

An appeal

- by -

Nirmal Singh Gosal operating as  
Nanaimo Airporter and Coast Limosine Service  
("Gosal")

- 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:** James Wolfgang

**FILE No.:** 2002/216

**DATE OF HEARING:** July 16 and 23, 2002

**DATE OF DECISION:** August 20, 2002

## DECISION

### APPEARANCES:

Stan Jarvis	for himself
Nirmal Gosal	for himself
Denise Barber	for Nirmal Gosal
Sudesh Manhas	Interpreter

### OVERVIEW

This is an appeal by Nirmal Singh Gosal (“Gosal”) or (“the Company”) operating as Nanaimo Airporter and Coast Limosine Services pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated March 27, 2002.

The Determination found Stanley Jarvis (“Jarvis”); was not given 32 hours away free from work each week; was not given 8 hours free between shifts; had split shifts that exceeded 12 hours; was not paid minimum daily guarantee on days when he worked less than four hours; had not been paid overtime for hours worked in excess of 8 hours per day or over 40 hours per week and was not paid statutory holidays. Gosal was in violation of Sections 33, 34, 36(1) and (2), 40, 44 and 45 of the *Act*.

It was determined Gosal owed Jarvis \$3,347.51 for minimum daily guarantee, overtime, statutory holiday pay, additional vacation pay and interest.

A penalty of \$0.00 was imposed.

Gosal filed an appeal with the Tribunal on April 17, 2002. Gosal claims Jarvis was left in the position of manager while he was in Vancouver. Further he claims there are 173 days in which there is a period of one hour or more where Jarvis had charged for wages and there are no details of activity during that period. He states copies of the trip sheets were included to show there is a gap in work of at least one hour. He asks the Tribunal to vary the Determination by 173 hours.

A hearing was scheduled for July 16, 2002 and during the preliminary matters it was found Gosal required an interpreter. He had invited a person to act as his interpreter however this person was not an independent authorized interpreter and the hearing was adjourned until a proper interpreter could be arranged by the Tribunal.

The hearing re-convened on July 23, 2002 with the assistance of an interpreter.

No copies of the trip sheets, the original complaint or Record of Employment for Jarvis were supplied to the adjudicator. The original trip sheets were brought to the hearing by the accounting firm however no copies were supplied to the parties or the adjudicator.

Evidence was taken from all parties.

At the hearing, Jarvis made a claim for compensation in lieu of notice for a layoff in July 2001. This had not been included in his original claim.

### **ISSUE**

Is Jarvis entitled to pay for hours worked, overtime, vacation pay and interest as outlined in the Determination?

Is Jarvis entitled to compensation in lieu of notice for the layoff?

### **THE FACTS AND ARGUMENT**

Jarvis was employed by Gosal as a driver at the rate of \$7.60 per hour. The Determination states Jarvis was employed from January 1, 1999 however that was in error. Jarvis did work a few hours in November and December of 1999. He started working a more regular schedule in January 2000 until November 2001. There was a brief period in 2001 in which Jarvis was unemployed, as Gosal had lost the contract at the airport. Gosal has two operations; one being a limousine service and the other a minibus service primarily to the Nanaimo Airport. Jarvis was hired to drive airport service vehicles and occasionally a limousine. The drivers received a higher rate when driving the limousine. The airport service was expected to service every scheduled flight to the airport and wait for delayed flights.

In the Determination Gosal claims that he should not have to pay overtime wages to Jarvis because the employee was submitting his own hours and writing his own pay cheques. He claims Jarvis told him not to worry about paying overtime especially during the period he was in Vancouver. He stated Jarvis asked for as many hours as he could get, as he needed the additional income.

In his submission dated February 22, 2002 to the delegate of the Director, Gosal states, in part:

1. Mr. Jarvis has been employed by Mr. Gosal since 1999. Mr. Gosal is East Indian and does not speak English very well so Mr. Jarvis offered to calculate the earnings and remittance for all employees including himself. Mr. Jarvis filed (sic) out the cheque stubs and prepared the payroll cheques on behalf of Mr. Gosal in accordance with the Labour Relations and CCRA regulations.....

Further in the letter of February 22, 2002 submitted with his appeal Gosal states when he went to Vancouver he “left Mr. Jarvis in charge and he was to manage the business and use employees so as not to incur overtime”. He argued Jarvis increased his work time substantially when he was away. Gosal states, in part: “We are not sure that all Mr. Jarvis’s hours can be confirmed as there was no one here to monitor him and his hours of employment, and he completed his own time sheets and pay calculations”.

In his submission to the Tribunal dated May 29, 2002 Gosal states, in part:

Mr Jarvis states, “he was not designated as a manager” yet Mr. Jarvis’s action of managing the business contradict his statement. If you review the cheque stubs, the majority of payroll calculations were completed by Mr. Jarvis, demonstrating that he completed the payroll in accordance with the time sheets he prepared and I just signed the cheques.

Also in his letter of February 22, 2002 Gosal states, in part:

When reviewing the trip sheets, you will see there are gaps of time of (sic) ranging up to hours. It was by agreement with Mr. Jarvis that these down times were for lunch and coffee breaks. Mr. Jarvis would often go home for lunch, yet he never shows a lunch hour on his time sheets and pays himself for lunch.

In his letter of appeal dated April 13, 2002 to the Tribunal Gosal states, in part:

I have reviewed almost all daily work sheets for the period in question and there is no mention of a dinner hour. The employee has in no case detailed any time taken for a dinner break yet the investigating officer states that 'he would detail when his dinner hour was'. There is no mention of time-off which the investigating officer gives no credit to.

Gosal argued in the same letter that Jarvis is not as meticulous in detailing his records as reported by the delegate.

"The employee stated that he used the down time to wash the vans, dispatch records and perform banking and payroll duties. In the case of fueling and duties such as that the employee has detailed that is what he is doing. If the employee was as detailed as the investigating officer makes him out to be why is this not detailed on the sheet. I submit that is because the employee was not performing such duties.

In the letter to the Tribunal dated May 29, 2002 Gosal states, in part:

Whether Mr. Jarvis refers to them as lunch breaks, dinner breaks or did not show anything during that period is irrelevant. The fact is that there were breaks in his time long enough to qualify for lunch breaks is the important thing. Based on my review of the tripsheets there was approximately 173 hours which were breaks long enough for lunch/dinner breaks on separate days. Therefore I ask again that 173 hours be removed from the amount outstanding.

Gosal claims in his appeal that at no time did Jarvis raise any issue regarding his employment until the potential sale of the business to Jarvis failed.

Jarvis claims he was instructed by Gosal to write a meal break on every time sheet even if he did not get one. Gosal was adamant about this and they at times argued about this point.

Jarvis claims he was not a manager. There was only one other driver and he was senior to Jarvis and knew the Gosal family well. Therefore no scheduling was necessary. While he admits there were a considerable number of trips by Gosal to Vancouver, they were seldom over one day and Gosal was in contact by telephone on a regular basis. Gosal was always available, as he had to sign the cheques.

He does admit doing the payroll from March 1, 2001 until May 31, 2001 and from July 1, 2001 until July 4, 2001. He claims Gosal told him to do the payroll when his family ceased to perform these duties or he would be fired.

Gosal claimed he had a number of drivers and said there were four or five. When asked to name them Gosal could not recall their names. The representative for the accounting firm that did the Company's books indicated they issued four to five T-4 slips per year but could not identify the classification or duties of the persons receiving the slips. There was a period of time when Gosal's family were involved

in the business however the son moved to Vancouver and Jarvis took over the payroll duties. That, according to Jarvis, reduced the staff from 5 to 2 regular drivers plus Gosal. There was another driver who could be called in however he did very little driving except for emergencies.

Jarvis states Gosal would send him home on many occasions after only one or two hours of work whenever Gosal decided to drive himself. There were also periods when he would only be scheduled to drive for one or two hours. Regardless of the circumstances he only claimed actual driving time rather than the four-hour minimum required by the *Act*.

When Jarvis was hired, Gosal told him he did not pay overtime. Jarvis claims there were many times he did not receive 32 hours free from work each week. There was one period when Gosal, the other driver and the emergency driver were away at the same time. As he was the only person driving he worked for 19 to 20 hours per day including Christmas Day at straight time.

Jarvis claims to have kept a very accurate log of his time. This was in addition to the company trip sheets. He recorded the time and address of pickup and drop off of customers and other duties such as washing the vans and refuelling them. It showed the time of refuelling and the number of litres of fuel. It also acted as a log-on, log-off for times he was not driving. Jarvis stated he did not claim for any time he was not working. He would calculate all the time he spent at work, subtract the time he was at home on call with a cell phone, and report only the actual driving time on his time sheets. He was paid straight time for these hours. The trip sheets would show he had started and ended his day with a greater number of hours than he actually claimed.

Jarvis claimed he had a fax machine in his home and received and sent reports from there to the dispatch office booking appointments.

The Company had access to a small office at the airport and the drivers would use that to do their paper work and reports. The office also had a fax and telephone and the drivers would standby there if waiting for the next flight. Jarvis states that the only breaks he had were between flights when he was sitting at the airport waiting on call. He claims that during this down time Gosal required him to wash vans, dispatch records, and perform banking and payroll duties. He was not paid for nor did he submit this time on his records.

There was a period when Gosal lost the contract for airport service. The drivers were effectively laid off during this period. We have no evidence of when Gosal recovered the airport contract. Jarvis claims he was laid off in July and returned to work for Gosal in October 2001. He worked eight days and quit.

At the hearing Jarvis made a claim for compensation in lieu of notice for the period he claims he was laid off in July.

## ANALYSIS

Clearly Jarvis was not a manager. There is no evidence Gosal told Jarvis or the other driver that Jarvis was a manager. I believe that started after Jarvis filed his complaint with the Employment Standards Branch (the "Branch"). In Gosal's February 22, 2002 letter he states, in part: ".....he was in essence the "payroll clerk" who was providing knowledgable (sic) advice to Mr. Gosal". I find that to be a more definitive term of Jarvis's duties than that of a "manager". Gosal has provided no evidence to establish Jarvis was a manager within the meaning of the *Act*.

Gosal claims he expected the drivers to only work eight hours and then go home. He did not order any employee to work overtime. Thus the claim by Gosal there were additional drivers becomes critical. When requested to name the other drivers Gosal could not recall their names. Without additional drivers it would not be possible to cover the period the airport was open without overtime. One must consider the first passengers were picked up more than one hour before the first flight in the morning and the service continued until the last flight of the day when the pilots were taken to their hotel. We have evidence Gosal's family did drive until some time before they moved. We have no evidence of the amount of driving they did and how it affected the hours of Jarvis. However, with only two drivers one would expect their hours would increase substantially.

Jarvis and the other driver shared the majority of driving with Gosal for the airport service. We did not receive any evidence of how the other driver was paid or whether his hours were similar to those of Jarvis.

The delegate, in the Determination states, in part:

All records reviewed during this investigation indicated that the employee:

Was not guaranteed 32 free hours from work each week and was not guaranteed 8 hours off between each shift

had shifts that exceeded 12 hours in a day

Was not paid overtime as required under the *Act*

The facts confirmed that the employer paid all hours of work at straight time including hours worked in excess of 8 per day or 40 hours per week.

Gosal does not argue that Jarvis worked overtime. His complaint is the amount of hours he reported and that Jarvis had agreed to work all hours for straight time. The provisions of the *Act* are minimums and an employer and an employee cannot agree to conditions less favourable than those provided by the *Act*. Therefore, even if Jarvis had agreed to work overtime for straight time it is a violation of the *Act*.

The main problem is in determining what Jarvis did when he was not picking up and dropping off customers. According to Jarvis this time was used for washing and vacuuming the vans, scheduling the next days pick-ups and being on standby either at home or at the airport. He also did scheduling from home as he had a fax machine to be in contact with the dispatch company. When questioned at the hearing, if Jarvis did not perform these duties, who did? Gosal had no evidence to the contrary. I find that evidence of Jarvis to be believable.

Gosal has no evidence, which disputes Jarvis's claim regarding the hours worked by him. He has reviewed the trip sheets and identified those periods of one hour or more when Jarvis is not reporting pickups and drop offs. Gosal signed all of the paycheques and claims he did not question the amount of time being submitted by Jarvis. It is difficult to believe an experienced businessman such as Gosal would not review the payroll he was signing. Also we have the uncontested evidence of Jarvis that he only did the payroll for about 3 months of the nearly 19 months he was employed. On reviewing the Wage Calculation Summary prepared by the delegate I find the increase in hours for Jarvis occurred during the week of July 09, 2000 and continued for the next 54 weeks, long past the time Jarvis claims he was doing the payroll. Either Jarvis was doing the payroll for the total period or someone else was preparing the payroll using the same approximate hours as reported by Jarvis.

Jarvis claims Gosal forced him to show a meal break on his time sheet each day, regardless of whether he was able to take the break. Gosal did not refute that statement. According to Jarvis, if it was possible to take a meal break he did not claim pay for that period and the time would be deducted from the hours reported. If he was required to work thru without a break, which occurred more often than not, he claimed for that time if he was actually driving.

In the response by the delegate to the Tribunal dated May 1, 2002 it states, in part:

On page one of Mr. Gosal's appeal submission, he indicates that my Determination states the employee "detailed" his lunch/dinner hours. I must apologize for the wording used. In fact the employee did not detail his "lunch/dinner hour" as such. What I meant to say, was that he would not include any period of time that he was not driving. He claims these gaps of time were periods when he was on call, with the company van, and cell phone turned on. The complainant did not charge the employer for these periods.

I have difficulty with the request by Gosal to reduce the amount owed by 173 hours. Gosal claims these periods of one hour or more were agreed to be used as lunch and coffee breaks. Jarvis disputes that indicating there was no such agreement, only the requirement he report a meal break each day. During the presentation by Gosal for the deduction of 173 hours I requested examples of times when the trip sheet showed breaks of one hour or more. Three separate trip sheets were presented and Jarvis was asked to explain those breaks. With the use of his daily logbook he was able to satisfactorily explain his hours and duties on those specific days. It basically showed Jarvis was performing other duties or the time was deducted from the daily total of hours. One example was the periods of standby at the airport waiting for the next flight. During this period both major airlines were using the airport and flights were more frequent which did not allow Jarvis to return home and book off. Jarvis claims he did not claim or get paid for that standby.

The submission by the delegate to the Tribunal dated May 12, 2002 states, in part:

The only hours that were calculated in the overtime wage calculation were the hours written down in the trip logs, detailing Mr. Jarvis's trips, and would include periods between flights, when Mr. Jarvis claims that he was generally performing duties for the employer. Even if Mr. Jarvis was not performing duties for the employer, but was waiting at the airport between flights, he is still entitled to be paid for this time.

The delegate, in the Determination states, in part:

With regard to the issue of minimum daily pay, there were many days in the employees and the employer's records that showed the employee worked and was paid for less than four hours.

All records reviewed during this investigation indicated that the employee:

Was not guaranteed the minimum daily pay as required under the *Act*

Gosal presented no evidence regarding the payment of daily minimum pay.

Jarvis kept a separate daily logbook on his activities and the information contained in that book, according to Jarvis, was recorded at the time it occurred. The delegate, in the Determination states, in part:

In reviewing the complainant's extensive records, it appears his method of calculating his hours was consistent.

I find that the employee's records appear quite authentic and accurate, and found that there were no obvious periods of time that the employee was charging the employer for time spent on a break when he shouldn't have been.

Prior to working for Gosal, Jarvis had been employed for over 28 years with two other employers as a "Security Personnel". The requirements of those positions were by the minute journalising, log entries, hourly log and shift activity.

Notwithstanding the confusion over the dates of when certain events occurred I am inclined to believe, on the basis of probabilities that the evidence of Jarvis is to be preferred over that of Gosal.

The delegate found the employer was not paying statutory holidays, which was evident on the payroll records. Gosal did not offer any evidence to dispute the fact he had not paid statutory holidays and that part of the Determination is confirmed.

The delegate appears to have done a careful and thorough investigation using both the employer and employee records to arrive at the Determination. There is responsibility on the appellant to prove the Determination is in error, either in fact or in law, and Gosal has failed in that regard and the remainder of the Determination is confirmed.

The undisputed evidence of Jarvis claims the Company lost the contract at the Nanaimo Airport on July 4, 2001 and the drivers were laid off without notice or pay in lieu of notice. We have no copy of a Record of Employment. Jarvis claims one was issued to him in August and he received EI therefore proving he did not quit but was laid off.

The claim for compensation in lieu of notice for the July layoff was not included in his original complaint with the Employment Standards Branch and as a result the delegate did not consider it in the Determination.

The Tribunal is not an investigative body. That is the role of the Director. Consequently, the Tribunal will not adjudicate claims that have not been first addressed by the Delegate. Therefore the Tribunal is without jurisdiction to consider the claim by Jarvis for compensation in lieu of notice. Moreover, Jarvis is out of time to file a complaint in any case (see Section 74(3) of the *Act*).



**ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated March 27, 2002. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**