

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Dimar Enterprises Inc. operating as  
Pacifica Building Maintenance  
("Pacifica" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE No.:** 2000/210

**DATE OF HEARING:** June 26, 2000

**DATE OF DECISION:** July 18, 2000

## DECISION

### APPEARANCES

Mr. Greg Osborne on behalf of the appellant Employer

### OVERVIEW

This is an appeal by 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 March 2, 2000. The Determination concluded that the Employer owed \$830.41 to Mr. Charnjit Kainth (the “Employee” or “Kainth”) on account of regular wages and compensation for length of service.

### FACTS AND ANALYSIS

The appellant has the burden to show that the Determination is wrong. In this case, the Appellant Employer appeared at the hearing whereas the Employee did not. After approximately 30 minutes from the scheduled time of 9:00, I commenced the hearing.

Kainth was employed by Pacifica, which operates a janitorial business. He worked for the Employer between October 1997 and May 6, 1999, as a janitor at the rate of \$8.00 per hour. He worked at the Richmond Centre mall. During the period March 1, 1999 and April 30, 1999, he also worked at the Eagle Quest Golf Centre in Vancouver. The present appeal is concerned with the work at the Golf Centre, in particular, the time required to do the work, and the termination of Kainth’s employment on or about May 11, 1999.

I turn first to the matter of regular wages.

The Employer advised the delegate that the work at the Golf Centre involved between 30-40 minutes and that Kainth was paid for travel time, 15 minutes each way. According to the Determination, the payroll records indicated that he was paid for one hour for each shift worked there. The Employee advised the delegate that he worked at least two hours at the Golf Centre each night and supplied a calendar with the hours he claimed to have worked there. The delegate concluded:

“The contract at Eagle Quest [between the Employer and its customer] was for one hour of work and I do not think it was possible for the complainant to perform this work in one half hour, therefore I find the complainant entitled to one and one half hours pay on each day that he worked at Eagle Quest, that is, one hour of work and one half hour travel time. As travel time was conducted between work assignments during the same day, that is, travel to and from work sites, this is work for which the complainant is entitled to be paid wages.”

The delegate awarded \$160.00 plus \$6.40 on account of wages and vacation pay to Kainth. The delegate found that Kainth worked 40 days at the Golf Centre and he was, therefore, owed

20 hours (40 times 1/2 hour) at \$8.00 per hour. The delegate relied on a calendar of days worked supplied by Kainth. According to the calendar, Kainth worked at the Golf Centre for 32 days between March 1 and April 1, 1999. Kainth had marked "2.0" on the calendar for each day he claimed to have worked at the Golf Centre. However, this included a two-week period between April 1 and 15, 1999 when Kainth, according to the payroll records, did not work at all. Surely, if Kainth had, in fact, worked during this two-week period, he would have complained of the Employer's failure to pay his regular wages. Moreover, I am concerned that the calendar only indicates the hours worked at the Golf Centre. I agree with the Employer that the delegate ought to have considered the credibility of this documentation, which is the only documentary foundation of the claim for the additional hours of work. This document lacks credibility.

Vijay Paul Pabla, Kainth's supervisor, testified that he worked with him at the Golf Centre. He explained that there were always 2-3 employees there, including himself. He also explained that the work was done in 30-45 minutes.

In the circumstances, I do not accept that Kainth worked as claimed and, accordingly, uphold the appeal on this point.

The second aspect of this appeal is the conclusion that the Employer terminated Kainth and that he, therefore, is entitled to compensation for length of service.

The Determination states the Employer's position to be that Kainth was fired for cause because he failed to request time off in writing contrary to company policy. The Employee explained to the delegate that he, in fact, told his supervisor on May 6, 1999, that he needed to take May 8 off and was given permission. The delegate considered the circumstances, including a written policy of the Employer which, says the Employer, requires time off to be requested in writing and the Employer's practice as evidenced by letters from employees. The delegate reasoned:

"Clearly the employer's policies state that an employee must inform his supervisor in advance to take time off. The complainant has signed the Conditions of Employment which are all written in English. One problem I have is that complainant does not speak English nor does he read English, so I question whether the complainant understood clearly the written statement Conditions of Employment. ...

In this case the complainant states that he asked his supervisor for a day off. The supervisor has indicated that he did not have permission to be off. It is quite possible that there was some confusion on the part of the complainant or the supervisor or both. Regardless, even if the complainant did not have permission for the day off does this constitute termination of employment without notice or compensation for length of service [sic]."

The delegate concluded that the Employer could not rely on its policy to support the discharge.

Osborne and Pabla explained that Kainth had, in fact, missed three days of work—May 8, 9 and 10—without permission or notice. Pabla explained that he telephoned Kainth on May 11 and that Kainth did not at the time offer any explanation for his absence. He also testified that he always spoke with Kainth in their common language, Punjabi. In any event, Pabla stated that he had

heard Kainth speak in English at the work place. In his view there was no room for a misunderstanding or confusion, as seems to have been the basis for the delegate's decision. The Employer also pointed out that Kainth had filled out his employment application in English. The Employer suggested that it was not correct that he did not understand English. In the circumstances, I am prepared to accept that the Employer had cause for termination. I do not base that decision on the enforceability of the Employer's written policy or Conditions of Employment. In my view, the unexplained absence from work for three days is sufficient cause for termination.

Some two and one half hours after the hearing had concluded, Kainth appeared at the Tribunal, apparently with a friend and indicated that he wanted to participate in the hearing of the Employer's appeal. He explained to the staff of the Tribunal that he had been unable to find the location of the hearing. There was no indication that he had attempted to contact the Tribunal to obtain its assistance in finding the location. The hearing notice includes not only the address of the location of the hearing, the Tribunal's offices in Vancouver, but also the Tribunal's telephone number. The hearing notice sets out the time of the hearing, in this case 9:00 a.m. As well, it indicates that a failure to attend may be fatal to the party's case. In the instant case, I waited for approximately 30 minutes after the scheduled time before I commenced the hearing. However, unless a party takes steps to contact the Tribunal, a party cannot assume that the hearing will not proceed as per the hearing notice. A party who does not appear must assume that risk.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determinations in this matter, dated March 2, 2000, be cancelled.

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**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**