

An appeal

- by -

Oriental Overseas Container Service Ltd.  
(OOCs)

- 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:** April D. Katz

**FILE No.:** 2002/548

**DATE OF DECISION:** February 6, 2003

## DECISION

### OVERVIEW

The Appellant, Oriental Overseas Container Service Ltd., (“OOCs”), appealed a Determination which found that it owed one of its truck drivers, Athwal Sucha Singh (“Athwal”) \$5,049.59 in wages and vacation pay. OOCs appealed the Determination on the basis of its belief that all truck drivers are independent contractors not employees, and therefore no wages or vacation pay were owing. The amount of the wages and vacation pay found to be owed is not in dispute.

### ISSUE

Did the Director err in concluding that Athwal was OOCs’s employee within the meaning of the *Employment Standards Act (Act)*?

### ARGUMENT

OOCs’s argues that Athwal’s relationship with OOCs was as an independent contractor. In support of this position OOCs raises several factual indices in the appeal and in response to the Athwal’s submission.

1. There was no written contract of employment or any other documentation that would show Athwal was an employee of OOCs.
2. OOCs did not sign any T4 or any records from Revenue Canada showing Athwal as an employee.
3. OOCs did not apply for a WCB number for Athwal, which would be required for an employee.
4. OOCs did not train Athwal during the period he did work for OOCs.
5. OOCs treated Athwal as an ‘Owner-Operator’. Athwal ‘provided service to our customers under’ OOCs’s “instruction and using his own truck”.
6. OOCs paid all Owner –Operators 70% commission from the revenue they made when they provided service to OOCs customers and that was what Athwal agreed to do.
7. The Rules and Regulations of the Vancouver Port only allow OOCs to book appointment times not individual truckers.
8. Athwal owned his truck, had his own insurance and cell phone and could have worked for additional companies. OOCs did not ask Athwal not to work for any other companies during his period with OOCs.

OOCs further submissions argue that Athwal assumed the risk that customers would pay OOCs when he continued to haul containers after September 11, 2001. Customers did not continue to pay and OOCs had to go out of business.

Athwal argues that he was OOCs's employee. He argues that he was trained by OOCs where to pick up containers and how to deliver the containers and get the paper work done. OOCs set up the appointments with the docks and clients and directed Athwal what to do and when. At the time of this work Athwal was working exclusively for OOCs. The payment was a fixed amount and there was no more or less profit based on customer satisfaction or customer involvement. OOCs did not pay any GST to Athwal, which would have been required if the relationship was with an independent contractor.

## FACTS

Athwal performed work for OOCs between November 5, 2001 and January 25, 2002. Athwal was not paid for the work that he performed between January 4, 2002 and January 25, 2002. OOCs kept records of the work done and the amount owed to Athwal.

## ANALYSIS

The onus is on an appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled.

The Director's Delegate found that Athwal was an employee within the meaning of the *Employment Standards Act* ("Act"). The Delegate relied on the definitions of 'employer' and 'employee' in the Act. Independent contractor is not defined in the Act although the common law has defined it and interpreted it for a long period. The Delegate applied the common criteria for determining if a relationship is one of employer and employee or independent contractor. The criteria applied were control, whose tools were used, was there an opportunity for profit or loss and integration, was the work integral to the business.

*Control:* OOCs exercised control over the activities of Athwal in determining what work would be done and when. Athwal was totally dependent on OOCs's prescribing which containers would be picked up where and when. Athwal had no independent opportunity to build relationships with customers. The compensation was totally dependent on Athwal doing as OOCs bid him to do at the time and place he was to do it.

*Tools:* The Director's Delegate found that Athwal provided his own truck. Athwal did not dispute that he provided his own insurance and cell phone.

*Profit or Loss:* Athwal was paid on a commission basis that was preset and unchanged. There were no bonuses and Athwal had no opportunity to profit from bidding on the work or setting different rates. Athwal had no investment in the business that would have allowed him to know if the work involved risk.

*Integration:* The work OOCs did was pick up and deliver containers from the docks. The work Athwal did was to pick up and deliver containers from the docks. Without Athwal OOCs would have hired someone else to perform the work of the company.

Based on this analysis the Director reached the conclusion that Athwal was an employee within the meaning of the *Act*. Athwal's work met all the criteria except tools. Many employees are required to provide their own vehicles or gloves, boots, and other work related tools. The fact that Athwal provided his own tools does not invalidate the other findings.

OOCs argues that there is no written agreement or other documentation to support the conclusion that Athwal was an employee. OOCs submits that Athwal was a joint venturer in the arrangement with customers and assumed the same risk with OOCs. OOCs state that both were victims of customers who did not pay for the work done. Athwal did not decide to do a pick up based on any knowledge of the customer. Athwal did the work at OOCs's bidding. Athwal had no ability to assess the risk or know if the customer had the capacity to pay.

The issue of whether a person performing work is an employee or an independent contractor is a question of fact and law. There is no requirement for there to be documentation of an agreement to employ someone for the person employed to be found to be employed. Documentation may support a conclusion but it is not essential.

Based on the undisputed facts raised in the Delegate's analysis in the Determination, Athwal was under OOCs's control performing work that was integral to the business. Athwal had no independent opportunity to profit from the business or prevent loss as long as he performed the work. Athwal had no discretion that he could exercise that would affect the profit or loss or when or where the work was done. Based on these facts there is no basis to conclude in law that Athwal was an independent contractor.

## **CONCLUSION**

Based on the evidence before me I find that Athwal was properly characterized as an "employee" and there is no evidence to support an error in the Determination. I deny the appeal and confirm the Determination.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated November 1, 2002 be confirmed.

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**