

An appeal

- by -

Oak Forever Furniture Co. Ltd.
(appeals by Mehar Khangura and by Armandeep and Surinder Bath)

- 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: Ib S. Petersen

FILE No.: 2001/268 and 2001/502

DATE OF DECISION: September 27, 2001

DECISION

SUBMISSIONS:

Mr. John Frank	on behalf of the Oak Forever furniture Co. Ltd. ("Oak Forever")
Mr. James Klassen	on behalf of Mehar Khangura ("Khangura")
Mr. Baljinder Khangura	on behalf of himself
Mr. Kulwant Singh Virk	on behalf of himself
Ms. Lynne Fanthorpe	on behalf of the Director

OVERVIEW

This is an appeal by Oak Forever and Khangura pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on March 16, 2001 which determined that Oak Forever was the employer of Kulwant Singh Virk, Baljinder Khangura and Harjit Singh (the "Employees") and that they were owed \$34,154.30 on account of, among others, overtime wages, vacation pay and statutory holiday pay.

Both Oak Forever and Khangura appeal the Determination. It should be noted that although the Determination is addressed to Oak Forever, at its business address in Abbotsford, it is to the attention of Khangura. He was also copied with the Determination. There is, however, no order against Khangura. The order, including that for payment, is against Oak Forever.

In the circumstances, the only issue I propose to deal with is whether Oak Forever is the employer of the Employees.

FACTS AND ANALYSIS

This matter was originally scheduled for a hearing. However, following a review of the file, I have decided that a hearing is not necessary and that the matter can be decided from the submissions on file.

The following facts are not in dispute:

1. Oak Forever is a limited company, incorporated under the laws of British Columbia. The officers and directors of that company are Armandeep and Surinder Bath.
2. Oak Forever ceased operations in the spring of 1998.

3. Khangura wished to purchase the premises and equipment. He did so by way of a purchase agreement in May 1999, between himself and the limited company, Oak Forever. He made only three payments on the purchase, in April, May and June 1999, though he remained in possession of the premises and apparently operated the business while attempting to arrange financing.
4. In early February, counsel for Oak Forever demanded payment of the purchase price. It was not paid and shortly thereafter, in April 2000, Khangura ceased operations.
5. The Employees were employed between April 1999 and April 2000.
6. One of the Employees, Virk, writes, in a submission to the Tribunal, that his complaint was against Khangura and "... I must indicate that have no dealings with Armandeep and Surinder Bath, since Mehar Khangura was my employer. Mr. Khangura is the individual I have filed a complaint against, he owes me money." In another submission, Virk describes that he "was hired by Mehar Khangura for his company (Oak Furniture Forever) as a carpenter."
7. Another Employee, Baljinder Khangura, states in a submission that "I asked my employer Mehar Khangura for my money that he owed me, but I never got any answer from him, he kept saying that he owes me nothing [sic]."
8. From cheques appended to various submissions, it appears that employees were paid by cheques in the name of 576077 B.C. Ltd. DBA Oak Forever and Oak Forever Furniture.
9. Counsel for Khangura, who takes issue with the amounts awarded to the Employees, states in a submission: "It appears that my client may in fact be the employer that the claimants are concerned with."

The Employees do not take issue with the material facts alleged by counsel for Oak Forever. Neither does the Delegate. Based on the facts not in dispute, there is, in my view, no basis for a conclusion that Oak Forever was the employer of the Employees.

However, the delegate says that the information provided in the appeal is "new information" that could have been provided by Oak Forever and the Baths during the investigation. While this argument is somewhat formalistic and technical, it is not without merit. Upon receipt of a Demand for Employer Records, dated July 12, 2000, from the Delegate, the Baths advised the delegate to contact Khangura. Amandeep Bath returned the Demand to the Delegate with a note stating: "This does not belong to us. They were leasing from us. Please contact M. Khangura." While this is not entirely legally correct, it does capture--in a broad sense--that the business has been transferred and identifies the person to whom the business was transferred.

On November 8, 2000, the Delegate wrote to the Baths requesting a copy of the lease agreement along with information on how to contact Khangura. As well, on February 16, 2001, the Delegate again wrote to the Baths. She stated that there had been "no cooperation from either you [the Baths] or Mehar Khangura." She explained the amount owing based on the information then available to her and indicated that the Baths may be liable as directors or officers of Oak

Forever. As well, she indicated that she would be proceeding with Determinations unless she heard from them by March 5, 2001. Interestingly, the letter notes:

“It is my understanding that the company was being run by Mehar Khangura (“Khangura”). Khangura was the person the complainants stated was their employer and Khangura’s signature appears on cheques that have been returned by the bank as NSF. Khangura may be deemed to be a director of the company and also held responsible for up to two months’ wages.

The finding of Khangura to be a director [sic.] does not absolve you of your responsibility as a corporate officer.”

It is clear that the Baths and Oak Forever did not respond to the Delegate’s further requests for information.

Nevertheless, in the circumstances, I am not prepared to let the Determination against Oak Forever stand. In my view, the Baths and Oak Forever did let the Delegate know that their position was that Oak Forever was not the employer. This is not a “new issue.” There is, however, bluntly put, no reasoned analysis of why Oak Forever is named as the employer. The Delegate simply appears to be proceeding from the assumption that Oak Forever was the employer because it (or the Baths) did not respond to her inquiry after having told her that they were not involved with the operation. From her correspondence, quoted above, it is clear that the Delegate was aware of at least some of the basic factual information potentially relevant to an inquiry into the question of the employer’s identity. From the complaint forms, it is apparent that the Employees name “Mehar Khangura. 576077 DBA Oak Forever Furniture,” “Manjit Khangura (Oak Forever),” or “Mehar Khangura (Oak Forever)” as their employer. Moreover, some of the cheques available to the Delegate during the course of her investigation indicate that “576077 B.C. Ltd. DBA Oak Forever” may be the employer. In a submission to the Tribunal the Delegate attaches a corporate search for the numbered company which, by the way, does not appear to have been part of her investigation because the search is dated August 21, 2001--after the Determination. In any event, from that basic information, it seems to me, the Delegate could identify the corporate vehicle potentially or possibly involved in the operation (including its registered and records office) and its principal, Khangura (and his address). The Delegate’s failure to deal with the evidence before her in the Determination is a serious error.

I am cognizant of the principles set out in earlier decisions of the tribunal in such case as *Tri-West Tractor Ltd.* (BCEST #D268/96) and *Kaiser Stables* (BCEST #D058/97). In *Specialty Motor Cars (1970) Ltd.* (BCEST #D570/98), the Adjudicator noted that the

“... Kaiser Stables principle relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence was not provided to the

investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria.”

In the circumstances, in my view, the integrity of the Tribunal’s process would not be well served by letting a Determination stand and be enforced against the wrong person, as clearly seems to be the case here. In the result, I am prepared to admit the evidence tendered on behalf of Oak Forever.

In the circumstances, my decision is to cancel the Determination. This does not mean, of course, that the Delegate is prevented from proceeding, in accordance with the *Act*, with whatever wage claims the Employees may have against their employer. Other than my conclusion that the employer is not Oak Forever, I make no decision in that regard. I do not decide who that employer might be. I do not decide, as well, whether or not that employer may be precluded from addressing the merits of the Determination due to a failure to participate in the investigation. I leave these and other questions to the Delegate.

ORDER

Under Section 115 of the *Act*, I order that the Determination dated March 16, 2001 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal