

An appeal

- by -

Him-Mat Enterprises Ltd.
("Him-Mat")

- 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: Carol L. Roberts

FILE No.: 2003A/1

DATE OF HEARING: April 8, 2003

DATE OF DECISION: April 15, 2003

DECISION

APPEARANCES:

On behalf of Him-Mat Enterprises Ltd.: Nancy Y. Fong, Lim & Company, Barristers & Solicitors

On his own behalf: Arun Jagga

OVERVIEW

This is an appeal by Him-Mat Enterprises Ltd. (“Him-Mat”) of a Determination of a delegate of the Director of Employment Standards issued December 3, 2002. The delegate concluded that Him-Mat contravened sections 17, 18, and 58 of the *Act* in failing to pay Arun Jagga regular wages and vacation pay, and ordered that it pay Mr. Jagga compensation in the amount of \$3,741.17.

ISSUES TO BE DECIDED

At issue on appeal is whether the delegate erred in concluding that Mr. Jagga was entitled to wages and vacation pay.

Him-Mat contends that its principal, Vivek Darbura, did not have an opportunity to respond to the allegations. It says he was never contacted during the investigation, as the business operation had ceased, and all letters sent to those premises were never received.

Him-Mat claims that Mr. Jagga was an owner of the business, rather than an employee.

FACTS

Mr. Jagga alleged that he worked as a restaurant manager for Him-Mat, which operated the Balti Tandoori restaurant, from January 29, 2002 to May 25, 2002. He alleged that, although the parties agreed that he would be paid \$1000 per month plus gratuities, he received only one cheque, in the amount of \$500, for the entire employment period. He seeks recovery of the balance of his agreed upon wages. Mr. Jagga did not maintain a record of his hours of work, but claimed he was at the restaurant almost the entire time it was open.

On September 11, 2002, the delegate became aware that the bailiff had seized the remaining assets of the restaurant, and the business was no longer in operation. On October 9, 2002, the delegate issued a Demand for Records, and enclosed a letter setting out the complaint, seeking the employer’s response. The documents were sent to the registered records office, which was the address of the President, who was an officer of the company. It was returned unclaimed.

In the absence of any evidence or submissions to the contrary, the delegate found that Mr. Jagga’s claim had been substantiated, and determined that he was owed \$3,741.17.

ARGUMENT

Him-Mat says that the business had ceased, and the Bailiff had seized the assets of the restaurant. None of the documents sent to that address were received. Further, it also says that the documents sent to the Registered and Records office were returned unclaimed, since the President had left the company June 2001. Ms. Fong acknowledged that the corporate records had not been maintained. She stated that, although a notice of change of directors had been filed in January, 2002, the registered records office address had not been changed.

Ms. Fong acknowledged that the delegate had served the documents as required under the *Act*.

I am satisfied that Mr. Darbura did not have an opportunity to respond to the allegations. Although the documents were served in accordance with the *Act*, and thus are deemed to have been served, that presumption is rebuttable. The evidence is that the delegate's letter and demand for records was unclaimed. I accept that Mr. Darbura was not notified of the allegations, and allow the appeal on this basis.

Mr. Drubara testified that, in December 2001, he entered into an oral agreement with Mr. Jagga to sell 50% of the business to him for \$30,000. He said that, although he received \$15,000 of the purchase price, Mr. Jagga failed to pay the balance.

Ms. Fong provided a copy of a letter she had been instructed to write on Mr. Darbura's behalf, in support of that position. In that letter, dated February 26, 2002, she says that she is instructed to write to Mr. Jagga

with regard to your agreement to purchase 50% of the shares in the capital of the Company.... We understand from our client that you had a verbal agreement in December, 2001 to purchase 50% of the shares in the capital of the Company for the sum of \$15,000.00. We understand that you paid \$5,000 on or about January 1, 2002 and a further \$10,000 on or about January 11, 2002, to the Company which was deposit (sic) to the Company's account with CIBC.

The letter continued as follows "We understand that you have been managing and running the business since that time..."and sought Mr. Jagga's signatures on necessary documents to complete the transaction.

Mr. Jagga acknowledged that he received the letter, but did not respond to it.

Ms. Fong provided copies of two cancelled cheques issued to Him-Mat by Mr. Jagga's wife. The December 20, 2001 cheque of \$5000 indicated that the amount was a "restaurant deposit".

Him-Mat also provided, as evidence, a customer application made by Balti Tandoori Grill to Hanif's International Foods Ltd. on March 22, 2002. The application was made by Mr. Jagga (Jagea), who indicated that he was the owner of the company.

I heard evidence also from Dion Herft, Mr. Immattiparambil, and Roop Dyal, the bartender/waiter, chef, and a customer, respectively, of Balti Tandoori. They all testified that Mr. Jagga held himself out as owner of the restaurant.

Him-Mat also contends that Mr. Jagga's actions were more consistent with that of an owner, not an employee. It says that he worked for 5 months without a salary, ordered food and supplies for the restaurant and held himself out as owner.

Mr. Jagga argued that, in fact, the money his wife paid to Mr. Darbura was for the purchase of a Subway franchise, and Mr. Darbura refused to complete the deal. He contended that the Determination ought to be upheld.

ANALYSIS

The burden of substantiating an appeal rests with the appellant. Having heard the evidence of the parties, I find that the appellant has met that burden, and allow the appeal.

I accept, on the evidence presented, that Mr. Jagga entered into an agreement to purchase a 50% interest in the restaurant, and that he was not an employee.

I accept not only that Mrs. Jagga gave Mr. Darbura \$15,000 not as a loan, as she alleged in a later statement of claim, but as a down payment on the restaurant. Further, I do not accept that the payments were for a Subway franchise. Mrs. Jagga's first cheque, dated December 10, 2001 identified the funds as being for the restaurant. There was no discussion or agreement between the parties about the Subway franchise until February of 2002.

I also accept, on the evidence, that Mr. Jagga held himself out to third parties as a part owner, and performed acts consistent with that status, such as ordering supplies, taking a food safe course, and providing direction to employees.

Furthermore, I do not find it reasonable that Mr. Jagga would work long hours at the restaurant for as long as he did, without either keeping a record of his hours of work or demanding payment for that work, if he were an employee.

I conclude that Mr. Jagga was an owner, not an employee, and allow the appeal.

ORDER

I Order, pursuant to Section of the Act, that the determination, dated December 3, 2002, be cancelled.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal