

An appeal

- by -

Indica Restaurant and Catering Services Inc.
carrying on business as Indica Restaurant
("Indica")

- 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: David B. Stevenson

FILE No.: 2007A/98

DATE OF DECISION: November 5, 2007

THE FACTS

8. The appeal challenges the calculation by the Director of the complainant's hourly wage rate. The facts which are relevant to this matter are set out in the following excerpt from the Determination:

The evidence clearly shows that the complainant knew prior to leaving India that his rate of pay was to be \$1,500 per month for 40 hours. Therefore, based on the evidence, I find that the complainant agreed to the \$1,500.00 rate of pay and the contract was not unilaterally changed as alleged.

The conversion of a monthly wage to an hourly rate is as follows: $\$1,500.00 \times 12 \div 52 \div 40 = \8.65 . However, my review of the payroll records indicates that the complainant was consistently paid twice per month in the amount of \$750.00 for 80 hours. This fact was not disputed by the parties. Based on this evidence, I find that the complainant's hourly rate to be \$9.37 per hour ($\$1,500.00 \div 2 \div 80 = \9.37).

9. The Determination contains no analysis relating to the payment of wages for December 25, 2005 and January 1, 2006. The only reference in the Determination to those dates is that, "the complainant has recorded that he worked every day for the last six months except for Christmas and New Year's Day". In reply to the appeal, the Director says the inclusion of wages for these days was an error, as payment for statutory holidays was included in a settlement of some of the complaint, and concedes the amount of the Determination should be reduced by \$159.29.

ARGUMENT AND ANALYSIS

10. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

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 made.

11. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. Indica has not specified any ground of appeal, but the only ground that could be related to the arguments raised in the appeal is that the Director erred in law in deciding the hourly wage rate. Accordingly, the burden on Indica is to show the Director erred in law in calculating of the hourly wage rate.

12. The Tribunal has 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.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
13. While a calculation of the hourly wage rate of a complainant can include a question of law where, as in this case, that calculation involves a consideration of the definition of “regular wages” in Section 1 of the *Act*, it is typically and predominantly fact driven. In this appeal, Indica does not say the Director misinterpreted or misapplied that definition, or any other provision of the *Act*, but argues the calculation was based on an incorrect factual finding or conclusion: that Yaspal Singh was paid \$750.00 for every 80 hours of work. Effectively, Indica is asking this Tribunal to assess the correctness of findings of fact made by the Director.
14. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).
15. In the circumstances of this case, the only basis for alleging, or finding, an error of law is on the third and fourth parts of the definition; that the Director acted without any evidence or acted on a view of the facts that could not be reasonably entertained.
16. Indica says their records showed the complainant was paid \$750.00 twice a month. The Director, at least in part, confirms that assertion in the excerpt from the Determination provided above and, in reply to the appeal, says:
- I do not dispute Mr. Narinder Singh’s assertion that Indica was making wage payments on a semi-monthly basis.
17. The Director goes on to say, however, that “his calculation of wages as detailed in the attached payroll record is not in keeping with a semi-monthly payroll” for the following reasons:
- The payroll record submitted by Indica was incomplete and a penalty was issued. The record did not indicate a) the dates when the cheques were issued, b) period the cheque amount covered, nor c) number of hours worked. The only information the payroll record provided was a monthly entry indicating two cheques issued both in the amount of \$750.00 less statutory deductions. There was no disagreement between the parties that the complainant was to be paid \$1500.00 per month based on 40 hours per week. Therefore, to arrive at the \$750.00 amount paid twice per month, the only conclusion was that based on 40 hours his rate of pay was \$9.37 per hour. If I am wrong and the hourly rate of \$8.65 is correct, the complainant would have received \$692.00 ($\$8.65 \times 40 \times 2$) and not \$750.00 ($\$9.37 \times 40 \times 2$).

18. The difficulty with the above reasoning, and the conclusion which formed the basis for the calculation by the Director of the wages owed, is that there was no evidence either that Indica agreed to pay Yaspal Singh \$750.00 every two weeks or that, in fact, Yaspal Singh was paid \$750.00 every two weeks. The findings of fact made in the Determination and the concessions made in the reply of the Director expressly accept that the agreement of the parties was that Yaspal Singh would be paid \$1500.00 a month, that he was paid that amount in each month he worked and that the amount was paid on a semi-monthly basis. Those findings are confirmed by at least two documents in the Section 112(5) record: a copy of Indica's payroll record for Yaspal Singh and copies of two wage cheques payable to Yaspal Singh for May 2006.
19. The payroll records – and I certainly agree that they are incomplete and do not comply with several of the requirements of Section 28 of the *Act* – confirm that Yaspal Singh was never paid more than \$1500.00 for any month he worked. As the Director states in the reply to the appeal, “the only information the payroll record provided was a monthly entry indicating two cheques issued both in the amount of \$750.00 less statutory deductions”. The wage cheques are both for the same amount, an amount which translates to \$750.00 before statutory deductions; one cheque is dated “15/05/2006” and has a reference of May 1-15; the other is dated “31/05/2006” and has May 16-31 as its reference.
20. There is no evidence in the Section 112(5) record for the conclusion reached, while there is evidence supporting the position taken by Indica. The only basis for the contested finding is the Director's view that the payroll record provided was “not in keeping with a semi-monthly payroll”. The presumption that the \$750.00 was for 80 hours work is without foundation. As the Director has noted in the reply, the payroll record provided by Indica did not show either the period the cheque covered or the number of hours worked. That presumption is also inconsistent with the evidence and findings that Indica offered to pay Yaspal Singh \$1500.00 a month based on a 40 hour work week, he accepted that offer and that rate of pay was not altered during his period of employment.
21. I am satisfied the calculation by the Director of a wage rate of \$9.37 an hour amounts to an error of law; there is no evidence to support the conclusions leading to that calculation and, in respect of conclusions relating to the payroll records provided by Indica, takes a view of facts that cannot be reasonably entertained.
22. The only reasonable view of the evidence would result in a calculation of the regular wage based on a monthly wage of \$1500.00.
23. The appeal is allowed.

ORDER

24. Pursuant to Section 115 of the *Act*, I order the Determination dated July 27, 2007 be varied in accordance with this decision. The matter is referred back to the Director to make the appropriate calculations.

David B. Stevenson
Member
Employment Standards Tribunal