



An appeal

- by -

Ashoka Canadian & Indian Cuisine Inc. operating as Ashoka Restaurant and
Khalsa Developments Ltd. operating as Quality Hotel Harrison Hot Springs and
Surinder Singh Grover operating as Harrison Grill

-and by-

Ripudaman Singh Malik Director/Officer of Khalsa Developments Ltd.
operating as Quality Hotel Harrison Hot Springs

- 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: Ib S. Petersen

FILE No.: 2001/361 and 2001/362

DATE OF HEARING: August 9, 2001

DATE OF DECISION: August 16, 2001

DECISION

APPEARANCES:

Mr. David Unterman	counsel, on behalf of Khalsa and Ripudaman Singh Malik
Ms. Gurpreet Nigah	on behalf of herself
Ms. Harjit Dhaliwal	on behalf of herself
No one	on behalf of the Director

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against two Determinations of the Director issued on April 12, 2001.

The first Determination concluded that a number of employees, including Nigah and Dhaliwal, were owed \$9,168.29 by the Employer, Ashoka Canadian & Indian Cuisine Inc. operating as Ashoka Restaurant, which operated a restaurant between May 2000 and September 30, 2000, on account of wages, overtime wages, statutory holiday pay, vacation pay and compensation for length of service. The Determination concluded, as well, that Khalsa, which operated a hotel, from which the Employer leased restaurant space and equipment, and Surinder Singh Grover, which, according to the Determination subsequently operated a restaurant under the name Harrison Grill, and the Employer were associated companies under the *Act* (Section 95). In the result, the associated companies were jointly and severally liable for outstanding wages. The second Determination concluded that Malik was liable as a director or officer of Khalsa for the amount set out above.

ISSUES

As I noted at the hearing, the issues before me largely boils down to the following:

1. Is Khalsa an associated company?
2. If the first question is answered in the affirmative, was Khalsa given an opportunity to participate in the investigation?
3. If it was, are the amounts awarded to the employees correct?
4. Is Malik liable as a director or officer of khalsa?

For the reasons set out below, I have only found it necessary to deal with the first issue, that of associated companies.

FACTS

The material facts are relatively straightforward and largely not in dispute.

Khalsa leased space and equipment to the Employer, which operated a restaurant on its hotel premises. Khalsa was the Employer's landlord. There was no overlap between Khalsa and the Employer with respect to shareholders, officers or directors. The restaurant Employer had two principals, Amrita Grover and Mohinder Singh Kaur. Khalsa is owned by Malik and his wife. They are the officers and directors of that company.

One of the principals of the Employer, Amrita Grover, was a longtime friend of Hardeep Malik, the appellant Malik's son, and the general manager of the hotel. The evidence was that Grover had full-time employment in the lower mainland and was, therefore, frequently absent from Harrison. The principals of the Employer agreed to give Hardeep Malik signing authority to allow him to co-sign cheques, including paycheques. The latter agreed to do this as a personal favour to Grover. The Employer's cheques required two signatures, i.e., the both of the principals or one of the principals and Hardeep Malik. Hardeep Malik testified, and this was not contradicted, that he had nothing to do with the operation of the restaurant and he did not exercise any control or direction over its operation. The only link, according to the Determination, between Khalsa and the Employer, apart from the landlord-tenant relationship, was Hardeep Malik's signing authority with respect to the Employer's cheques.

At the hearing, Nigah testified that the restaurant for the first few weeks used the hotel's Visa machine to process credit card payments. Subsequently, the restaurant got its own machine. Dhaliwal also testified that Hardeep Malik from time to time came into the restaurant kitchen and asked them "how's it going." Both employees explained that they worked long hours and were owed wages. From the standpoint of "associated companies," nothing turns on this evidence.

The restaurant Employer was in operation between May and September 2000 and closed its doors on October 1. The delegate found that the Employer had failed to pay its employees as required under the *Act*.

ANALYSIS

Khalsa and Malik appeal the Determinations. As the appellants they have the burden to persuade me that the Determination is wrong.

At the hearing, Khalsa and Malik were represented by counsel. Nigah and Dhaliwal attended, as well, and, given their limited English, were assisted by an interpreter. The Director's delegate

was not present. It is clear to me that, in the circumstances, Nigah and Dhaliwal were ill-equipped to deal with the legal issue of associated companies and the proper application of Section 95 of the *Act*. Since the resolution of this matter fundamentally turns on this issue, it would have been appropriate for the delegate to be present.

I have little hesitation in concluding that the Delegate erred in his conclusion that Khalsa was an associated company with the Employer and, therefore, that Malik may be liable.

Khalsa and Malik relies on the decision of the British Columbia Court of Appeal in *Ewachniuk v. British Columbia (Director of Employment Standards)* (1998), 60 B.C.L.R. (3d) 245. In that decision, the Court of Appeal had occasion to deal with the predecessor to Section 95 of the current *Act*, namely Section 20 of the former *Employment Standards Act*. The two statutory provisions are similar. In that case a restaurant was operated through a company. The owner of the premises (the “landlord”) leased space to the restaurant and was a 50% shareholder in the company. Moreover, the landlord contributed financially to the restaurant and paid for renovations and television advertisements. Until a few months before the restaurant ceased operations, the landlord was a director of the company. However, he did not take any part in the day-to-day running of the restaurant, had no keys to the premises, had no involvement in the hiring and firing of employees, and did not sign paycheques. Based on Section 20 the former *Act*, the Director considered the landlord liable and issued a certificate for unpaid wages owing to employees. The certificate was appealed to the Supreme Court of British Columbia on a “trial *de novo*” basis. The Supreme Court upheld the appeal and the Court of appeal agreed. The fact that the restaurant could not have continued in business without the financial support from the landlord was not sufficient. The landlord did not exercise the degree of control necessary to bring him within Section 20 of the former *Act*.

In my view, this case is on point. In fact, in the circumstances, it is clear that the landlord in *Ewachniuk, above*, had a much greater involvement in the business than is the case here. There is nothing to support an argument that Khalsa, Hardeep Malik or Malik took any part in the running of the restaurant, were involved in the hiring and firing of employees or, in fact, exercised any degree of control over the operations of the restaurant. This is the uncontradicted evidence before me. The only link between the hotel and the restaurant, apart from the arms length landlord-tenant relationship, is the fact that Hardeep Malik co-signed cheques, including paycheques, for the restaurant. The uncontradicted evidence was that Hardeep Malik co-signed cheques when one of the two partners were not present and that he did so as a favour to one of the partners, a longtime friend. His signing authority could be taken away at any time. He did not sign all cheques for the restaurant; some cheques were signed by the two partners in the restaurant. He never refused to sign cheques presented to him for signature. He explained that he would only question cheques if they were for large amount or they were made out to one of the partners. The signing of cheques had nothing to do with his employment at the hotel.

In short, I do accept the delegate's conclusions and uphold the appeal by Khalsa and Malik. Accordingly, I set aside the conclusion that Khalsa is an associated company of the Employer and that it or Malik is liable for the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 12, 2001, be confirmed in part. I uphold the Determination against the Employer, Ashoka Canadian & Indian Cuisine Inc. operating as Ashoka Restaurant, the Employer, in the amount of \$9,168.29 plus interest. I cancel and set aside the Determination that Khalsa is an associated company of the Employer and that it or Malik is liable for the wages owed under the Determination.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal