

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-

Kulwinder Kaur Atwal

(“Atwal”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/477

DATE OF HEARING: August 27th, 1997

DATE OF DECISION: September 5th, 1997

DECISION

APPEARANCES

Kulwinder Kaur Atwal	on her own behalf
Kausar Chaudhry and Shahid Chaudhry	for Lahore Sweets & Restaurant Ltd.
No appearance	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal brought by Kulwinder Kaur Atwal (“Atwal” or the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on June 9th, 1997 under file number ER 060-353 (the “Determination”). The Director determined that Lahore Sweets & Restaurant Ltd. (“Lahore” or the “employer”) owed Atwal, its former employee, the sum of \$1,100.97 on account of unpaid wages.

Atwal’s appeal is based on the assertion that she is entitled to substantially more wages--her original claim exceeds \$4,500--than were awarded to her in the Determination.

The appeal hearing was held at the Tribunal’s offices in Vancouver on August 27th, 1997 at which time I heard testimony from Kausar and Shahid Chaudhry (officers, directors and shareholders of Lahore), on behalf of the employer, and from Atwal, Jaswinder Bhindra, Nachatter Kaur and Preetpaul Atwal, on behalf of the appellant. The appellant, was well as all of her witnesses, testified through a certified Punjabi interpreter.

FACTS

Lahore operates a small (20 tables) restaurant in North Delta offering traditional Indian cuisine. The restaurant is essentially family-run although there are usually two or three other employees on staff. The restaurant opened for business in late September 1996.

Atwal’s evidence is that she was employed as a kitchen cook/assistant with Lahore from October 25th, 1996 until December 24th, 1996. She says she was hired at wage rate of \$7 per hour and that she worked twelve or so hours each day and approximately six days each week during her period of employment with Lahore. At the hearing, Atwal presented a calendar onto which she had recorded her daily hours. I note that although Atwal purports not to speak english (her evidence was given through a certified interpreter), the notations on this calendar are in english and appear,

based on a sample of Atwal's handwriting that I requested during the hearing, to be in someone else's hand.

Atwal called a friend and former Lahore employee, Jaswinder Bhindra, who testified as to Atwal's typical work day--10:00 A.M. to 9:00 P.M. or later (to midnight or even 1:00 A.M.) on most days. Ms. Bhindra only worked at Lahore from November 6th to 12th, 1996 and she says that she was never paid for her labour although she was supposed to be paid \$800 per month--Ms. Bhindra never filed an unpaid wage complaint with the Employment Standards Branch. Atwal's mother and husband also testified that Atwal worked extremely long hours during her tenure at Lahore.

Mr. and Mrs. Chaudhry testified that Atwal typically reported for work each day around 11:00 A.M. and left about 6:00 P.M. and that she worked five or six days each week. The Chaudhrys testified that Atwal never worked more than 8 hours in a day. The employer, contrary to the *Act*, did not pay Atwal twice each month and did not maintain any proper payroll records. The Chaudhrys testified that they paid Atwal on two occasions, both times in cash, in the amounts of \$1,000 and \$400, respectively. While the employer was able to produce a receipt acknowledging payment of the \$1,000 cash payment (on December 6th, 1996) there is no receipt for the \$400 payment allegedly made in November 1996. Atwal acknowledges receipt of the \$1,000 payment but denies receipt of the \$400 payment.

Atwal testified that she quit her employment with Lahore out of frustration arising from the employer's failure to pay her wages; the employer says that it terminated Atwal for cause.

ANALYSIS

This appeal, in the absence of any credible records from either party, must be resolved on the basis of the parties' relative credibility. This approach, too, is problematic in that I find both Atwal's and the Chaudhry's evidence to be unsatisfactory. As previously noted, there are no credible contemporaneous payroll records upon which I can base a reasoned conclusion. Finally, none of the witnesses stands independent from the two parties.

I do not believe that Atwal was regularly working as late as she testified; on the other hand, I do believe that she worked somewhat longer hours than acknowledged by the employer. Having considered the evidence in its totality, I am of the view that, on the balance of probabilities, Atwal worked 8 hours per day, 6 days per week, during the period of her employment. Her basic wage rate for these hours worked was agreed to be \$7 although she is entitled to weekly overtime pay where applicable. I further find that the only money paid to her was a cash payment on or about December 6th, 1996 in the amount of \$1,000.

Atwal's wage claim may be summarized as follows:

<u>Week Beginning</u>	<u>Wage Claim</u>	<u>Weekly Overtime Claim</u>
October 20th	2 days	Nil

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October 27th	6 days	1 day
November 3rd	6 days	1 day
November 10th	6 days	1 day
November 17th	6 days	1 day
November 24th	6 days	1 day
December 1st	6 days	1 day
December 8th	6 days	1 day
December 15th	6 days	1 day
December 22nd	3 days	Nil

In addition to “base” and overtime hourly pay, Atwal is also entitled to vacation pay pursuant to section 58(3) of the *Act* and interest pursuant to section 88 of the *Act*. As noted above, the employer is entitled to a credit for the \$1,000 cash payment made in early December.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied in accordance with the findings of fact set out herein.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal