhina (“Chhina”), alleged that she was employed at the salon as a hair stylist and aesthetician from April 18, 2013, until June 21, 2013 (a period of approximately two months). She claimed her rate of pay was fixed at the prevailing minimum wage of \$10.25 per hour but was never paid anything at all and, accordingly, she quit. In due course, Ms. Chhina filed an unpaid wage complaint and it was later set down for hearing (January 21, 2014). On February 3, 2014, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”) upholding the complaint and awarding Ms. Chhina the total sum of \$4,125.71 on account of unpaid regular wages, overtime pay, vacation pay and section 88 interest. In addition, and also by way of the Determination, the delegate levied three separate monetary penalties against Studio 1 (see *Act*, section 98) for having contravened sections 17 (regular payment of wages), 18 (payment of wages on termination) and 28 (failure to keep payroll records) of the *Act*. Thus, the total amount payable under the Determination was \$5,625.71.
4. At the complaint hearing, Ms. Chhina testified about how she came to be employed at the salon, the directions she received from Ms. Sidhu regarding how she was to document her hours and revenues, and her unsuccessful efforts to secure payment for her work both during and after her employment. She also provided some documentary evidence regarding her hours worked in the form of a calendar. Ms. Kulwinder Kaur, a former Salon 1 employee, also testified at the complaint hearing as a corroborating witness for Ms. Chhina. Ms. Sidhu, for her part, maintained that there never was an employment relationship between the salon and Ms. Chhina and that the latter “was a client who was unhappy with a service that [Ms. Sidhu] provided” and that when the salon refused to issue a refund, Ms. Chhina filed a fraudulent unpaid wage complaint. Ms. Sidhu also seemingly maintained that Ms. Kaur had never been employed at the salon (delegate’s reasons, page R6).

5. The delegate concluded that Ms. Chhina's testimony, corroborated as it was by various other evidence, was credible whereas Ms. Sidhu's testimony "sounded as if she was concocting it as the hearing progressed" (delegate's reasons, p. R8) and, in several instances, was plainly implausible. The delegate's entirely defensible rationale for rejecting Ms. Sidhu's testimony, based on a number of separate considerations, is set out in some detail at pages R8 and R9 of her reasons. The delegate accepted both Ms. Chhina's and Ms. Kaur's evidence regarding the hours worked by Ms. Chhina and, applying the relevant provisions of the *Act*, calculated her unpaid wage claim.
6. On March 11, 2014, Studio 1 filed an appeal of the Determination based on two of three statutory grounds set out in subsection 112(1) of the *Act*, namely, the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Studio 1 asked the Tribunal to cancel the Determination and its principal challenge to the Determination appears to have been grounded, firstly, on allegations that the delegate made several factfinding errors and, secondly, based on concerns about the manner in which Ms. Kaur gave her testimony (by teleconference) and, more generally, about the entire complaint hearing process.
7. As noted at the outset of these reasons, Member Bhalloo summarily dismissed the appeal because it had no reasonable prospect of succeeding. With respect to Studio 1's overarching submission, namely, that Ms. Chhina was a disgruntled customer, not an employee, Member Bhalloo noted that the delegate's findings of fact in this regard were amply supported by the evidentiary record and that the appeal was simply an undisguised attempt to reargue the position Studio 1 unsuccessfully advanced at the complaint hearing. I wholly concur with Member Bhalloo's characterization of Studio 1's position on appeal regarding the delegate's findings of fact and her findings regarding the relative credibility of the two principal adversaries in this dispute.
8. With respect to Studio 1's natural justice argument, it should be noted that some of the expressed concerns related to dealings between Ms. Sidhu and another delegate who, apparently, was involved in the file prior to the complaint hearing. This delegate did not conduct the complaint hearing and, of course, did not issue the Determination. Accordingly, it is not clear to me what jurisdiction the Tribunal might have to deal with alleged, but not particularized, "inappropriate and unjustified language" used by this other delegate. For my part, I cannot see that the Tribunal has any authority to address these unparticularized complaints. The other points raised by Studio 1 with respect to natural justice were dismissed by Member Bhalloo at paras. 33 to 37 of his reasons for decision.

THE APPLICATION FOR RECONSIDERATION

9. This timely application for reconsideration is supported by a number of assertions. First, Ms. Sidhu says that Studio 1 was incorporated prior to Ms. Chhina filing her complaint. I fail to see the relevance of this fact. While it is true that Ms. Chhina originally named another company in her complaint as her employer, this issue was addressed in the delegate's reasons at page R8 (and reasonably so, in my view). The second assertion concerns the fact that Ms. Kaur testified by teleconference rather than in person – a witnesses' evidence is not inadmissible merely because that person does not testify in person (see *Act*, section 84). Ms. Kaur testified, at least in part, in Punjabi rather than English and her testimony was translated by Ms. Chhina – there was no objection to this process at the hearing and Studio 1 does not say that there was any sort of translation error. In my view, the much better practice is for certified translators to be utilized to translate witnesses' testimony into English. However, as previously noted, no objection was taken at the hearing regarding the process utilized and since all parties seemed to be literate in Punjabi and there was, apparently, no translation errors, I do not see that there was any sort of legal or natural justice error relating to this matter. Third, Studio 1, again, says that the delegate's findings of fact and credibility determinations

should be overturned – but there is no basis for so doing by way of a reconsideration application unless the finding of fact or the credibility finding was “perverse” in the sense that there was no evidentiary foundation for it. In my view, the delegate’s findings of fact and credibility findings were based on a proper evidentiary foundation. Based on my view of the record, Studio 1’s case, not Ms. Chhina’s, was the one highly worthy of disbelief.

10. Finally, with respect to the natural justice issue, Ms. Sidhu says “just because Ms. China’s [*sic*] story (not facts or proofs) look to be more real, the determination goes in favor of the complainant” and “I don’t feel it is right to penalize a party unless the guilt is proven with concrete evidence”. Ms. Chhina’s evidence was accepted because it was credible whereas Ms. Sidhu’s testimony appears to have been fanciful in the extreme. The delegate did what the delegate was obliged to do when faced with conflicting *viva voce* evidence – that is, weigh each parties’ testimony in light of other corroborating evidence and ultimately determine which story appears to more accurate and worthy of belief.

CONCLUSION

11. The Tribunal’s reconsideration power is a discretionary authority and applicants do not have an “automatic right” to have their application considered on the merits. The Tribunal has a long-standing rule that applicants must first demonstrate their application raises important and fundamental questions of law or raises a reasonable presumptive case that the decision under review was tainted by natural justice failings. Although this application is timely, it does not raise a serious legal issue or a *bona fide* argument relating to a possible breach of the rules of natural justice. In effect, Studio 1, having had its rather fanciful story rejected (now twice), makes a third request to have its position validated. In my view, this application falls well short of passing the first *Milan Holdings* threshold and, accordingly, leave to have the application fully considered on the merits should not be granted.

ORDER

12. Studio 1’s application to reconsider Member Bhalloo’s decision is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal