

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-

Bombay Palace Restaurant Ltd.

(“Bombay Palace”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/793

DATE OF HEARING: March 31st, 1999

DATE OF DECISION: April 15th, 1999

DECISION

APPEARANCES

Surinder Pal Brar & Amarjit Brar	for Bombay Palace Restaurant Ltd.
Rai Parmar	on his own behalf
No appearance	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal brought by Bombay Palace Restaurant Ltd. (“Bombay Palace”) 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 October 30th, 1998 under file number 87-967 (the “Determination”).

The Director’s delegate determined that Bombay Palace owed its former employee, Rai Parmar (“Parmar”), the sum of \$3,777.04 on account of unpaid wages and interest. By way of the Determination, a \$0 penalty was also assessed pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

The Director’s delegate rejected Bombay Palace’s position that Parmar’s involvement with the restaurant was solely as a potential buyer or investor. The delegate concluded that Parmar was employed by Bombay Palace from August 7th to October 16th, 1997. However, the delegate rejected Parmar’s assertion that he worked from 11:00 A.M. to 11:00 P.M. each day and that he was to be paid \$10 per hour. The delegate held:

“...on a balance of probabilities [Parmar] was employed in some capacity by the restaurant. As no hours are provided by either [party], hours will be assessed based on eight hour day [sic], six days per week at straight time in accordance with [Parmar’s] characterization of his position as a manager. The wage rate is to be the prevailing minimum wage rate...”

The appeal was heard at the Tribunal’s offices in Vancouver on March 31st, 1999 at which time I heard evidence and submissions from Amarjit and Surinder Brar, on behalf of Bombay Palace, and from Parmar on his own behalf.

ISSUE TO BE DECIDED

Bombay Palace says that it never entered into an employment relationship with Parmar; rather, Parmar was interested in purchasing the restaurant business and, to that end, spent some considerable time on the premises evaluating the business. However, Parmar was never hired, as he asserts, to be the restaurant manager.

FACTS

Bombay Palace's evidence

Bombay Palace operates a 100-seat restaurant in Surrey. In the same plaza, Bombay Palace's principals--Surinder and Amarjit Brar--also operate a "sweet shop". The restaurant has a staff of four including cooks and servers.

Ms. Amarjit Brar testified that Parmar--who was acquainted with some of her friends--originally approached her and her husband, Surinder Pal Brar, expressing an interest in buying the restaurant. To that end, Parmar spent about 2 weeks on site reviewing the operations and at the end of this period requested additional time to continue to monitor the operations. In approximately mid-September 1997 Parmar introduced the Brars to friends of his who made a verbal offer to buy the restaurant for some \$50,000--this offer was rejected out of hand, the Brars believing the restaurant to be worth two or more times that amount. Parmar continued to visit the business until mid-October when the Brars asked him to leave because they came to the conclusion that he was not seriously interested in buying the restaurant. It was only at this time that Parmar asserted that he had been employed as the restaurant's manager and claimed unpaid wages.

The Brars acknowledge that Parmar was on-site throughout the period from early August to mid-October 1997 but say that he was never hired as a restaurant manager; indeed, given that business was slow and the close proximity of the restaurant to the Brars' "sweet shop" (just a few doors away in the same plaza), there was no need to hire an on-site manager for the restaurant.

According to Ms. Brar, Parmar was "watching the cash-flow", he signed for some deliveries to the restaurant and was provided a key to the premises. Ms. Brar was unable to say whether or not Parmar supervised the restaurant staff but did admit that she told the staff they should follow his directions presumably because Parmar was expected, at some point, to be the new owner of the restaurant.

Parmar's evidence

Parmar says that he was hired in early August 1997 to "promote the business"; it was agreed that he would be paid \$10 per hour. There was no letter of engagement and he never completed any usual payroll forms (such as those required by Revenue Canada) when he was hired. He says that he provided the Brars with his social insurance number but has no written record of so doing.

Parmar admits having worked throughout the period August 7th to October 16th, 1997 without ever having received a paycheque although, so far as he knew, the other staff were being paid. Parmar says that he was not so concerned about not receiving his wages because he had an income flow from certain rental properties that he owned.

Parmar says that he worked from 10 to 12 hours each day the restaurant was open. Parmar says he submitted a document showing his hours worked to the Parmars--they deny this--but was unable to produce a copy of this record.

Parmar did not receive a T-4 from the Brars for the 1997 taxation year nor did he ever take any steps to follow-up that apparent omission.

Parmar testified that it was never his intention to buy the restaurant but was present when the aforementioned "\$50,000 offer" was made.

Parmar says that he opened the restaurant each morning and closed it each night; his duties included receiving deliveries, preparing cash reports and monthly sales reports; he redesigned the menu and ordered advertising flyers; he supervised the 4 or 5 staff members. Parmar testified that it was "my duty to promote the business; I was a manager and a consultant; I was to assist to make the business more profitable".

ANALYSIS

This case turns on the comparative credibility of the parties. Very obviously, the two strikingly different versions of events given by the parties cannot comfortably co-exist. Neither party called any independent evidence that might have corroborated their testimony. Thus, I find that the outcome of this appeal must turn on the burden of proof.

As the appellant, Bombay Palace bears the onus of showing that the Determination is incorrect. I cannot conclude that the delegate's analysis of the situation is clearly wrong. I find it hard to fathom, as did the delegate, why the Brars would allow Parmar such extended access to the restaurant premises--including the provision of a key and the security code number--if his presence was merely to review the operations of the business as a potential buyer.

I draw an adverse inference from the employer's failure to call any of the staff members who were present during the material time and who might have shed some further light on Parmar's activities during the period August 7th to October 16th, 1997. Further, the following facts--none of which are contested by the Brars--all are consistent with there having been an employment relationship between Parmar and Bombay Palace:

- Parmar was given the security code number;
- he had keys to the premises;
- he used restaurant funds to pay bills;
- he acknowledged deliveries to the restaurant; and
- he arranged for a new menu to be printed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$3,777.04** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal