

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 -

Vancouver Security Management Ltd.
And
Alvin Koh

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 98/275 & 98/279
DATE OF HEARING: August 28, 1998
DATE OF DECISION: September 8, 1998

DECISION

APPEARANCES

Sarjit Singh on behalf of Vancouver Security Management Ltd.

Alvin Koh on his own behalf

OVERVIEW

This decision deals with two appeals, one by Vancouver Security Management Ltd. (“VSML”) and one by Alvin Koh. Both appeals are made under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on April 8, 1998 by a delegate of the Director of Employment Standards.

The Director’s delegate determined that Alvin Koh was employed by VSML and that he is entitled to regular wages, overtime wages, vacation pay and statutory holiday pay amounting to \$3,276.42 (including interest). The Director’s delegate also determined that Alvin Koh was not dismissed by VSML and, therefore, is not entitled to compensation for length of service under Section 63 of the *Act*. VSML’s appeal is based on its submission that Alvin Koh was a contractor rather than an “employee” as defined in the *Act* and it seeks to have the Determination cancelled. Alvin Koh appeals only that aspect of the Determination in which the Director’s delegate found that he is not entitled to compensation for length of service.

A hearing was held on August 28, 1998 at the Tribunal’s offices. Evidence was given under oath. When I asked VSML’s representative to state his full name as part of the witness’ affirmation he testified that his “official name” is Sarjit Singhand that he has several aliases, as follows: Sarjit Singh Dennis; Sarjit Singh Dhaliwal; Dennis S. Sarjit; and Sarjit S. Dennis.

ISSUES TO BE DECIDED

Did the Director’s delegate err in determining that Alvin Koh was an employee and that he was not entitled to compensation for length of service under Section 73 of the *Act*?

FACTS

There is no dispute that Alvin Koh performed security services for VSML from June 19, 1997 to October 5, 1997. There is also no dispute that he was paid \$8.00 per hour for most of those services although he was paid \$9.00 per hour, \$10.00 per hour or \$12.00 per

hour on those occasions when he worked at a specific location. He was paid a total of \$6,521.00 during the relevant period.

The Determination sets out VSML's position that Alvin Koh was a self-employed contractor and its submissions in support of that position. There is also a complete set of reasons which sets out why the Director's delegate determined that Mr. Koh was an "employee" as defined by the *Act*. In deciding that Mr. Koh was an "employee", the Director's delegate considered the statutory definition of "employee" and "employer", the provisions of Section 4 of the *Act* (requirements of this *Act* cannot be waived) and the following four factors:

1. Control: The employer had the power and right to select, suspend, or dismiss the complainant. He has the right to control the method in which the job is carried out and sets the payment scale for wages or other remuneration to the complainant.
2. Integration: The work performed by the complainant is an integral part of the employer's operation and the complainant was an integral part of the organization. An ordinary person would view the relationship as one of employer and employee.
3. Economic reality: The complainant did not bear any risk of loss with respect to the activity. Neither did he have the opportunity to make a profit. The complainant did not provide similar service to another company while in the employ of the employer, nor was he involved in other business activities at the same time.
4. Nature of work performed: The complainant was not engaged to provide a single service leading to a specific result as is the case if he was an independent contractor. Rather he was employed to provide personal service for an indefinite period of time.

On the question of Mr. Koh's entitlement, to compensation for length of service, under Section 63 of the *Act*, the Director's delegate gave the following reasons in the Determination:

... I doubt that the complainant was threatened by the employer, as alleged, to the extent that he was afraid to report to work, I am convinced by the evidence that he was in the process of seeking alternative employment and on a balance of probabilities, I find that he did not make himself available for work and consequently the employer was justified to treat the complainant as having left its employment. I, therefore, find that the complainant is not entitled to any compensation for length of service.

An "Overtime Calculation Report" was attached to the Determination and it set out Mr. Koh's daily hours of work, hourly wage rates, calculations of total wages earned and the total amount of wages owing to him.

VSML's written Reasons for its appeal, signed by Dennis S. Sarjit, contains several statements which are particularly relevant:

"Prior to commencing work for Vancouver Security, a wage was negotiated with Mr. Alvin Koh. The wage of \$8.00 per hour was slightly more than the minimum wage and close to the \$10.00 per hour Vancouver Security received for the contract."

"Alvin Koh was given as much work as he could handle, all the time knowing that he was being paid a flat rate of \$8.00 per hour."

"Alvin Koh did work long hours, however he requested this and knew full well that he was being paid a flat rate of \$8.00 per hour."

"We did not treat Alvin Koh unfairly or pay him unjustly. We paid him a good wage relative to what we received from our clients."

