



An appeal

- by -

LS Labour Solutions Inc.

- 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 (as amended)

TRIBUNAL MEMBER: Carol Ann Hart

FILE No.: 2005A/136

DATE OF HEARING: November 21, 2005

DATE OF DECISION: December 8, 2005

DECISION

SUBMISSIONS

Ronnie Gill	On behalf of LS Labour Solutions Inc.
Mandeep Bahniwal	Representing herself
Harjinder Dhaliwal	Observer
Manjit Arneja	Interpreter

OVERVIEW

1. This Decision is issued with respect to an appeal by LS Labour Solutions Inc. under section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on January 6, 2005 (the “Determination”) by Sharn Kaila, a delegate of the Director of Employment Standards (the “Director”).
2. The appeal was originally filed outside of the time frame permitted in the *Act*, and I issued a Decision dated July 27, 2005 concerning the timeliness issue (BC EST #D113/05). In that Decision, the request of the appellants for an extension of time to file the appeal was allowed.
3. The parties were subsequently invited by the Tribunal to file written submissions concerning the merits of the appeal.
4. On September 29, 2005, an Interim Decision was issued (BC EST #D155/05). The two grounds on which the appellants based their appeal of the Determination were addressed. It was alleged by the appellants that the Director had failed to observe the principles of natural justice in making the Determination, and that there was new evidence which was not available at the time the Determination was made.
5. The allegation that the Director failed to observe the principles of natural justice in making the Determination was dismissed. It was decided that the Tribunal would conduct an oral hearing concerning the allegation that there was new evidence which was not available at the time the Determination was made.
6. In the Interim Decision, I determined that the only new evidence which would be considered would be the following:
 - The new documentation which was found in the shredding basket after the fact-finding meeting before the delegate for the Director;
 - The sheet of paper submitted to the delegate for the Director which the appellant claims is a list of hours written in the complainant’s own handwriting, with the notation “*paid \$608*” written on it;
 - The documentation concerning the handwriting analysis; and
 - Any oral testimony, or documentation already filed with the appeal, concerning the evidence outlined in the three points above.

HEARING

7. A hearing was conducted on November 21, 2005 in Abbotsford, B.C.. Ronnie Gill arrived one-half hour late for the hearing. The hearing did not commence until after Ms. Gill had arrived.
8. All testimony was presented under solemn affirmation. At the request of Mandeep Bahniwal, the Tribunal provided an Interpreter, Manjit Arneja, who provided interpretation services for Ms. Bahniwal, as required.

BACKGROUND

9. The appellant, LS Labour Solutions Inc., is a licensed farm labour contractor. Mandeep Bahniwal was employed by the appellants as a farm labourer for the period from March 23, 2004 to May 7, 2004. In her complaint filed under the *Employment Standards Act*, Ms. Bahniwal alleged that she had not been paid for 224 hours of work during the period in which she was employed by the appellants.
10. In the Determination, the delegate for the Director concluded that LS Labour Solutions Inc. had contravened the *Act* by failing to pay to Mandeep Bahniwal all wages due upon termination of employment. LS Labour Solutions Inc. was ordered to pay to Ms. Bahniwal the sum of \$1792.00 for wages pursuant to section 18 of the *Act*; \$71.68 for annual vacation pay pursuant to section 58 of the *Act*; and \$48.72 in accrued interest payable under section 88 of the *Act*. The delegate for the Director also imposed a \$500 penalty for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.

ISSUE

11. I must determine the following issue in this Decision:
12. Should the Determination be set cancelled or varied on the basis that there new evidence which was not available at the time the Determination was made?

APPELLANTS' EVIDENCE AND SUBMISSIONS

13. The appellants claimed that since the fact-finding meeting, additional documents written by Ms. Bahniwal had been found which demonstrated that Ms. Bahniwal was paid all the amounts owing to her.
14. Ronnie Gill testified that the current policy of LS Labour Solutions Inc. was not to pay employees until they had provided their Social Insurance Number. Ms. Gill said that in the past she had advised her father, Gurdev Singh Gill against providing cash advances. However, it was Ms. Gill's evidence that her father had acted against her advice and had provided cash advances to employees who had not given him their Social Insurance Numbers. Those cash advances were later deducted from employees' paycheques. Ms. Gill stated that Mandeep Bahniwal's Social Insurance Number was not received until June 16, 2004 when it was provided to LS Labour Solutions Inc. by Ms. Bahniwal's new employer.
15. Ronnie Gill said that she kept meticulous records in the course of her work as an accountant, but her father did not keep good records. He had sometimes made notations in a notebook he carried with him, but the records of payments made were unsigned. Ms. Gill described her father's notebook as "a

nightmare". Ms. Gill also testified that her father had suffered from pneumonia in 2004, and had experienced bouts of dementia during his illness.

16. Ronnie Gill said that she operated an accounting business from an office in her parents' home. She and her parents would place documents for potential shredding in the shredding basket. Ronnie Gill said that she always sorted through the documents from the shredding basket prior to actually shredding them.
17. Ms. Gill stated that her mother had told her that when Mandeep Bahniwal had been present in her home, she had asked Ms. Bahniwal to provide the records of the hours she had worked. Ms. Bahniwal had recorded the hours she had worked on sheets of paper, and given them to Mrs. Gill. According to Ronnie Gill, her mother had forgotten about these documents, believing they were unimportant, and had placed them in the shredding basket.
18. The appellant submitted copies of the new evidence found, as well as a written opinion of Donald N. Brown, Examiner of Questioned Documents, of Pacific Forensic Science Consultants and Services Ltd., who had examined the handwriting on the documents in question. The appellant maintained that this evidence would establish that Ms. Bahniwal was not truthful in her testimony in the fact-finding meeting, or in filing her complaint under the *Employment Standards Act*; and that she had been paid in full, and no wages were owed to her.

RESPONDENT'S EVIDENCE AND SUBMISSIONS

19. Mandeep Bahniwal testified that just prior to the time she began working for LS Labour Solutions, she had gone to the home of Mr. and Mrs. Gill to apply to be a nursery worker. Mr. Gill had asked her to choose one of two options in terms of how she would prefer to be paid. She could be paid \$7.00 per hour in cash; or \$8.32 per hour by cheque. Ms. Bahniwal said that Mr. Gill had told her that the \$7.00 per hour cash payment option was generally chosen by employees who were collecting Employment Insurance benefits. He had warned that it could sometimes take two to three months for employees to receive their cash payments, as the payment would not be made until after the work project in question was concluded.
20. Ms. Bahniwal testified that she had advised Mr. Gill that she preferred the cash payment option, as she was receiving Employment Insurance benefits. I asked Ms. Gill how the \$7.00 per hour cash payment would affect her Employment Insurance benefits. She replied exactly as follows: "*That's something like a fraud. People get Unemployment and they work for a contractor who pays them \$7.00 cash. That way UI won't find out.*"

APPELLANTS' REPLY

21. Ronnie Gill replied that she and her parents had first learned that Ms. Bahniwal was receiving Employment Insurance benefits on June 16, 2005 through a discussion with Ms. Bahniwal's new employer.
22. Ms. Gill testified that LS Labour Solutions Inc. would not knowingly participate in cash payment scheme for employees receiving Employment Insurance benefits. According to Ms. Gill, the timesheets recording the work done by employees were forwarded to government officials at the offices of Employment Insurance (Human Resources and Skills Development) and Employment Standards. When an employee

was receiving Employment Insurance benefits, LS Labour Solutions Inc. was required to complete report cards for the employee.

ANALYSIS

23. The appellants engaged the services of FBIG Incorporated to conduct a handwriting examination concerning the documents they maintained had been written by Mandeep Bahniwal. A written opinion dated April 26, 2005 (the “Handwriting Examination Report”) was issued by Donald N. Brown, Examiner of Questioned Documents, Pacific Forensic Science Consultants and Services Ltd.
24. The Curriculum Vitae provided by Mr. Brown with his report reveals that Mr. Brown worked for a total of 35 years with the Royal Canadian Mounted Police, the Armed Forces, and other police organizations before he retired with the rank of Superintendent. Mr. Brown has many years of experience in forensic document examination, and providing expert witness testimony. Since his retirement, Mr. Brown has worked as a forensic document examiner.
25. For ease of reference, I will refer to the evidence submitted by LS Labour Solutions Inc. using the same exhibit numbers as those used by Mr. Brown in his report. The evidence found by the appellants (Exhibits Q-1-Q-3 in the Handwriting Examination Report) was analyzed and contrasted with Daily Log reports (Exhibits K1-K11) which had been completed by Ms. Bahniwal. At the hearing, Ms. Bahniwal acknowledged that she had completed the Daily Log reports (Exhibits K-1-K-11), and submitted them to Mr. Gill, at his request.
26. I will address Exhibit Q-1 first. This document indicates the dates worked, the number of hours worked on each day, and records that \$10.00 was payable for gas for each day worked.
27. Ms. Bahniwal testified that she had written everything on that document at the request of Mr. Gill, except the notation in the upper Right corner “Paid \$608”. Ms. Bahniwal denied that anyone had written “Paid \$608” on Exhibit Q-1 in her presence.
28. Ms. Gill argued that the notation “Paid \$608” on Exhibit Q-1 in Ms. Bahniwal’s own handwriting was a clear indication that Ms. Bahniwal had been paid \$608.00.
29. In the Handwriting Examination Report (at page 2), Mr. Brown wrote in part as follows:
- ...please be advised that all the material of exhibit (front and Back) Q1, has been identified as being written by the writer of the known material of exhibits K1 to K11, inclusive. This also includes the \$608, in the upper righthand (sic.) corner of the document, but excludes the digits 1000 on the reverse of this exhibit.
30. I will now consider Exhibit Q-3. On that document, there is a notation “Pd \$700 Apr 27/04”. Ms. Bahniwal testified that she had not written anything which appeared on the document identified as Exhibit Q-3. Ms. Bahniwal also denied that she had received a payment of \$700.00 on April 27, 2004.
31. Ms. Gill contended that the notation “Paid \$700 April 27/04” on Exhibit Q-3 was a clear indication that Ms. Bahniwal had been paid the sum of \$700.00.

32. Exhibit Q-3 is a sheet of paper apparently showing dates, and calculations of amounts paid and owing. The opinion of Mr. Brown in the Handwriting Examination Report was that the writing on that page was that of Ms. Bahniwal.
33. I turn now to the mysterious person named Manjinder Dhaliwal. Both Ms. Bahniwal and Ms. Gill denied that they knew a person named Manjinder Dhaliwal. Ms. Gill stated that LS Labour Solutions Inc. believed that Manjinder Dhaliwal may have worked for them, but there was no Social Insurance Number on file for Manjinder Dhaliwal, and they had no way to contact this person.
34. Notations, which I have found were written by Ms. Bahniwal, seem to reflect that amounts were owing to Manjinder Dhaliwal, and were paid. On Exhibit Q-1, it appears to have been noted that \$392.00 was owing to Manjinder Dhaliwal. It is possible that this amount may have been paid to Ms. Bahniwal, so that she could give it to Manjinder Dhaliwal. On Exhibit Q-3, the figure \$392.00 is written again in the middle of the page, and there is an indication that the sum of \$300.00 was deducted from that amount leaving a balance of \$92.00. The dates written above that calculation just above the middle of the page on Exhibit Q-3 correspond with the days of work attributed to Manjinder Dhaliwal on Exhibit Q-1.
35. In assessing credibility, I have applied the principles set out in the decision of the BC Court of Appeal in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (BCCA) as follows at pages 357-358:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection, it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am referring to the comparatively infrequent case in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions..."

36. I find on a balance of probabilities that it is the handwriting of Mandeep Bahniwal which appears on Exhibit Q-1, including the notation "*paid \$608*", and on Exhibit Q-3. This is consistent with most of the other evidence in this case, including the Handwriting Examination Report of Mr. Brown. Mr. Brown's Curriculum Vitae indicates that he has many years of experience and significant expertise in forensic document examination. He also has no personal stake in the outcome of this appeal.
37. No other reasonable explanation for the conclusions reached by Mr. Brown was offered by Ms. Bahniwal. Ms. Bahniwal acknowledged that she had written everything on Exhibit Q-1, except for the notation "*paid \$608*". I did not find the evidence of Mandeep Bahniwal to be credible that she did not know anything about a person named Manjinder Dhaliwal. This evidence was simply not consistent with the

documentary evidence in this case. The name Manjinder Dhaliwal appears on many of the Daily Log sheets (Exhibits K-1-K-11), and these Daily Log sheets were completed by Ms. Bahniwal. There were no more than five names on each of the Daily Log sheets, including Mandeep Bahniwal's name. In addition, Manjinder Dhaliwal's name was written on Exhibits Q-1 and Q-3, and I have found that Ms. Bahniwal was the writer of most of the notations on those documents, including the name "Manjinder Dhaliwal".

38. Ms. Bahniwal also admitted that she had asked to be paid in cash so that her Employment Insurance benefits would not be affected. Overall, I found Ms. Bahniwal's testimony to be inconsistent with the other evidence in this case, and self-serving.
39. Ms. Bahniwal's notations on Exhibit Q-1 indicate that a total of \$1000.00 was owing, and the amount was split into two separate amounts of \$608.00 (for Ms. Bahniwal) and \$392.00 (for Manjinder Dhaliwal).
40. It is possible that Manjinder Dhaliwal does not exist, and that name was used as part of the "fraud" described by Ms. Bahniwal. If this were the case, the full \$1000.00 may have been retained by Mandeep Bahniwal. However, it was not established by the appellants that Manjinder Dhaliwal did not exist. Rather, the appellants indicated that they believed that Manjinder Dhaliwal had worked for them, and they wanted to pay this person for the work completed.
41. The burden of proof is on the appellants to demonstrate that Ms. Bahniwal received (and did not pay to another person on behalf of LS Labour Solutions) the wages which they allege were paid to her.
42. The most probable situation based on all of the evidence presented is that the \$1000.00 amount included \$608.00 for Ms. Bahniwal, and \$392.00 for a person named Manjinder Dhaliwal. This is consistent with Exhibit Q-1, and with Exhibit Q-3. On Exhibit Q-1, there is no indication as to when the amount of \$608.00 was paid. On Exhibit Q-3 there is a notation that \$700.00 was paid on April 27, 2004. I find that this amount reflects the \$92.00 which apparently remained outstanding on the debt owing to Manjinder Dhaliwal plus the \$608.00 received by Mandeep Bahniwal. The sum of \$300.00 (of the total of \$392.00 owing to Manjinder Dhaliwal) may have been paid at some earlier time by LS Labour Solutions Inc. to Manjinder Dhaliwal directly, or may have been paid at some point to Ms. Bahniwal to given to Manjinder Dhaliwal. It was not proved that Ms. Bahniwal was paid wages of \$300.00 for her own work on April 24, 2004, as alleged.
43. The appellants have failed to meet the onus of proving that Ms. Bahniwal received and retained the amounts indicated in Exhibits Q-1 and Q-3 which were noted in connection with the name Manjinder Dhaliwal. There was no proof that Ms. Bahniwal was paid the sum of \$300.00 on May 15, 2004, as alleged. Besides the sum of \$332.80, which Mandeep Bahniwal acknowledged having received, it was not established that LS Labour Solutions paid a cash payment of more than \$608.00 to Ms. Bahniwal for her labour. I have determined that the sum of \$608.00 was paid by LS Labour Solutions in cash to Ms. Bahniwal on April 27, 2005.

CONCLUSION

44. It was uncontested, as reflected in the original Determination, that Ms. Bahniwal had been paid by LS Labour Solutions Inc. the amount of \$332.80 by cheque. I have determined based on the new evidence provided by the appellants, that an additional amount of \$608.00 was paid to Mandeep Bahniwal in cash for her work by LS Labour Solutions Inc. on April 27, 2004.

45. Pursuant to section 115 of the *Act*, I order that the Determination dated January 6, 2005 is varied to reflect that the amount of \$608.00 in wages was paid in cash to Mandeep Bahniwal, and this should be deducted from the amount found to be owing. The interest should be re-calculated in accordance with s. 88 of the *Act*. I order that the Determination dated January 6, 2005 is otherwise confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal