

**BC EST #D 582/97**

**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 -

(“ California Custom Auto Body 1995 Ltd.”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**Adjudicator:** Paul E. Love

**File No.:** 97/793

**Date of Decision:** January 14, 1998

**DECISION**

**OVERVIEW**

This is an appeal by California Custom Auto Body 1995 Ltd., pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued on October 10, 1997. In this appeal the employer claims that there are no wages owing to two employees and that the Director’s delegate erred in determining that one of the employees, Rajeshwar Sharma, was an employee rather than an independent contractor. The employer’s arguments that the findings of fact made by the Director’s delegate were in error, was rejected.

**ISSUES TO BE DECIDED**

Is Rajeshwar Sharma an employee or independent contractor?

Did the employer fail to pay to the employees wages?

**FACTS**

Harpreet Singh Sohi (“Sohi”) was employed by the employer as an auto body prep man at a rate of \$9.00 per hour for the period August 5, 1996 to September 27, 1996. Sohi quit his employment. The employer drew three cheques, totaling \$1,188.00 that did not clear its bank. The employer apparently disputed the amount owing to Sohi but admitted that the cheques failed to clear its account. The employer failed to respond to a verbal invitation to supply payroll records, and failed to comply with a written demand for employer’s records dated September 12, 1997. The Director’s delegate found that the amount owing to Sohi was a total of \$1,299.65 consisting of wages of \$1,188.00, vacation pay of \$47.52 and interest of \$64.13.

The Director’s delegate determined that Rajeshwar Sharma (“Sharma”) was employed as an auto body painter, paid \$1,000 biweekly for the period July 17, 1996 to August 30, 1996. Sharma quit his employment. The Director’s delegate found that Sharma was an employee, rejecting the employer’s contention that he was an independent contractor. The employer drew a cheque for \$900.00 on August 23, 1996, which did not clear its bank. Sharma claimed a further \$1,000 in pay, however, the Director’s delegate determined that this claim was not substantiated.

The Director’s delegate found that the employer contravened sections 17, 18 and 58 of the Act and ordered that the employer cease contravening these sections of the Act and comply with the requirements of the Act.

## ANALYSIS

Issue # 1: Was Sharma an employee of California Custom Auto body 1995 Ltd.?

The employer argues that Sharma was not an employee because he had all the decision making power with respect to where the work was done, the profit and loss, and that he was paid on a piecemeal basis. The Director's delegate applied the "control test" in determining whether Sharma was an employee. The Director's delegate found that the employer supplied the tools for the work. Sharma appears to have performed the work at the employer's work place. Further it would appear also that Sharma was carrying out the tasks normally associated with an employee. I see no error made by the Director's delegate in the test applied or the evidence considered.

The employer also has filed a document which purports to be a statement by Sharma that he is an independent contractor. I put no weight on this document for the following reasons:

(a) the signature which purports to be Mr. Sharma's signature appears to be substantially different than the signature of Mr. Sharma on the complaint information form dated October 28, 1996.

(b) the person making the declaration is Raju Sharma as opposed to the employee Rajeshwar P. Sharma. I cannot infer from the face of the document that Raju Sharma is Rajeshwar Sharma.

(c) the employer refused or neglected to participate in the investigation which the Director's delegate sought to make concerning this document.

Issue # 2: Did the Director's delegate err in his findings of the amounts owing to Sohi and Sharma ?

From the file material before me it is clear that the employer drew 3 cheques to Sohi in the sum \$1,188.00 which did not clear its Bank.. The employer advances **now** that he paid Sohi in cash for the cheques which did not clear its account. I would have expected this explanation to have been advanced to the Director's delegate during the course of the investigation. As it does not appear to have been advanced at that time, I infer that this allegation is untrue.

The Act provides that the Director's delegate has an investigatory power and in particular the power to demand production of records. An employer or employee cannot withhold records from the Director's delegate and expect that this Tribunal is going to condone that conduct.

Fatal to any dispute by the employer to the amounts owing to these employees is its failure to respond to the demand for records made by the Director's delegate dated September 12, 1997.

There appears to be no allegation by the employer that the Director's delegate erred in his Determination that the sum of \$ 900.00 is due and owing to Sharma.

**ORDER**

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated October 10, 1997 be confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**