

An appeal

- by -

Narinder G. Dhaliwal and Mahabir S. Dhaliwal operating as Vancity Printers
(the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/579

DATE OF HEARING: October 22, 2001

DATE OF DECISION: November 2, 2001

DECISION

APPEARANCES:

Mahabir Singh Dhaliwal	on his own behalf and for Narinder Gill Dhaliwal
Kevin Tu, Agent	for Kienhao Harold Tu

OVERVIEW

This is an appeal filed by Narinder Gill Dhaliwal and Mahabir Singh Dhaliwal, carrying on business as VanCity Printers (the “Employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on July 17th, 2001 (the “Determination”). By way of the Determination, the Employer was ordered to pay the sum of \$3,170.09 to its former employee, Harold Tu (“Tu”), on account of unpaid wages and interest.

This appeal was heard at the Tribunal’s offices in Vancouver on October 22nd, 2001 at which time I heard the testimony of Mr. Mahabir Singh Dhaliwal on behalf of the Employer and Mr. Kienhao Harold Tu on his own behalf. No one appeared at the appeal hearing on behalf of the Director.

In addition to the witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

ISSUES ON APPEAL

Mahabir Singh Dhaliwal, on behalf of the Employer, says that the Determination is in error several respects including the wage rate and the number of working hours credited to Tu.

FINDINGS OF FACT

The Employer operates a printing business in Vancouver. Tu worked in the shop in November and December 2000. The Employer concedes that it owes Tu unpaid wages and that it did not pay Tu any wages whatsoever. The Employer says that it is not obliged to pay Tu statutory holiday pay for Christmas 2000. Regarding this latter point, Mr. Dhaliwal incorrectly asserts that Tu was not “eligible” for statutory holiday pay for Christmas 2000.

As noted in the Determination, Tu was hired under a federally-funded program whereby his agreed hourly wage, namely, \$10 per hour, would be subsidized through an organization known as “Progressive Intercultural Services” to the extent of \$5.00 per hour. The Employer appears to be under a misapprehension about the terms of this latter subsidy program. The Employer was

obliged to pay Tu at a rate of \$10 per hour and then it could recover the \$5 per hour subsidy from the federal program. The Employer's position that it was only obliged to pay Tu \$5 per hour for all hours worked is untenable.

There is a dispute between the parties with respect to the number of hours actually worked by Tu. The Employer says it was not obliged to pay Tu for hours worked in November 2000 because Tu was being "trained" during that period or, alternatively, because during November Tu was simply being "assessed" as to his suitability for the job. However, under section 1 of the *Act*, an "employee" includes "a person being trained by an employer for the employer's business" and thus Tu's "training hours" in November 2000 are fully compensable at the agreed hourly rate. Whether the Employer was or was not "assessing" Tu's work during November, the services rendered during that period constitute compensable working time under the *Act*.

Mr. Dhaliwal conceded during his testimony that Tu did work some overtime hours but maintains that Mr. Tu is not entitled to be paid any overtime although I was not able to discern why the Employer believed it was relieved from any overtime pay obligation. Mr. Dhaliwal simply asserted that in his view the Employer "shouldn't have to pay any overtime". The Employer's written submissions suggest that perhaps it had a concern about Mr. Tu's efficiency but that is not a proper basis for refusing to pay overtime.

With respect to the parties' divergent evidence regarding Tu's working hours, I accept--as did the delegate--Tu's records as being more credible than the Employer's. I might add that I am giving no weight whatsoever to the two "witness" statements (from former employees at least one of whom is related to the Employer) that were submitted to the Tribunal (but not to the delegate) as appendices to the Employer's appeal form. These two statements are not under oath and neither witness appeared before me. Further, both statements appear to be inherently unreliable since each suggests that Tu did not commence work until about mid-December 2000 which is contrary to Mr. Dhaliwal's *viva voce* evidence that Tu commenced his employment in early November 2000.

Tu recorded his hours each day on a calendar that was provided to the delegate. According to Mr. Dhaliwal, he wrote down Mr. Tu's hours each day and provided this scrap of paper to the company bookkeeper who, in turn, recorded the hours in some other document (which has not been produced before me). These "scraps of paper" have apparently been destroyed. Mr. Tu never acknowledged the correctness of the hours apparently recorded by the Employer and the Employer's bookkeeper did not appear before me. The Employer did not have a time clock for its employees.

The Employer produced a record of Tu's hours at the hearing (I note this record was not provided to the delegate) but this record is inherently unreliable. For example, it does not show any hours worked in November 2000 even though Mr. Dhaliwal conceded at the hearing that Tu worked at least a few days in November. Further, the Employer's time record--which is a

summary and not an original record--indicates that Tu worked up until January 11th, 2001 when it is clear that Tu's employment ended in late December 2000.

Finally, I have reviewed the delegate's calculations and find them to be entirely in order. Tu conceded at the hearing that on those days where he worked 8 hours or more he received a 30-minute meal break; the delegate adjusted Tu's compensable working time accordingly.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$3,170.09** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal