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 -

Amarit Mangat

- and -

Jeevan Mangat
operating as Mangat Residential Estates and Developments
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/474
HEARING DATE:	September 21, 1998
DECISION DATE:	November 13, 1998

DECISION

APPEARANCES

Mr. Jeevan Mangat	on behalf of the Employer ("Mangat")
Mr. Amarit Mangat	on behalf of himself
Ms. Dorothy Kobza	on behalf of herself

OVERVIEW

This decision concerns two appeals pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on June 29, 1998 which determined that Jeevan Mangat and Amarit Mangat operating as Mangat Residential Estates and Developments was liable for unpaid wages, statutory holiday pay, vacation pay, and for unauthorized deductions from wages to Dorothy Kobza (the "Employee" or the "Complainant"). One appeal is brought by the Employer ; the other is brought by Amarit Mangat who says that he is not the Employer. The Director's delegate found, in a sparsely reasoned Determination, that the Employer owed $8,591.06. The Employer argues that the Determination is wrong. The Employer says that the Employee was, in fact, paid all wages owing. In particular, the Employer says that the delegate failed to take into account the value of the rental accommodation made available to Kobza.

ISSUES TO BE DECIDED

The issues are: (1) Is Amarit Mangat the employer of Kobza? And (2) Did the delegate err in making the Determination such that it ought to be varied or cancelled?.

FACTS AND ANALYSIS

1. Amarit Mangat

Amarit Mangat says he is not the Employer, which he says is a sole proprietorship owned by his father, Jeevan Mangat. He has no ownership interest in the Employer. He agrees that he has helped his father in the business and is a former employee. Kobza says that she dealt with Amarit Mangat during her employment, primarily between October 1993 and June 1997. Kobza agrees that she does not know of the relationship between Amarit Mangat and the Employer. Jeevan Mangat agrees that he is the Employer.

The Determination contains no reasons whatsoever to support a finding or conclusion that Amarit Mangat is the Employer. The delegate did not appear at the hearing and there is no evidence before me to support that Amarit Mangat is the Employer. In the result, there is no basis upon which to uphold this part of the Determination and I find that he is not and order that his name be struck from the Determination.

2. Wages Owed

The Determination stated that the Employer did not attend a scheduled meeting with respect to this matter and failed to respond to the calculations provided to him by the delegate. The delegate based his calculations on the Complainant's records. Mangat denies failing to cooperate and states that he, in fact, made three trips to Vancouver Island to meet with the delegate but was told that the delegate was unavailable. The delegate did contradict this. In the result, I am prepared to consider the appeal.

The Employer's grounds of appeal may be summarized as follows. The delegate did not take into account, in calculating wages owed:

- the fair market value of the two bed room apartment occupied by Kobza;
- Kobza received $1,554.00 for income tax purposes;
- Kobza did receive statutory holiday pay;
- Kobza did, in fact, take vacation with pay and, therefore, is not entitled to vacation pay;
- Kobza accepted changes to her remuneration in May 1997.

It is trite law that the appellant bears the burden of proving that the Determination is wrong.

a. Value of accommodation

Kobza's husband testified that the Employer hired her in October 1993 as resident caretaker at $1,000.00 per month plus the apartment. There was no agreement in writing between the parties. According to Kobza's records, between 1993 and March 1995, the Employer paid her on that basis, and in 1994 and three months of 1995, deducted $200.00 from her wages on account of statutory deductions. While the Employer does not seriously dispute this, Mangat testified that two things happened in 1997: first, Revenue Canada determined that the apartment must valued at fair market value; and, second, that Kobza became a part-time employee in May. He claims, and she denies, that he told her that she would have to "go part-time" or quit, and that she continued to work and, therefore, accepted part-time. He claims that his accountant sent her a letter. She denies receiving this letter.

In so far as I understand the Employer's argument, it is that the delegate ought to have taken into account the value of Kobza's accommodation during her employment. He says that fair market value is $550.00. When calculating the amount owed, this should be added. In the result, Kobza, the Employer says, owes him money.

