

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Dilbag S. Khaira & Amandeep S. Khaira  
carrying on business as "Khaira's Trucking"  
("Khaira" or the "employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No:** 1999/774

**DATE OF HEARING:** March 3, 2000

**DATE OF DECISION:** March 10, 2000

**DECISION**

**APPEARANCES:**

Dilbag S. Khaira	on his own behalf
Amandeep S. Khaira	on his own behalf
Afsar Ali	on his own behalf
No appearance	for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Dilbag S. Khaira & Amandeep S. Khaira carrying on business as “Khaira’s Trucking” (“Khaira” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 13th, 1999 under file number ER 97-442 (the “Determination”).

The Director’s delegate determined that Khaira owed its former employee, Afsar Ali (“Ali”), the sum of \$1,707.44 on account of unpaid wages. By way of the Determination, the Director also assessed a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

This appeal was heard at the Tribunal’s offices in Vancouver on March 3rd, 2000. Both appellants (Dilbag is the father of Amandeep) appeared and testified before me (Dilbag S. Khaira by way of an interpreter), as did Ramaljith Khaira (Dilbag’s spouse) and Sukdev Kang, on behalf of the employer. The respondent employee, Ali, also appeared and testified on his own behalf. The Director was not represented at the appeal hearing.

**FACTS**

Khaira owns two trucks and hauls freight--typically lumber--as a subcontractor for a firm known as “Two-Way Trucking”. As I understand the situation, Ali briefly worked for Khaira as a truck driver from August 5th to September 12th, 1999 as a driver--Ali appears to have worked on an intermittent basis during this period. The elder Khaira drove one truck and, on occasion, Ali drove the other truck owned by the firm (referred to as the “number 13” truck). As determined by the delegate--and Ali has not appealed this finding--Ali was to be paid 28% (he originally claimed he was entitled to 35%) of the gross revenues (*i.e.*, the monies paid by “Two-Way Trucking” to Khaira) generated by Ali when he drove the number 13 truck.

Based on information provided to the delegate by Mrs. Khaira (which the employer now says contained an error), Ali’s commission earnings were determined to be \$1,816.36 for August and \$570 for September. After accounting for 4% vacation pay, an \$800 wage payment made to Ali

and statutory interest (see section 88), Ali was awarded \$1,704.44. The delegate rejected--as do I--the employer's position that Ali also received a \$350 cash advance. There is nothing in the employer's payroll records to document such an advance and, given Ali's denial that such a payment was made, I cannot, on a balance of probabilities, conclude that the delegate erred on this point.

**ISSUE TO BE DECIDED**

The employer says that when it submitted information to the delegate it erred in that it provided to the delegate the total gross revenues for the month of August rather than the amount that reflected only Ali's "share" of those revenues. Apparently, this information was provided to the delegate by Mrs. Khaira when her husband was out of town and she simply misunderstood the delegate's request for information.

According to the employer, Two-Way Trucking's payments on account of truck number 13 (*i.e.*, the truck driven by Ali) and Ali's commission entitlement are as follows:

August 1999:	$\$3,303.50 \times 28\% =$	\$ 924.98
September 1999:	$\$2,038.00 \times 28\% =$	<u>\$ 570.64</u>
Subtotal:		\$1,495.62
Plus Vacation Pay (4%):		\$ 59.82
Less Wages Paid:		<u>(\$ 800.00)</u>
Balance Due:		<u>\$ 755.44</u> plus interest

As can be seen, the employer does not dispute Ali's entitlement for September, only that for August.

**ANALYSIS**

I find the employer's evidence (both *viva voce* and documentary) as to the revenues generated by Ali to be credible, supported as it is by the payment sheets provided directly to Khaira by Two-Way Trucking. The employer submitted into evidence all of Ali's daily trip sheets--in Ali's own hand--and Ali acknowledged in his testimony that the trip sheets were a complete record of his work for the employer. The employer's records consist of Ali's trip sheets that were, in turn, submitted by him directly to Two-Way each week. Two-Way then recorded on the trip sheets themselves the gross payment due to Khaira (Ali's entitlement being 28% of this figure) for each delivery made.

I find, on a balance of probabilities, that the employer submitted information to the delegate showing, for the month of August, the total payments made by Two-Way to Khaira (which included the revenue generated by the elder Khaira earned while driving the other company truck); the employer neglected to “separate out” the revenues that were generated solely by Ali. Accordingly, I find it appropriate to vary the Determination.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied to reflect an amount due, by way of unpaid wages from Khaira to Ali, of **\$755.44** together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

Inasmuch as I have found that Khaira did not pay Ali all of the wages to which he was entitled, it follows that the \$0 penalty is confirmed. In all other respects the Determination is confirmed.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**