

An appeal

- by -

Jassi Management Ltd.

("Jassi")

- 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: M. Gwendolynne Taylor

FILE No.: 2003A/39

DATE OF DECISION: April 23, 2003

DECISION

This decision is based on written submissions presented by Harpal Sahota on behalf of Jassi Management Ltd (“Jassi”), Surinder and Gurmeet Braich (“the Braichs”) and the Director of Employment Standards.

OVERVIEW

This is an appeal by Jassi from a Determination of the Director dated December 10, 2002, concerning a complaint by Gurmeet Braich. There is an identical appeal from an identical determination concerning a complaint by Surinder Braich. This decision applies to both although separate decisions will be issued.

The Director’s delegate found that the Braichs were owed wages of \$3,637.91 each, plus interest, for a total of \$3,800.15. The Director found that they were employees rather than independent contractors, that they were not managers within the meaning of the Act, that the Braichs were employed to perform a wide variety of duties for joint remuneration of \$1,500.00 per month, that there was insufficient evidence that the employer misrepresented terms and conditions of employment, and that the Braichs were not entitled to compensation for length of service because they had not been employed in excess of three months. To arrive at the wages owed, the delegate made findings of how many hours per day the Braichs each worked.

Many of the Braichs’ claims were denied by the delegate. However, the only appeal is by Jassi and the only issues remaining from the director’s investigation relate to the amount of wages owing. Jassi’s ground of appeal is that new evidence has become available. Although not stated on the appeal form, I think it is fair to say that Jassi is alleging that the Director erred in making findings of fact concerning the number of hours worked by the Braichs.

Jassi requested that the Tribunal conduct an oral hearing. By letter dated March 17, 2003, the tribunal notified the parties that the appeal would be adjudicated based on written submissions and that an oral hearing would not be held (see section 107 of the *Act*).

ISSUE

1. Is there new evidence that would justify the Tribunal in varying or cancelling the Determination or referring it back to the Director?
2. Did the Director err in law in making findings of fact?

THE FACTS

The delegate has provided the record from the Director’s investigation which includes the Claim form, invoices, statements of hours worked, written statements of evidence, correspondence, etc. from both the Braichs and Jassi.

The delegate set out a number of facts which he indicated were not in dispute: Jassi owns and operates two motels in Houston, BC; the Braichs worked at both hotels between August 15 and November 7, 2001; Jassi paid them a total of \$4,100; the Braichs invoiced Jassi semi-monthly for \$750 wages plus supply

purchases; the Braichs carried out a variety of duties including staffing the front desks, cleaning, chambermaid work and repairs; the various opening and closing hours of the front desks; and Harpal Sahota is the sole officer and director of Jassi Management Ltd.

Although the delegate indicated these facts were not in dispute, in the appeal Jassi states that it is not true that the Braichs duties were other than staffing the front desk.

Harpal Sahota has difficulty with the English language. This was the reason he advanced for requesting that the Tribunal hold an oral hearing. In the reply to the appeal, the delegate made note of Mr. Sahota's language difficulty and suggested that he should be given more latitude than might otherwise be extended to an appellant. The delegate also noted that during the investigation he attempted to communicate through Mr. Sahota's son, who has more advanced English skills, but the son deferred to his father.

It is apparent from the Determination that Mr. Sahota made submissions and presented documentary evidence to the delegate and that the delegate took his evidence into account in coming to his conclusions. It is probable that the language barrier resulted in Mr. Sahota not fully presenting his side of the story, or not being fully understood.

In finding the number of hours worked, the delegate did not have daily records from either party. The delegate stated:

Given the absence of any daily records of hours worked, all I can do in this case is to arrive at the most reasonable estimate of hours worked considering the evidence presented. As the Braichs invoiced the Employer together for "*supervisory services*" I find that, between the two of them, the Braichs worked for the total hours that the motel offices were open on each day of their employment. For the purposes of calculation, I shall assume that each of the Braichs worked an equal share of the hours on each day.

The office was open between 12 and 15 hours per day and the delegate found that between them the Braichs worked those hours each day, 7 days per week.

ARGUMENT

Jassi's main argument is that the Braichs did not work the hours the delegate calculated. Jassi also argued that there was just cause for termination. This issue does not arise in the appeal since there is no entitlement to compensation for length of service.

In the appeal, Mr. Sahota submitted a written statement of his view of how the employment arrangement came to be, what the terms were, how many hours the Braichs worked, etc. He noted that there were payroll books, pay stubs, and employees who were witness to the Braichs' work. By memo dated March 7, 2003, Mr. Sahota asked the Tribunal to let him know what evidence the Tribunal needed. By return letter on March 7, 2003, the Tribunal's administrator advised Mr. Sahota that the tribunal could not provide legal advice and that Mr. Sahota would have to decide what evidence to submit. The administrator also clarified that the Tribunal is an adjudicative body, not an investigative body. Accordingly, the Tribunal makes decisions on the basis of the evidence brought to it by the parties. Jassi did not respond to that letter nor submit any evidence.

In response to the appeal, the delegate submitted that Jassi had done little to assist in the determination of the hours worked. Although normally the delegate would submit that the Tribunal should not accept new evidence, in this case he was concerned about the language difficulty and suggested that latitude be given.

REASONS AND DECISION

An appeal to the tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. The tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on Jassi to demonstrate that there are grounds for cancelling or varying the Determination.

Although Jassi indicated that there would be new evidence presented, none has been received. There are two types of 'new' evidence that parties present to the Tribunal. One type is evidence that simply was not available at the time of the Director's investigation – that type of evidence is a ground of appeal under section 112(1)(c). The other type is evidence that a party could have presented to the delegate but neglected to do so, for whatever reason. That does not provide a ground of appeal. In the past, the tribunal has held that it would not normally, without good reason, accept new evidence that could have been submitted during the delegate's investigation (see *Kaiser Stables Ltd.*, BC EST #D058/97).

In this instance, the language difficulty could argue in favour of the Tribunal granting latitude to Jassi, as suggested by the delegate. However, Jassi has not presented the evidence, other than his written account of what transpired. The delegate had that evidence and, therefore, it is not new.

Jassi's appeal basically comes down to asking the Tribunal to change the delegate's Determination, without any additional evidence or any legal challenge to the Determination. As noted above, the Tribunal does not simply re-investigate. I have considered the evidence before the delegate and the difficulties he faced in coming to his conclusions. I find that his findings of fact are reasonable and that his determination is supported by the evidence.

I find that Jassi has not demonstrated grounds for dismissing or varying the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated December 10, 2002, be confirmed in the amount of \$3,800.15, together with any interest that has accrued pursuant to section 88 of the *Act*.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal