

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 -

Surjit S. Sethi operating as Prime Time Electric
("Sethi")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	98/510
DATE OF HEARING:	December 9 1998
DATE OF DECISION:	January 11, 1999

DECISION

APPEARANCES

Denovan T. Hill	Counsel for Surjit S. Sethi
Surjit S. Sethi	The Appellant
Satinder Sethi	Witness
Sarwan Cheema	Witness
Sam Sharma	Witness
Harjinder Sokhti	Witness
Mansit Singh Saini	Witness
Harjap S. Singh	The Complainant
Kuldip Singh	Assisting Singh
Salil Dhaumya	Interpreter
Elaine Bellamore	For the Director

OVERVIEW

Surjit S. Sethi operating as Prime Time Electrical and Prime Time Electric ("Sethi", "the appellant" or "the employer") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated July 10, 1998. The Determination is that Harjap S. Singh ("Singh", "the complainant" or "the employee") worked from May 11, 1996 to January 8, 1997 for Sethi and is owed regular wages, minimum daily pay, overtime pay, statutory holiday pay and vacation pay plus interest.

PRELIMINARY ISSUE DECIDED

The Director objected to hearing from several of the witnesses assembled by the employer. The delegate argued that to hear from them on appeal, was to allow the appellant to submit evidence which should have been submitted on investigation of the Complaint but was not through a failure to participate in the investigation. In response, counsel for the appellant argued that it is not that Sethi knowingly acted to thwart the investigation: It is either that he misunderstood the process, in expecting the delegate to interview the witnesses; that the delegate conducted a less than thorough investigation; or some combination of the two. And beyond that it was argued that the hearing should take the form of a trial de novo as of overriding importance was the need to hear from all who might aid in the assessment of credibility.

The Tribunal may conduct an appeal in the manner it considers necessary (section 107 of the *Act*). While most of the Tribunal's hearings are akin to an appeal by way of rehearing, a hearing may take the form of trial de novo, true appeal, or be a hybrid of another sort: What is of the utmost importance is not what the process is called but that it be fair and

efficient [World Project Management Inc. et al, (1997) BC EST # D134/97]. It is neither necessary nor efficient to re-establish all of the delegate's findings in this sort of case. And for that reason, I advised the parties that it was my not intention to completely rehear all matters but conduct a hearing which focused only on the issues raised by the appeal. Beyond that I decided that I would hear from all of the employer's witnesses but one, Buta Mann of Pacific Developments Ltd. ("Pacific").

The Tribunal will not necessarily foreclose a party to an appeal from bringing forward new evidence in support of their case, but we will not allow the appeal procedure to be used for making a case that should have and could have been made to the delegate at the investigative stage but was not through a failure or refusal to co-operate with the delegate [Tri-West Tractor Ltd., (1996) BC EST # D268/96]. I find in regard to the witness, Mann, that he could have and should have been heard at the investigative stage but was not because of a lack of effort by Sethi and that is all. The delegate made repeated attempts to contact Mann but failed, in part because, on calling Mann at a telephone number provided by Sethi, the person answering the telephone hung up on the delegate when she explained that she was from the Ministry of Labour. Sethi was advised of that by the delegate, through his accountant, Sam Sharma, and she asked that someone have Mann contact her. Nothing at all was heard from Mann. As I see it, that was only because Sethi did not make any real effort to produce Mann at the investigative stage, the same sort of effort that produces Mann on appeal. I find that is to fail to co-operate with the investigation.

I find that the evidence does not clearly show that the reason that other witnesses were not heard at the investigative stage is some failure or refusal on Sethi's part to co-operate with the investigation. To the extent that evidence is relevant it has been allowed and considered.

OTHER ISSUES TO BE DECIDED

There are two main issues that I must decide. The amount of work is at issue. The Determination is that Singh started work for Sethi on May 11, 1996 and that his last day of work was January 8, 1997 and it is based on a record of hours worked which is produced by the employee. According to Sethi, the Determination wrongly puts the onus on the employer to keep records; the employee started work in August; the employee's record of work is not a credible record as it overstates the amount of work performed for the employer, and is obviously compiled from other records which were not produced; and the delegate should have preferred the employer's record of work over that of the employee.

At issue is the matter of how much Singh has been paid for his work. The delegate found that Singh was paid \$3,000. Sethi claims to have paid \$612 beyond that. And it is said that prior to September of 1996, Singh was working for other employers and paid directly by the home owners and construction contractors on whose homes and projects he worked.

FACTS

Surjit Sethi does not object to the use of "Prime Time Electric" to describe his business but cheques show that he operates as Prime Time Electrical. He does that outside of a full-time job that he has with Phillips Services Corp.. Sethi is an electrical technician. Operating as Prime Time Electrical, he undertakes the wiring of houses and the installation of electrical products and appliances for both home owners and construction contractors.

Harjap Singh worked in India as an electrician before his recent emigration to Canada. Sethi hired him as an electrician's helper. But the point of hire is disputed. Singh and the Determination have Singh starting work on the 11th of May, 1996. Sethi's record of work indicates that Singh began work on the 1st of September but, on appeal, he accepts that it may have well been as early as August when Singh began working for him.

Singh met Sethi and began working alongside him, and under his direction, long before August. Sethi gained a contract for work on the house of Singh's grandfather, Roop Sidhu. Sidhu introduced Sethi to Singh and he arranged to have Singh work on the house under Sethi's direction as a sort of trainee/helper. As Sethi remembers matters, that was in July but his records show that work on the project, 63 SW Marine Drive, was in May, not July.

Sethi says that Singh worked for Sidhu, not him. He showed promise, and that led to his being hired for various other construction projects in June, July and the first part of August. In that period, Sethi was observing Singh's aptitude for work as an electrician and Singh worked under Sethi's general supervision and direction. But according to Sethi, he did not employ Singh: Singh was hired and employed by project developers and home owners. On that point, home owners and European Developments Ltd. ("European") write and/or testify that they paid Singh directly for work, but none go so far as to say that they were actually Singh's employer. Sarwan Cheema, a friend of Sethi's, says that he paid Singh \$1,500 but he says that amount was then deducted from what he owed Sethi for electrical work. All but European say that Singh was paid cash. Singh, on the other hand, denies that he worked for, and ended up being paid by, any of them. He says he was not paid cash by anyone. He confirms that European gave him a cheque for \$400 but claims that, on cashing the cheque, he gave the money back. Not a single one of the alleged cash payments is confirmed, not those of the home owners, nor the \$400 repayment by Singh.

As Singh describes matters, he was at first only being trained by Sethi and that it was his understanding that, as he was being trained, he was not going to be paid. On appeal, he appears to say that it was his understanding that he would be paid for work in July and August. Yet the delegate reports that during the course of the investigation, Singh told her that "he was learning from May to August so Mr. Sethi didn't pay him anything". And he tells me that he knew full well that he was not to be working for money while he was collecting Employment Insurance ("EI"). He was attending ESL classes and collecting EI until about mid-August.

A common theme of the home owners is that Singh asked to be paid in cash because he did not have a bank account. Yet he had a bank account on the 15th of July, 1996. European's

cheque, which was issued against a United Civic Savings Credit Union account, was cashed by Singh on that day at a branch of the Bank of Montreal.

There is agreement that Singh worked for Sethi from August, 1996, to and including the first week of January, 1997. But the extent of work in this period is a source of disagreement. Both employer and employee present a record of hours worked for the period. They are quite inconsistent with one another. Employer and employee records differ even on the days worked. The employer's record indicates work on days when the employee says he did not work, and vice versa. The delegate has compared the employee's record with his school's record of his attendance at ESL classes, and a record of work for Pacific, and found no inconsistencies. And none are shown to me. I am shown that the employee's record is inadequate in only one respect and that is its failure to account for when he stopped work for lunch.

The employer produces a record of hours worked and a payroll record which consists of a page of calculations by Sethi's accountant, Sam Sharma. There is no accounting for statutory holiday, vacation pay, overtime work or minimum daily pay. The payroll record divides work into 4 pay periods and indicates that Singh should have been paid net pay of \$956.55, \$896.65, \$693.07 and then \$522.76, with Revenue Canada being paid another \$542.97 in taxes and CPP and EI premiums. Yet what Singh says is that he was paid a total \$3,000 by Sethi, in three pay cheques, each in the amount of \$1,000 each. It does not add up. And while Sethi claims to have paid Singh another \$612 in cash, that is denied by Singh, not confirmed, and it falls short of explaining the payroll record.

An ROE was prepared by Sharma for Singh. It states that the 3rd of January was Singh's last day of work. Sethi's record of work indicates that the 5th of January was his last day. The employee claims that his last day of work was the 8th of January, 1997 and his record of work is consistent with that.

ANALYSIS

Singh was clearly employed by someone in the months of May through August, 1996. And it is either that Sethi was the employer in that period or it is that Singh was employed, as Sethi claims, by the owners of the houses and the developer, European. Yet not a single home owner tells me or shows that they became Singh's employer, nor does European do that. All that the home owners say is that they paid him cash for his work and that is far from clear as none of the cash payments are confirmed. European did pay Singh but that is not necessarily to say that it acted as Singh's employer. The circumstances of the payment are not known. It is possible that Sethi was the employer and that European was only assisting its subcontractor with his employee.

What I must do is choose between two very different versions of the events in this case, one in which there is a distinct lack of records. According to Sethi, Singh was under his supervision and direction but worked for the home owners and European. According to Singh, Sethi was his employer from the 11th of May on, and he was not paid except for the

\$3,000 that Sethi eventually paid him. My task is to determine what is credible, what is likely to be the truth in all of the circumstances, while keeping in mind that it is possible for witnesses to testify in all sincerity, yet be mistaken or untruthful; That the passage of time and the introduction of self-interest can have that effect [489535 B.C. Ltd. d.b.a./ Chalet Bakeries (1996) BC EST #D219/96, also Faryna v. Chorny (1952) 2 D.L.R. 354 (BCCA)]. When I do that, I find that I prefer the employee's version of matters.

I find what Sethi claims is rather improbable. Undermining all of what Sethi has to say is the abysmal state of his records. They are not only inadequate but parts of what does exist is plainly wrong. That leads me to doubt much of what he has to say. Beyond that, I find that he is the only common element in Singh's employment. In operating as an electrical contractor, he would need someone like Singh, someone to pull wires, clean-up work sites and install electrical components. It is unlikely that the home owners and developing contractors, on the other hand, would have wanted to go to the trouble of employing the electrician's helper. And when I consider the possibility that others did employ Singh, it strikes me as most unlikely that they would then hand control and direction of the employee to Sethi, all fail to keep proper records, and pay cash as alleged given Singh's bank account.

I find that, most likely, Singh agreed to work for Sethi as a sort of trainee/helper on the understanding that he was not going to be paid so long as he was being trained. That is consistent with his interest in gaining work in Canada as an electrician, the difficulty he would face as a new immigrant with a less than adequate command of English, and also understanding that he was not supposed to work for pay while collecting EI. It also explains to me why Singh worked for so many months without being paid.

The mere fact that Sethi controlled and directed Singh's work means that he fits the Act's definition of "employer", which is a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee. (s. 1 of the Act, definitions.)

Section 28 of the Act places the onus on the employer to keep various employment records. Where the employer's records are incomplete or inadequate, a delegate may rely on the employee's record of work so long as it appears reasonable. That is fully consistent with the Act. And it is simply inconceivable to me that an employee's claim for wages should fail because of his or her employer's failure to keep proper records.

The delegate has found that the employer's record are misleading and inadequate. That is what I have found. She has concluded that the employee's record is of a quality, on thoroughly examining that and other records, that a Determination could be based on it. I agree with that conclusion but find that the Determination should be adjusted, now that it is discovered that Singh failed to keep track of when he stopped for lunch. Given that Singh worked on construction projects, that construction workers commonly take ½ hour for lunch, and that it can logically be expected that Singh would only have stopped for lunch

when work went beyond 5 hours, I find that there is a need to reduce the amount of work by ½ hour on all days where work went beyond 5 hours. When I do that, using the detailed calculations of the delegate as a guide, I find that Singh did not earn total wages of \$9,757.59 but \$9,207.94. To that must be added vacation pay of 4 percent or \$368.32.

My calculations include pay for work from May to August even though I believe that Singh agreed to work for nothing for much if not all of that period. The Act requires it. As the Act defines "employee", it includes " a person being trained by an employee for the employer's business". Section 16 of the Act states that "an employer must pay an employee at least the minimum wage as prescribed in the regulations". And, section 4 of the Act, renders null and void any agreement which calls for less than the minimum standards of the Act.

4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 apply to union employees and are of no importance in this case. Singh is owed wages for all work while being trained.

The employee has said that he was paid \$3,000 by Sethi. I am satisfied that his T4 for the year 1996 shows that another \$522.76 was paid out on his behalf as income tax, CPP and EI premiums.

Singh was paid \$400 by European for work. While he says that he paid that money back, like the alleged cash payments by home owners, there is no proof of that repayment. As the \$400 was for work that is included in the calculations, the amount needs to be deducted from what Sethi is found to owe. All considered, I find that the total amount of wages, overtime pay, statutory holiday pay, minimum daily pay and vacation pay which Singh is owed is $\$9,207.94 + 368.32 - 3,522.76 - 400$ or \$5,653.50. To that must be added interest.

ORDER

I order, pursuant to section 115 of the Act, that the Determination dated July 10, 1998 be varied. Surjit S. Sethi operating as Prime Time Electrical and Prime Time Electric owes Harjap Singh \$5,653 in regular wages, minimum daily pay, overtime pay, statutory holiday pay and vacation pay together with whatever interest is owed under section 88 of the Act.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunals