

An appeal

- by -

Jassi Management Ltd.
(the “Appellant”)

- 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.: 2003A/150

DATE OF DECISION: August 6, 2003

DECISION

OVERVIEW

This is an appeal based on written submissions by Jassi Management Ltd. (the “Appellant”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination and Reasons for the Determination issued by the Director of Employment Standards (the “Director”) on April 17, 2003 wherein the Director’s Delegate (the “Delegate”) found that the complainant was entitled to overtime wages, statutory holiday pay, annual vacation pay, compensation for length of service and accrued interest totaling \$26,452.09.

ISSUES

1. Did the Director fail to observe the principles of natural justice in making the Determination appealed from?
2. Was the Director correct in the findings of fact regarding the hours of work of the Respondent?

ARGUMENT

The Appellant’s Position

In the appeal form dated May 23, 2003 and further letter in support of the appeal of the same date the Appellant says that the Director failed to observe the principles of natural justice and seeks to refer the matter back to the Director. In the supplementary letter of May 23, 2003 the Appellant says that he gave a contract to the Respondent to provide service at the Houston Motor Inn for the sum of \$2,000.00 per month. He says that the Respondent didn’t tell him that there would be extra hidden cost in holiday pay and overtime etc. He says that the Respondent set his own time and called others to help without consent from the Appellant. The Appellant says he had no control over the Respondent and submitted time sheets showing relief hours worked by two other persons. The Appellant notes that time sheets with his name on them show that he worked for the Houston Motor Inn, but sometimes there was no money in that Motor Inn’s account so he made out cheques from another motel account for the Respondent. The Appellant says that the Director had a misunderstanding and requests that the Director look at this again. The Appellant says that he has witnesses and records of payments which can be made available on request, but he does not submit any further information in this regard.

In a further written submission dated June 30, 2003 the Appellant says that the Respondent could not possibly have worked 24 hours a day 7 days a week. The Appellant says that when the Respondent worked extra time he submitted two invoices and that those invoices were paid. The Appellant says that he owes the Respondent nothing and, in fact, the Respondent caused damage to the Appellant’s business which is closed due to a loss of money.

The Respondent’s Position

The Respondent did not file a response to the appeal.

The Director's Position

In a written submission dated June 13, 2003 and filed with the Tribunal June 17, 2003 the Director submits a copy of the record which was before the Delegate who rendered this Determination.

The Director responds to the Appellant's assertion that some evidence which was submitted during the investigation was misinterpreted. Regarding the assertion that time sheets (which were attached at section "T" of the Determination) were not fairly interpreted and that the hours of work for which the Respondent was credited should be reduced by the hours reflected on these time sheets, the Director says that, while it is indeed possible that some of the hours reflected on the time sheets are times when the Respondent was given relief, it is not possible to determine from the evidence which, if any, of the hours claimed are for relieving the Respondent. The Director says that if, as the Appellant suggests, cheques were written from the Pleasant Valley Motel account for work performed at the Houston Motor Inn, it is not even possible to determine at which motel the work was performed. The Director says that the Appellant has simply failed to provide sufficient clear and credible evidence to disturb the findings in the Determination.

The Director further submits that he had concerns with the Appellant's difficulty with English and the ability to make his case. He says that efforts were made through the investigation to communicate through the Employer's son, who is fluent in English. However, in the end, the Appellant's son deferred to his father to deal with the file. The Director says that, in view of this, he would not object to any new evidence being introduced on the appeal.

THE FACTS

The Appellant operates two motels in Houston, B.C., the Pleasant Valley Motel ("PVM") and the Houston Motor Inn ("HMI"). The Respondent worked as the "manager" of the HMI from November 27, 2000 to October 31, 2001, at which time he was terminated. The Appellant did not give the Respondent any advance written notice of his termination. The Appellant had paid the Respondent a monthly salary of \$2,000.00 at the outset, increasing to \$2,400.00 by April 1, 2001. The Appellant did not pay the Respondent any overtime, annual vacation pay, statutory holiday pay or compensation for length of service.

The office of each motel was open from 8:00 a.m. to 11:00 p.m., Monday through Saturday and from 9:00 a.m. to 10:00 p.m. Sundays and holidays, during the months of May through October. In the months of November through April, the offices were open from 8:00 a.m. to 10:00 p.m. Monday through Saturday and from 9:00 a.m. to 9:00 p.m. Sundays and holidays.

During the investigation the Respondent gave evidence that he was on call for 24 hours per day. He claimed that he was an employee although the Appellant required him to present invoices in order to receive pay. The Respondent gave evidence that the Appellant had purchased him a stamp bearing the imprint "RAV BAL MANAGEMENT SERVICE" and that he was required to use that stamp on the invoices. The Respondent denied owning a computer that was used for any employment duties and denied having hired replacement staff for times he was away. The Respondent gave evidence that he had no supervisory authority over the chambermaid staff and that he neither hired, disciplined or fired any staff.

In the investigation the Appellant argued that the Respondent was an independent contractor and, in support of this, he provided invoices from the Respondent submitted for services and copies of cheques

that had been issued to “Rav Bal Management Services”. The Appellant gave evidence that the Respondent made an offer to it to provide management services including guest services, cleaning, maintenance and promotion of the business. The Appellant gave evidence that the Respondent provided his own computer and calculator and that the Respondent would hire and pay his own replacement if he was away. Regarding the hours of work, the Appellant acknowledged in the investigation that the office was open between 12 and 15 hours per day, but argued that the Respondent was provided with many relief hours. In support of this, the Appellant had submitted during the investigation copies of time sheets purporting to show relief hours worked by a Mr. Sahota or by another employee, Bina Minhas.

In the Determination and Reasons for the Determination which were issued, the Delegate found that the Respondent was an employee rather than an independent contractor and that he was not a “manager” as defined by the Regulation. Regarding the hours of work, the Delegate found that no credible evidence had been offered to show that the Respondent did not work all of the hours that the office was open as claimed by the Respondent. The Delegate noted, however, that the Respondent had taken one week off in May and took that into consideration in the calculations that he made.

ANALYSIS

1. Did the Director fail to observe the principals of natural justice in making the Determination?

Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski*, [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.). In this case there is evidence that the parties were given an opportunity to present their evidence, question the evidence provided by the Respondent, and make a submission to the Delegate with respect to the issues raised by the complainant.

It is apparent that the time sheets which the Appellant relies upon in support of its appeal were before the Delegate during the investigation and prior to the Determination rendered. The Appellant has made no submission responding to the Delegate’s identification of the information or evidence lacking in these time sheets. The Appellant has failed to provide any further evidence or explanation of how these time sheets specifically indicate where the hours were in relief of the Respondent. Further, the Appellant has failed to provide any further evidence or explanation of how the cheques written on either motel’s account indicate at which motel work was performed.

With respect to any difficulties in communicating in English, it is apparent that the Delegate afforded every opportunity for the Appellant to communicate through the principal’s son, who is fluent in English.

In the circumstances, I find that the Appellant has failed to demonstrate on a balance of probabilities that the Director failed to adhere to the principals of natural justice during the course of her investigation and issuing of the Determination appealed from.

2. Was the Director correct in the finding of fact of the hours worked by the Respondent?

The onus is on the Appellant to establish on the balance of probabilities an error in the finding of the Delegate.

The Appellant has not provided any new evidence or indicated any where in the time sheets or other evidence which was before the Delegate that the Respondent did not work the hours claimed and which the Delegate found had been worked. These time sheets do not indicate where hours worked by other persons were for relieving the Respondent. The fact that hours were worked by others does not establish that they were in relief of the Respondent. Further, as the Delegate submitted, if, as the Employer suggests, cheques written from one motel account were for worked performed at another motel, it is not possible to determine from these cheques at which motel the work was actually performed.

In the circumstances, I find that the Appellant has failed to demonstrate on a balance of probabilities that the Director erred in the findings made.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated April 17, 2003 and filed under number ER #117-467, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal