

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/092

**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 18, Part 4, Section 40 and Part 5, Section 46 of the *Act* in respect of the employment of Trevor Howe (“Howe”) 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 \$1,880.60.

Surrey Husky has appealed on the ground that the Director failed to observe principles of natural justice and asks that the Determination be cancelled. The appeal provides the following reasons:

1. The employee was paid in full as per the hours worked in Oct/01, and as per the agreement between the employee and employer for Nov/01 ( employee was to be paid \$2000.00 for working 6 nights a week and store was to be closed for 3 to 4 hrs every night).
2. For Oct/01 employee did not produce a store schedule but did produce a store schedule for Nov/01. Because Oct/01 store schedule did not match with employee’s claim but employee’s own records (which appears to have hours added on later) does match.

The assertion that the store was closed 3 to 4 hours every night was not raised during the investigation.

Surrey Husky has requested an oral hearing “to ask questions to know more about the claim”. The Tribunal has decided, however, 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:

Trevor Howe (Howe 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 regular wages, overtime wages and statutory holiday pay. At issue is Howe’s term of employment, wage rate and whether he is entitled to additional wages under the Act.

Surrey Husky is a convenience store and gas station. Howe was employed by Surrey Husky from October to December 2001 as a full service attendant.

Howe complained that he had not been paid for all regular and overtime hours worked during his period of employment and that he had not been given proper pay statements through his employment. He provided copies of calendar pages, on which he had recorded the hours he worked, copies of scrap papers, on which he had recorded his work schedules prior to transferring that information to the calendar pages, and some copies of the employer's work schedules.

Surrey Husky responded that Howe had been paid all wages owed; he was paid minimum (\$7.60 an hour) for October and then a salary of \$2000.00 for November - which included annual vacation and statutory holiday pay. Surrey Husky submitted records that showed Howe worked from October 14 to December 1, 2001 and a copy of a payroll ledger that showed hours worked and payment of wages. No daily record of hours worked was kept. There were unexplained differences between the work schedules and the information provided by Howe and the records provided by Surrey Husky.

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. The hours worked and wages earned in October were not paid until January 9, 2002 - after Howe's employment had ended and the complaint filed.
2. The records provided by Surrey Husky did not accord with either the information provided by Howe or the work schedules made up by Surrey Husky.
3. There was no explanation for switching Howe to a monthly salary; paying a full service attendant by way of salary was inconsistent with the way wages were paid to all other full service attendants, who were paid minimum hourly wage. The only other employee paid salary was the Manager, who was paid \$1500.00 a month in November 2001 - \$500.00 less than what Surrey Husky claimed it paid Howe.

The records provided by Surrey Husky did confirm that Howe worked overtime every week without any calculation of overtime wages and worked December 1, 2001 without being paid for that day.

The Director preferred the record of hours worked provided by Howe. The Director found that Howe worked from October 4 to December 2, 2001. The Director also found Howe was eligible to be paid statutory holiday pay for November 11, 2001 (Remembrance Day).

## **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 has not provided any additional material with 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 Howe being paid \$2000.00 a month salary, the Director notes that Howe has denied any such arrangement. The Director notes the statement in Surrey Husky's appeal that the store was to be closed 3 to 4 hours a night is raised for the first time, but is not supported by any objective evidence; the employer's own work schedules do not show that Howe worked a "split shift". In respect of this new argument, the Director wonders which 3 or 4 hours the store was closed each night, whether that decision was left to the discretion of Howe, a new employee, and whether Howe was given a key to lock an unlock the store?

In his reply, Howe says there was no agreement that he would be paid salary and says the records of hours worked that he gave to the Director were accurate.

In its final reply, Surrey Husky restates its position on the wages paid to Howe and elaborates on its position relating to the hours worked by Howe in November, saying the hours which the store closed every night was left to Howe's discretion and that he was given a key to the store and the alarm activation code. Surrey Husky also submits that Howe was trained by Surrey Husky for the job.

As indicated above, the burden in this appeal is on Surrey Husky to show an error sufficient to justify the Tribunal's intervention under Section 115 of the Act. No additional evidence has been submitted with this appeal. Specifically, Surrey Husky has not provided any evidence that demonstrates the decision of the Director to accept the record of hours worked provided by Howe was such an error. Apart from the new matters concerning Howe having the discretion to close the store for 3 or 4 hours every night and the request to recover training costs from Howe, the appeal only restates the positions - rejected by the Director on the available evidence - taken during the investigation.

On the matter of Howe closing the store each night, this argument is nothing more than a different point of attack on the decision of the Director to accept the accuracy of Howe's record of hours worked and nothing in this appeal has persuaded me the Director's decision on that was wrong. In all the circumstances, it would take more than a bald assertion by Surrey Husky to satisfy me this argument had any basis in fact and demonstrated an error in the Determination. In my view the questions raised by the Director are not adequately answered by Surrey Husky. I agree completely with the skepticism expressed by the Director that this employer would provide a new employee with a key to the premises - and the code to its alarm system - without there at least being some objective evidence supporting that having been done.

Finally, Surrey Husky indicates in their reply that an oral hearing is needed in order to, "explain the training procedure and costs involved and why we think employee should not be paid for training". Surrey Husky says it should be entitled to recover the cost of training, and all related costs. There is nothing in the appeal, however, which suggests that training Howe 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 to the merits of the appeal, even if I accepted that argument could included as an issue in the appeal.

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 \$1,880.60, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**