

An appeal

- by -

Balwant S. Gill

- 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:** Lorne D. Collingwood

**FILE No.:** 2003A/123

**DATE OF HEARING:** July 30, 2003

**DATE OF DECISION:** August 12, 2003

## DECISION

### APPEARANCES:

Balwant S. Gill	On his own behalf
Eric Samuel	For South Asia Travels

### OVERVIEW

Balwant S. Gill (“the Appellant” in this decision), pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), appeals a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 19, 2003. Mr. Gill filed a complaint with the Employment Standards Branch and claimed that South Asia Travels Limited (“South Asia Travels”) owed him six months of wages. The Determination is that, even if Mr. Gill was employed by South Asia Travels, and he is not an independent contractor, South Asia Travels’ claim, there is not evidence to prove the complaint. The delegate also found that Mr. Gill was claiming wages for a 1 and ¼ month period when he was not working for South Asia Travels but out of the country and it is his conclusion that the complaint is “borderline vexatious”.

From his appeal form, one would think that Mr. Gill appeals out of a belief that the delegate failed to observe principles of natural justice in reaching his decision. Mr. Gill has made no attempt to explain how it is that the delegate was unfair, however. He produces further evidence of travel bookings on appeal but, outside of that, he does nothing but restate his case in the hope that the Tribunal will believe him where the delegate did not.

I have in this decision decided that I should confirm the Determination. The complaint was found to be completely lacking in information to support it and the additional information which is produced on appeal does nothing to correct that deficiency. And while he does not go so far as to use the term, it is clear to me that the delegate has also decided that the Appellant is not credible. I am also led to prefer South Asia Travels version of events over that which is provided by Mr. Gill, indeed, I am not convinced that the relationship between Mr. Gill and South Asia Travels was ever one of employment. There is just too much about this case that just does not add up.

An oral hearing was held in this case. Mr. Gill was provided with the services of an interpreter.

### ISSUE AT THE HEARING

Mr. Gill asked that I hear from six people that he said were witnesses. Questioned on that, he said that each and every person was in a position to confirm that he was an employee. I then asked him to explain how that could be, and to describe his relationship with all six persons. Mr. Gill told me that five of his ‘witnesses’ were former customers who had bought tickets from him and the sixth person was his former landlord. He could not tell me how any of these people were in a position to know whether he was employed by South Asia Travels or his rate of pay or what hours were worked. Indeed, the Appellant could not even tell me whether any of his former customers actually purchased their tickets in the relevant period.

Mr. Gill told me that his former landlord was the person most familiar with his relationship with South Asia Travels. I decided that I would at least hear from the landlord. I found that the landlord knew a shareholder in South Asia Travels who assists Mr. Samuel, President of the company, but that he does not know how Mr. Gill was to have been paid and he does not know whether the relationship between South Asia Travels and Mr. Gill was one of employment.

I decided that I would not hear from any of the remaining five persons presented as witnesses because the Appellant had failed to provide me with any reason to believe that any of the five had first hand knowledge of rate of pay or hours worked or even whether the Appellant was in fact an employee.

### **ISSUES RAISED BY THE APPEAL**

From his appeal form, one would think that Mr. Gill appeals out of a belief that the delegate failed to observe principles of natural justice in reaching his decision. I do not consider that to be an issue, however. Mr Gill has not made any attempt to explain how it is that the delegate was unfair.

An issue which I must decide is whether there is or is not evidence to prove the complaint. The delegate has found that Mr. Gill's complaint is "borderline vexatious", whatever that means, but he has also decided that there is not evidence to prove the complaint and that the complaint can be dismissed under section 76(3)(e) of the *Act*.

The issue at dispute in this complaint is whether or not Mr. Gill was an employee of South Asia Travels Limited for the period April 1, 2001 to September 30, 2001. Based on the evidence submitted by both parties, even if I found Mr. Gill to be an employee of South Asia Travels Limited there is not enough evidence to substantiate the hours of work, rate of pay and period of employment of Mr. Gill. Mr. Gill did not deny the fact that he was out of the country for a period of 1 ¼ months during the period for which he claimed wages as an employee of South Asia Travels Limited. Mr. Gill gave no explanation why this information was not included in his complaint. In addition to there not being any evidence to substantiate the complaint I find this complaint to be borderline vexatious.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination should be varied or cancelled, or a matter or matters referred back to the Director because of an error in law, failure to observe principles of natural justice, or evidence which was not available at the time the determination was made.

### **FACTS**

Mr. Gill was at one time employed by another travel agency ("GI"). He worked out of GI's Abbotsford office.

Gill tells me that GI paid him \$2,000 a month but he does not produce evidence to confirm that.

Gill was a guarantor of GI's Abbotsford lease and he had the authority to sign cheques for that company. I asked Mr. Gill if he is an owner of GI. He tells me that he is not now, nor has he ever been one of the owners of GI, that GI is owned by Nirmal S. Dhaliwal and/or Baljit S. Brar. I asked him to explain his confusion. He told me that Dhaliwal and Brar may well be one and the same person.

I asked Mr. Gill to explain why he signed the lease. He tells me that he was pressured into signing the lease by GI.

At some point in the year 2001, Singapore Airlines moved to reduce its number of authorized agents from 5 to 3. South Asia Travels and GI, fearing that they might both cease to be authorized agents, decided that they would start acting as partners of a sort. GI began booking flights on Singapore Airlines through or, at least, under the name of South Asia Travels. South Asia Travels was able to remain as an authorized agent of Singapore Airlines.

On or about this point, GI lost its standing as an authorized agent of Singapore Airlines. GI was caught selling airfare from San Francisco to Dehli at rates which were less than the rates which San Francisco travel agents were able to offer their customers. GI could do that because the cost of a flight from Vancouver to Dehli (via San Francisco) was significantly less than going rate for flights from San Francisco to Dehli.

South Asia Travels took over GI's Abbotsford office. The loose partnership between South Asia Travels and GI soon ended and South Asia Travels moved to a new Abbotsford location.

There is no evidence to suggest that South Asia Travels and GI are one and the same or that South Asia Travels bought GI. GI continues to operate today. Indeed, it is operating again out of its former Abbotsford location.

South Asia Travels, on taking over GI's Abbotsford office, offered Mr. Gill a job. It drafted documents (called an "agreement") which set out the terms and conditions that it was offering. The salary that it offered Gill is \$1,500 a month. There are not any documents to show that South Asia Travels agreed to employ the Appellant.

Mr. Gill claims that South Asia Travels offered him a job at \$2,000 a month and that he started working for South Asia Travels on April 1, 2001. According to the Appellant, he worked a regular workday for six months, except for a vacation which lasted 1 and ¼ months, that he worked in what was now the Abbotsford office of South Asia Travels and he has not been paid for his work to this day. South Asia Travels claims that Gill declined its offer of employment and that he chose to work an independent travel consultant, something that would allow him to book flights with any number of agencies. According to South Asia Travels, Gill was told that, to the extent that it booked any travel through South Asia Travels, it was prepared to pay him 50 percent of commissions for each sale and that he has not been paid because he has never presented South Asia Travels with a bill for sales made.

An advertisement was placed in a Punjabi bi-weekly newspaper. The ad, under the heading "South Asia Travels", lists Balwant Gill as the person to see for the best fares for travel in Canada and to India, the U.S.A., Europe and Africa.

South Asia Travels complains that the above ad was taken out in the paper by GI without South Asia Travels' permission. I am told that GI paid for the ad but I have not been shown that GI paid for the ad.

Tarsem Gill (no relation to the Appellant) was employed by South Asia Travels in June of 2001. She worked in its Abbotsford office and she writes to say that Gill did not work at South Asia Travels. An independent travel consultant also writes to say that Gill did not work for South Asia Travel.

The delegate was presented with documents which indicate that Gill did book a small number of Westjet flights as an agent of South Asia Travels.

Mr. Gill on appeal produces evidence, new evidence, of bookings made by him through Gaba Travel, an authorized agent for Lufthansa Airlines. Mr. Gill is listed on a majority of the bookings as a representative of South Asia Travels. Travel bookings are devoid of information in respect to rate of pay and hours worked.

## ANALYSIS AND DECISION

The Appellant complains of a failure to observe principles of natural justice but I am not shown that the delegate has acted in any way that is unfair, nor am I shown that the Determination should be varied or cancelled or a matter or matters referred back to the Director for reason of an error in law or for reason of new evidence.

There is new evidence in this case. It is not new evidence which was not previously available.

The Tribunal will not normally accept new evidence on appeal but there is not an absolute bar to receiving new evidence and I am convinced that this is a case where the Tribunal should accept new evidence. Where the Director, as here, dismisses a complaint on the basis that there is not evidence to prove the complaint, I am quite prepared to accept any new evidence of whether there is or is not evidence to prove the complaint.

The new evidence which Mr. Gill submits is further proof that he worked as a travel agent. It is not, however, evidence that confirms that he was employed by South Asia Travels and it does not allow one to determine the rate of pay or the extent of work. It remains that there is not evidence by which rate of pay or the extent of work can be determined.

The Director may dismiss a complaint where there is not evidence to prove the complaint.

76 (1) Subject to subsection (3), the Director must accept and review a complaint made under section 74.

(3) The Director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(e) there is not enough evidence to prove the complaint.

A person who files a complaint with the Employment Standards Branch cannot be required to prove each and every aspect of the complaint. That is to expect too much of the employee. It would defeat the main purpose of the *Act* which is to provide employees with basic protections and minimum standards. But where the Director conducts an investigation and finds that the complaint is completely devoid of support, the case here, the Director may dismiss the complaint pursuant to section 76(3)(e) once that is realized. Not doing so, is in my view an inefficient use of scarce resources.

While he does not go so far as to use the term, my reading of the Determination is that he has also decided that South Asia Travels is believable whereas the Appellant is not. I am also led to prefer South Asia Travels version of events over that which is provided by Mr. Gill, indeed, I am not convinced that the relationship between Mr. Gill and South Asia Travels was ever one of employment. There is just too

much about this case that just does not add up. There are drafts of employment agreements but no agreement on terms and conditions. It seems to me that if Mr. Gill did work a regular workday for six months that there would be at least some evidence of that. It is unlikely that a person would work for six months without being paid a cent or at least some ironclad promise that he would be paid.

South Asia Travels has said that if Mr. Gill did make actual sales where commissions were paid to it, that he is owed 50 percent of those commissions. That share of commissions can be collected through Small Claims Court.

I have not been shown that there is evidence to prove the complaint or even that Mr. Gill is an employee. The Determination is confirmed.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated March 19, 2003 be confirmed.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**