

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 -

Lal Singh Dhinjal
("the appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Sherry Mackoff

FILE No.: 97/517

DATE OF HEARING: October 27, 1997

DATE OF DECISION: November 7, 1997

DECISION

OVERVIEW

This is an appeal by Mr. Lal Singh Dhinjal (“the appellant”) under Section 112 of the *Employment Standards Act* (the “Act”) from Determination CDET No. 006437, dated June 18, 1997, issued by a delegate of the Director of Employment Standards. The delegate concluded that Mr. Dhinjal was an independent contractor and not an employee of Matharu Enterprises Ltd. (“Matharu Enterprises”) The delegate accordingly dismissed Mr. Dhinjal’s complaint that Matharu Enterprises had failed to pay wages in accordance with the Act.

The appellant seeks to have the Determination cancelled. It is his position that he was an employee of Matharu Enterprises. He claims that he is entitled to the following, less the amount of \$5500.00 that he has already been paid: 529 hours at \$20.00 per hour; 68.5 overtime hours at \$30.00 per hour; compensation in the sum of \$1000.00 for the use of his air and power tools; and approximately \$950.00 that he paid for the rental of various tools.

It is the position of Matharu Enterprises that the appellant was an independent contractor; that he was paid in full and that no further money is owing to him.

A hearing was held at the Vancouver office of the Employment Standards Tribunal on October 27, 1997. Mr. Dhinjal appeared on his own behalf. He gave evidence and called one witness, Mr. H. S. Wadhwa. Mr. Harcharn Singh Matharu, the president and majority shareholder of Matharu Enterprises, appeared on behalf of Matharu Enterprises. Mr. Matharu gave evidence through a certified interpreter.

In almost every respect, the evidence given by Mr. Dhinjal and Mr. Matharu conflicts sharply.

ISSUES TO BE DECIDED

- 1) Was Mr. Dhinjal an independent contractor or an employee of Matharu Enterprises?
- 2) If Mr. Dhinjal was an employee of Matharu Enterprises, is he owed any wages?

FACTS

Mr. Dhinjal is a carpenter and has been a carpenter for thirty-two years. He is a member of the Carpenters’ Union. When he is not working on a union job he works wherever he can. By way of background I would note that in 1993 and 1994 Mr. Dhinjal and two other

people ran a business, N.D.C. Construction Ltd. This company was in the business of framing houses. The appellant stated that N.D.C. Construction Ltd. ceased its framing business because the three people involved in the company did not get along.

The dispute that forms the basis for this appeal arises from work that Mr. Dhinjal did at the Red Rose Furniture site at 13140 80th Avenue, Surrey. Matharu Enterprises was the general contractor and the project involved turning a one-floor warehouse into a two-floor warehouse.

It is Mr. Dhinjal's evidence that he was employed by Matharu Enterprises to work on the "Red Rose" job from July 16, 1996 until October 7, 1996. He stated that he was first approached by Mr. Matharu to prepare an estimate, and that when Mr. Matharu was later successful in obtaining the job, he asked the appellant to work as the carpentry foreman.

It is Mr. Dhinjal's evidence that Mr. Matharu agreed to pay him \$20.00 per hour, \$30.00 per hour overtime and that Mr. Matharu agreed to compensate Mr. Dhinjal for the use of his power and air tools. It is Mr. Dhinjal's evidence that Mr. Matharu agreed to pay the rate that a rental company would charge for the tools.

Mr. Dhinjal said that he did not want to be a subcontractor. He stated he refused to sign an "Agreement" that Mr. Matharu prepared (exhibit #1) that provided that Mr. Dhinjal would work as a subcontractor for Matharu Enterprises. The "Agreement" states in part: "All jobs where Mr. Dhinjal has been given sub-contract, he will be fully responsible to finish the jobs. All contract where both parties have entered, all profits and lose will be split 50:50 ratio."

It is Mr. Matharu's evidence that Mr. Dhinjal contacted him and asked him if he had work. Mr. Matharu told the appellant that he did have work and that he had to bring his own tools. According to Mr. Matharu the agreement with Mr. Dhinjal was that he would get \$5500.00 for framing and finishing at the Red Rose job.