At the hearing, Sarjit Singh made the following points on behalf of VSML in support of its submission that Mr. Koh was not an employee:

- Mr. Koh was paid more than the minimum wage required by the *Act* and *Regulations*;
- Mr. Koh was paid a different wage rate when he worked at different locations;
- Mr. Koh wished to be paid as a self-employed contractor;
- The Determination is unfair because the Director's delegate had a conflict of interest because he came from the same country as Mr. Singh and Mr. Koh;
- VSML had no control over the number of hours worked by Mr. Koh;
- If VSML had control over Mr. Koh's hours of work, it would not have scheduled him to work so many hours.

I was provided with copies of VSML's invoices to its clients for security services provided at those locations where Mr. Koh worked. I was also provided copies of invoices by which VSML paid Mr. Koh for his services under the terms of a "Security Subcontract Agreement". All of the invoices which were introduced into evidence appear to have been written by the same person (the hand-writing is identical).

Mr. Koh testified that although his last day of work was October 5, 1997 his employment with VSML was not terminated until October 19, 1997. It was on that day, he testified, that

Mr. Singh arranged to meet him at 101 West Hastings Street, the vacant building formerly occupied by Woodward's Stores. When they met, Mr. Singh presented him with a "Security Subcontract Agreement" dated June 1, 1997 as well as six invoices (variously dated June 30, 1997; July 30, 1997; August 30, 1997; 2 x September 30, 1997 as well as one undated invoice). Following a "heated argument" in which he refused to sign any of the documents, Mr. Koh testified, he did sign them under duress after Mr. Singh threatened him. He testified that he was fearful because they were meeting in a vacant building and the doors were locked.

Mr. Singh did not cross-examine Mr. Koh about his testimony on the meeting noting that he had "... nothing further to add."

ANALYSIS

Section 114(1)(c) of the *Act* allows the Tribunal to dismiss an appeal if it is "...frivolous, vexatious or trivial or is not brought in good faith." Black's Law Dictionary (6th edition) defines "frivolous" as:

A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

Similarly, a frivolous appeal is defined as "...one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed."

VSML's appeal is based on its submission that Mr. Koh was a contractor rather than an "employee" under the *Act*. As an appellant, VSML bears the onus of establishing that the Director's delegate erred in determining that Mr. Koh was an "employee." To have some prospect of meeting that onus VSML must submit some evidence or argument which challenges the material points in the Determination. When I review the Determination, I find that VSML's appeal is devoid of merit because it has not made any submission nor given any evidence to challenge or controvert the material of fact and reasoning by the Director's delegate in the Determination. Furthermore, in its written Reasons for the appeal, VSML acknowledges that it negotiated an hourly wage rate with Mr. Koh and that it paid Mr. Koh "... a good wage" relative to the fees it charged its clients for security services.

In the absence of any evidence to the contrary, I confirm the finding made by the Director's delegate that Mr. Koh was an employee of VSML from June 19, 1997 to October 5, 1997. Similarly, there are no grounds on which to disturb the calculations made by the Director's

delegate concerning Mr. Koh's entitlement to regular wages, overtime wages, vacation pay and statutory holiday pay.

That leaves one issue to be decided - Mr. Koh's entitlement to compensation for length of service under Section 63 of the *Act*. I find that the Director's delegate erred in determining that Mr. Koh is not entitled to compensation for length of service.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

On the evidence before me, I find that Mr. Koh did not resign from his employment with VSML. Thus, under Section 63 of the *Act*, VSML is liable to pay compensation for length of service unless it can establish that it terminated Mr. Koh's employment for "just cause." There is nothing in the evidence or submissions which seeks to establish that VSML had "just cause" to terminate Mr. Koh's employment. Therefore, VSML is liable to pay one week's wages to Mr. Koh as compensation for length of service under Section 63(1) of the *Act*.

Mr. Koh's hours of work varied considerably from week to week during his employment. The "Overtime Calculation Report" which was attached to the Determination shows the following hours of work and wages during the last 8 weeks of his employment:

<u>Week Ending</u>	<u>Total Hours Worked</u>
October 4, 1997	29.5
September 27, 1997	32
September 20, 1998	76.5
September 13, 1997	79
September 6, 1997	72
August 30, 1997	93
August 23, 1998	27
August 16, 1997	<u>60</u>
Total # Hours Worked During Last 8 Weeks of Employment	469

The total number of hours generates an average of 58.6 hours per week. Mr. Koh's "regular wage" was \$8.00/hour. Thus, his entitlement to one week's wages as compensation for length of service amounts to \$469.00 to which 4% vacation pay must be added to give a total of \$487.76.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to include Mr. Koh's entitlement to compensation for length of service in the amount of \$487.76 (including 4% vacation pay) as set out above.

Geoffrey Crampton
Chair
Employment Standards Tribunal