

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 -

Jutt Motors Ltd.
("Jutt ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Paul E. Love

File No.: 97/783

Date of Decision: January 14,1998

DECISION

OVERVIEW

This is an appeal, under s. 112 of the *Employment Standards Act* (the “*Act*”) by Jutt Motors Ltd. (“Jutt”) from a Determination dated October 8, 1997. Jutt employed Pakhar Bains, Harnek Chhiana and Kulwant Singh Dhillion to work at its gas bar. The employer paid the employees \$5.00 per hour, for a 40 hour work week, by agreement. The agreement violated the terms of the *Act*, and no substantive ground of appeal was raised by the employer, save and except its ability to pay the amounts set out in the Determination. During the course of submissions, it became apparent to the Director’s Delegate that a calculation error had been made in respect to amounts owing Harnek Chhiana and Kulwant Singh Dhillion. The Determination was varied to correct the error, and otherwise confirmed.

ISSUES TO BE DECIDED

Did Jutt Motors Ltd. employ the employees at a rate of \$5.00 per hour in violation of the *Act*?

FACTS

During the course of an investigation, the employer admitted to the Director’s Delegate that Pakhar Bains, Harnek Chhiana and Kulwant Bains worked 40 hours per week at the employer’s gas station. The employer alleged that he took these employees on at that rate after they “begged him” for work. The employer further alleged that the employees were commissioned sales persons. The Director’s Delegate determined that the employees were paid \$5.00, per hour, cash, which is less than the minimum wage of \$7.00. The Director’s delegate calculated the amount owing as of September 30, 1997 to each of the employees as follows:

Harnek Chhiana	\$11,285.00
Pakhar Bains	\$5,438.37
Kulwant Singh Dhillion	\$11,391.69

It is not necessary for me to set out the details of the calculation made by the Director's delegate. The Director's delegate discovered an error in the calculations concerning Mr. Chhiana.

The total amount owing to Mr. Chhiana was determined to be \$5,942.64. In written submissions counsel for Mr. Dhillion identified a further calculation error with respect to Mr. Dhillion. Counsel pointed out that the 4 % vacation pay should be calculated on Mr. Dhillion's actual earnings after adjustment for the minimum wage, rather than just on the additional monies payable for the minimum wage adjustment. This amounts to an additional \$216.00. The total amount owing to Mr. Dhillion is \$11,607.69. The amount owing by Jutt to all employees is \$22,988.70.

The Director's delegate found that the employer had violated sections 16, 18, 45, and 58 of the Act, and ordered that the employer cease contravening these sections of the *Act*.

ANALYSIS

The burden of proof is on Jutt to show that the Determination ought to be cancelled or varied. The employer alleges that the employees were to be paid commissions which amounted to \$40.00 per day. The employees allege that they were employed at the rate of \$5.00 per hour for an 8 hour day. The Director's delegate accepted the evidence of the employees on this point, and I see no reason to disturb this finding of fact.

It appears that regardless of whether the employees were paid by commission or paid hourly, the arrangement is violation of the minimum wage provisions of the *Act*, and any agreement is void pursuant to section 4 of the *Act*. Section 4 reads as follows:

The requirements of this Act or regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 46, 61 and 69.

The employer submitted that this Tribunal ought to take into account the ability of the employer to pay minimum wage. It is my view that the employer's ability to pay minimum wage is not a relevant consideration for me on the appeal. I find that the employer has not established that any error was made by the Director's delegate.

I find, however, that there was a mathematical error in the calculations for the employee, Harnek Chianna. The correct amount should be \$5,942.64 payable to Harnek Chianna. I also find that there was a mathematical error with regard to Mr. Dhillion's vacation pay, with the correct amount being \$11,607.69. The amount owing by Jutt to all employees is \$22,988.70.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter dated September 29, 1997 be varied by ordering Jutt Motors Ltd. to deliver to the Director the sum of \$22,988.70 by way of certified cheque or money order payable as follows: \$5,942.64 to Harnek Chianna, \$5,438.37 to Pakhar Bains and \$11,607.69. Kulwant Singh Dillion.

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Paul E. Love
Adjudicator
Employment Standards Tribunal