

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 -

Gadey Plumbing Heating & Sprinkler Ltd. operating as Compacting
("Gadey")

- of Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/466

DATE OF HEARING: October 4, 1999

DATE OF DECISION: November 2, 1999

DECISION

APPEARANCES

Walter Terry Bower	For the appellant
Major Singh Gadey	Witness
Jaswinder Cheema	On his own behalf
I. Singh Cheema	Witness
Bernie Gifford	For the Director
Manjit Arneja & Bir Arneja	The Interpreters

OVERVIEW

Gadey Plumbing Heating & Sprinkler Ltd. operating as Compacting (“Gadey”, “the employer” or “the appellant”) appeals a Determination by a delegate of the Director of Employment Standards dated June 28, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination, issued in the absence of any evidence from the employer to the contrary, is that Jaswinder Cheema was employed by Gadey, was paid cash for some of his work but is owed another \$2,630.59 in wages and interest. The Determination was issued over the objection of Gadey which claimed that it did not know Cheema and that it did not hire or employ the man, or pay him money.

Gadey on appeal argues that the Determination is wrong in that the delegate failed to establish whether Cheema was employed by Gadey or any other business entity operated by one or both of the Gadey brothers. The appellant claims that there is not any evidence of the employment relationship which is said to exist in the Determination. Gadey argues that it hardly can be said to have failed to produce records of the employment when there was not an employment relationship in the first place.

ISSUES TO BE DECIDED

Is there evidence to support the Determination? It is that question that I must decide.

No longer an issue, in that it was decided at the outset of the hearing set in the appeal, is an objection of the delegate. Gadey’s plan was to have its case presented by its accountant, Walter Bower, of the firm, Jenrob and Associates. The delegate objected to that. The delegate claimed that throughout his investigation of the complaint, he had never been able to hear from the employer directly and that everything had been filtered through Bower. I

ruled against the delegate and said that fairness demanded that the appellant be allowed to make its case in whatever fashion it saw fit, just so long as it is both relevant and consistent with the purposes and requirements of the *Act*.

FACTS

Gadey is in the plumbing and heating business. It is also in the business of providing soil compacting services.

Jaswinder Cheema claims that he and two other people were employed by, and performed compacting for Gadey, or possibly one or both of the Gadey brothers, Major and Kamaljit. The period of the employment is said to range from the 30th of August to the 29th of October, 1998. According to Cheema, he was paid \$1,090 in cash but is still owed wages. He has both a record of hours worked and a list of the residential construction sites on which he claims to have worked. Under oath, he swears that he was hired by Major Gadey and driven to job sites by Major Gadey.

The employer does not have any record of work by Cheema. Major Gadey denies that he drove Cheema to work or hired or employed Cheema for compacting or any other work. The employer also produces a record of work. It consists of invoices and it says they cover each one of the projects that were undertaken in the relevant period. Those invoices show that Gadey took on a compacting jobs along with plumbing and heating work. None of the jobs listed on the invoices match any of the work on Cheema's list. The two sets of records are entirely inconsistent with one another.

Cheema's record would appear to indicate that Gadey had many customers and that he was rather busy working for Gadey. Yet Bower, accountant for Gadey, testifies that so far as he knows, Gadey as a company is far from prosperous and is experiencing great difficulty in securing enough work for it to keep going.

Cheema's list of jobs does appear to be incorrect in some important respects. According to his list, he worked on sites where occupancy permits had been granted prior to the period of the alleged employment. The fact that occupancy permits are granted even when sidewalks and driveways have not been installed may explain that. There are also addresses on Cheema's list which are for vacant lots and others which do not exist. That may only be due to the fact that Cheema compiled his list from memory and at night. He may simply have the wrong address.

In a letter dated February 15, 1999, Onkar Bassi of Rain Gaurd Gutters & Soffits (That is how the company spells its name.) states that "due to a shortage of work, (Cheema) was retained by our company on a subcontractor basis from July 1, 1998 to October 15, 1998." But Bassi was interviewed by the delegate and he led the delegate to believe that Cheema did not perform any work for Rain Guard in what is alleged to be the period of employment by Gadey.

Cheema told the delegate that he worked with two other labourers. The delegate was given only first names of the two men and was led to believe that there was no way to interview either of them. On appeal, to the surprise of everyone, Cheema announced that in fact it may be possible to contact the men.

The delegate, in explaining the Determination, states, "The employer, in attempting to create a history of employment for the complainant, by submitting his records relating to other employers, has not provided any records for the period the complainant allegedly worked and the employer's evidence is contradicted by Mr. Onkar Bassi." The latter refers to Bower's suggestion that Cheema probably was working for Bassi's company, Rain Gaurd, in the alleged period of the employment. The delegate ends his explanation of the Determination with the comment, "In the absence of any evidence from (Gadey) to the contrary, I conclude the Complainant is owed wages as set out in his complaint.

ANALYSIS

What I must decide is whether the appellant has or has not met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of what is either an error in fact or in law.

Cheema says that he was hired by Major Gadey and driven to work by the man. Major Gadey denies that. Obviously, someone is lying. I have great sympathy for the delegate in the face of such diametrically opposed claims.

Cheema admits to receiving cash payments. There are employees that accept cash and employers that pay cash and keep no records so as to avoid Revenue Canada obligations and those which stem from the *Act*. It appears that the delegate is concerned by that and it is that which has driven him to issue the Determination. But no where, in the Determination, does the delegate set out what is a rational basis for deciding that alleged employment relationship did exist. He merely assumes that one exists.

When I consider the evidence which was before the delegate, indeed, the evidence which is before me, I find that it cannot be reasonably concluded that Cheema was probably employed by Gadey. That is fatal to the Determination.

It simply may be that the employer did not produce records of the alleged employment for an entirely legitimate reason, namely, that it never employed Cheema.

I am satisfied that this Determination cannot be allowed to stand. But I believe that to cancel it, or to vary it at this stage, might well be unfair to the employee. I have decided to send the whole matter of the Complaint back to the Director for further investigation.

ORDER

I order, pursuant to section 115 of the *Act*, that the matter of the Complaint by Jaswinder Cheema be referred back to the Director of Employment Standards for further investigation.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal