

An appeal

- by -

Gurpreet Kaur

- 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:** John Savage

**FILE No.:** 2006A/138

**DATE OF DECISION:** February 13, 2007

## DECISION

### SUBMISSIONS

Gurpreet Kaur, for the Appellant

Ravi Sandhu, for the Director of Employment Standards

### INTRODUCTION

1. Gurpreet Kaur (“Kaur”) appeals a Determination of the Director dated November 9, 2006 - ER#130-727. Although the grounds of appeal reference a breach of natural justice, the grounds described in the written submissions address perceived inadequacies in the investigation and treatment of the evidence.
2. Kaur was employed as an administrative assistant by Apna Media Group Inc. (“Apna”) whose principal was Sukhjinder Sihota (“Sihota”). Kaur, as well as two other employees, Kashif Majeed (“Majeed”) and Samir Gandhi (“Gandhi”), all filed complaints against Apna alleging the non-payment of overtime. Kaur was also terminated from her employment and claimed severance pay. Kaur alleged that one of the payments she received from Apna was not overtime pay, but a repayment of a loan which she had made to Apna.
3. The Delegate made a finding regarding credibility against Kaur, ostensibly applying the decision in *Farnya v. Chonrny*, [1952] 2 D.L.R. 354 and dismissed Kaur’s complaint. Kaur appealed. Kaur and the Director filed written submissions and the Tribunal determined that the appeal would be decided on the basis of written submissions.

### ISSUES

4. Does the appeal give rise to an appealable issue?
5. Did the Delegate err in law or breach the principles of natural justice in the circumstances of this case?

### APPEALS UNDER THE EMPLOYMENT STANDARDS ACT

6. An appeal to the Employment Standards Tribunal is a limited appeal. Section 112(1) of the *Employment Standards Act* restricts the grounds of appeal as follows:
  - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 being made.

7. It is not open to an appellant to appeal factual findings, findings of mixed fact and law, or to introduce new evidence on appeal that was available at the time the determination was made.
8. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where a decision maker:
1. misinterprets or misapplies of a section of a statute;
  2. misapplies an applicable principle of general law;
  3. acts without any evidence;
  4. acts on a view of the facts which could not reasonably be entertained; or
  5. adopts a methodology that is wrong in principle.
9. As I understand the submissions before me, the main thrust of the appeal here is that the investigation was flawed and Delegate adopted a view of the facts that could not reasonably be entertained, or that the conclusion of the Delegate does not follow from the reasons given.
10. There are references in the submissions of Kaur to allegations of bias on the part of the Delegate. My review of the record does not support such an assertion.

### **ANALYSIS OF THE DELEGATE**

11. The Delegate had before him the evidence of Kaur, the evidence of Apna, various records and evidence from two witnesses, Gandhi and Majeed.
12. After referencing the test in *Farnya v. Chonrny*, [1952] 2 D.L.R. 354 the delegate immediately stated “In consideration of this test I prefer the evidence of Apna to that of Kaur”. The Delegate then proceeded to give reasons for such preference, and it is those reasons that are questioned by Kaur.
13. The first reason given is that the records produced by Apna are “much more detailed than those provided by Kaur”. As noted by the Delegate; Apna’s records show Kaur’s start times, finish times, total hours worked for each day, and the time taken off for lunch breaks each day. Kaur’s records only refer to hours worked each day and the total number of hours of overtime worked.
14. There is no suggestion by the Delegate that Kaur’s record was created after the fact. The mere fact that the records of the employer are more detailed than those of the employee does not, in my opinion, provide a basis on which to found a determination on credibility.
15. The Delegate also considered Gandhi’s evidence that Kaur worked longer hours than Gandhi did. The Delegate rejected this evidence on the basis of an admission by Gandhi that he did not record the number of overtime hours worked by Kaur. Gandhi was also out of the country for a month of the 6 month period during which Kaur was claiming wages.
16. With respect to the evidence of Gandhi, as I have noted, Gandhi himself had a claim against Apna for unpaid overtime wages. I have reviewed the record provided by the Delegate and there is no evidence

that the Delegate compared the hours worked by Gandhi, upon which he or his office presumably made a determination, and the hours worked by Kaur. In fact, the record does not include any information on Gandhi's hours so that one might make such a comparison.

17. In my view it is not particularly noteworthy that a fellow employee does not record or attempt to record the hours worked by someone else who works longer than they work. How could they? Such an employee, however, could quite well observe that someone else worked longer hours than they worked. Since the hours worked by Gandhi were a matter of a dispute between the Gandhi and Apna, that information would be before the Delegate for comparison. Instead of making such comparison the Delegate simply rejected the evidence.
18. The second reasons given by the Delegate for rejecting this evidence is that Gandhi was out of the country for a period of one month that was in dispute. The period of time which is in issue here, however, is six months. While the comparison cannot be made for one month of that time, it can be made for five months of the disputed time.
19. The Delegate then went on to consider Kaur's claim that she loaned Sihota \$2000 and that a cheque she received for \$2000 was repayment of the loan and not wages. The Delegate in his Determination credited Apna with the sum of \$2000 as though it were paid for wages and accepted Sihota's evidence that the sum was paid for overtime based on a list of overtime hours given to Sihota by Kaur. No list is produced as part of the record.
20. Kaur testified that she made such a loan. She also asked the Delegate to interview Majeed who she said witnessed such loan. Majeed advised the Delegate that he could not remember such event. Kaur asked the Delegate to interview Gandhi who she had told about the loan before this dispute arose. Gandhi confirmed that Kaur had told him about the loan. The Delegate rejected Kaur's evidence because Majeed did not verify it and although Gandhi verified that Kaur had told him about it, Gandhi did not witness the transaction.
21. There is other evidence, however, concerning this matter that the Delegate apparently overlooked. Although Sihota said the money was for payment of overtime, the cheque issued does not say it is for pay or payroll. The other cheques issued by Apna to Kaur make such reference.
22. For example, the cheque issued May 1, 2005 is for \$1345.52 and is marked "pay". The cheque issued June 1, 2005 is for \$1469.92 and is marked "pay may/2005". The cheque issued July 1, 2005 is for \$1469.92 and is marked "pay". The cheque issued August 5, 2005 is for \$1469.94 and is marked "pay". The cheque issued August 31, 2005 is for \$1469.94 and is marked "pay". The cheque issued October 4, 2005 is for \$1433.12 and is marked "payroll". The same applies to cheques issued October 31, 2005, December 1, 2005. These and other cheques for wages are for odd amounts which reflect the deduction of income tax. The cheque issued November 30, 2005 is for \$2000. It is not marked "pay" or "payroll". Why not?
23. Moreover, the payroll records produced by the employer do not refer to the \$2000 payment as a payment for overtime. The records show payments for overtime but that payment is not recorded as such. The employer record describes this as "Advance 11/30/2005". That reference is consistent with Kaur's evidence that she loaned or "advanced" these funds to Sihota. The term "advance" is singularly inappropriate as a description of the payment of past due overtime. The records also show that no amount is deducted for taxes, whereas the payments for salary including overtime have deductions made for

taxes. If this were a payment for past overtime, as suggested by Sihota, there should be a deduction for taxes and a corresponding near contemporaneous remittance for taxes as required by the *Income Tax Act*.

24. While these matters were before the Delegate, the reasons show that they were not considered, were overlooked or not properly analyzed. In my opinion, the analysis of and record before the Delegate does not support the conclusion he reached based on the reasons given.
25. In most cases findings of credibility do not give rise to an appealable issue. This is not such a case. Here the failure to consider or properly appreciate relevant evidence results in an error of law: *Harper v. The Queen* [1982], 1 S.C.R. 2, 65 C.C.C. (2d) 193 at 210; *MacDonald v. The Queen*, [1977] 2 S.C.R. 665.
26. In the circumstances it would be appropriate to refer the matter back to the Director for reconsideration. By this I do not suggest any particular outcome to the appeal. The determination of whether wages are owed in this case is for the Director to determine after reconsidering the evidence. Moreover, in a case such as this, where credibility is in issue, the best course may well be to hold a hearing and take the evidence of all of the witnesses under oath or affirmation.

## ORDER

27. Pursuant to s. 116 of the *Act* it is ordered that the Determination is set aside, and the complaint is referred back to the Director for reconsideration.



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**John Savage**  
**Member**  
**Employment Standards Tribunal**