

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 -

Darshan S. Sandhu operating Sonney Trucking
("Sandhu")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE No: 1999/594

DATE OF DECISION: January 5, 2000

DECISION

OVERVIEW

This is an appeal by Darshan S. Sandhu operating Sonney Trucking (“Sandhu”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination issued by the Director of Employment Standards on September 21, 1999. The Determination found Sandhu had violated Section 18 (1) of the *Act* and ordered him to pay Raval Cheema (Cheema) \$2,020.67.

ISSUE TO BE DECIDED

Does Sandhu owe wages to Cheema for the months of June and July 1998?

FACTS

Sandhu employed Cheema as a truck driver from March 15, 1998 to July 13, 1998. Sandhu claims for the first few weeks Cheema went with the other driver to learn the route and to learn how to drive. Sandhu claims Cheema did not want to be paid for the period he was learning. Cheema claims he was laid off by Sandhu and Sandhu claims Cheema quit July 11, 1998 without warning or notice.

In his complaint Cheema claims he was to be paid a commission of 25% of the value of the “trucks gross wages”. Cheema claims he was paid monthly on the 25% commission basis only until May 31, 1998. At the end of June Sandhu started complaining about his driving and claiming he did not have sufficient work for Cheema. Cheema claims he did not receive any further money from Sandhu.

In the original investigation Sandhu admitted to the delegate that wages are owed but, as Cheema had damaged the truck, he would not be paid.

Cheema claims he kept a record of hours worked by logbook but Sandhu came to his house and took the logbooks from his elderly parents. Sandhu failed to supply any payroll records to the delegate. The delegate issued a Demand for Records to Safeway Services Ltd. for whom Sandhu operated as a sub-contractor. Safeway provided a summary of hours worked by Cheema as prepared by Bev Robinson of Coping with Trucking Inc. This firm does logbook analysis for trucking companies. The first entry for Cheema is March 21 and 22, 1998 showing him off duty. His first driving time is recorded as March 23, 1998. The last entry is shown as July 11, 1998 where he is shown as “driving”. Cheema claims he worked until July 13, 1998.

It should be noted Sandhu, in his letter of October 1, 1999 to the Tribunal, makes reference to a date of July 13, 1999 and July 2, 1999. I believe this is in error and should refer to July 13 and July 2, 1998. In a letter dated October 12, 1999, Cheema makes reference to July 2, 1999. I believe this is an error and should read July 2, 1998. Further, both the complaint and the Determination make reference to “Sunny Trucking” while Sandhu’s letterhead indicates the proper name is

“Sonney Trucking”. Finally the Determination makes reference to the commission being set at “20%” when the complaint and the claim for wages of \$4,500 should be a commission of 25%.

In a letter to the Tribunal dated October 1, 1999 Sandhu claims Cheema was paid for June 1, 1998 to “July 13, 1999”. Included is a payroll statement alleged to be for Cheema showing total earnings of \$2,200.00 less deductions of \$523.72 leaving an amount of \$1,676.28 which Sandhu claims Cheema received on Cheque #116 on “July 02, 1999”. There is no other information provided except a written date under Earnings showing “June 98”. No payroll records have been included or a copy of the cancelled cheque #116.

Cheema admits receiving cheque #116 but claims it was for April and May and this was the first payment he had received since his employment by Sandhu. Cheema claims when Sandhu came to his house and took the logbooks he also took all of his receipts.

Also included in the submission dated October 1, 1999 are two documents, one being a photocopy of a statement by ICBC to Cheema showing he owed \$270.00 as of the 23rd of May 1998. The second is a photocopy of a cheque issued to Cheema from the personal account of Sandhu for \$400.00 dated July 2, 1998. A notation at the bottom identifies this as payment for expenses.

Sandhu claims in a letter to the Tribunal dated Nov 5 that the \$400.00 was an advance requested by Cheema.

Cheema claims this was a personal matter and not related to the business. It was written on a joint personal account of Sandhu and his wife.

Also included in the letter of October 1, 1999 Sandhu claims Cheema owes \$921.20 but does not identify for what reason Cheema owes this amount.

In a further letter to the Tribunal dated November 5, 1999 Sandhu included photocopies of two cheques, the first dated May 22, 1998 issued to Cheema in the amount of \$842.23 and the second dated June 1, 1998 in the amount of \$1,200.00, also issued to Cheema. There is no indication on either cheque showing the purpose of the cheques.

The delegate claims these documents were not provided to him at the time of his investigation and Sandhu did not inform him he had paid Cheema. Sandhu told the delegate he owed Cheema wages but, as he had damaged the truck, he was not going to be paid.

The delegate indicates the parties are close family relatives and the investigation did not rely on the credibility of either party over the other.

ANALYSIS

It would appear Sandhu changed his position from the time of the investigation and his appeal and subsequent submissions to the Tribunal. He failed to supply any payroll information to the delegate, relying on the story that Cheema had damaged his truck and therefore Cheema was not to be paid. Then, in a submission to the Tribunal, Sandhu takes the position Cheema had been paid

his wages and produces photocopies of cheques, which were, alleged payroll cheques to Cheema. The only documentation supplied to support that position was a single photocopy of a document headed "Earnings" and bears the handwritten entry "June 98" in the area normally used to show the dates from the beginning of a pay period to the end of the pay period.

I will accept the cheques were issued to Cheema however I would need more evidence to convince me that these cheques represent payment of wages for June and July, particularly when the last cheque was dated July 2, 1998 and was to cover the period to July 13, 1998. Also, it was Sandhu's evidence that Cheema quit without notice. If Sandhu was not aware Cheema was quitting how could he issue a cheque dated before the incident?

According to the evidence of Cheema, Sandhu took the logbooks and other material from his home. We do not have any evidence from Sandhu to the contrary yet the delegate was required to formally demand the log records from Safeway Services Ltd., the firm from whom Sandhu had a sub-contract.

The evidence produced by the Demand for Records from Safeway Service Ltd. is the most reliable proof of the number of hours worked by Cheema during June and July 1998

Cheema has objected to the calculation of the rate of pay at the minimum wage of \$7.15 per hour. While I agree this probably does not represent the "going rate" for a truck driver in this market, without the evidence of an employment contract or payroll records showing the amount that had been paid nothing can be done to change the Determination in that matter.

The question of the damage to the truck was not considered in the Determination and is not before the Tribunal. Section 21 (2) of the *Act* states:

An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

The issue of expenses claimed by Cheema was not addressed in the Determination, if it follows the pattern of the rest of the case I can only assume the delegate did not have sufficient reliable information to make a determination. I am in the same dilemma and cannot rule one way or the other on that matter.

This also applies to the issue of the \$400.00 cheque dated July 2, 1998. Was it a personal matter, as claimed by Cheema, a payment of expenses as claimed by Sandhu, or as Sandhu further states in his submission to the Tribunal November 5, 1999, an advance, which Cheema had promised to repay and never did? The evidence favours Cheema's position. The \$400.00 cheque was issued on a personal account rather than the business account and another cheque in the amount \$1,676.28 which Sandhu claims Cheema received on Cheque #116 is also dated July 2, 1998. It would seem logical that two cheques issued the same day, July 2, 1998 but on separate bank accounts were for different purposes.

There is a conflict in the evidence of Cheema. In his complaint, Cheema claims to have been paid on a once a month basis until May 31, 1998. Later, his evidence is that Cheque #116 dated July 2,

1998 is the first money he had received from Sandhu and is payment for April and May. This does not affect the Determination or appeal, as the issue is whether Cheema was paid for June and July 1998.

It has been well established in many decisions of this tribunal following the *Tri-West Tractor*, B.C.E.S.T. D268/96 decision and the *Kaiser Stables*, B.C.E.T. D58/97 that the employer cannot bring evidence forward later that should have been provided during the investigation. Evidence which was previously available and not supplied will only be considered under exceptional circumstances.

In all case, it is the responsibility of the appellant to convince the Tribunal the Determination was wrong and should be altered or cancelled. In this case, Sandhu has failed to present sufficient evidence that was not available at the time of the investigation to convince me to cancel the Determination.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination dated September 21, 1999. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal