

An appeal

- by -

562649 B.C. Ltd. operating as Jani-King Commercial Janitorial Services
("Jani-King" or "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: Paul E. Love

FILE No.: 2000/635

DATE OF DECISION: January 22, 2001

DECISION

OVERVIEW

This is an appeal filed by 562649 B.C. Ltd. operating as Jani-King Commercial Janitorial Services (“Jani-King”) of a Determination dated August 22, 2000. Jani-King failed to cooperate in the investigation, and therefore the Delegate determined that Mr. Erpillo was an employee, and that wages were owing to him. The Delegate found many breaches of the *Employment Standards Act* (the “Act”) by this employer, who had a prior history with the Employment Standards Branch. The Delegate also found that the employer had deducted improperly from wages, amounts said to be due and owing by the employee to the principal’s wife, pursuant to an oral agreement arising from a motor vehicle collision. I did not admit or consider new evidence tendered at this hearing by Jani-King, which was not tendered by the employer to the Delegate during the investigation. I confirmed the Determination as the employer did not identify any errors in the Determination.

FACTS

Eliseo Erpilla was employed by Jani-King and provided commercial cleaning services to Jani-King’s customers at a variety of locations in the Greater Vancouver area. He accepted the job to clean offices on a part time basis for a flat rate of \$860.00 per month. He used his own vehicle to travel to the job sites, and the company provided keys for ten buildings. Jani-King reimbursed him for cleaning supplies but not for travel.

Mr. Erpillo was paid by Jani-King for October, but following a car accident between his vehicle and the vehicle driven by Mrs. Klarreich his paycheque was reduced by \$200.00 without his consent. The Delegate accepted that Mr. Erpillo did not agree to this deduction, but did not protest for fear of losing his job. Jani-King did not pay him in December until he made repeated requests for his pay. In January, Mr. Erpillo received only half his pay, and the employer refused to pay any more. As Jani-King was not paying Mr. Erpillo, or reimbursing him for the costs of using his own vehicle, Mr. Erpillo quit. When Mr. Erpillo attempted to collect the wages owing to him the employer, particularly, Allan Klarreich, a principal of the employer, threatened Mr. Erpillo with legal action.

The Delegate found that the employer’s refusal to pay Mr. Erpillo amounted to a constructive dismissal. The Delegate further found that Mr. Erpillo was employed for a three month period between October 3, 1998 and January 31, 1999. The Delegate found that Mr. Erpillo was entitled to compensation for length of service.

The employer failed to comply with the Demand by the Delegate for payroll records and other records. The employer was rude and obstructive in dealing with the Delegates involved in the investigation of Mr. Erpillo’s complaint. Mr. Klarriech, a principal of Jani-King has a

past history with the Employment Standards Branch (the “Branch”), and part of his strategy in the past, is to behave in a rude, abusive and uncooperative manner in dealing with Delegates investigating complaints. This employer or “forms” of this employer have been known to the Branch since 1995. This Tribunal has confirmed two Determinations in the past which involve Mr. Klarriech and Jani-King.

Part of the “unfortunate nature” of this case, is that the employee sought \$630.00 at the time the complaint was filed. The employer was given two opportunities by Delegates to settle the case at the amount presented by the employee, plus accumulated interest. The Delegates sent to the employer letters on July 21, 1999 and July 6, 2000 providing an opportunity to settle this matter for \$630.00 plus accumulated interest. After investigation, the Delegate determined that the employee was entitled to substantially more than the employee claimed originally.

As a result of having only the employee’s information and evidence the Delegate determined that Eliseo Erpilla was an employee of Jani-King and entitled to the following sums:

Regular wages; overtime, minimum daily pay and vacation pay	\$2,062.97
\$200.00 deducted from November pay	\$200.00
Compensation for length of service of one week, based on an average of 33.25 hours at \$7.15 per hour	\$237.14
4 % vacation pay on \$200.00 and 237.74	\$17.51
Interest per section 88 of the Act	\$257.18
Total Wages owing	\$2,776.41

The Delegate found the following breaches of the *Act*:

- (a) failing to pay Mr. Erpillo at least semi-monthly - s. 17(1);
- (b) failing to pay Mr. Erpillo all wages owing within 6 days after termination - s 18(2);
- (c) withholding or deducting from Mr. Erpillo’s wages, business costs, including the insurance deductible, s. 21 (1) and (2)
- (d) failing to pay employees a minimum of four hours, on each day an employee works - s. 34(2)
- (e) failing to pay Mr. Erpillo overtime on each Saturday and Sunday after 8 hours per day - s. 40(1)

- (f) failing to pay Mr. Erpillo for statutory holidays worked at 1.5 times the regular wage, plus failing to give a working day off with pay - s. 46;
- (g) failing to pay at least 4 % of the employee's gross wages as holiday pay - s. 58(1);
- (h) failing to pay compensation for length of service - s. 63(1) and 66.

In his written appeal submission the employer seeks to tender new evidence which was not tendered to the Delegate. This material is not admissible in these proceedings as it was not tendered to the Delegate.

The Delegate analyzed the information provided to her by the employee. The Delegate found that Mr. Erpilla was a credible informant, with wages owing to him, significantly more than he claimed in his complaint. The Delegate reviewed the definition of employee set out in the *Act*. The Director also considered that Mr. Erpilla was under the direction and control of Julieta Bato Klarreich, a partner in the operation of the Jani-King franchise. The economic reality was that Mr. Erpilla was in a position of economic dependency on the company. The Delegate also considered the evidence Howard Joyce, a regional director for the Jani-King franchise for Vancouver south, which includes the franchise in this case. The Delegate verified that with Mr. Joyce that any persons working for the numbered company, would be considered by him to be employees of that company. The Delegate determined that Ms. Erpilla was an employee and was entitled to wages plus interest in the amount of \$2,776.41.

Employers' Submission:

The employer made a rambling written submission. From the submission it appears that the employer alleges Eliseo Erpilla was not an employee. In essence, the employer claims that the Delegate and the complainant fabricated the additional amounts on the Determination, over and above the employee's complaint because the employer refused to "kowtow" to the Delegate, and suggests that the employee's initial complaint arises out of an ICBC fraud, in respect of a vehicle. The complaint against the Delegate is without foundation. The complaint alleging the ICBC fraud was viewed by the Delegate as irrelevant to her investigation.

The employer claims that it deducted the sum of \$200.00 and further wages from Mr. Erpilla's check because Mr. Erpilla was in a collision and damaged a vehicle owned by Mr. Klarreich and driven by Mrs. Klarreich. Mr. Klarreich is apparently a director of 56269 B.C. Ltd. Mr. Klarreich alleges that Mr. Erpilla attempted to have his wife, participate in an ICBC fraud where Ms. Klarreich would report the vehicle as damaged in a hit and run and Mr. Erpilla would pay the deductible. Mr. Klarreich claims that when Mr. Erpilla did not pay the deductible, he reported "the fraud" to ICBC and proceeded to deduct amounts on the deductible and damages from Mr. Erpillo's wages

There was no written assignment of wages from Mr. Erpilla to the company, or Mr. or Mrs. Klarreich.

The employer claimed that the Delegate erred in finding more money was owed to the employee, than was claimed by the employee in the complaint to the branch, in a period of time 6 months after the claim was presented. The employer argues that the Delegate erred in the manner in which wages were calculated, and that the employee and the Delegate overestimated the time required for each job.

ISSUE

Did the Delegate err in determining that Mr. Erpillo was an employee and entitled to wages?

Did the Delegate err in determining that Mr. Erpillo was entitled to a sum in excess of the complaint?

Did the Delegate err in determining that the employer deducting monies from Mr. Erpillo's pay in violation of sections 21 and 22 of the *Act*?

ANALYSIS

In an appeal under the *Act* the burden rests with the appellant, in this case the employer, to demonstrate an error in the determination such that I should vary or cancel the determination. In this case the employer refused absolutely to participate in the investigation and was rude and abusive to the Delegate. He now seeks to tender evidence which was not submitted to the Delegate at the time of the investigation. This information clearly is not admissible. This Tribunal has adopted a policy that an appellant must co-operate in an investigation, and the failure to co-operate is fatal to the introduction of new evidence on an appeal: *Tri-West Tractor Ltd., BCEST #D268/96, Re Kaiser Stables Ltd., BCEST #D058/97*. I therefore have not considered any new material tendered by the company. This point largely disposes of all the errors alleged by Jani-King which relate to the amounts in the Determination. I consider that most of the issues raised by Jani-King are entirely devoid of merit, such that the appeal should be dismissed as a frivolous, vexatious or trivial appeal pursuant to s. 114(1) of the *Act*.

Limitation Issue:

The complaint made by the employee was filed with the Employment Standards Branch within six months after the last day of employment as required by s. 74(3) of the *Act*. The Delegate found that additional amounts were owing to the employee in the period of time, six months after the date the employee last worked. There is, however, no obligation of the Delegate under the *Act* to complete an investigation within six months of the last date of

employment. Once the Delegate receives a complaint the Delegate must investigate a complaint, unless the complaint can be characterized as falling under s. 76(2) of the *Act*. The complaint is not one that can be characterized as falling under s. 76(2) of the *Act*. After completing an investigation a Delegate may issue a Determination. The amount claimed in a complaint does not form a “ceiling”, and does not limit the amount which a Delegate may find to be due and owing by the employer as a result of an investigation. Employees are often not aware fully of their rights under the *Act*. I am not prepared to give s. 74(3) the meaning suggested by the employer as it is not in accordance with the usual liberal and remedial construction that is given to employment standards legislation: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986. The Delegate has considerable latitude, through investigation to uncover violations, other than those alleged in the complaint, and can issue a Determination with regard to all violations uncovered during the course of an investigation: *Re Sunco Construction Services Ltd.*, BCEST # D475/97, confirming BCEST #D202/97.

Here the employer had at least two chances to limit its liability by paying the amount requested by the employee. A portion of the delay dealing with this matter can be attributed to the employer’s conduct in frustrating the investigation, and the Delegate’s problem in identifying the proper employer, given that the employer had operated in a variety of forms in the past. The Delegate did not err in finding that the employee was entitled to more than the employee claimed on the complaint form. The fact that the Determination was issued more than six months after the termination of employment does not demonstrate any error made by the Delegate.

Employee Entitled to Wages:

On the basis of information that was provided to the Delegate, there appears no doubt that Mr. Erpillo was an employee, subject to the direction and control of Jani-King, and economically dependent on Jani-King.

On the basis of information that was provided to the Delegate, and which the Delegate found credible and trustworthy, the employer has not demonstrated any error in the Determination. Jani-King chose not to participate in the investigation, and not to produce documents, and therefore the only cogent evidence before the Delegate was the evidence of the employee.

I therefore find that the employer has not met the burden of proving any error with regard to the wages set out in the Determination in the amount of \$2,776.41.

Deduction from Pay:

The deduction of monies from Erpilla’s pay to enforce the terms of an alleged oral agreement, is clearly a breach of the *Act*. Section 21 of the *Act* provides that an employer may not withhold, deduct or requirement of all or part of the employee’s wages, except in

accordance with the *Act* or *Regulations*. Under s. 22 of the *Act*, the employee can give a written assignment in certain circumstances which an employer must honour. The Director can also authorize an assignment for a purpose the director considers to be for the benefit of the employee. Jani-King had no right to deduct the sum of \$200.00 or any other amount from the paycheques of the employee, in this case.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated August 22, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal