

An appeal

- by -

Jaswinder Singh Momi
(“Momi”)

- 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: W. Grant Sheard

FILE No.: 2001/56

DATE OF DECISION: May 2, 2001

DECISION

SUBMISSIONS:

Jasvinder S. Momi	on his own behalf
Ajmer S. Johal	on his own behalf
Judy McKay	on behalf of the Director

OVERVIEW

This is an appeal based upon written submissions by an employer, Jasvinder Momi (the “Employer”), pursuant to Section 112 of the Employment Standards Act (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on December 12, 2000 wherein it was held that Ajmer Johal (the “Employee”) was an employee of the Employer and that the Employer owed the Employee wages of \$4,168.67 for regular wages, overtime wages, and vacation pay.

ISSUE

Is the Employee owed wages by the Employer?

ARGUMENT

The Employer’s Position

During the investigation the Employer argued that the Employee was not an employee but was a 50/50 partner and that he was paid all the money that was owed to him in cash. In written submissions dated January 9, 2001 the Employer did not pursue the assertion that the Employee had been a partner, but he maintained that the Employee had been paid in full by cash and by a cheque payable to the Employee’s relative. The Employer provided copies of two invoices supporting this assertion.

The Employee’s Position

In a written submission dated January 30, 2001 the Employee denies that the Employer made the cash payments to him as the Employer alleges and that he has no knowledge of a cheque paid to his relative (his father).

The Director's Position

In a written submission dated January 30, 2001 the Director's delegate notes that the invoices provided by the Employer on this appeal were not provided to her during her investigation despite a demand and requests of the Employer to do so. Now, having viewed the invoices of the Employer, the delegate inferentially challenges the authenticity of these documents, noting that they are in English while she found the Employer writes and speaks very little English and they do not appear to her to be in the Employer's handwriting. The Director's delegate also notes that the Employer's invoices contradict the position he took during the investigation that he and the Employee were 50/50 partners. The delegate says that the Employer was given an opportunity to make a submission at the investigation stage, but chose not to. In view of all this, the delegate says that this appeal should be dismissed.

THE FACTS

The Employer operates a drywall business. The Employee gave evidence to the delegate that he obtained this employment through a newspaper advertisement in the Awaaz Newspaper dated February 4, 2000, which (translated) reads:

“Drywall comp. Looking for new hires. Min. two years experience up to \$12.00 per hour. Non-exp. Also welcome. Further information call Jasvinder at 572-3498.”

The Employee gave further evidence that he was paid \$11.00 per hour and that he received two NSF cheques from the Employer for wages. The Employer provided copies of those cheques to the delegate.

The Employer did not respond to the delegate's request for documents and records. The Employer informed the delegate that the Employee was not an employee, but a “50/50 partner” and that he had been paid in full in cash for all money owed to him.

The delegate ruled that the Employee was an employee of the Employer and that the Employer owed him \$4,168.67 for daily and weekly overtime wages.

On this appeal the Employer provided copies of two invoices noting that various cash payments had been made to the Employee and one cheque paid to the Employee's relative. The Employee has denied that he received those cash payments and advises that he has no knowledge of a cheque paid to his relative (his father).

THE ANALYSIS

The onus is on the appellant to establish, on a balance of probabilities, that the Determination of the Director was made in error.

I find that the invoices submitted by the Employer are not reliable evidence. As noted by the Director's delegate, they appear to contradict the position taken by the Employer during the investigation the Employee was in fact a "50/50 partner". Furthermore, they were not provided in a timely fashion to the delegate despite repeated requests for such documentation and no compelling reason for failing to provide them earlier has been given. Lastly, there is no acknowledgement on the invoices by the Employee of receipt of the cash purportedly given to him and noted in the invoices.

There is no reliable evidence which establishes on a balance of probabilities that the findings or calculations of the Director's delegate were in error.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated December 12, 2000 and filed under number ER #102-807, be confirmed.

W. GRANT SHEARD

**W. Grant Sheard
Adjudicator
Employment Standards Tribunal**