There is no issue that Kobza is a resident caretaker (see Section 1, *Regulation*). *Regulation* 17(a) provides that the minimum wage for a resident caretaker is, for an apartment building containing 9 to 60 residential suites, $420.00 per month plus $16.80 for each suite. I understand that there were 48 suites in the building in Kobza was responsible for. In other words, minimum wages per months is $1,226.40. Section 20 of the *Act* provides for payment of wages in Canadian currency, by cheque, draft or money order, payable on demand, or by direct deposit (if authorized). Section 21(1) of the *Act* proscribes unauthorized deductions from wages and reads:

> 21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of the employee wages for any purpose.

In this case, there is no "written assignment of wages" and it cannot, therefore, be argued that this arrangement is a "written assignment ... to meet a credit obligation" within Section 21(4) (see *Sophie Investments Inc.*, BCEST #D527/97, upheld in part on reconsideration in *The Director of Employment Standards*, BCEST #D447/98). Mangat says that his accountant wrote to Kobza in or around May 1997 explaining that the value of the rental accommodation was $550.00 per month. Her husband agreed that they did receive a letter explaining that the value of the apartment was $550.00. In my view, such a letter does not constitute a "written assignment of wages". In the result, I am unable to agree with the Employer that--his view of--fair market value of the apartment provided to Kobza should be taken into account.

b. Amounts paid for income tax

The Employer says that he paid an amount, $1,545.96 to Kobza on account of income tax. He explains that he paid this amount to Kobza for her to pay on account of "employer contributions" for taxes for 1994. This amount should be taken into account in the calculation of the amount Kobza is entitled to. Kobaz agrees that she received an amount in 1996 because the Employer had not remitted taxes to Revenue Canada. She says, and the documents submitted by her at the hearing confirm, that the Employer did not make statutory deductions in 1993 and deducted at a flat rate of $200.00 per month in 1994 and for three months in 1995. In my view, the approximately $1,500 should not be taken into account. The amount was paid on account of 1994 and is simply not relevant with respect to amounts owing for 1996-98.

c. Statutory holidays

The Employer argues that Kobza, in fact took her statutory holidays with pay. The Employer did not provide any evidence to support this assertion. Kobza's documents indicates that she worked and I accept that she did.

d. Vacation pay

Mangat says that Kobza took vacation between January 1996 and April 1998. There was some evidence before me to the effect that the Employer never stopped Kobza from taking vacation and that she, in fact, did take some--not much--vacation time (though it was unclear whether she took time off for vacation during the material time (January 1996-April 1998). The Employer did not keep any records. In circumstances, I am not prepared to interfere with the delegate's determination that Kobza was entitled to vacation pay for the time worked between January 1996 and April 1998.

e. Change in terms of employment

As mentioned above, the Employer argues that Kobza's terms and conditions of employment changed in May 1997: from that time she became a part-time employee. Mangat explained that he employed two other individuals to work in the apartment building in consideration of subsidized rent. He states that he told Kobza that she would have to agree to become part-time or quit. As she did not quit, he assumed that she had accepted the new terms of employment. At that time he also told her that the value of the suite was $550.00 per month. Mangat stated that he informed Kobza by letter from his accountant. He did not bring a copy of this letter and the accountant was not called to give evidence.

Kobza disagrees. She explains that she received a cash advance in June 1997 of $500.00 (but did not receive her wages), received $800.00 in July, $700.00 in August and September, $750.00 in October, $700.00 in November, $500.00 in December (received in January 1998), and nothing in January, February and April. She also denies receiving any notification of her change to part-time status.

As mentioned earlier, the onus is on the Employer to prove that the Determination is wrong. Leaving aside the issue of minimum wages for part-time resident caretaker, which was not argued before me, I am faced with two conflicting versions of the facts. He says he changed the terms and conditions of employment with notice, she says he did not. The continued payments of wages to Kobza after the time Mangat says he made her a part-time employee (in May), which remain unexplained, do not support his argument. There is nothing in writing to support his assertion.

Mangat did not explain, in any detail, Kobza's alleged new terms and conditions of employment. In the result, I am not prepared to disturb the delegate's finding on this point.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated June 29, 1998 be confirmed in the amount of $8,591.06 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal