

An appeal

- by -

Sukhwinder Parmar and Jaheeda Ali operating as J & R Janitorial Services
("J & R")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/38

DATE OF DECISION: April 29, 2004

DECISION

SUBMISSIONS

Sukhwinder Parmar: On behalf of J & R Janitorial Services
Richard Saunders: On behalf of the Director
Ile Narayan: On his own behalf

OVERVIEW

This is an appeal by Sukhwinder Parmar and Jaheeda Ali operating as J & R Janitorial Services (“J & R”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued February 4, 2004.

Ile Narayan filed a complaint with the Director alleging that J & R had contravened the Act in failing to pay him regular wages, statutory holiday pay and vacation pay. Following a hearing on November 13, 2003, the delegate determined that Mr. Narayan was entitled wages, vacation and holiday pay and interest in the total amount of \$1,596.73. The delegate also imposed a \$1,500 administrative penalty on J & R for contraventions of the Act.

Mr. Parmar contends that new evidence has become available that was not available at the time the Determination was made, and seeks to have the Determination cancelled. He contends that the delegate didn’t ask him if he had any evidence.

The Tribunal has determined the appeal would be adjudicated based on written submissions and that an oral hearing would not be held.

ISSUES TO BE DECIDED

At issue is whether J & R has established that evidence has become available that was not available at the time of the hearing and that the evidence supports a cancellation of the Determination.

FACTS

The delegate held a hearing into Mr. Narayan’s complaint on November 13, 2003.

According to the Determination, Mr. Parmar did not attend the hearing, which was set for 9:00 a.m. Another delegate left a message for Mr. Parmar about the hearing. Mr. Parmar was finally contacted at 10:00 a.m., and he participated in the hearing by telephone. Mr. Parmar indicated that he had left a letter at the Branch that morning at 8:30 a.m., and did not stay for the hearing because he did not “like people who lie and cheat and cost the government money” and “did not want to contribute to their lies”.

Mr. Narayan was employed by J & R as a janitor from May 26, 2003 until approximately July 12, 2003. He contended that he worked at four locations, and that he began work between midnight and 1:00 a.m.

and finish between 4:00 and 8:00 a.m. He stated that some evenings Mr. Parmar drove him around between job sites in his van. He also stated that he took directions from Jaheeda Ali, Mr. Parmar's wife. Mr. Narayan contended he was entitled to be paid \$10 per hour for hours that he recorded on his own time sheet. Mr. Narayan's witness, Mr. Vasdewan, indicated that he worked at the same locations as Mr. Narayan, and that the hours of work maintained by Mr. Narayan accurately reflected the actual hours of work.

Mr. Narayan further contended that, after three weeks of work, he asked Mr. Parmar for wages and that Mr. Parmar told him he did not have the money because he hadn't been paid by the owners.

Mr. Parmar agreed that Mr. Narayan worked on four projects for him at a rate of \$8.00 per hour for two hours each evening. However, he contended that Mr. Narayan worked for him, not J & R Janitorial, and that, although he offered to pay him, Mr. Narayan did not pick up his cheque.

Mr. Parmar also agreed that he wrote down Mr. Narayan's hours of work on a time card on a daily basis. However, he could not explain why the writing and colour of ink was the same on each time card. Mr. Narayan and Mr. Vasdewan denied seeing the time cards, and contended that they were not accurate.

Mr. Parmar further indicated that he had not been paid for janitorial work at one of the locations.

Finally, Mr. Parmar indicated that he would arrange to have more witnesses provide letters to the Branch confirming that Mr. Narayan worked a total of two hours each evening. The delegate gave him eight days to provide that documentation. The delegate had not received any letters as of February 4, 2004.

A corporate registry search demonstrated that Ms. Ali was the sole proprietor of J & R. The time cards provided to the delegate by Mr. Parmar were under a cover letter signed by & J & R Janitorial Services, Jaheeda". The delegate determined that Mr. Narayan was employed by Mr. Parmar and Ms. Ali operating as J & R Janitorial Services.

The delegate found Mr. Narayan's record of hours of work to be the most credible. He determined that his rate of pay was \$8.00 per hour, and that he had not been paid for his work. He calculated the wages owing and the administrative penalty for J & R's contraventions of sections 18, 58 and 45 of the Act as set out above.

ARGUMENT

Mr. Parmar submitted a five page letter with his appeal, explaining that he had been hired as a janitor for buildings located in Burnaby and North Vancouver. He provided contact names and telephone numbers of the general managers of those premises. Mr. Parmar contended that Mr. Narayan was not hired to work in one of the buildings, so he relaxed on sofas in the lounge drinking coffee while Mr. Parmar and other cleaners cleaned the premises. He submitted that he would have liked to have trained Mr. Narayan in other areas but Mr. Narayan refused because of a sore back. He contends that Mr. Narayan indicated that he preferred to work only two hours.

Mr. Parmar contended that only he was hired to perform the work, and that the building manager did not want more than two people in the premises.

Mr. Parmar further contended that Mr. Narayan only worked a total of 60 hours between May 26, 2003 and July 7, 2003, and that his employment was terminated.

Mr. Parmar submitted Mr. Narayan's hours of work, a letter from the general manager of one of the buildings, and a copy of a cheque stub from a building maintenance company. He indicated that "witnesses will testify to these severe allegations by letter or telephone if needed". Mr. Parmar also submitted letters from two other janitors who he contended worked with him in several of the buildings.

Finally, Mr. Parmar contended that J & R Janitorial Services "does not exist for a long period of time".

The delegate provided the record of material provided in relation to the complaint, including the complaint, the self help kit and the corporate search.

Mr. Narayan contended that the evidence Mr. Parmar submitted was to have been submitted at the hearing and was not. He also notes that one of the witness statements is from Mr. Parmar's sister, and that she only worked weekends. He contends that Mr. Parmar's submissions are not truthful.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- a) the director erred in law
- b) the director failed to observe the principles of natural justice in making the determination; or
- c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that a Determination is incorrect rests with an Appellant. (*Natalie Garbuzova* BC EST #D684/01) On the evidence presented, I find that burden has been met.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Mr. Parmar has not met any of these conditions.

All of the documents submitted by Mr. Parmar could have, with due diligence, been obtained either before the hearing, or within the time period granted by the delegate following the November hearing.

Fact sheets enclosed with the notice of hearing outline the hearing process, including a statement that “all documents to be used at the hearing must be provided in advance”.

Had Mr. Parmar appeared at the hearing with his witnesses, as he ought to have, the witnesses would have been placed under oath and subject to cross examination. Their statements are unsworn, and at this point, have little evidentiary value.

In any event, I am not persuaded that the evidence presented by Mr. Parmar is credible. Corporate searches indicate that, as of February 4, 2004, J & R Janitorial was still registered as a business. In addition, the first response to Mr. Narayan’s complaint was from “J & R Janitorial Services – Jaheeda”, and the material deposited at the Branch the morning of the hearing was identified as being from “Sukie Parmar c/o J. R. Janitorial Services”.

I am not persuaded that, had the delegate considered this evidence at the hearing, he would have arrived at a different conclusion on the issue of whether Mr. Narayan was entitled to wages in the amount sought, or on the issue of whether J & R was the employer.

The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated February 4, 2004 be confirmed in the amount of \$3,096.73, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal