



An appeal

- by -

Raj Sainaney  
("The Employee")

- 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:** Jean Greatbatch

**FILE No.:** 2000/752

**DATE OF DECISION:** February 14, 2001

## DECISION

### APPEARANCES

Raj Sainaney	(“Sainaney”)
Bob McQuillan	for Metal Distributors Ltd, (the “Employer”)
Judy Ho, (“Ho”)	bookkeeper, for the Employer
Gulshan Anand,	Interpreter for Sainaney
Lesley A. Christensen	IRO, Delegate of the Director of Employment Standards (the “Delegate”)

### OVERVIEW

This is appeal by Raj Sainaney under Section 112 of the Employment Standards Act of a determination of the Director of Employment Standards issued on October 5, 2000.

Sainaney’s original complaint was that his employer, Bob McQuillan, the owner of Metal Distributors had reduced his income from \$1750 bi-weekly to \$1,000, from January 1, 1999 until August 13, 1999 and that his employer had failed to pay him vacation pay in the amount of \$5,250. Sainaney was employed as an engineer (not as a professional engineer excluded under section 31(f) of the Act) by Metal Distributors from February 12, 1997 to August 13, 1999. Sainaney claimed that his wife, Sonoo Sainaney (“S. Sainaney”) was also employed by Metal Distributors, and that she worked as his assistant, working on marketing studies, equipment costing and technical support. Sainaney alleges that S. Sainaney was to be paid \$750 bi-weekly and that she worked from home. S. Sainaney was interviewed by the Delegate of the Director (“the Delegate”), during her investigation, and told her that she had never spoken with nor received instructions from the Employer, that she had never been hired by Metal Distributors but that she did assist her husband with project reports and quotes.

The Employer provided information to the Delegate that Sainaney had requested that his income be split to reduce his income tax. The Delegate interviewed Judy Ho, (“Ho”) bookkeeper for Metal Distributors, who stated that Sainaney had approached her in March 1999 to calculate how much income tax would be payable on bi-weekly incomes of \$1750, \$1000 and \$750. Ho reported that several days later Sainaney requested that she issue him with 2 cheques each pay period, one made out to his wife and the other to him. Payroll records show that from March 19 to April 16, Ho issued bi-weekly paycheques for \$1750 to S. Sainaney, no cheques to Sainaney; on April 30 and May 14 she issued cheques totalling \$1750 split unevenly between Sainaney and S. Sainaney and after May 14 until Sainaney quit his position in August, Ho issued bi-weekly cheques of \$1000 to Sainaney and \$750 to S. Sainaney.

The Employer's records also showed that Sainaney had been paid \$6,125 in vacation pay over the course of his employment and had taken 7 weeks off work for vacation from September 11 to November 2, 1998. This exceeds the statutory requirement of 4% of income.

The Delegate concluded that the evidence showed that Sainaney had been paid \$1750 bi-weekly until March 5, 1999 and that he had requested income splitting from that date on. The Delegate found that the evidence showed that Sainaney's wife had been receiving part of his income due to his own wishes, but that the total bi-weekly income was \$1750. The Delegate concluded that there was no evidence that S. Sainaney was an employee of Metal Distributors and that the money paid to her was intended to pay for Sainaney's work.

## **ISSUE**

Sainaney appealed the determination on the following grounds:

1. The Employer broke the law by not paying CPP and UI for him for his entire period of employment, and that this was illegal.
2. The Determination is based on false evidence given by Ho, who, as a current employee is not likely to speak out against her employer.
3. The ROE issued by the Employer for S. Sainaney reports her as an assistant to Sainaney and that her earnings were \$750 bi-weekly. This provides documentary evidence that she was an employee of Metal Distributors.

## **ARGUMENT**

The Employer raised a preliminary objection to the presence of the interpreter, as he stated that never in the course of Sainaney's employment had language posed a problem. The Delegate also noted that an interpreter had not been necessary during the course of her investigation. The appellant indicated that he needed the interpreter in order to understand the proceedings. It is important that both parties to a hearing fully comprehend all that transpires, therefore I allowed the interpreter to be present for the duration of the hearing.

Sainaney claimed that the Record of Employment (ROE), issued by the Employer and signed by Bob McQuillan himself, listed S. Sainaney as "assistant to die cast engineer" who was paid \$750 bi-weekly was proof that his wife was employed by Metal Distributors. Sainaney argued that if his wife had not been an employee of the Employer then the ROE issued in her name was fraudulent and that this was proof that McQuillan's evidence should be disregarded. Sainaney also argued that the evidence given by Ho was not credible, as she was still a current employee of Metal Distributors and that he would not have discussed income splitting with Ho, but would have gone directly to McQuillan, as his employer.

## THE FACTS AND ANALYSIS

Sainaney did not provide any evidence at the hearing that Metal Distributors employed his wife. His wife did not attend the hearing, and he did not give evidence of the work performed by his wife, that the employer had hired his wife or that she received direction from the Employer.

Judy Ho testified that she was the bookkeeper for Metal Distributors and that she kept personnel records and issued paycheques for the Employer. Ho stated that no deductions for UI or CPP were deducted from Sainaney's paycheques, that he was paid as a contractor, had told her that he was a contractor and she had prepared T4 slips for 1998 and 1999 stating that he was a contractor. Ho stated that Sainaney had approached her early in 1999 to ask about the tax implications of his \$1750 bi-weekly cheque being split into one for \$1000 and another for \$750. She said that Sainaney had told her that he wanted to be paid up to \$26,000 per year and that any pay over that amount should be paid out to his wife. Ho stated that after checking with the Employer to make sure that this was allowed, she began to split Sainaney's cheques according to his wishes. Ho testified that she did not consider this request to be illegal as Sainaney was paid as a contractor, not an employee. Ho stated that Sainaney came to ask her advice on financial matters on a number of occasions.

The Employer testified that he had hired Sainaney initially as a part-time employee, but that due to a request from Sainaney, he had been paid as a contractor. He confirmed that he had signed the ROE for S. Sainaney; at the request of Sainaney to reduce the latter's taxable income. He denied that he had ever hired S. Sainaney.

In deciding this appeal, the Tribunal considers the following factors:

An appeal under section 112 is not a re examination of the complaint. It is an appeal to decide whether the determination was correct based on the facts and the law: *Syncon Investments Ltd.* BC EST D94/97

The burden of proof lies with the appellant to show that on the balance of probabilities the determination under appeal should be varied or cancelled: *World Project Management Inc.* BC EST #D115/97

The appellant in this case brought forward no evidence that the facts upon which the determination was based were incorrect. There was no evidence, for example, either through Sainaney's testimony or that of S. Sainaney herself that she had been an employee of Metal Distributors.

There was evidence that the Employer had completed a false ROE for S. Sainaney. The Delegate in making her determination considered the ROE evidence. The Employer's evidence was that the ROE had been issued at the request of Sainaney himself. While completion of a false document does call into question the Employer's credibility, there is no reason to doubt the credibility of Ho. Her evidence was that Sainaney himself asked to be paid as a contractor and

that he had been paid as such for a number of years. She clearly stated that she had been asked by Sainaney to split his pay cheques between him and his wife to reduce his income tax. As Ho was the person who prepared and issued pay cheques, her evidence is key. The answers that she gave to Sainaney at the hearing, and her recollection of the events during the spring of 1999 were clear and concise. I have no reason to doubt her credibility.

In conclusion, the appellant in this appeal did not meet the burden of proof to show that the determination should be cancelled due to an error in law or fact.

### **ORDER**

Pursuant to section 115 of the Act, I confirm the determination of October 5, 2000

**Jean Greatbatch**

**Jean Greatbatch**

**Adjudicator**

**Employment Standards Tribunal**

JG/bls