

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 -

Rajgopal Singh Sharma
("Sharma")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood
FILE NO.: 98/385
DATE OF HEARING: July 29, 1998
DATE OF DECISION: August 25, 1998

DECISION

APPEARANCES

A. Bae	Counsel for the Appellant
R. G. Sharma	The Appellant
J. Takhar	For Kahala Enterprises Ltd.

OVERVIEW

Rajgopal Singh Sharma, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), appeals a Determination by a delegate of the Director of Employment Standards dated May 25, 1998. The Determination is that Kahala Enterprises Ltd. operating as the Pantry Restaurant (the “Pantry”) voluntarily paid wages which were found owing as a result of an audit by the delegate, and that no further amount of wages is owed under the *Act*.

ISSUES TO BE DECIDED

The issue is whether or not the Pantry paid Sharma for all overtime worked by him. The delegate found that Sharma is not owed additional wages for the period to December 29, 1997: That, in fact, pay was in excess of what the *Act* provides. The delegate found that, from the 29th on, the Pantry underpaid Sharma by \$190.49.

The appellant claims that payroll records supplied by the Pantry are false and that the delegate erred in not finding, and relying on, the true record of work. Had she done that, the appellant argues, she would have found that Sharma’s work was as indicated by his record of hours worked, or as is set out by a Comcheq record of hours worked. The appellant argues further that, given numerous errors in the employer’s payroll record, it is clearly an incorrect record and that, as such, the delegate should have relied on the either his record of work or the Comcheq record. Overtime pay of \$4,464.91 is claimed.

FACTS

Raj Sharma worked as a chef in the kitchen of the Pantry until January 28, 1998. At that point he began to receive Workers’ Compensation for an injury to his forearm.

Sharma filed a confidential complaint with the Employment Standards Branch and that led to an audit of payroll for all twenty employees of the Pantry. The delegate reviewed payroll records produced by the employer and work schedules. She interviewed

employees and questioned the employer. She found that the employer paid double-time for all overtime worked before the 29th of December, 1997, in that each hour of overtime was counted as two hours of work. The delegate found that Sharma was paid more than the *Act* requires for work to the 29th. She also found that, from the 29th of December on, the Pantry failed to pay overtime in contravention of the *Act* and that Sharma was owed \$190.49.

The delegate wrote Sharma and explained what she had found as a way of settling the Complaint. (That respected the confidential nature of the Complaint.) Along with a letter dated May 1, 1998, she sent a detailed analysis of pay and work for three periods selected at random. They show, in all three instances, pay which is in excess of the required amount. Sharma responded by claiming that the employer tampered with payroll records and that he was sure that he was owed more than \$190.49. That is noted in the Determination.

On appeal, the appellant claims once again that the delegate has relied on a false record of work. I am presented with no evidence of that.

The Pantry's payroll record contains many errors. Those errors are almost entirely in the employee's favour.

Beyond the employer's record of work, I am shown a rough record of work kept by the employee on a calendar and records produced by Comcheq, the company which prepared pay cheques for the employer. The Comcheq 'record' is based on figures supplied by the employer, figures which reflect the practice of doubling the number of overtime hours worked in calculating pay.

ANALYSIS

It is alleged that the delegate failed to find the true record of work kept by the employer but the appellant fails to produce any evidence of a second record, or of record tampering, and, as far as I can see, the delegate's investigation of the Complaint was exceptionally thorough.

The employer's payroll record contains many errors. I have advised the employer to improve his record keeping. But, as matters are presented to me, I see no reason to view that as anything more than sloppy record keeping. The evidence falls well short of establishing that the errors are part of deliberate attempt to avoid paying wages. And the appellant fails to show me that the delegate erred in deciding that, imperfect as it is, the employer's record is the best record available.

The appellant argues in particular that overtime should be paid on the basis of hours of work as shown by Comcheq records. But Comcheq did not keep a record of work. Its information was provided to it by the employer and it reflects the practice of counting each hour of overtime as two hours of work.

The employee claims work beyond that shown by the employer's record of work but he fails to prove what is claimed and alleged. Accordingly, the Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination, dated May 25, 1998, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunals