

An appeal

- by -

Veena Maharaj

- 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:** Carol L. Roberts

**FILE No.:** 2002/227

**DATE OF HEARING:** August 15, 2002

**DATE OF DECISION:** September 3, 2002

## DECISION

### APPEARANCES:

Veena Maharaj	On her own behalf
For Tri-Force Security Services Ltd.:	Pat Stefiuk, Clover Creary

### OVERVIEW

This is an appeal by Veena Maharaj, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 17, 2001. Ms. Maharaj complained that Tri-Force Security Services Ltd. ("Tri-Force") failed to pay her all her wages owing, including regular wages at an amount in excess of what she was paid, overtime and statutory holiday pay, and compensation for length of service.

After investigating Ms. Maharaj's complaint, the Director's delegate concluded that Tri-Force had not contravened the *Act*, and closed the file.

### ISSUE TO BE DECIDED

Whether the Director erred in concluding that the *Act* had not been contravened. Ms. Maharaj contends that the delegate was biased against her, that he erred in concluding that she had not been wrongfully dismissed, and that he erred in determining both her correct hourly wage and the number of hours she worked. Ms. Maharaj abandoned her appeal in respect of her entitlement to reimbursement for uniform costs at the hearing.

### FACTS

The relevant facts are as follows.

Ms. Maharaj worked as a security officer for Tri-Force, a security service company, from June to October, 2000.

Ms. Maharaj alleged that she was dismissed without cause or notice, and was entitled to length of service compensation. Tri-Force contended that it had cause to dismiss Ms. Maharaj, or, in the alternative, that she quit. After referring to Ms. Maharaj's complaint letter to the Branch in which she stated she was not getting enough hours of work, the delegate concluded that Ms. Maharaj was an "on call" employee, and could accept employment offered by Tri-Force, or take employment with another employer. He determined that no compensation for length of service was owed.

In his determination, the delegate wrote that Ms. Maharaj provided him with a complaint form, pay stubs containing handwritten notes of where she disagreed with Tri-Force's records, but did not provide a record of the hours she worked.

Tri-Force provided the delegate with payroll records which indicated Ms. Maharaj' hours of work and gross wages paid. The records indicated that she was paid \$8.25 per hour. Ms. Maharaj contended that her rate of pay was \$9.00 per hour. The delegate relied upon the records provided by Tri-Force to calculate the overtime owed to Ms. Maharaj. The delegate concluded that

there does not appear to the (sic) any contract to pay any other rate than \$8.25 per hour. It may be that other employees would receive a different rate depending on a particular work site. The employer's records indicate the rate to be \$8.25 per hour.

The delegate concluded, after calculating wages and overtime, that the amount of \$67.52 was owed to Ms. Maharaj. That amount was paid to her before the Determination was issued, and the delegate concluded that no further amount were owing.

## **ARGUMENT**

### **Compensation for length of service**

Ms. Maharaj contends that she was hired as a full time employee, and that she was dismissed without notice, or cause.

Tri-Force submitted emails in which the CEO of Tri-Force, Allan Khan states that Ms. Maharaj should be dismissed for cause. It also submitted a memo setting out what purports to be a discussion between Ms. Maharaj and Clive Hamdorff, the personnel manager, on Thursday, November 2, 2000. It states that Ms. Maharaj was dismissed from Tri-Force on November 9. Although the document contains an illegible signature in the line adjacent to the manager's title, Ms. Maharaj's signature is not on the document. While Ms. Maharaj agreed that she and Mr. Hamdorff had a discussion about a number of issues, disciplinary action was never taken. She says that she did not quit, and that the that the Record of Employment ("ROE") establishes that she was dismissed.

Ms. Creary indicated at the hearing that she completed the ROE on the instructions of Mr. Kahn.

### **Hourly rate of pay**

Ms. Maharaj also contended that she was promised a wage of \$9.00 per hour by Mr. Hamdorff, but was unable to contact Mr. Hamdorff for confirmation of this evidence for the purposes of the appeal.

Tri-Force argued that ICBC paid different rates for guards, and that the \$9.00 per hour wage rate was applicable only to full time guards at the ICBC head office. It says that Ms. Maharaj was never assigned full time guard duties at that site, and further, that she had not completed the necessary training required for that rate of pay.

### **Hours of work**

At the hearing, Ms. Maharaj submitted her calendar, excerpts of which were enclosed with her appeal. She testified that she had provided that information to the delegate during the investigation. It is not referred to by the delegate at any point in the determination.

Ms. Creary testified that Ms. Maharaj would hand deliver or fax in her time sheets on a bi-weekly basis. Mr. Khan would review them, and alter the records based on Tri-Force's schedule. In some instances, Mr. Khan reduced the hours recorded to reflect what he felt Ms. Maharaj actually worked - i.e. he deducted 1 hour for Ms. Maharaj ostensibly reporting late, or 1/2 hour for a lunch hour that he was of the view she took, or ought to have taken.

Ms. Maharaj contends that Mr. Khan wrongfully altered her hours, and that she was not paid what she was entitled to. Ms. Maharaj stated that although she always complained to Mr. Hamdorff about the shortage of pay, and that he promised to investigate her complaints, he did not do so.

## **ANALYSIS**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met in part.

### **Hourly wage**

I am unable to conclude, on the evidence, that Ms. Maharaj was entitled to an hourly wage of \$9.00. There was no written contract between Ms. Maharaj and Tri-Force, and Ms. Maharaj was never paid \$9.00 per hour. Furthermore, in her May 23, 2001 letter to the delegate, Ms. Maharaj stated that Mr. Hamdorff promised her \$8.25 per hour, rather than the \$9.00 per hour she advanced at the hearing.

Ms. Maharaj also contended that she was to be paid \$9.00 per hour when she worked at ICBC locations.

I accept Tri-Force's evidence that the contract between Tri-Force and ICBC requires that Tri-Force pay a specified rate of pay only to full time employees permanently assigned to the ICBC head office. Ms. Maharaj was not permanently assigned to that office. Ms. Maharaj's own documents support Tri-Force's evidence in that regard.

### **Hours of Work/Length of service**

Although there was no written employment contract between the parties, Ms. Maharaj's bi-weekly time sheets demonstrate that she worked irregular hours. However, they also demonstrate that she worked, in essence, a 40 hour work week between July 2 and 29, and approximately 30 hour work week between July 30 and August 26. Work slowed down to approximately one half of that between August 27 and October 7, and then reverted to approximately a 30 hour work week between October 8 and 21.

Section 63 of the *Act* sets out an employer's liability for length of service. Section 65 sets out several exceptions to that statutory obligation. They include an employee:

- (a) employed under an arrangement by which
  - (i) the employer may request the employee to come to work at any time for a temporary period, and
  - (ii) the employee has the option of accepting or rejecting one or more of the temporary periods

Although the delegate did no analysis of the facts as they relate to the law or refer to this section of the *Act*, I infer that he concluded that Ms. Maharaj fell within the s. 65(a) exception.

The delegate characterized Ms. Maharaj as an "on call" employee. That has no definition under the *Act*. The delegate made no findings as to whether Ms. Maharaj was an employee, whether or not she was "on call". Part time and "on call" employees are not disentitled to compensation for length of service.

It appears that Ms. Maharaj had some expectation that she would work regularly, and indeed did so for most of her period of employment. The fact that Ms. Maharaj was issued an ROE lends some weight to her argument that she was an employee. Furthermore, there is no evidence as to whether Ms. Maharaj had the option of accepting or rejecting Tri-Force's shift assignments, or the consequences of her doing so.

Ms. Maharaj's RoE indicates that she was dismissed from her employment. The delegate conducted no analysis as to whether, if Ms. Maharaj was an employee, she was dismissed without length of service compensation.

I refer this matter back to the delegate for investigation and analysis.

I accept that Ms. Maharaj also provided the delegate with copies of her biweekly time sheets. Tri-Force acknowledged that the records they provided to the delegate as their working records were completed by Ms. Maharaj. Those unaltered records correspond to Ms. Maharaj's calendar. The delegate did not conduct any investigation into the rationale for Mr. Kahn's alteration to the records, or his justification for doing so. I also refer this matter back to the delegate for investigation as to whether Ms. Maharaj was paid what she was entitled to be paid.

## **ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination dated October 17, 2001 be sent back to the delegate for further investigation and analysis on the issues of whether Ms. Maharaj was an employee, if so, whether she was entitled to compensation for length of service, and whether Ms. Maharaj is entitled to regular wages, on an expedited basis.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**