

Ontario Superior Court of Justice

Toronto Small Claims Court

BETWEEN:

Parveen Singh and Amar Deep Singh, Plaintiffs

and

1793667 Ontario Inc. and 179367 Ontario Inc. o/a Chef of India,
Defendants

Gil Fischler, counsel for the Plaintiffs
E. Vaiano, licensed paralegal, for the Defendants

Decision

This matter was heard on December 6th, 2013. Having read the pleadings and heard the evidence, I find in favour of the Plaintiffs.

The Pleadings

In this case, the plaintiff, Parveen Singh (“Parveen”) claims damages in the amount of \$8000.00 for unpaid wages and entitlements pursuant to *The Employment Standards Act, 2000*, S.O. 2000, c.41. The plaintiff, Amar Deep Singh (“Amar”) claims damages in the amount of \$15,000.00 in unpaid entitlements pursuant to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“the Act”) together with \$2000.00 for wrongful dismissal. The Defendant, 1793667 Ontario Inc. o/a chef of India (“Chef of India”) is a restaurant with two locations in Toronto, on Eglinton Avenue and Yonge St.

Parveen pleads that he was employed by Chef of India for approximately 12 weeks as a Curry and Tandoori Chef. His hourly wage was \$18.75 per hour. Further, he pleads that he was entitled to be paid overtime pay of \$28.12 for any hours that he worked per week over 44 hours, pursuant to the *Act*. Parveen pleads that during the course of his employment, he worked approximately ten hours a day, six days per week. Pursuant to the *Act*, Parveen was entitled to be paid \$1274.92 per week. Instead, he was only paid around \$692.00 per week. Further, Parveen pleads that he was not paid his full wage, overtime, vacation pay or public holiday pay as required by the *Act*.

Amar pleads that he was employed by Chef of India for approximately 26 weeks as a waiter. His hourly wage was \$8.90 per hour and he was entitled to be paid overtime pay of \$13.35 for any hours that he worked per week over 44 hours pursuant to the *Act*. Amar pleads that during his employment, he worked approximately 12 hours a day, 6 days a week. Pursuant to the *Act*, Amar was entitled to be paid \$766.00 per week. Despite this, he was only paid \$360.00 per week. Amar also pleads that he was entitled to overtime pay, vacation pay and public holiday pay as required by the *Act*. Amar also pleads that he was constructively dismissed by Chef of India. Amar pleads that he was entitled to at least 2 months' notice of termination pay. Amar pleads that he is entitled to \$15,000 for unpaid wages and \$1763.00 for wrongful dismissal.

In their Defence, both Defendants plead that Parveen was employed by the Defendant, Chef of India, from February 21st, 2011 until April 24th, 2011. Parveen was paid a weekly salary of \$750.00. His hours were from 11:30 a.m. to 2:30 p.m. and 5:00 p.m. to 10:00 p.m., five days per week. Parveen did not work any overtime hours during his tenure at Chef of India.

With respect to Amar, he was employed as a waiter by Chef of India from April 26th, 2010 to April 17th, 2011. His rate of pay was \$8.90 per hour. He did not work any overtime hours during this period. The Defendants plead that Amar was paid his hourly wages, vacation pay and public holiday pay as required by the *Act*. Therefore, there is not any money owed by Chef of India to Amar.

The Evidence

Parveen Singh testified on his own behalf. His evidence was that he came to Canada in 2005. He had considerable international experience working as a chef, including two years in Germany. He worked at Dhaba Restaurant when he first came to Canada, developing a new buffet. He then relocated to Winnipeg for a few years, and returned to Toronto in 2008. After a number of other positions, he commenced employment at Chef of India in February, 2011.

It was agreed that his rate of pay would be \$750.00 per week. Parveen split his time between the two different locations of Chef of India, Eglinton Avenue and Yonge Street in Toronto.

Reference was had to Tab 3 of Exhibit 1. This is a pay cheque made out to Parveen in the amount of \$1189.19. Parveen testified that he was paid the same amount every two weeks based upon \$750.00 per week less deductions.

His evidence was that he worked considerable overtime hours that he wasn't paid for. When he made enquiries with respect to the outstanding overtime, he was told that he would be paid the outstanding amounts when the Defendants' accountant returned to town.

Tab 2 of Exhibit 1 was also referenced. This is a schedule of hours worked by the Defendants' staff. Parveen testified that he worked a number of days not referenced in Tab 2. Pictures were taken documented at Tab 4 on dates that Parveen worked that are not included in Tab 2.

Parveen testified that he typically arrived at work at 10:30 a.m. to prepare for the restaurant opening at 11:30 a.m. His first responsibility was to turn on the clay Tandoori oven before the restaurant opened. He would stay through the lunch service that concluded at 2:30 p.m. He would return at 5:00 p.m. for the dinner service. The restaurant would stay open until 10:30 p.m. during the week, Monday through Thursday. On Friday and Saturday nights, the restaurant would stay open until 11:00 p.m. He generally worked 9 or 10 hours per day. He did not keep written records with respect to his overtime hours worked. His evidence was that he did not receive any holiday pay or premium pay, although he was required to work on some statutory holidays.

Parveen's last day of work was April 22nd, 2011. He didn't receive any vacation pay after that time.

Amar Deep Singh testified on his own behalf. He immigrated to Canada with his father in 2008. He initially worked at Chef of India in 2010, and returned to work at Chef of India as a full-time server in October, 2011. His work day typically started at 10:30 a.m. He would work through the lunch service, and take a break at 3:45 p.m. He would return to work at 4:45 p.m. He would stay until closing at 10:30 or 11:00 p.m. He generally worked ten or eleven hours per day. April 14th, 2011 was his last day of work.

Amar testified that he was promised a raise, vacation pay and overtime pay. His hourly rate was \$6.00 per hour. He didn't receive detailed pay stubs. When he asked for a raise, he was dismissed by Chef of India. He didn't receive any vacation pay after his employment was terminated. Further, he wasn't provided with a Record of Employment.

Amar did not receive any holiday pay or premium pay as required by the *Act*, although he was required to work on some statutory holidays.

Ali Hoque ("Ali") testified for the Defence; he is one of two owners of the Defendant restaurants. With respect to Amar, Ali testified that he started part-time work as a server. Ali was happy with his performance. He was paid at an hourly rate of \$8.90 per hour. In addition he received tips. Amar never worked more than 40 hours per week. His day would start at 10:30 or 11:00 a.m. Ali's wife also worked at the restaurant, so Amar didn't have to help extensively with cleaning the restaurant. Ali testified that Amar received 4 % vacation pay.

With respect to Parveen, he was paid at the rate of \$750.00 per week. Ali's evidence was that Parveen never asked about overtime, and never complained. On April 26th, 2011 Parveen didn't show up for work. Ali subsequently received a lawyer's letter. Ali testified that any vacation pay was included in the \$750.00 weekly salary.

Reference was had to Tab 7 of Exhibit 1. This is a work schedule prepared by Ali. Ali acknowledged some errors in the chart. It reflects April 24th as being Amar's last day of work, when his actual last day worked was April 14th, 2011.

Reference was also had to Tab 9 of Exhibit 1. This is a summary of wages paid to employees. No vacation pay or statutory pay is entered with respect to Amar or Parveen. Ali could not reference any documentation to support that overtime, statutory holiday pay, premium pay or vacation pay was paid to the Plaintiffs.

Decision

This case turns on the credibility of the witnesses. Both Parveen and Amar came across as credible and forthright individuals. Their respective work histories reveal them to be conscientious, hard working individuals. Ali also testified in a forthright manner for the Defence. However, in certain areas, the records contradicted Ali's testimony. Specifically, the accounting records entered at Tab 9 of Exhibit 1 contradicted Ali's evidence with respect to vacation pay, holiday pay and premium pay. Also, certain errors were demonstrated with respect to the work schedule entered at Tab 2 of Exhibit 1. The evidence of the Plaintiffs was not contradicted by any of the documents produced. Consequently, where the evidence of the Plaintiffs and the Defendants was contradictory, I prefer the Plaintiffs' version of events.

The Defendants have not demonstrated in any satisfactory way that they paid holiday pay, (s. 24 (1) of the *Act*) premium pay, (s. 24 (2) of the *Act*) or vacation pay (s. 35.2 of the *Act*) to the Plaintiffs. Furthermore, there is no evidence that termination pay was paid to Amar as required pursuant to s. 61 of the *Act*. The Defendants did not keep the records required in Part VI of the *Act*, and therefore they are not in a position to refute the allegations made by both Plaintiffs.

I accept the Plaintiffs' evidence with respect to their hours of work, and therefore decide that they are both entitled to overtime pay as provided for in Section 22 of the *Act*. Parveen testified that he worked on average at least 14 hours of overtime per week.

Amar testified that he worked on average at least 28 hours of overtime per week. Neither Parveen nor Amar was paid overtime as required in Part VIII of the *Act*.

I accept the calculations provided by the Plaintiffs' counsel with respect to amounts owing to both Plaintiffs. With respect to Amar Deep Singh, the amount of \$15,136.85 is outstanding. This includes \$10,466.40 in overtime wages; \$857.25 for vacation pay; \$796.00 for holiday pay; \$238.00 for premium pay and \$1990.00 for termination pay. The additional amount owing represents amounts outstanding for ordinary wages.

With respect to Parveen Singh, the amount of \$7227.53 is outstanding. This includes \$4331.25 for overtime hours, \$209.37 for vacation pay; \$507.00 for holiday pay; \$58.00 for premium pay, and an amount owed for his last week of work of \$1218.75. The additional amount owing again represents amounts outstanding for ordinary wages.

Judgment

The Plaintiff, Parveen Singh shall have judgment against the Defendants in the amount of \$7227.53. The Plaintiff, Amar Deep Singh shall have judgment against the Defendants in the amount of \$15,136.85. Costs may be spoken to.



Deputy Judge Anschell
January 24th, 2014