

**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 -

Bachitter Boparai  
("Boparai")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 97/697

**DATE OF HEARING:** November 19, 1997

**DATE OF DECISION:** November 21, 1997

**DECISION**

**APPEARANCES**

Bachitter Boparai	on his own behalf
Baldev Sandhu	on behalf of M.R. Snack Ltd.
Marvin Moss	on behalf of M.R. Snack Ltd.

**OVERVIEW**

This is an appeal by Bachitter Boparai (“Boparai”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated August 21, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Boparai alleges that the delegate of the Director erred in the Determination by concluding that M.R. Snack Ltd. (“M.R. Snack”) did not owe wages for overtime, statutory holiday pay and compensation for length of service. The delegate of the Director determined that M.R. Snack did owe annual vacation pay in the amount of \$374.00 to Boparai.

**ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Does M.R. Snack owe overtime wages to Boparai ?
2. Does M.R.Snack owe Statutory Holiday pay to Boparai ?
3. Does M.R. Snack owe compensation for length of service to Boparai ?

**FACTS**

The following facts are not in dispute:

- Boparai was employed by M.R. Snack as a route salesman/manager from April 20, 1996 until December 1, 1996;
- the vacation pay issue has been settled by the payment of \$374.00 by M.R. Snack to Boparai;
- neither Boparai nor M.R. Snack kept any records with respect to the number of hours worked each day;

- the routes that Boparai would service comprised of West Vancouver, Vancouver, Richmond and White Rock;
- Boparai would load product into the van between 6:30 a.m. and 7:30 a.m. and then travel to service the various accounts;
- Boparai would travel between 125 to 150 km. each day and visit between 15 to 22 accounts;
- at each account, Boparai would check the stock, make up the orders as necessary, remove outdated product and prepare invoices and collect money owing;
- after the last account was serviced, Boparai would return to the warehouse, empty the van and turn in the cash and paperwork;
- on December 1, 1996, Boparai and another employee were involved in an altercation in the workplace which resulted in the police being called and Boparai being charged with assault;
- Boparai was terminated by M.R. Snack as a result of this altercation;
- Boparai subsequently agreed to the terms of a 'peace bond';
- the actual court hearing into the assault charge has not yet been held.

Boparai testified and stated that:

- he normally serviced a minimum of 18 accounts each day;
- it would take him from 1 to 1 1/2 hours to load the van each day prior to commencing his route;
- he was required to clear all accounts each day and it took him approximately 1/2 hour per account;
- when he applied for the job he was told by Baldev Sandhu ("Sandhu") the President of M.R. Snack that he would be paid either on a commission basis which could result in up to \$3,000.00 per month or he would be paid at a salary of between \$2,000.00 to \$2,200.00 per month;
- he chose to be paid on the salary basis;
- when he got his first paycheque it was for only \$650.00 and when he approached Sandhu he was told that all employees got paid the same;
- he advised Sandhu that he expected to be paid what was promised to him;
- on a couple of occasions, Sandhu paid him \$50.00 in cash;
- he suggested to Sandhu that perhaps the routes should be cut back to be in line with the wages being paid;
- the altercation resulted from the other employee asking him for the keys to the van;
- he did not physically strike the other employee, he merely put his arm up to defend himself;

Sandhu testified on behalf of M.R. Snack and stated that:

- on the day of the altercation, Boparai came into the office in the morning to submit money collected the previous day but did not present the necessary paperwork;
- Boparai was asked where the paperwork was and he replied that he had left it at home;
- Boparai was asked by Marvin Moss (“Moss”) to go home and get the paperwork before he started to work his route but Boparai refused, stating that he would bring in the paperwork after he was finished for the day;
- Moss told Boparai that he was not going work if he did not provide the paperwork first;
- Moss then asked Boparai for the keys to the van;
- when he entered the kitchen area he observed Moss standing on a table against the wall and Boparai standing about 3 to 4 feet in front of him;
- he observed Boparai and Moss engaging in a heated discussion;
- he instructed Boparai and Moss to stop the argument;
- Boparai and Moss then went outside;
- when he went outside, he heard Boparai swearing at Moss and he then instructed Moss to come back inside the warehouse;
- the police were called and subsequently charged Boparai with assault.

In response to questions from the Tribunal, Sandhu stated that:

- Boparai was hired on the basis of a guaranteed draw of \$1,300.00 per month for the first few months against commissions earned;
- he never promised Boparai a salary of \$2,000.00 or \$2,200.00 per month;
- Boparai worked on the Victoria Day, Canada Day, BC Day, Labour Day, Thanksgiving Day and Remembrance Day holidays;
- Boparai was not paid for the statutory holidays nor was he paid extra for working on the statutory holidays;
- he would drive each of the routes to determine the amount of time it should take each salesman to complete the days work.

## **ANALYSIS**

The burden of establishing that the delegate of the Director erred in the Determination rests with Boparai.

In the absence of daily records being kept by Boparai or M.R. Snack and in the face of the conflicting evidence provided, I am not prepared to speculate as to how many hours may have been worked by Boparai each day. The wages paid to Boparai reflect an hourly rate of \$7.50 per hour based on an 8 hour day, 40 hour week.

Based on the evidence provided and on the balance of probabilities, I conclude that Boparai is not entitled to overtime wages.

With respect to the issue of statutory holidays, Sandhu has conceded that Boparai worked on the statutory holidays, was not paid for the statutory holidays nor was he paid the appropriate rate for working on the statutory holidays.

I conclude that Boparai is entitled to be paid for the statutory holidays which fell during his period of employment and further that Boparai is entitled to be paid the appropriate rate for working on those statutory holidays. The wages owing to Boparai for those 6 statutory holidays worked is calculated as follows;

\$1300.00 per mo. x 12 ÷ 52 ÷ 5 = \$60.00 per day x 6 days	= \$360.00
1/2 time rate for working on statutory holidays x 6 days	<u>= \$180.00</u>
sub-total	= \$540.00
4% vacation pay	<u>= \$ 21.60</u>
statutory holiday pay owing	<b>= \$561.60</b>

With respect to the issue of compensation for length of service, Section 63 of the *Act* provides that an employer is liable for compensation for length of service after 3 months of employment. This liability may be discharged for a number of reasons, among which is if the employee has been dismissed for just cause.

In the normal course of events, for a single incident of misconduct to warrant the dismissal of an employee, the act of misconduct relied upon must be of a sufficiently serious nature.

The circumstances surrounding the altercation between Boparai and Moss, assault on another employee, are in my view, sufficiently serious to warrant the termination of Boparai's employment for this single incident of misconduct.

Based on the evidence provided and on the balance of probabilities I conclude that M. R. Snack has established just cause for termination of the employment of Boparai.

The appeal by Boparai is therefore allowed to the extent as set forth above with respect to payment for statutory holidays.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 21, 1997 be varied to be in the amount of **\$561.60** together with interest calculated pursuant to Section 88 of the *Act*.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**