

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 -

Lovely Sweets Ltd. operating as Shagun Sweets
("Lovely Sweets" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen
FILE NO.: 99/197 and 99/199
HEARING DATE: October 8, 1999
DECISION DATE: October 19, 1999

DECISION

APPEARANCES

Mr. E. Ajit Saran	on behalf of Lovely Sweets
Ms. Rupinderpal Dhaliwal	on behalf of herself

OVERVIEW

This is an appeal by Lovely Sweets and Mr. Kamal Mroke (“Mroke”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations of the Director of Employment Standards (the “Director”) issued on March 12, 1999. The Determination against Lovely Sweets (the “Corporate Determination”) concluded that three employees, including Ms. Rupinderpal Dhaliwal (“Dhaliwal”), were owed \$7,999.04 on account of wages, overtime wages and vacation pay. The Determination against Mroke found that as a director of the Employer, he was liable for \$5,752.09.

The Employer and two of the complainant Employees settled their differences prior to the hearing, leaving the findings in the Determination with respect to Dhaliwal outstanding. The Determination concluded that she was entitled to \$5,288.22, including interest.

Under the heading “evidence and analysis”, the Corporate Determination sets out the following specifically with respect to Dhaliwal:

“3. The employer and Dhaliwal disagree over the period of her employment with Shagun Sweets--the employer states that Dhaliwal’s employment was terminated as of December 31, 1997 and Dhaliwal states that she worked until mid-March and then continued to work for the new owner of the business. The new owner of the business, Neelam Chera, advised Sandra Bowman, of the Employment Standards Branch, that she had seen Dhaliwal working in the shop on two occasions when she visited the shop in February and March 1998 and that Dhaliwal had continued to work for the business after she, Chera, had purchased it.

Dhaliwal also provided evidence from Meenu Sekhon, a personal friend who worked at a nearby shop, that she had worked at Shagun Sweets in 1998, as well as statements from other persons who saw her at the shop.

Based primarily on the evidence provided by Neelam Chera, I accept Dhaliwal’s statement that she was employed by the employer during 1998.

4. Dhaliwal alleges that she worked 60 hours per week and submitted a record of daily hours worked for the period January to March 1998. I have accepted this record. Dhaliwal did not submit a record for October to December 1997. In the absence of any other evidence, I have used the employer's records as evidence of the minimum number of hours worked by Dhaliwal during this period."

FACTS AND ANALYSIS

A hearing was held at the Tribunal's offices in Vancouver on October 8, 1999. The hearing notice provides that a party is to notify the Tribunal if the party requires the assistance of an interpreter. Dhaliwal did not do so. After the hearing had commenced, she advised that she felt she needed an interpreter. In the circumstances, as one was available on short notice, I briefly adjourned the hearing until the interpreter arrived.

At the hearing, the Employer argued that the delegate erred in her finding that Dhaliwal worked for the Employer after December 31, 1997, i.e., for the period January 1 to March 16, 1998. Effective December 31, 1997, the Employer terminated all employees and carried on with the assistance of family members only. Dhaliwal, on the other hand, maintained that she did work until March 16 when she quit due to non-payment of wages.

Mroke is a businessman. He is the sole director of Lovely Sweets. He has operated several restaurants in the Vancouver area and in the United States. He explained that he purchased the business in July 1997. The business, which catered to the East Indian community, was located in the Khalsa Business Centre in Surrey. Within a relatively short time, Mroke found that business was not good and decided to sell. Rather than close down the business, which could make it difficult to sell, he decided to operate it with the assistance of family members. He terminated the employment of all employees effective December 31, 1997 and paid them all amounts owing. Specifically, with respect to Dhaliwal he said that she was hired in October and terminated effective December 31, 1997. He emphatically denied that she was working for Lovely Sweets from January to March, 1998. While his family members ran the store, he attended the store "a couple of times a week or more".

Dhaliwal testified that she did, in fact, work from January 1 to March 16, 1998. At that time she quit because she had not been paid.

The Employer argues that this case is about credibility. I agree. There are two conflicting and mutually exclusive versions of the relevant facts: the Employer's that she did not work from January 1 to March 16, 1998, and Dhaliwal's that she did. The issue before me is whether the Employer has satisfied me that the delegate erred when she determined that Dhaliwal worked for the Employer during the time in question. The burden to persuade me that the delegate erred rests with the appellant Employer.

The Employer's evidence at the hearing was that it did not have an opportunity to respond to the records supplied by Dhaliwal to the delegate with respect to hours worked. Counsel for the Employer stated that the first time the Employer saw the records, was at the hearing. The delegate did not attend the hearing and, therefore, was not in a position to dispute this assertion. As is indicated by the quote from the Determination, set out above, the delegate accepted that the records were accurate and relied upon them to calculate amounts owing to Dhaliwal. Dhaliwal relied upon the records to substantiate that she, in fact, worked for the Employer during the time in question. The Employer's evidence was that Dhaliwal did not work January to March. I have a number of concerns with respect to these records, consisting of notations made on a calendar, which leads me to question their reliability and, in turn, Dhaliwal's credibility. In cross examination, she agreed with the suggestion put to her that the records were meticulously kept by her on a daily basis, i.e., contemporaneously. She claimed that the records accurately reflected her work. Yet, she admitted that some of the entries were made by her sister, and she was unable to identify which were made by her, and which were made by her sister. In my opinion, this raises considerable doubt as to the credibility of the records. Moreover, there were gaps in the records, periods were missing: there was no documentation for one month, and there were dates without any indication of hours worked. In addition, there was a considerable difference in the manner in which the notations were made: the notations said to cover the period of employment with the Employer were written in a different handwriting and in a manner more consistent with having been written in one sitting as opposed to on a daily basis. The notations for January-March were clearly more "neat" than subsequent notations. The Employer's argument basically was that the records had been falsified to "milk" the Employer. In all of the circumstances, I accept the Employer's argument.

I was troubled by other aspects of Dhaliwal's testimony.

In cross examination, Dhaliwal agreed that she had been paid up for the period before January 1, 1997, i.e., for the period between October 20 and December 31, 1997. She agreed that there was no issue between her and the Employer for that period, despite the claim to have worked the same hours, some 10 hours, six days a week. In the Determination, the delegate stated that Dhaliwal did not submit any records for the hours worked in 1997. Given the authority of the delegate to investigate and award compensation, it clearly would have been in her interest to do so. She stated that she did have the records for October-December at home. She agreed that she had not provided the records to the delegate and that she did not have a claim for that time. In my mind, this raises some doubt about the credibility of her testimony.

In addition, Dhaliwal had great difficulty recalling details about her employment: she could not recall the name of the cook, when he came to work and--perhaps more importantly--who let her into the shop at the beginning of her shift. She agreed that she did not have a key to the shop. She explained that the manager/partner let her into the shop. However, he left the business in early January. If that was the case, who let her into the shop after that time: Dhaliwal could not recall.

In the context of the above, perhaps the most damaging part of Dhaliwal's testimony was that there was considerable doubt in my mind as to whether the testimony was, in fact, Dhaliwal's. In the

course of her giving evidence, she was referring to several sheets of paper containing notes. Naturally, counsel for the Employer requested production of the notes. In the circumstances, I agreed. Having reviewed the notes, he questioned her on the notes. She admitted that the notes had been prepared by her “uncle” to assist her giving evidence. Although Dhaliwal was a recent immigrant to Canada, she is well-educated and has a B.A. degree from India. In the circumstances, I question the credibility of her testimony.

In all of the circumstances, I accept that Dhaliwal did not work in January, February and March as claimed and I agree with the Employer that the delegate erred when she found that she was.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated March 12, 1999 be cancelled.

**Ib Skov Petersen
Adjudicator
Employment Standards Tribunal**