

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Pinderjit Singh Jhalli

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/679

DATE OF HEARING: March 24, 1997

DATE OF DECISION: April 16, 1997

DECISION

APPEARANCES

Pinderjit Singh Jhalli on his own behalf
Shivdev Singh Pooni on behalf of Pooni Drywall Ltd.

OVERVIEW

This is an appeal by Pinderjit Singh Jhalli (“Jhalli”), under Section 112 of the *Employment Standards Act* (“the *Act*”), against Determination No. DDET 000489 which was issued by a delegate of the Director of the Employment Standards Branch (the “Director”) on October 24, 1996. The Determination, which shows Shivdev Singh Pooni as a director/officer of Pooni Drywall Ltd., finds that Jhalli is owed \$271.10 in unpaid wages, vacation pay and interest.

A hearing was scheduled for March 7, 1997 at 9:00 a.m. at the Tribunal’s offices in Vancouver. Mr. Jhalli did not appear at 9:00 a.m. and, consistent with the Tribunal’s practice in such circumstances, a grace period of 15 to 20 minutes was granted to allow for all parties to appear. When Jhalli had not appeared by 9:30 a.m., I decided that the hearing would not proceed on that day and so advised Mr. Pooni and the interpreter. However, Jhalli arrived at 9:35 a.m. and explained that he had had difficulty finding the hearing room due to the lack of signage on the exterior of the Tribunal’s offices. There are no signs on the exterior of the Tribunal’s offices which indicate that the Tribunal is located within. That fact, combined with Jhalli’s limited command of English, led me to re-schedule the hearing for March 24, 1996 at 9:00 a.m.

A hearing was held on March 24, 1997 at the Tribunal’s offices in Vancouver, at which time evidence was given under oath.

Sasha Khanna was the official interpreter at the hearing.

ISSUES TO BE DECIDED

There are two issues to be decided in this appeal. The first issue is whether the Tribunal should allow Jhalli to introduce certain new evidence in support of his appeal. If the Tribunal allows that evidence, the second issue is what wages are owed to Jhalli.

FACTS

Jhalli submitted a Complaint & Information (inadvertently dated March 19, 1995) to the Employment Standards Branch (the "Branch"). It was received by the Branch on March 21, 1996. In Section E of the Complaint & Information, Jhalli made the following statement in support of his complaint:

"I started working for Pooni's Drywall Ltd. on Aug 1, 1995 to Oct 17, 1995 and between this period of time I worked 457 hours. My pay was \$9.00 per hour at that time. When I asked Mr. Jag Pooni to pay me he refused to pay me for worked hours. I also have a witness that can support my claim. His name is Kulwant S. Khungra. His Phone # is (604)-941-4902. I worked on Mr. Khungra's House which is located at 1557 Rockcress Place, Coquitlam, BC."

The Determination shows that Jhalli was employed as a drywaller by Pooni Drywall Ltd. from August 1, 1995 to October 17, 1995 with an hourly wage of \$9.00 per hour. The calculation schedule attached to the Determination shows the following:

<i>Wages earned</i>		
<i>August 1 - October 17, 1995 =</i>		<i>\$4,907.23</i>
<i>Vacation Pay:</i>		
<i>4% x \$4,907.23 =</i>		<u><i>196.29</i></u>
		<i>\$5,103.52</i>
LESS:		
<i>Wages paid August 14, 1995</i>	<i>\$1,500.00</i>	
<i>Wages paid October 21, 1995</i>	<i>2,000.00</i>	
<i>C.P.P. deduction</i>	<i>165.65</i>	
<i>U.I.C. deduction</i>	<i>219.39</i>	
<i>Income tax deduction</i>	<u><i>965.00</i></u>	
	<i>1,350.04</i>	<u><i>-4,850.04</i></u>
		<i>\$253.48</i>
<i>Interest:</i>		
<i>November 1, 1995 - October 24, 1996:</i>		<u><i>17.62</i></u>
TOTAL WAGES PAYABLE:		<u><u><i>\$271.10</i></u></u>

These amounts are supported by several pages of detailed calculations. The Director's delegate set out the following findings on page 2 of the Reason Schedule which was attached to the Determination:

"In the absence of any records provided by the employer, I accept the statement of hours worked submitted by Jhalli.

As the employer has failed to provide evidence of wages paid, I accept that Jhalli received two payments totaling \$3,500.00.

The T-4 statement issued by the employer showed statutory deductions totaling \$1350.04. Therefore, I accept that gross wages were paid to Jhalli in the amount of \$4,850.04.

Available evidence shows Jhalli earned wages and vacation pay in the amount of \$5,103.52."

During her investigation, the Director's delegate wrote to Jhalli on June 21, 1996 requesting that he provide full details of his hours of work and wages paid while employed by Pooni Drywall Ltd. That letter also contained the following statement:

"I am not satisfied that you are owed any wages and unless compelling evidence is forthcoming, I may have no choice but to dismiss your claim due to lack of evidence."

Jhalli responded in a letter dated July 3, 1996.

The Director's delegate wrote to Jhalli on July 29, 1996 requesting clarification of the information provided by Jhalli in his letter of July 3rd and noted that she would be "... unable to take any further action on your complaint until I receive the requested information."

Jhalli responded in an undated letter which the Director's delegate received on September 18, 1996.

Jhalli submitted an appeal to the Tribunal on November 15, 1996 in which he offered the following reasons for his appeal:

“On March 19, 1996 I filed a complaint against Pooni’s Drywall Ltd. On that complaint I wrote that first day I worked was Aug 1, 1996 but actual first day I worked for Mr. Pooni was May 22, 1995. The reason I wrote Aug 1, 1995 was Mr. Pooni owed me wages from Aug 1, 1995 to Oct 17, 1995. The wages he paid me on Aug 14, 1995, the sum of \$1,500.00 dollars and on Oct. 21, 1995 the sum of \$2,000.00 was actually the wages from May 22, 1995 to July 27, 1995 which is still not paid in full by Mr. Pooni. The reason I am appealing this is I still didn’t get paid from Aug 1, 1995 to Oct 17, 1995. Also he still owes me wages from May 22, 1995 to July 27, 1995. The total hours I worked between May 22, 1995 to July 27, 1995 are 650.30 hours which I got paid only \$1,500.00 on Aug 14, 1995 and \$2,000.00 on Oct. 21, 1995. I also have address of all the houses I worked on and witness to back up my claim. I am sending you a photo copy of my T-4 1995 which is proof of my income with Pooni’s Drywall Ltd. If there is more information you need please write to me. Thank you.”

Jhalli submitted to the Tribunal a hand-written note which set out his recollection of the number of hours he worked each day between May 22, 1995 and July 27, 1995. He did not give this information to the officer who investigated his complaint. Jhalli testified at the hearing that he prepared the list from notes he kept while he was employed by Pooni Drywall Ltd.

ANALYSIS

The facts in this appeal are somewhat unusual. In his Complaint and Information, Jhalli stated that he started working for Pooni Drywall Ltd. on August 1, 1995. A complete and thorough investigation of Jhalli’s complaint was conducted by the Director’s delegate prior to making a determination that Pooni owed wages to Jhalli. The Reason Schedule attached to the Determination shows that the Director’s delegate relied entirely on Jhalli’s statements concerning the number of hours he worked for Pooni and the wages he was paid because Pooni did not provide any payroll records.

In his appeal, Jhalli asks the Tribunal to accept and rely on new evidence in order to vary the Determination. The evidence on which Jhalli asks the Tribunal to rely is evidence which was available at the time that he submitted his complaint and during the time that the Director’s delegate conducted her investigation. The only reason given by Jhalli for not giving this evidence to the Director’s delegate is that he provided hours-of-work information for the period of time for which he was not paid wages (August 1, 1995 to October 17, 1995).

In *BWI Business World Incorporated* (BC EST # D050/96) the Tribunal noted that the Director's delegate is acting in a quasi-judicial capacity when conducting an investigation and making a determination.

In *Tri-West Tractor Ltd.* (BC EST # D268/96) the Tribunal noted that an appeal under Section 112 of the Act:

"...is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have been and could have been given to the delegate in the investigative process."

I agree with and adopt that description of appeals under Section 112 of the Act.

Jhalli provided information about his hours of work and wages on three occasions during the investigation of his complaint. On none of those occasions did he refer to being employed by Pooni during the months of May, June and July, 1995. The Director's delegate made it clear in her letter of June 21, 1996 that she may have "*...no choice but to dismiss (Jhalli's) complaint due to lack of evidence.*"

Under those circumstances and given the facts set out above, I find that it would be improper to allow Jhalli to challenge the Determination with evidence which he acknowledges that he did not give to the Director's delegate when expressly requested to do so on two occasions.

ORDER

I order, under Section 115 of the Act, that Determination No. DDET 000489 be confirmed.

Geoffrey Crampton
Adjudicator
Employment Standards Tribunal