Mr. Matharu stated that there was no agreement to pay \$20.00 an hour or \$30.00 an hour overtime. Moreover, according to Mr. Matharu, exhibit #1 was not prepared by Mr. Matharu and must have been prepared by Mr. Dhinjal.

Mr. Matharu stated that Mr. Dhinjal started work at the Red Rose job on July 16, 1997 and finished on August 25th or 26th, 1997.

According to Mr. Dhinjal the carpentry work at the Red Rose job was done by employees of Matharu Enterprises. However, all of the other work at the warehouse (electrical, air-conditioning etc.) was subcontracted out. Leaving aside the carpentry, both the appellant and Mr. Matharu agreed that all of the work at the Red Rose site was contracted out.

Mr. Dhinjal testified that Matharu Enterprises had several employees involved in the carpentry. Mr. Matharu worked full-time on the carpentry and picked up materials. Mr. Matharu's son, Avtar Matharu, worked 114.5 hours and there were four carpenter's

helpers. According to Mr. Dhinjal one of the helpers, Gurdail Singh Grewal, worked a significant amount of time - 464 hours. The other helpers' time on the job ranged from a couple of days to a week.

Mr. Dhinjal testified that because he was the foreman he was asked to keep time records for the employees doing the carpentry. The handwritten columns of hours contained in the appellant's notebook (exhibit #4) include a record of hours for Mr. Matharu. When I asked Mr. Dhinjal about two numbers that appeared in the time records, he told me that the numbers did not refer to the Red Rose project, but referred to renovations done to the Rangeela Dance School. He stated that he, along with Mr. Matharu and Gurdail Grewal, worked for several days renovating the dance school.

Mr. Matharu's evidence again conflicts with the appellant. It was Mr. Matharu's evidence that the only employees on the Red Rose site were himself and his son and that the only people involved in the carpentry were himself, his son and the appellant. He stated that he never asked Mr. Dhinjal to keep a record of his own hours or of anyone else's hours.

Mr. Dhinjal used his own tools on the Red Rose job. That is one of the few facts in this case that is not in dispute. The appellant claims that Mr. Matharu agreed to pay him "rent" for the use of his power and air tools. He claims that Mr. Matharu agreed to pay what a rental company charges and that would be approximately \$1000. It was Mr. Matharu's position that everything was included in the \$5500.00.

The appellant also testified that he rented tools for the Red Rose job from B.C. Rentals and paid for them with his own Visa charge card.

Mr. Dhinjal produced photocopies of invoices from B.C. Rentals. The invoices are in Mr. Dhinjal's name and he claims that they relate to the Red Rose project. Some of the invoices are for significant amounts. For example, the invoice dated July 26, 1996 is for \$202.92. Another invoice, dated September 10, 1996, totals \$285.48. On close examination the invoices show not only rentals, but purchases (for nails etc.) as well.

Mr. Dhinjal stated that he rented the tools because Mr. Matharu told him to rent the tools. Mr. Matharu testified that he never asked Mr. Dhinjal to rent any tools from B.C. Rentals.

Mr. Dhinjal produced photocopies of several Visa statements. The statement dates are April 8, 1996, August 8, 1996, September 9, 1996 and October 7, 1996. The August, September and October statements show various transactions with B.C. Rentals Ltd. The April statement has charges from Coast Building and Valley Rentals. Mr. Dhinjal stated that in March, 1996 he worked on a job in Langley for Mr. Matharu and the items on his April Visa bill that refer to Coast Building and Valley Rentals relate to the Langley job. Mr. Dhinjal stated that because Mr. Matharu did not have his cheque book, Mr. Dhinjal paid for the supplies at Coast Building. I would note that the amount charged at Coast Building was \$979.71.

Mr. Dhinjal received \$5500.00 for his work on the Red Rose job. He received a cheque for \$1000.00 on July 27, 1996 and a cheque for \$1000.00 on August 10, 1996. Mr. Matharu produced photocopies of two cheques (exhibit #8). One cheque is dated September 3, 1996 and is for \$1500.00. The other cheque is dated September 27, 1996 and is for \$2000.00. It

has the words "Final Payment" on it.

Mr. Dhinjal never received a pay stub from Matharu Enterprises. Matharu Enterprises made no remittances to the Receiver General on behalf of Mr. Dhinjal.

Mr. Dhinjal said that there was no agreement as to hours per day or days per week. He stated he usually worked eight hours a day. He testified that Mr. Matharu set his daily hours and decided when he should go home. The start time was usually 7:30 a.m. or 8:00 a.m. and the finish time was 4:30, 5:00 or 6:00 p.m. Mr. Dhinjal took days off in August: August 3rd to 5th and August 19th to 23rd.

According to Mr. Matharu, Mr. Dhinjal set his own hours and Mr. Matharu did not keep a record of Mr. Dhinjal's hours.

Mr. Dhinjal testified that Mr. Matharu controlled the work site. Mr. Matharu decided how and when the work would be done. When Mr. Matharu was not on site Mr. Dhinjal directed the work site.

Mr. Matharu stated that he had control of the work site and would give instructions to the subcontractors.

Mr. Matharu testified that he worked with Mr. Dhinjal; that they did the framing together. He testified that they both decided how the framing would be done and that they shared ideas.

During the course of the appeal Mr. Dhinjal alleged that Mr. Matharu owed money to suppliers and subcontractors that worked on the Red Rose project. His witness, Mr. Harsukhdip Singh Wadhwa, is the owner of Tempo Electric Ltd., the company that did the electrical work on the Red Rose job. Mr. Wadhwa testified that he has not been paid by Mr. Matharu.

Mr. Wadhwa stated that he was on and off the site for approximately three months. During that time he saw Mr. Dhinjal working as a carpenter. He also saw Mr. Matharu, his son Avtar, once or twice, and an old man who was working as a carpenter's helper. Mr. Wadhwa said he saw the helper frequently while the rough carpentry work was being done.

ANALYSIS

Was Mr. Dhinjal an employee of Matharu Enterprises or was he an independent contractor?

Section 1 of the *Act* defines the words “employee” and “employer” and these definitions must be given a liberal interpretation. There is, however, no single test for determining whether a person is an employee or an independent contractor. In each case, all of the

circumstances must be considered to determine whether or not a relationship is one of employment.

Numerous considerations have been used to differentiate between employee and independent contractor status. Moreover, the weight to be attached to the relevant factors will vary from case to case. Some of the factors include: 1) “the degree of control that the party for whom the work is being done has over the activities of the party conducting the actual work.” [see: *Castlegar Taxi (1988) Ltd. v. British Columbia (Director of Employment Standards)* 58 BCLR (2d) 341 at 345.] 2) whether the person performing the work uses his own equipment 3) whether the person doing the work has a chance of profit or whether there is a risk of loss 4) whether the person performing the work is an integral part of the business 5) whether the individual does work for more than one person 6) whether the individual hires his own helpers.

The very sharp discrepancies in the evidence provided by Mr. Dhinjal and Mr. Matharu make this a difficult case. However, on an appeal of a Determination the onus is on the appellant to satisfy the Tribunal that the Determination is wrong and I am not persuaded that the appellant has shown, on a balance of probabilities, that the Determination should be cancelled.

Because the evidence is contradictory, I am unable to determine what degree of control, if any, Mr. Matharu exercised over the appellant’s work. However, what is not in dispute is that all work, other than carpentry, was done by subcontractors. Moreover, the payments that the appellant received did not conform to common employment pay periods and no remittances were made to the Receiver General on his behalf.

It is not in dispute that the appellant used his own tools. Moreover, he stated that he brought his own air and power tools to the site and expected to receive compensation for their use. He is claiming \$1000.00 for the “rental” of these tools.

As well, the appellant stated that he placed tool rental charges on his own Visa bill and he claims reimbursement for those charges. In my view an employee would not run up personal bills in the sum of hundreds of dollars for tools and materials on behalf of an employer. Not only did the appellant say that he had used his personal credit card for the Red Rose job, but he stated that he had used his credit card for work done for Mr. Matharu in Langley.

The fact that the appellant used his own tools, that he claims a rental charge for his air and power tools and that the appellant claims reimbursement for the tool rental charges that he put on his Visa have persuaded me that he was an independent contractor and not an employee.

Having reached this conclusion, I need not address the second issue.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination CDET No. 006437, dated June 18, 1997, be confirmed and that the appeal be dismissed.

Sherry Mackoff
Adjudicator
Employment Standards Tribunal