

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 -

Gate Way Pizza & Pasta House Ltd.
("Gateway" or the Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 97/717, 97/778, 97/779, 97/780

HEARING DATES: January 5 and February 16, 1998

DECISION DATE: March 18, 1998

DECISION

APPEARANCES

Mr. Jasbir Padda on behalf of the Employer
Mr. Paramjit Padda
Mr. Garry Padda
Mr. Jatinder Padda
Mr. Anwar Badha
Mr. Jim Ageliades
Mr. John Sterne
Mr. Manjit Chahal
Ms. Tania Komline
Mr. Kuldip Rai
Mr. Aqbal Gill

Mr. Kuldip Gill on behalf of the Complainant Employee
Ms. Rajinder Gill
Mr. Harwinder Grewal
Mr. Param Kaler

Mr. Baljit Bains on behalf of the Complainant Employee
Mr. Rajinder Bains
Mr. Hardeep Singh Samra

Ms. Kawal Kahlon-MacIntosh interpreters
Ms. Gushpushp Gill

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against several Determinations of the Director of Employment Standards (the “Director”) issued as follows:

- September 9, 1997 which imposed a penalty of \$500.00 on the Employer for “failing to keep proper records”(Determination #1);
- October 2, 1997 for violations of Sections 18(2), 35, 40(1) (2), and 58(3) with respect to Mr. Kuldip Gill. This Determination found that Mr. Gill was an employee of the Employer from June 6, 1997 to August 18, 1997, though he had been absent between June 30 and July 24 due to an injury. He had been employed as a kitchen helper but had not been paid regular wages,

overtime, statutory holiday pay and vacation pay. The Employer agreed that Mr. Gill had come to the restaurant voluntarily during the month of June to obtain work experience. The employer did not have any records and the Director's delegate accepted Mr. Gill's records of the hours worked. The Director's delegate determined that Mr. Gill was entitled to payments for regular wages, overtime, statutory holiday pay, vacation pay and interest in the amount of \$3,313.87 (Determination #2);

- October 6, 1997 for violations of Sections 18(2), 35, 40(1)(2), and 58(3) with respect to Mr. Baljit Bains. This Determination found that Mr. Bains was an employee of the Employer from December 1, 1996 to March 1, 1997. He had been employed as a cook/delivery driver but had not been paid regular wages, overtime, statutory holiday pay and vacation pay. The Employer denied knowing Mr. Bains. The employer did not have any records and the Director's delegate accepted Mr. Bains' records of the hours worked. The Director's delegate determined that Mr. Bains was entitled to payments for regular wages, overtime, statutory holiday pay, vacation pay and interest in the amount of \$7,837.69 (Determination #3); and
- October 6, 1997 which imposed a penalty of \$0.00 on the Employer for contravention of Sections 18(2), 35, 40(1) and (2), 58(3) with respect to Mr. Baljit Bains (Determination #4).

The Employer argues that the Determinations are wrong and asks that they be set aside.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are whether the Determinations should be varied, confirmed or cancelled. More specifically, the issues boil down to whether Mr. Gill and Mr. Bains were employees of the Employer and whether it was appropriate, in the circumstances, to issue the penalty Determinations.

FACTS

Determination #1: On August 19, 1997, the Director's delegate issued a Demand for Employer Records. The Demand requested that the Employer "disclose, produce and deliver employment records" for "all pizza drivers and cooks, be they employees, self-employed or sub-contractors" for a certain period, by a certain time and date, including:

- “1. All records relating to wages, hours of work, and conditions of employment.
2. All records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 & 47 of the *Employment Standards Act Regulation*.”

Gateway does not dispute that the Demand was issued.

The Director's delegate found as follows:

“Judy McKay reviewed the records and discovered that the records were missing the following information:

- the employee's name, date of birth, occupation, and residential address;
- the date employment began;
- the hours worked by the employee on each day;
- the dates of the statutory holidays taken by the employee and the amounts paid by the employer.

You contravened Section 28 of the *Employment Standards Act* by failing to keep proper payroll records. The penalty for this contravention is \$500.00 which is imposed under Section 28 of the *Employment Standards Regulation*.”

The submission by the Director's delegate notes that the records produced were deficient as described except that the employee names and residential addresses were included.

The Employer states that Baljit Bains was not an employee and supplied such records it had with respect to other individuals who worked for it on a “contract basis”.

Determination #2 and 3: The issue raised in both of these determinations is whether Mr. Gill and Mr. Bains were employees of the Employer.

Mr. Jasbir Padda, who is a realtor, testified that he is a part owner of the business which opened in 1995 and which, as implied by the name, is a pizza and pasta take-out restaurant. He operated the business with his brother, Mr. Paramjit Padda, though he only works there on an occasional basis as and when needed. The restaurant is a small family run business which cannot afford to have any employees. Mr. Paramjit Padda is the cook/manager, and his wife, Ms. Jatinder Padda, works weekends and occasionally after midnight. Mr. Paramjit Padda does deliveries himself or utilizes individuals who are available on an “on call” basis. He denied that Mr. Bains had ever worked at the restaurant or been an employee of the Employer. He acknowledged that Mr. Gill had come to the restaurant to gain work experience some days in June. He emphasized that Mr.†Gill did not have a drivers licence.

Mr. Paramjit Padda is the other part owner of the business, which opened in July 1995. Business has been slow, sometimes no more than \$150 per day. The revenue statements submitted by the Employer shows that it did better than that, averaging, for example, a little under \$300.00 per day

in December of 1996. The records also indicated that there were three pizza drivers delivering pizza for the Employer on a “contract basis” between December 1996 and February 1997. Mr. Paramjit Padda is the only one who works at Gate Way Pizza & Pasta House Ltd. He is there every day. His brother, Jasbir Padda, came 2-3 times per week. Occasionally, it utilizes a delivery person who is paid \$2.00 per delivery. At the time in question, these individuals were Abdul Rehman Nazz, Kuldip Rai and Rana Bains. In late December of 1996, there was a heavy snow fall and no deliveries. He went there for only a few hours on those days. Mr. Paramjit Padda has the keys and is the one who opens and closes the restaurant. He testified that Gate Way Pizza & Pasta House Ltd. sometimes closes early if business is slow and never late, i.e., at 1:30 a.m., and that they stop taking orders at 12:00 a.m. The opening hours of Gate Way Pizza & Pasta House Ltd., according to the “menu”, is from 4:00 p.m. to 1:00 a.m. on Mondays through Wednesdays, 4:00 p.m. to 2:00 a.m. on Thursdays, 4:00 p.m. to 3:00 a.m. on Fridays and Saturdays, and 4:00 p.m. to 12:00 a.m. on Sundays.

Mr. Jasbir Padda testified that on December 28, 1996, because of heavy snowfall, there was no employee working. The restaurant was open on December 29, the restaurant was open around 5:30 or 6:00 p.m. and it closed at 11:30 p.m. He stated that Mr. Paramjit Padda was alone at the restaurant and he had to walk there due to heavy snow. There were only four deliveries on that date.

Mr. Paramjit Padda explained, with respect to Mr. Gill, that he came in June of 1997 because his cousin told him that Mr. Gill needed work experience. He did not have a drivers licence and he came some days, other days not, according to his own schedule. Some days he was there just one hour. The Employer submitted records indicating that Mr. Gill worked a total of 37 hours between June 8 and 24, 1997. The records, a single sheet with dates and hours, were produced with the appeal to the tribunal. The origin of the document was unclear but it appears not to have been made at the time of the employment.

Ms. Jatinder Padda, Mr. Paramjit Padda’s wife, testified that she worked there every day, cleaning after hours. She had another job for a building maintenance company where she worked between 5:00 p.m. and 12:00 a.m. every day, Monday through Friday. She testified that she worked about 4 and 1/2 hours every day at the restaurant. Her evidence was that Mr. Bains never worked at Gate Way Pizza & Pasta House Ltd., but that Mr. Gill had worked there a few days in June. Sometimes the restaurant would close early. She stated that dough for the pizza was made about two times a week. Revenue for the business was between \$75 and \$200 daily. There were about 6-8 deliveries per day.

The Employer produced a great number of witnesses. These witnesses were mainly (business) neighbours or customers of the restaurant, but also friends, relatives and business associates. Mr. Badha testified that he attended the restaurant 1-3 times per week two years ago, usually between 5:00 and 8:00 p.m. He saw only Mr. Paramjit Padda work in the kitchen, with his wife and children there. He observed the occasional delivery person. He stated that he could see who worked in the restaurant from the counter. Mr. Ageliades stated that he went to Gate Way Pizza &

Pasta House Ltd. quite often and had deliveries made to his home. He stated that he never saw Mr. Gill or Mr. Bains. Mr. Sterne, who operated a laundry in the same mall as Gate Way Pizza & Pasta House Ltd., went there 1-2 times a week. He never saw the Complainants working there. Mr. Chahal, Ms. Komline, Mr. Garry Padda and others gave similar testimony. They frequented Gate Way Pizza & Pasta House Ltd. from time to time and did not see Mr. Gill or Mr. Bains there. Kuldip Rai stated that he worked at Gate Way Pizza & Pasta House Ltd. on and off for a year from December 1996 on an "on call" basis. He stated that he had never seen Mr. Bains but he had seen Mr. Gill a few times in June of 1997. The other delivery drivers were Mr. Rana Bains (the brother of Mr. Bains) and Mr. Nazz.

Mr. Harvinder Grewal testified on behalf of Mr. Gill, who is his nephew. He said that Mr. Gill started with the Employer on June 6, 1997. He spoke to Mr. Paramjit Padda, who was a friend of his, on the telephone who said that he needed someone at work that day. He took Mr. Gill to Gate Way Pizza & Pasta House Ltd. that day. The agreement he believed he made with Mr. Padda was that he would start paying after one week. He said that Mr. Padda kept promising to pay but did not do so. Mr. Gill quit his employment on August 18 because Mr. Padda did not pay. Mr. Grewal stated, among others, that he dropped Mr. Gill off at Gateway 4-5 times, around 3:00 or 4:30 p.m. He also testified that he picked Mr. Gill up at Gate Way Pizza & Pasta House Ltd. around 4:30-5:00 on August 18. His understanding was that Gate Way Pizza & Pasta House Ltd. opened around 4:00 or 4:30 p.m.

The next witness for Mr. Gill was Mr. Param Kaler. He stated that he delivered pizzas at Gate Way Pizza & Pasta House Ltd. for about 19 days. He said he saw Mr. Gill at work there. In cross examination, he stated, among others, that the Employer made about 15-22 pizzas, though some days as few as 5. He stated that he saw Ms. Padda come and work occasionally and that he saw Mr. Padda's children there sometimes with other children.

Rajinder Gill testified that she drove Mr. Gill, her brother-in-law, to work before going to her own job, mostly on Saturdays. He would start at 4:00 to 4:20 p.m. She worked Monday through Saturday. She stated that Mr. Gill initially worked seven days per week but that he asked Mr. Padda to give him Sundays off. She also stated that she worked 8:00 to 4:00 Monday through Friday, and 5:00 to 11:00 on Saturdays. She stated that Mr. Gill, who lived with her and her husband, used to come home late Fridays and Saturdays. She stated that she picked him up a few times. On those occasions he would telephone her at work. She denies that she picked him up at 10:30 p.m. (as stated in the Determination).

Mr. Gill took the stand and explained that he started to work for the Employer as a result of his uncle's contact with Mr. Padda. He had come to Canada about one year ago before that from India. He started on June 6 and worked until June 30 when he suffered a knee injury. On July 25 he went back to work. He quit on August 18. He did not know what his hourly wage rate would be but he assumed that his uncle had arranged for that. He testified that he made pizzas for the Employer. Mr. Gill explained that he kept track of his hours on a calendar where he noted hours worked. In cross examination, he stated that he finished school at 2:45 and started work most days

at 4:00 p.m. He testified that he made between 15-20 pizzas per day and that the dough was made three times a week. He stated that it took about four hours to make a batch of dough. Occasionally, mostly on Mondays, he would do cleaning duties, such as mopping. He Gate Way Pizza & Pasta House Ltd.: there were chairs and a table in front of the counter on the one side, and a pop machine on the other. Connected with the kitchen there was a washroom and a small room on the other side with a single bed. He said he saw Mr. Jasbir Padda twice, once when the front door was broken.

Mr. Rajinder Bains testified that he saw Mr. Bains work there. He is related to the Complainant and lives in Cloverdale but frequented a night club near Gate Way Pizza & Pasta House Ltd. He also knows Mr. Bains' brother who worked there, but his evidence was that he did not know that Mr. Rana Bains worked there. He testified that he loaned his van to Mr. Bains for deliveries when the latter's truck had been in an accident. He explained that Mr. Bains used to drive (18 wheel) truck for his father and has a Class 1 licence. Mr. Hardeep Singh Samra also testified that he saw Mr. Bains work there and ordered pizza from him after being to a nearby night club. He is also a family friend.

Mr. Baljit Bains testified that his brother used to work for the Employer as a delivery driver "on call". He stated that he "trained" one week in November 1996. His agreement with Mr. Paramjit Padda was that he would be paid \$7.50 per hour to work as a delivery driver/cook. He also testified that he kept track of his hours of work on a daily basis on a calendar. He testified that he never got any day off work. One day during the heavy snow fall he stated that he started at 5:00, otherwise he always started at 4:30 p.m.

In cross examination, the Employer questioned the authenticity of Mr. Bains' calendar. Mr. Padda asked Mr. Bains to produce the original calendar. He did not bring it to the hearing. Rather than adjourning the hearing, I ordered Mr. Bains to produce the original calendar for my consideration and review. Mr. Bains advised me subsequently that the calendar was no longer in his possession. When Mr. Bains was questioned about the hours of operation of the restaurant, he was uncertain as to the opening hours whether it was 4:00 or 4:30 p.m. Mr. Padda asked him if the restaurant sometimes opened late and closed early. He stated that it was usually on schedule. He did not recall opening/closing during the heavy snowfall. Nevertheless, he put down 4:00 p.m as start time for each day. He testified that his brother stopped working when he started and only worked occasionally on Fridays and Saturdays when Gate Way Pizza & Pasta House Ltd. got busy. In cross examination, Mr. Bains was able to give a detailed description of Gate Way Pizza & Pasta House Ltd.. Mr. Bains stated that he got his class 1 licence. He was not able to explain why he kept working for Gate Way Pizza & Pasta House Ltd. for three months without any pay. He testified that he could get higher pay elsewhere, between \$18.00 and \$20.00 driving truck.

ARGUMENT

The arguments of the parties with respect to the main dispute here, namely the employment status of Mr. Bains and Mr. Gill are relatively straight forward. Mr. Bains and Mr. Gill insists that they worked for the Employer and that they worked the hours set out on the calendars submitted in evidence. The Employer, on the other hand, argues that it did not have any employees and that, in fact, it could not afford to have any employees. Neither had any experience in the food industry. The Employer argues that the calendars seems to have been written in one day and not on a daily basis, as suggested by both Complainants. Mr. Padda, in particular points to Mr. Bains' alleged hours of work stated to start at 4:00 while at the hearing, he claimed to have started at 4:30. Again, with particular reference to Mr. Bains, Mr. Padda pointed to the heavy snow fall in December where the business was closed or operated with reduced hours. The Employer's evidence was that the business sometimes opened late closed early, Mr. Bains stated that his hours were also generally the same every day. The witnesses for the Complainants were friends and relatives and should not be believed.

ANALYSIS

Determination #1 and #4: Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 28 of the *Regulation* establishes a penalty of \$500.00 for each contravention of Section 28 of the *Act*. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of Section 28 of the *Act* has occurred (see, for example, *Mega Tire Inc.*, BCEST #D406/97; and *Lakeside Office Systems Ltd.*, BCEST #D166/97). Similarly, Section 29 of the *Regulation* provides for penalties escalating from \$0.00 to a maximum of \$500.00 for each affected employee for contravening "specified provisions" listed in Appendix 2 of the *Regulation*, including Sections 18(2), 40(1)(2) and 58(3) of the *Act*.

Section 28 of the *Act* requires that the employer keep records of certain information, including those pertaining to the identity of the employee, hours of work and statutory holidays. In the case at hand, the records kept by the employer were deficient as they did not contain the employee's date of birth, occupation; the date employment began; the hours worked by the employee on each day; the dates of the statutory holidays taken by the employee and the amounts paid by the employer.

That is not the end of the matter. In my view the penalty Determinations cannot stand. First, Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it. Given that the power to impose a penalty is discretionary and is not to be exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation* (*Randy Chamberlin*, BCEST #D374/97). Those considerations apply to both penalty Determinations which state no more than the fact that the Employer contravened certain provisions of the legislation. In my view, that is insufficient.

Second, there is in my view a fundamental problem with the penalty Determination based on the failure to keep proper records. Section 28 of the *Act* require employers to “keep records” for “each employee”. The *Act* does not require an employer to keep records of persons who are not employees. In the case at hand, the Demand for records included: “all pizza drivers and cooks, be they employees, self-employed or sub-contractors”. Section 85 of the *Act* gives the Director the authority to “inspect any records that may be relevant to an investigation” under Part 10 of the *Act*. The Director may require a person to produce or deliver such records (see also Section 46 of the *Regulation*). There is no evidence that the Director’s delegate considered the employee status of Mr. Bains and others before issuing the penalty Determination. It may well be that the “pizza drivers” are employees within the meaning of the broadly worded definition in the *Act*. Nevertheless, in my view, the Director’s delegate must consider the employee status before issuing a penalty for failure to keep “employee records”.

Determination #2 and 3: The law is quite clear. If a person is an employee of an employer, he or she must be paid in accordance with the *Act* and *Regulation*. This decision does not turn on an issue of law but on a choice between two mutually exclusive versions of the facts: on the one hand, the Complainants (and their witnesses) who state that they worked at the Gate Way Pizza & Pasta House Ltd.; on the other, the Employer (at its witnesses) who say that they did not (albeit, the Employer acknowledges that Mr. Gill worked for a short while on an occasional basis to obtain work experience).

There is no disagreement that Mr. Gill worked for the Employer. The Employer admits that he worked between June 8 and 24, 1997 for 37 hours. The Employer did not dispute that he worked as a kitchen helper and was involved in making dough and cooking pizzas at those times. The Employer says that he was there for his own benefit to obtain training and gain work experience. Since he performed “work normally performed by an employee” he falls within the definition of an “employee” in Section 1 of the *Act*. The Employers records with respect to Mr. Gill are not reliable with respect to his hours of work and the dates of such work. The records were not produced until the appeal and, on the balance of probabilities were not made at the time of employment. On the other hand, on the balance of probabilities, I find that Mr. Gill’s records credible. In other words, I accept that he was an employee of the Employer and that he worked the times and dates set out in the Determination.

I find support for the conclusion that he was an employee of the Employer in Mr. Gill’s oral testimony at the hearing. He stated, for example, that he met Mr. Jasbir Padda on one occasion when the front door was broken. He believed this to have happened in August 1997. The Employer did not take issue with the date of this incident. Mr. Gill explained the work he did for the Employer, including how long time it took to make the pizza dough and how often it was prepared. He knew who the pizza drivers were. He explained that he did not work between June†30 and July 25, 1997 due to a knee injury which he did not claim was work related and agreed it could have been related to athletic activities. Mr. Gill was also able to point out that one

of the Employer's witnesses, who claimed never to have seen him or Mr. Bains, had a wife and two children.

I also accept, on the balance of probabilities, that Mr. Bains was an employee of the Employer. He was, as admitted by the Employer, able to describe Gate Way Pizza & Pasta House Ltd. in considerable detail. He testified that he dropped Mr. Paramjit Padda off from work every day and occasionally picked him up from home.

Mr. Bains testified under oath that he wrote down his hours of work on a calendar the original of which is no longer in his possession and that he wrote down his hours of work at the time of his employment. The parties and the Tribunal had photocopies. The Employer argued that in its opinion the records were not authentic, prepared at the same time and with the same pen. The Employer did lead any expert evidence on this point and, in the result, I am unable to accept the argument. This issue could have been raised earlier in the appeal. I am not prepared to accept the Employer's opinion in the face of sworn testimony to the contrary and I accept, on the balance of probabilities, that Mr. Bains worked the hours and dates set out in the calendar.

In the result, I reject the testimony of the Employer witnesses who did not observe either of the Complainants working at Gate Way Pizza & Pasta House Ltd. and that Mr. Paramjit Padda was the only person working in the kitchen. Mr. Gill and Mr. Bains worked for Gate Way Pizza & Pasta House Ltd. during certain periods of time, between December 1, 1996 and March 1, 1997 and June 8 and August 18, 1997, respectively. It was not clear from their evidence when exactly they had attended Gate Way Pizza & Pasta House Ltd.. Moreover, there are some inconsistencies in some of the testimony. Mr. Badha stated, for example, that he saw Mr. Paramjit Padda and Ms. Jatinder Padda work at Gateway. He said he went there 2-3 times a week between 5:00 p.m. and 8:00 p.m. Ms. Padda's evidence was that she worked until midnight at her cleaning job, except on weekends. Mr. Kuldip Rai stated that he worked for the Employer as a pizza driver from December 1996. However, when asked by Mr. Bains what major equipment broke down in December, he did not know.

On the balance of probabilities, I do not accept other key evidence presented by the Employer. First, I do not find it credible that Mr. Paramjit Padda worked alone at Gateway every day as cook/delivery person. Yet, he and Mr. Jasbir Padda insisted that was the case. If he was on deliveries, there would be no-one to take orders and make the pizzas. The explanation, that friends and relatives covered for him, I do not find credible. In the result, there would have to be at least one other person working with Mr. Padda. Second, the Employer explained that its revenues were such that it could not afford employees, in that its revenues were only about \$150.00 per day, was not consistent with the revenue statements submitted by the Employer itself which indicated much higher revenues.

It is trite law that the burden of proving just cause is on the appellant, in this case the Employer. In my view, where there are two equally credible versions of the facts, I am not required to go further than to go further. In the circumstances of this case, I conclude, even if I am wrong in my

conclusion that the Complainants' evidence was more credible, that I am not persuaded by the evidence and submissions presented by the employer that the Determinations are wrong.

ORDER

Pursuant to Section 115 of the Act, I order that:

1. the penalty Determinations in this matter (Determination #1 and #4), dated September 9, 1997 and October 6, 1997 be cancelled and the amount of the penalty returned to the Employer together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.
2. the Determination in this matter, dated October 2, 1997 and October 6, 1997 (Determination #2 and #3) be confirmed and the amount of the Determinations be paid out to the Employees, Mr. Gill and Mr. Bains, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal