

An appeal

- by -

Triple Nine Group Holdings Ltd. operating as Surrey Husky Market
("Surrey Husky")

- 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: David B. Stevenson

FILE No.: 2003A/090

DATE OF DECISION: June 19, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Triple Nine Group Holdings Ltd. operating as Surrey Husky Market (“Surrey Husky”) of a Determination that was issued on February 20, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Surrey Husky had contravened Part 3, Section 15 and Section 21, Part 4, Section 40 and Part 5, Sections 45 and 46 of the *Act* in respect of the employment of Sukhdeep S. Brar (“Brar”) and ordered Surrey Husky to cease contravening and to comply with the *Act* and the *Employment Standards Regulation* (the “*Regulation*”) and to pay an amount of \$2,908.43.

Surrey Husky has appealed on the ground that the Director failed to observe principles of natural justice and asks that the Determination be cancelled. There is a one page document accompanying the appeal form that includes a statement and lists a number of questions which the submission indicates need to be answered before Surrey Husky can submit a proper response.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue is whether Surrey Husky has shown the Director failed to observe principles of natural justice in processing the complaint.

FACTS

The Determination contains the following background information:

Sukhdeep S. Brar (Brar or the complainant) filed a complaint under Section 74 of the *Employment Standards Act* (the *Act*) alleging that Triple Nine Group Holdings Inc. [sic] operating as Surrey Husky Market (Surrey Husky or the employer) contravened the *Act* by failing to pay wages as required, including minimum wages, overtime wages and statutory holiday pay and by taking unauthorized deductions from his pay. At issue is whether Brar is entitled to additional wages under the *Act*.

Surrey Husky is a convenience store and gas station. Brar was employed by Surrey Husky from December 9, 2001 to May or June 2002 as a cashier at Surrey Husky’s business at a rate of \$6.00 an hour.

The Director concluded, on the basis of a Record of Employment issued to Brar by a former employer, that Brar had employment experience prior to November 15, 2001.

Brar submitted a detailed account of the dates worked and the start and stop times of each shift worked. To show the hours worked by Brar, Surrey Husky submitted a copy of a payroll ledger to the Director during the investigation, but no supporting or source documents such as time sheets or work schedules.

The Director did not accept the records provided by Surrey Husky, doubting their accuracy for several reasons:

1. The records gave the appearance of having been made up “after the fact” in an attempt to justify the amounts paid. Wages paid after the first month of employment were “rounded up” in a way that could have resulted in significant additional wage costs and tax liability for Surrey Husky.
2. The ledger entries made by Surrey Husky for May 2002 showed Brar worked only May 4 and 5 for a total of 8 hours, while his pay was calculated on his having worked 26 hours.
3. There was no indication in the records provided by Surrey Husky that any deductions, other than statutory deductions, were taken from Brar’s wages even though Surrey Husky contended all deductions were made with Brar’s consent. There seemed to be a number of “advances” and “overpayments” recorded against Brar’s pay that did not have any cheque numbers attached to them.
4. The excessive concern with “overpayments” was inconsistent with the “rounding up” of Brar’s wages.

The Director preferred the record of hours worked provided by Brar.

Surrey Husky took the position that Brar was paid for all wages he earned and that any deductions from wages were authorized by him. Surrey Husky also asserted that Brar did not inform the employer that he had been employed prior to November 15, 2001. Brar said that his rate of pay was discussed and Surrey Husky was aware of his entitlement to a minimum wage of \$8.00 an hour. The Director accepted Brar’s version.

Surrey Husky provided no written assignment authorizing it to make deductions from Brar’s wages and the Director decided that Surrey Husky had contravened Section 21 of the *Act*.

ARGUMENT AND ANALYSIS

The burden is on Surrey Husky to show an error in the Determination. An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation.

Surrey Husky believes an oral hearing is necessary in order to, “explain how much of the employer’s money, time and efforts are involved in educating and training employees to qualify for the job and why we think an employer should be allowed to recover the above cost”. There is nothing in this appeal that suggests the “money, time and efforts” involved in training Brar for the job was anything other than a cost of doing business for Surrey Husky. Section 21 of the *Act* prohibits an employer from requiring an employee to pay any part of the employer’s business costs. Accordingly, the evidence which Surrey Husky seeks to present would have no effect on the result. Simply put, such evidence would be irrelevant because no matter how much “money, time and effort” was put towards training Brar for the job, the *Act* prohibits any of those costs from being passed on to the employee.

The remainder of the appeal does no more than restate the position taken by Surrey Husky during the investigation of the complaint. It says:

. . . we believe we have paid all the money owed to Sukhdeep S. Brar but he still owes us money on his unpaid account.

As well, the appeal lists several question, which Surrey Husky says have to be answered before they can submit a proper response:

- when did the employee file this complaint?
- how did he keep his records and can we get a copy?
- why didn't the employee stop working and file a complaint or raise any concerns about his hourly wage while he was still employed?
- when did the employee find out he was only making \$6.00 an hour and what did he do about it?
- what is the dispute about coffee and other items charged to his account when all the entries are made by him?

The Director and Brar have filed replies to the appeal. Brar's reply is brief and does not add anything to an analysis of the merits of the appeal.

The Director submits that Surrey Husky has not shown the Director failed to observe principles of natural justice. I agree with the submission of the Director on this point. The record clearly shows Surrey Husky was afforded a full opportunity to respond to the allegations made in the complaint, to provide any relevant evidence and to fully state its position on the allegations made. The decision of the Director to reject much of the information provided by Surrey Husky does not, in the circumstances, amount to a failure to observe of natural justice.

On the question of Brar being paid a rate of \$6.00 an hour instead of \$8.00 an hour, the Director says the appeal does not address either the legal or factual correctness of the Director's decision on that question. Surrey Husky has only questioned why Brar did not raise concerns immediately about the \$6.00 an hour wage rate. Once again, I agree with the Director. The *Act* imposes a positive obligation on an employer to pay at least the minimum wage set by regulation (see Section 16). The *Employment Standards Regulation* (the "*Regulation*") sets the minimum wage at \$8.00 an hour. The *Regulation* also provide an alternative minimum wage (commonly referred to as the "training wage"), which is only applicable in the specific circumstances described in subsection 15(2) of the *Regulation*:

- 15 (2) Despite subsection (1), the minimum wage is \$6.00 an hour for an employee who
- (a) has no paid employment experience before November 15, 2001, and
 - (b) has 500 or fewer hours of cumulative paid employment experience with one or more employers.

The *Act* is remedial legislation. Because subsection 15(2) derogates from the basic standards provided by that legislation, it will be narrowly interpreted and any doubt about an employee's entitlement to the basic minimum wage should be resolved in favour of the employee. In the absence of clear evidence establishing the circumstances that would allow an employer to pay the "training wage", an employee is entitled to be paid the \$8.00 an hour minimum wage. Accordingly, the statutory obligation on Surrey

Husky was to pay Brar \$8.00 an hour unless it was clear that Brar had no work experience before November 15, 2001 and had 500 or less hours of cumulative paid employment with one or more employers. Where such an obligation of a positive kind is imposed, it is not open to Surrey Husky to suggest Brar might not be entitled to the \$8.00 an hour minimum wage because he didn't complain about his wage right away. Any inaction or delay by Brar - absent a failure to comply with statutory time limits - would not operate to enable Surrey Husky to escape its statutory obligation nor release it from its legal obligation to obey the statute. The evidence clearly shows that Brar was not a person who could be paid a minimum wage rate of \$6.00 an hour. Surrey Husky's statutory obligation was to pay him a wage of at least \$8.00 an hour. They did not comply with that statutory obligation and that is all that needs to be said.

I am also in complete agreement with the decision of the Director on the issue of unauthorized deductions. On the facts as applied to the language of Sections 21 and 22 of the *Act*, no other conclusion could have been reached. The final question on the appeal asks how there can be any dispute about the items charged to Brar's account when he entered them into his account. The issue, however, is not whether Brar may owe money to the employer, but whether the employer can deduct the perceived indebtedness from his wages; the *Act* says it cannot.

This appeal is dismissed. Surrey Husky has not shown the Director failed to observe principles of natural justice in making the Determination. Nor has Surrey Husky shown there is any error, generally, in the Determination. I agree with the Director that the questions attached to the appeal form are largely irrelevant to any aspect of the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 20, 2003 be confirmed in the amount of \$2,908.43, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal