

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Tejinder Gulati

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/134

DATE OF HEARING: July 18, 1997

DATE OF DECISION: July 23, 1997

DECISION

APPEARANCES

Tejinder Gulati Pal Gulati	on behalf of	Tejinder Gulati
Manvinder Kalra Awtar Madan Navinder Nijjar	on behalf of	482631 BC Ltd. operating as Mac's Convenience Store ("the Employer")

OVERVIEW

This is an appeal by Tejinder Gulati, under Section 112 of the *Employment Standards Act*, (the "Act"), against a Determination which was issued by a delegate of the Director of Employment Standards on February 10, 1997. The Determination resulted from a complaint by Tejinder Gulati that his former employer had failed to pay him overtime wages, annual vacation pay, statutory holiday pay and compensation for length of service as required by the *Act*. Following investigation the Director's delegate found that; wages in the amount of \$236.52 was owed related to overtime wages and statutory holiday pay annual vacation was paid on each pay cheque; and there is no entitlement to compensation for length of service as sufficient notice of termination was given.

Mr. Gulati's appeal alleges: that the Employer's payroll records (on which the Director's delegate relied) were "false fabricated sheets;" that he did not receive written notice of termination; that he was not paid vacation pay; and that he was not paid overtime wages and statutory holiday pay as required by the *Act*. As a result, he argues that he is owed \$2,747.46 by his former employer.

A hearing was held at the Tribunal's offices on July 18, 1997 at which time evidence was given under oath. Mr. Inderpal Mangat, a certified court interpreter attended to provide interpretation services as required. He attended throughout the hearing but his services were not required.

ISSUES TO BE DECIDED

There are four issues in dispute in this appeal:

1. Is Mr. Gulati's entitlement to overtime wages greater than the amount set out in the Determination?

2. Is Mr. Gulati's entitlement to statutory holiday pay greater than the amount set out in the Determination?
3. Is Mr. Gulati entitled to compensation for length of service?
4. Is Mr. Gulati entitled to vacation pay?

FACTS

Tejinder Gulati was employed as a cashier/salesperson on the "graveyard shift" from February 4, 1996 to December 6, 1996. The Employer's payroll records show that Mr. Gulati's wage rate was \$7.00/hour for the month of February, 1996 but it was increased to \$7.50/hour on March 1, 1996 and to \$8.00/hour on August 1, 1996. The calculation report which was attached to the Determination does not show an increase in the wage rate effective August 1, 1996.

The Director's delegate gave the following reasons for the Determination which he issued on February 10, 1997:

Overtime: ...(the Employer) has provided a record in the form of sheets of lined paper indicating a start time and end time for each day of employment.

The complainant has provided a partially complete alternate record of hours which differ significantly from those of the employer.

I have preferred the records of the employer for the following reasons:

- an employer has the legal obligation to maintain the records
- I have reconciled the hours recorded with the employer's payroll records
- I have further confirmed the hours generally worked by the complainant by means of a telephone interview with an employee who worked at Mac's during the time that the complainant was there, a Jagwinder Grewal.
- The complainant's records are incomplete and do not appear to be contemporaneous.

Annual Vacation Pay: I have reviewed the employer's payroll records and am satisfied that annual vacation pay was being paid at 4% on each pay cheque. Any additional vacation pay owing for unpaid overtime and statutory holidays has been adjusted for in the attached Calculation Sheet.

Statutory Holidays: All statutory holidays not paid in the course of employment have been adjusted for in the overtime calculation attached.

Compensation for Length of Service: The employer has produced a note which purports to give the requisite one week's notice of the termination of employment. The employer advises that a hand-written copy of the notice was given to Mr. Gulati on November 28, 1996. Mr. Gulati denied ever receiving a copy of the written notice of termination.

I find on a balance of probabilities that the employer did give notice of the termination of Mr. Gulati's employment.

The amount of wages paid by the Employer to Mr. Gulati is not in dispute. Records produced by the Employer, using "Simply Accounting" computer software, show the following amounts were paid to Mr. Gulati:

Regular wages	\$	12,515.50	
Overtime wages	\$	645.00	
Vacation pay	\$	<u>526.42</u>	
Total gross wages	\$		13,686.92
Net Amount	\$		11,016.14

While the employer's payroll calculations were performed using "Simply Accounting," payroll cheques were not produced by the software; they were produced "manually." The amount of each cheque issued differed slightly from the payroll records on account of withholdings for goods or lottery tickets received by Mr. Gulati during each month.

While Mr. Gulati does not deny that he received this amount as wages, he submits that he is owed additional amounts which he has not been paid, as follows:

Vacation pay	\$	615.71	
"Severance Pay"	\$	585.00	
Overtime wages and Statutory Holiday Pay	\$	<u>1,546.75</u>	
Total gross wages claimed to be owing:	\$		2,747.46

Mr. Gulati gave several reasons for his appeal, including the following:

- the cash register rolls record the start and end of each shift which he worked and are a more reliable record of his hours of work than the hand-written records submitted to the Director's delegate by the Employer;
- he did not receive the notice of termination which the Employer submits it gave to him on November 28, 1996; and
- no vacation pay was paid to him.

In support of his claim for overtime wages and statutory holiday pay, Mr. Gulati relies on his personal records which he made in a diary, in summary form, for each month of his employment. He also submitted to the Tribunal a worksheet which compared wages paid to him with his calculation of wages owing (based on his summary record). He testified under oath that he worked the hours as recorded in his personal records.

Mr. Gulati testified that he did not receive written notice of termination on November 28, 1996. Rather, he testified, Mr. Manvinder Kalra (the owner) spoke to Mrs. Gulati by telephone on December 7, 1996 and left a message that he should not come to work that day. Mrs. Gulati did not testify at the hearing nor make any written statement to the Tribunal. Mr. Kalra testified that he gave the notice of termination on November 28, 1996 at approximately 10:00 a.m. when the month-end inventory report showed substantial shortages. According to Mr. Kalra's evidence, he told Mr. Gulati the reason for his dismissal at the time he gave him the letter.

Mr. Gulati testified while he was paid each month, he received only three statements of earnings (February 29, 1996(sic); March 31, 1996 and August 31, 1996).

Mr. Kalra testified that in June, 1996 he met with Mr. Gulati at his home to discuss significant inventory shortages. At that time, Mr. Kalra testified, Mr. Gulati did not offer an explanation for the shortages but request that he be "given a chance." According to Mr. Kalra's testimony, he decided to continue employing Mr. Gulati because of a long-standing family relationship between the two men. There were no inventory shortages for the next several months, according to Mr. Kalra's evidence. Mr. Gulati did not refute this part of Mr. Kalra's evidence.

ANALYSIS

This is an appeal by Tejinder Gulati. As the person making the appeal, he bears the onus of proving that the Determination is flawed and, therefore, that it should be varied or cancelled. This is not a re-investigation of Mr. Gulati's complaint. The Director's delegate has completed his investigation of Mr. Gulati's complaint, has made certain findings which were supported by reasons and has determined that \$238.68 is owed to him

in wages. Mr. Gulati disputes the findings and the determination made by the Director's delegate.

When I review all of the documents and the evidence, I find that there is only one ground on which the Determination should be varied. The "calculation report" which was attached to the Determination (and which supported the amount of wages found to be owing to Mr. Gulati) contains an erroneous wage rate for the months of August, September, October, November and December. The evidence given by the Employer (and supported by the payroll records) was that Mr. Gulati's wage rate was increased to \$8.00/hour effective August 1, 1996. Thus, the Determination should be varied to show \$671.58 as the amount of wages owing to Mr. Gulati. This amount is the difference between the calculations made by the Director's delegate (using a wage rate of \$7.50/hour) and using \$8.00/hour for all hours of work shown in the Calculation Report for the period August 1 to December 6 (plus 4%).

My analysis of the evidence leads me to concur with the reasons given by the Director's delegate concerning vacation pay, statutory holiday pay and compensation for length of service. Mr. Gulati has not adduced any evidence which would cause me to find otherwise.

The task of assessing credibility is not easy. It is part of human nature for each person to recall events differently

Where there is conflict in evidence, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna v. Chorny* (1952) 2 DLR 354 (BCCA) have been widely accepted. He made the following comments on page 357, on how the issue of credibility ought to be assessed by an adjudicator:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must be reasonably subject (the witness) story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the best test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions.

...Credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case.

From my review of the evidence, I find that it was reasonable for the Director's delegate to prefer the Employer's hours of work records because they could be reconciled to the payroll records, were corroborated by co-worker of Mr. Gulati and because Mr. Gulati's records were incomplete and were not prepared contemporaneously. Additionally, the Employer's record ("Payroll Detail by Employee") confirms that the gross wage amounts

paid to Mr. Gulati each month included 4% vacation pay in addition to the wage amount calculated by multiplying his hourly wage by the number of hours worked.

With respect to the letter of termination dated November 28, 1996 I find that there was nothing improbable about Mr. Kalra's evidence. It was in harmony with the probabilities of this case. He knew that he had a problem with inventory shortages, but he also knew that it would take some time to recruit a replacement and to train that person. In addition, the familial relationship between the two men was another plausible reason for Mr. Kalra's decision to give notice of termination rather than imposing a summary dismissal.

Mr. Gulati argued that I should require the Director's delegate to examine the cash register roll, or that I should order the Employer to produce them to the Tribunal as a means to confirm his hours of work. I do not believe that either course of action is necessary. The Director's delegate relied on the hours of work records which were provided to him by the Employer and made a reasoned decision to rely on those records in preference to those provided by Mr. Gulati. In the circumstances of this appeal, I can not say that it was unreasonable for the Director's delegate to rely on the payroll records which were provided to him by the Employer. Thus, it is not necessary for me to order production of the cash register rolls.

ORDER

I order, under Section 115 of the *Act*, for all the reasons given above that the Determination be varied to show the amount of \$671.58 as owing to Mr. Gulati.

Geoffrey Crampton
Chair
Employment Standards Tribunal