

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 -

Barney's Fast Food Ltd.
("BFF Ltd.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 1998/782
DATE OF HEARING: February 23, 1999
DATE OF DECISION: March 24, 1999

DECISION

OVERVIEW

This is an appeal by Barney's Fast Food Ltd. ("BFF Ltd.") under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination which was issued by a delegate of the Director of Employment Standards ("the Director") on November 18, 1998. The Determination requires BFF Ltd. to pay \$2,394.31 to a former employee, Manjit K. Sahota, on account of unpaid wages (including regular wages, overtime wages, vacation pay and interest accrued according to Section 88 of the *Act*).

The primary ground of appeal is that BFF Ltd. disputes the number of hours which the Director found Ms. Sahota worked during her period of employment. BFF Ltd. submits that Ms. Sahota worked a total of 114 hours and is entitled to no more than \$815.10 in wages.

A hearing was held at the Tribunal's offices on February 23, 1999 at which time evidence was given under oath by Najma Arshid and Manjit Sahota.

Salil Dhaumya provided simultaneous translation services.

FACTS

There is no dispute that Ms. Sahota was employed by BFF Ltd. as a kitchen helper and that her hourly wage rate was \$7.15/hour. However, there is a significant dispute about the dates on which her employment started and ended as well as her hours of work.

In investigating Ms. Sahota's complaint, the Director wrote to BFF Ltd. on October 1, 1998 and requested a copy of all payroll records pertaining to Ms. Sahota. When no response was received, the Director issued a "Demand for Employer Records" on October 28, 1998 which required a response by November 12, 1998. The Director did not receive a response to that Demand and issued the Determination on November 18, 1998. Each of those three documents was sent to 7711 128th Street, Surrey: the location where Ms. Sahota was employed by BFF Ltd. The Determination was also mailed to BFF Ltd.'s Registered and Records Office. Najma Arshid, a director/officer of BFF Ltd. who appeared on its behalf, testified that the documents were not received, probably because it ceased operating at 7711 128th Street effective September 15, 1998.

The following findings of fact are contained in the Determination:

Working through the schedule of hours described by Sahota, I total 295 hours that were probably worked. In the absence of any information provided by the employer, I accept this figure as accurate for the calculation of payment of wages.

I accept that Sahota regularly worked 48 hours a week comprised of three days of 7 hours and three days of 9 hours.

On the balance of probabilities and the lack of information from the employer, I also accept that Sahota was not paid any wages for her work.

While the Determination does not contain an express finding about Ms. Sahota's dates of employment, the calculation schedule attached to it shows Ms. Sahota's first date of employment as June 30, 1998 and her last day of work is shown as August 11, 1998.

BFF Ltd. submits that Ms. Sahota was employed from July 14, 1998 to August 6, 1998 and worked either 6 hours or 8 hours on each day that she worked. That is, BFF Ltd. submits, Ms. Sahota did not work any overtime hours during her employment. It also submits that it is willing to pay Ms. Sahota \$815.10 (114 hours x \$7.15/hour) and denies having offered a cheque to her in the amount of \$592.00 as alleged.

Najma Arshid testified that she placed an advertisement for a kitchen helper in the *Indo Canadian Times* newspaper to which Ms. Sahota responded in person. After some discussion and telephone calls between the two women, Ms. Arshid testified she offered Ms. Sahota the position "... on a trial basis for one month, after which she would be paid regular wages". Ms. Arshid also testified that Ms. Sahota began working on July 14, 1998 and did not work after August 6, 1998. During her employment, Ms. Arshid testified, Ms. Sahota was ill and unable to work on July 29 and August 6, 1998. In addition, there were a number of days when Ms. Sahota worked while she was ill.

Ms. Sahota testified that when she responded in person to the newspaper advertisement, she was interviewed by Ms. Arshid, was offered the position immediately and began working the next day (June 30, 1998) at 3:30 p.m. She was not paid after working for two weeks and Ms. Arshid asked her to wait a day or two for payment. After working for another week without payment, Ms. Sahota testified, she was told by Ms. Arshid that the business did not have the money to pay her wages and she would be paid fully within two or three weeks. After a further 3 weeks elapsed, Ms. Sahota still did not receive any wages and Ms. Arshid explained: "Don't worry, I'll pay you later. There is some work going on at the new location." Following that conversation, and after discussing the matter with her family, Ms. Sahota decided to resign. She telephoned Ms. Arshid the next day to advise her of that decision. Approximately ten days later Ms. Sahota visited her former workplace to receive payment of her wages but Ms. Arshid asked her to return again in two or three days. She did so and, on that occasion, Ms. Arshid gave her a cheque for \$592.00. When she asked for an explanation of the amount of the cheque she was told that no deductions had been taken from her earnings. At that juncture, Ms. Sahota enlisted the assistance of her sister-in-law who was also unable to obtain a satisfactory explanation for the amount of the cheque. As a result, Ms. Sahota did not accept the cheque and left it with Ms. Arshid

ANALYSIS

It is trite law that BFF Ltd., as the appellant, bears the onus of proving that the Director erred in fact or in law in making the Determination.

I note that BFF Ltd. has not submitted nor sought to rely on any payroll records in making its appeal. It is clear, on the evidence adduced that BFF Ltd. has not complied with three sections of the *Act*: Section 17 (Paydays); Section 27 (Wage Statements); and Section 28 (Payroll Records). If BFF Ltd. had complied with those statutory provisions, the disposition of this appeal would have been considerably more straight-forward and, indeed, there may have been no need for Ms. Sahota to make a complaint under the *Act*.

One of the grounds of BFF Ltd.'s appeal is that it agreed to allow Ms. Sahota to work for one month on a trial basis and, if her work proved satisfactory, it would "... think of hiring her". Any such agreement would be a contravention of the *Act* by virtue of Section 4 (Requirements of the *Act* cannot be waived) and Section 1(1), which defines an "employee" as including a person who is "... being trained by an employer for the employer's business."

There is no dispute that Ms. Sahota was employed at the minimum wage rate permitted by the *Act* and *Regulation* (\$7.15 per hour). Ms. Arshid acknowledged in her testimony that BFF Ltd. advertised for a kitchen helper in the *Indo Canadian Times* "... at the end of June, 1998."

When I review all of the evidence before me and adopt the test set out by our Court of Appeal in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.), I find that I prefer the evidence given by Ms. Sahota with respect to the dates of her employment and her hours of work.

BFF Ltd. offers no substantive evidence to controvert the findings made by the Director and the evidence given by Ms. Sahota concerning the number of hours she worked and the days on which she worked. Further, even if I were to accept the hours of work evidence given by Ms. Arshid on behalf of BFF Ltd., there would still remain a clear contravention of Sections 1, 17, 27 and 28 of the *Act*.

In summary, BFF Ltd. has not established that the Determination contains an error in fact or in law.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal