

An appeal

- by -

Manjit Mahal operating as Mahal Trucking
(“Mahal”)

- 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: Carol L. Roberts

FILE No.: 2001/593

DATE OF HEARING: November 14, 2001

DATE OF DECISION: November 20, 2001



DECISION

APPEARANCES:

Manjit Mahal:	On behalf of Mahal Trucking
Wayne Masson:	On his own behalf
For the Director of Employment Standards:	No one appeared

OVERVIEW

This is an appeal by Manjit Mahal operating as Mahal Trucking ("Mahal"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 24, 2001. The Director found that Mahal contravened Sections 18 (2),21(1),40(1) and (2),45 and 58(3) of the Act in failing to pay Wayne Masson ("Masson") wages, overtime wages, statutory holiday pay and vacation pay, and Ordered that Mahal pay \$4,253.47 in wages and interest to the Director on Masson's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining Masson's entitlement to compensation.

FACTS

Masson worked as a driver for Mahal, a trucking business, on a commission basis from March 28, 2000 to February 20, 2001. He filed a complaint that Mahal had not paid him in accordance with the Act.

The delegate stated that, during the investigation, Mr. Mahal first took the position that Masson was an independent contractor. On a later date, he took the position that the hours that Masson worked were incorrect, and that Mahal in fact overpaid Masson. The delegate made a preliminary finding and provided that to Mahal on May 28. Mr. Mahal continued to maintain that Masson was overpaid, and spoke to the delegate on June 28. The delegate gave Mahal until July 4 to provide her with evidence of that position. None was received.

The delegate concluded that Masson was an employee. She further concluded that, although the agreement between the parties provided that vacation pay and statutory holiday pay was included in the commission, Masson was entitled to vacation pay, since the inclusion of vacation pay as part of an hourly wage scheme was prohibited under the Act.



The delegate further concluded that deductions from Masson's wages for WCB contributions, money owing to Kel-Mac and oil purchases had been made contrary to the Act.

Finally, the delegate reviewed the trip reports provided by Masson, and in the absence of any evidence from Mahal, accepted those as the best evidence of the hours he worked. She awarded overtime wages.

ARGUMENT

Mr. Mahal's letter of appeal does not set out any grounds for the appeal. He does not contend that the delegate erred in law or in fact. The information set out in the appeal letter does not differ from the information Mr. Mahal provided to the delegate at the first instance.

At the hearing, Mr. Mahal argues that the delegate did not investigate the claim properly. He contended that the manner in which Mr. Masson was paid was standard in the trucking industry, and that he could not afford to pay him what the delegate ordered. Mr. Mahal also argued that, even though he did not have any record of the hours Mr. Masson worked, looking at the dispatch sheet, it was not possible for him to work the hours he indicated. Mr. Mahal provided me with a spreadsheet containing job numbers, dates and pick-up and delivery sites that he indicated were for trips made by Mr. Masson between October 3, 2000 and February 20, 2001. Mr. Mahal indicated that, although he attempted to provide the document to the delegate, she refused to accept it. Because the delegate did not appear, I heard no evidence from her on this information. However, I note that Mr. Mahal attempted to provide the delegate with the document after the July 4, 2001 deadline the delegate she gave him to submit any additional information.

Mr. Masson contends that he did not sign any agreement with Mahal, and any documentation provided by Mr. Mahal is fraudulent.

The delegate provided a written submission setting out the basis for the calculation of wages owing. She seeks confirmation of the determination on the grounds that Mr Mahal provided no evidence that was not considered as part of the investigation.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met. The sole issue on appeal appears to be whether the delegate erred in determining Mr. Masson's hours of work. While Mr. Mahal disagrees with the delegate's determination, none of the other issues form a basis for appeal.

It is well established Tribunal practice not to accept new evidence on appeal. While I accepted Mr. Mahal's spreadsheet on the basis that he attempted to give it to the delegate after the deadline she provided to him, and she refused to accept it, I place little weight on it. The document was



purportedly prepared by an employee of Kel-Mac, to whom Mahal Trucking contracted its vehicles. The document does not identify the driver of the vehicle, and Mr. Masson was unable to say whether the dispatches noted were in respect of trips that he took. In addition, the document only sets out dispatches for 5 months of Mr. Masson's employment. Furthermore, I am unable to determine, on the face of the document, what time Mr. Masson began work, or what time he quit. As I explained to Mr. Mahal, an employer has an obligation under the Act to maintain records, including the hours worked by an employee. In the absence of any records, the delegate must apply the best evidence rule about the hours of work. The delegate used Mr. Masson's trip records, which note the odometer readings at the start of the day, the time he conducted the pre-trip inspection, and the time he conducted the post-trip inspection. While Mr. Masson may not have been driving the vehicle during all those hours, I accept his evidence that he was often told to wait for additional trips before he left, and would spend his time just waiting, or working on the vehicle. Mr. Mahal had no knowledge of the time Mr. Masson spent waiting for trips on Kel-Mac's instructions.

Consequently, the appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated July 24, 2001 be confirmed in the amount of \$4,253.47, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal