



An appeal

- by -

Mohinderpal Singh Bishram operating as Tejy Janitorial Services  
(the "Employer")

- 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:** Ib S. Petersen

**FILE No.:** 2000/459

**DATE OF HEARING:** October 16, 2000

**DATE OF DECISION:** January 10, 2001

## DECISION

### APPEARANCES:

Mr. Sukhjinder Singh Grewal                      counsel and agent for the Employer  
Mr. Chaman Chahal                                      on behalf of himself

### OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on June 9, 2000. The Determination concluded that the employee, Chaman Chahal, was owed \$14,577.63 on account of regular wages, overtime, vacation pay, statutory holiday pay and compensation for length of service by the Employer.

The findings in the Determination may be summarized as follows:

1. Chahal was employed as a janitor by the Employer from August 1, 1998 to November 25, 1999. He worked at the Grandview location of the real Canadian Superstore.
2. The hours of work were from 10:00 p.m. to 9:00 a.m., six days a week. The Employer alleged that the employees received a three hour break during each shift. Chahal denied this.
3. The Employer’s records did not indicate time off and payment for statutory holidays. It is fair to say that the delegate found the documentation presented by the Employer to be questionable.
4. Chahal did not quit his employment as claimed by the Employer. The delegate accepted Chahal’s explanation that he was terminated because he refused to sign a document stating that his hours of work were only 8 hours per day.

### FACTS AND ANALYSIS

The appellant has the burden to show that the Determination is wrong.

As I understand it, the Employer, who is represented by its counsel and agent, Mr. Grewal, and is not here in person, asserts that the delegate erred in several respects. Counsel maintains that Chahal quit, and told other employees that he “did not want to come to work anymore.” As well, employees confirm that hours of work were as asserted by the Employer, namely, 8 hours per day with a 3 hour break. Counsel also maintains that vacation pay and statutory holidays have been paid for. In regards to the latter issue, counsel notes that a

cheque for \$778.86 was issued by the Employer. The evidence in support of the appeal consists of sworn affidavits. The affidavits were sworn by employees of the Employer as well as the Employer, Bishram. There was no *viva voce* testimony presented on behalf of the Employer. Counsel explained that he had instructions to appear both as counsel and agent for the Employer, who apparently was in India due to a death in the family. He did explained that the Employer did not seek an adjournment.

As the issues on appeal are largely of a factual nature, I had serious concerns about the admissibility and weight to be given to the evidence presented on behalf of the Employer. Counsel argued that the affidavits ought to be admitted and that any concern I might have should go to the issue of weight.

Chahal testified at the hearing. As his English was poor, an interpreter was present and translated to and from the Punjabi language. In essence his brief testimony was as follows:

1. He was fired by the Employer. He testified that he was told, on November 26, 1999, when he attended his place of work at the Grandview location of the Superstore, that he was not allowed to go to work and that the Employer did not ask him to come back to work.
2. He explained that he used to start work at 10:00 p.m. and finish at 9:00 a.m. and did not take a 3 hour break during his shift.
3. He agreed that he received a cheque in the amount of \$778.76 from the Employer after the complaint had been launched.
4. He denied the statements attributed to him in the affidavits, including those that he had quit his employment and that he received a three hour break during his shift.

In my view, the appeal must fail. Even if I was prepared to admit the affidavit evidence, I place little or no weight on it. I do not accept this evidence over testimony under oath or affirmation, particularly with respect to the key factual issues on appeal. The statements made by employees and the Employer contradicted the testimony of Chahal. He was subject to cross examination, they were not. In my view, the appropriate course of action for the Employer in this case would have been to have the employees testify. That would have allowed Chahal an opportunity to question them. From this standpoint I find that the Employer has not met the burden on appeal. In other words, I accept that Chahal was terminated by the Employer and, thus, is entitled to compensation for length of service. I also accept that the hours of work were as claimed, and that Chahal did not receive a 3 hour break as claimed by the Employer.

Counsel argued that the Determination was flawed because it was based on statements from employees (one of whom, he said, did not work at the Grandview location--a point that was acknowledged by Chahal). Perhaps the delegate misstated the name of this individual. As

well, another employee swore, in one of the affidavits referred to above, that he never “stated” [presumably to the delegate] that he never received a 3 hour break. Finally, he argued that the statement of yet a third employee, referred to in the Determination, should be given little weight. I am not entirely sure why his testimony should be given little weight. In all of the circumstances, I accept that the delegate properly investigated the matters before him. Not only did he interview employees of the Employer, he also interviewed a manager with the Superstore who stated:

“The district manager for Superstores, Dan Robinson (Robinson) stated that the janitors could not leave the store during the night. Robinson stated that the janitors came in before the store closed at 10:00 p.m. and left when the store opened in the morning at 9:00 a.m. Robinson stated that the Superstores requires that the company that they contract the janitorial work to work on all days of the year except Christmas, New Years and Boxing Day and that they closed early on Easter Sunday. Robinson also stated that no one from the Superstore supervised the janitors but it was very unlikely that they took a three-hour break.”

With respect to the issue the cheque for vacation pay, mentioned above, it appears that the delegate took that amount into consideration. He states in the Determination that “Bishram also provided a cheque for the vacation pay based on his payroll records.” In my view, the Employer has failed to meet the burden to prove that this amount was not taken into account.

In brief, the appeal must fail.

## **ORDER**

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated June 9, 2000, be confirmed.

***IB S. PETERSEN***

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**