

An appeal

- by -

Sewa S. Bains and Amar K. Bains operating as Bains Orchards

- 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: Cindy J. Lombard

FILE No.: 2002/449

DATE OF HEARING: November 8, 2002

DATE OF DECISION: November 19, 2002

DECISION

APPEARANCES:

Sewa S. Bains and Amar K. Bains appeared together with their representative, Chanchal Bal.

Ashwani Lakha and Komal Lakha appeared on their own behalf together with Tek Lagaah who gave evidence on their behalf.

The Director of Employment Standards was represented by Erwin Schultz.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Sewa S. Bains (“Mr. Bains”) and his wife, Amar K. Bains (“Mrs. Bains”) operating as Bains Orchards (“the employer”) from a Determination of a delegate of the Director of Employment Standards (the “Delegate”) dated July 29, 2002, which found that:

1. Ashwani Lakha and Komal Lakha were employed by Mr. and Mrs. Bains operating as Bains Orchards;
2. Ashwani Lakha and Komal Lakha were owed wages and interest pursuant to Section 88 of the *Act* as follows:
 - a) Ashawani Lakha

i) Wages	\$4,484.50
ii) Interest	\$133.67
Total Due	\$4,618.17
 - b) Komal Lakha

i) Wages	\$6,184.50
ii) Interest	\$184.35
Total Due	\$6,368.85

(the “Determination”)

ISSUE TO BE DECIDED

1. Did Ashwani Lakha (“Mrs. Lakha”) and Komal Lakha (“Mr. Lakha”) receive wages owing to them?

FACTS AS ALLEGED BY THE EMPLOYER AND EMPLOYEEA. According to the Employer

Mr. Bains gave evidence for the employer. Mr. Bains says that he has been an orchardist for 23 years. Most of his employees such as Mr. Lakha are new immigrants to Canada.

From 1998 until 2002, Tek Lagaah, who is Mrs. Lakha's father and Mr. Lakha's father-in-law, organized family members to work in Bains Orchards and usually paid those family members through Mr. Lagaah.

Mr. Bains says that in approximately June 2001, Mr. Lagaah approached him and asked for an advance on the wages of himself and other family members as he needed money to help with the cost of two son-in-laws immigrating from India. By cheque dated June 13, 2001, Mr. Bains advanced \$13,000.00 to Mr. Lagaah. A copy of that cheque is marked as Exhibit #1. One of the son-in-laws was Mr. Lakha who commenced working at Bains Orchards on July 3, 2001, a few days following his arrival in Canada.

Mrs. Lakha also commenced working on July 3, 2001. As well, she had been employed in the years 1998 to 2000.

Six members of Mr. Lagaah's family were employed by the employer.

In the third week of August, 2001, Mr. Bains says that Mr. and Mrs. Lakha came to him and said that they were having a disagreement with the Lagaah family.

Mr. Bains agrees that the total wages due to Mr. and Mrs. Lakha is the amount determined by the Delegate, namely, \$9,189.00 each but says that they received all wages due by:

- 1) cheque
- 2) money order, or
- 3) cash

Mr. and Mrs. Lakha acknowledge that they received the following payments:

Ashwani Lakha

Total wages due:		\$9,189.00
Two cheques:	July 20, 2001	\$1,000.00
	August 31, 2001	\$700.00
Money order:		\$700.00
Cash advance		<u>\$1,000.00</u>
		\$3,400.00
		<u>-\$3,400.00</u>
Balance Due:		\$5,789.00

Komal Lakha

Total wages due:		\$9,189.00
Cheques	\$1,000.00	
Money order	<u>\$700.00</u>	
	\$1,700.00	<u>-\$1,700.00</u>
Balance Due:		\$8,489.00

Mr. Bains says that the balance was paid by cash as set out on the cash receipts dated July 31, August 31, September 30, October 31 and November 15, 2001, for Mr. and Mrs. Lakha.

In the alternative, Mr. Bains claims a set off of monies that he says he overpaid to Mr. Lagaah on behalf of all his employed family members and that he did so by cheque advances as follows:

June 13, 2001	\$13,000.00
July 20, 2001	1,000.00
August 22, 2001	11,000.00
August 31, 2001	700.00
November 2, 2001	5,000.00
October 5, 2001	<u>400.00</u>
Total monies advanced	\$34,700.00

Mr. Bains says that the other four Lagaah family members (i.e. except for Mr. and Mrs. Lakha) were due wages as follows:

1. Tek Lagaah	\$12,050.00
2. Rakesh Lagaah	12,050.00
3. Harbajan Lagaah	10,845.00
4. Parmjit Mahay	<u>9,189.00</u>
Total gross wages	\$44,134.00
Less deductions	<u>-6,289.14</u>
	\$37,844.86
	\$37,844.86
Less monies received	<u>-34,700.00</u>
Overpayment	\$3,144.86

Mr. Bains says that if the Determination that Mr. and Mrs. Lakha did not receive any cash payments is upheld, then his liability should be reduced by \$3,144.86.

Mr. Bains says that it was his practice over the years to pay immigrant employees in cash as their favoured method of payment and provide them with cash receipts at the end of each month.

Mr. Bains says this claim was made by Mr. and Mrs. Lakha not because any wages are owing to them but as revenge for a current dispute between he and Mr. Lagaah over leases which Mr. Lagaah took over

while Mr. Bains was in India and later disparaging remarks which Mr. Lagaah believes that Mr. Bains made in the local East Indian community.

B. According to the Employees

The evidence of the employees, Mr. and Mrs. Lakha remained the same as related to the delegate, namely that they did not receive all of the gross wages due to them; rather they each received only the sums by cheque, money order or cash as indicated in the summary of the employer's evidence.

Mr. Lakha says that he received no cash payment of wages other than the one payment.

As Mr. Lakha points out no receipt for that payment was produced by the employer. On the other hand the employer did produce receipts for alleged cash payments. Mr. Lakha points out that none of the receipts were signed by he or his wife and he categorically states that he received no other cash payment of wages from the employer nor did he receive any cash payment of wages via his father-in-law, Mr. Lagaah.

Mrs. Lakha confirms her evidence to the delegate that she received no cash payment of wages from the employer nor did she received any via her father, Mr. Lagaah.

Mr. Lagaah gave evidence confirming that not only did he not receive any cash payment of wages on behalf of the Mr. and Mrs. Lakha; he did not in any year ever see any of the cash receipts that Mr. Bains says that he gave to all employees for cash payment of wages.

CONCLUSION OF FACT AND ANALYSIS

The onus is on the employer to show on a balance of probabilities that the Determination is wrong is law or fact. The employer has not met this onus.

The employees say that they did not receive the cash payment of wages which the employer alleges that he paid to them. As pointed out by the Delegate in his Determination there is no evidence to the contrary. The employer did not have the employees sign the receipts that he alleges he gave to them when making cash payments and can not produce a copy of a receipt for the cash payment which Mr. Lakha acknowledges that he did receive.

Section 18 of the *Act* requires as follows:

18(1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

Furthermore, with respect to the employer's allegation that if the Determination's finding is upheld then an overpayment of wages to Mr. Lagaah on behalf of Mr. and Mrs. Lakha in the amount of \$3,144.86 should be applied to wages owing to the Lakhas. Section 22 of the *Act* provides that an employer must pay an employee's wages to a third party but only if the employee authorizes the payment to a third party in writing. No such assignment was made in this case.

For the foregoing reasons the appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal