

IN THE MATTER OF THE EMPLOYMENT STANDARDS CODE
REVISED STATUTES OF ALBERTA 2000 CHAPTER E-9
WITH AMENDMENTS IN FORCE AS OF NOVEMBER 1, 2010

AND IN THE MATTER OF AN ORDER ISSUED BY AN OFFICER
UNDER THE EMPLOYMENT STANDARDS CODE DATED APRIL 18, 2012
AGAINST

BETWEEN:

639299 ALBERTA LTD. O/A BISTRO INDIA

APPELLANT

AND

JEGADEESH MEGANATHAN

CLAIMANT

AND

DIRECTOR OF EMPLOYMENT STANDARDS

THIRD PARTY

UMPIRE: THE HONOURABLE JUDGE G.W. SHAREK
APPEAL HELD: SEPTEMBER 18, 19, 20 and DECEMBER 3, 4, 6, 2013

UMPIRE'S AWARD

Introduction

1. This matter came before me for before me for six days of hearing, September 18th, 19th, 20th and December 3rd, 4th and 6th, 2013. As a Provincial Court Judge, I sat as an Umpire pursuant to sections 69 and 101 of the *Employment Standards Code*, and this is an appeal by an employer, 639299 Alberta Ltd. and 1073026 Alberta Ltd. operating as Bistro India ("Bistro India" or the "Employer"), of an award of Officer Number ES-000273 dated April 18th, 2012, which directed the Employer to pay Jagadeesh Meganathan ("Meganathan" or the "Employee"), the sum of \$10,465.25, plus Order of Officer's fees of \$1,046.53, for a total of \$11,511.78.

Background Facts & Factual Findings

2. The Saunder Family, being Raj Saunder, Shanthi Saunder and their son Shyam Saunder determined, sometime in late 2009 or early 2010, that they wished to open a restaurant in Edmonton, Alberta, known as Bistro India, specializing in South Indian cuisine. Raj Saunder, who is an architect by trade, became acquainted with Janardhanrao Peyal ("J.R."), who was familiar

with South Indian cuisine, and was employed as a chef at another Edmonton restaurant. Raj Saunder consulted with J.R. with respect to general issues relating to establishing such a restaurant, and J.R. recommended that Meganathan be hired as a chef at the restaurant. J.R. was familiar with Meganathan as the two of them had worked together previously in India. Meganathan, up to early 2010, lived with his family in India, where he was gainfully employed as a chef with a hotel. On behalf of Raj Saunder, J.R. made the initial contact with Meganathan who was interested in the opportunity to come to Canada.

3. An "Employment Contract" was entered into between Bistro India as Employer, and Meganathan as Employee and was signed on February 26th, 2010, by Raj Saunder on behalf of the Employer and also on his own personal behalf as "primary contact", and it was signed by Meganathan on March 15th, 2010. The essential terms of the Employment Contract included,

- Start date: April 1, 2010
- Position: Ethnic food cook
- Reporting to Shanthi Saunder
- Hourly wage: \$13.00 per hour.
- Overtime rules: "If you work over 8 hours per day or 44 hours per week, you will be paid overtime. Overtime is calculated at 1.5 times your hourly wage."
- Duration of contract: 12 months
- Hours of work to be scheduled by Manager; "however, you will be asked to work no less than 40 hours per work".
- Job duties: specialty ethnic food cook. Assist with the kitchen cleaning and maintenance and other duties as assigned.
- Holidays: 14 days paid holidays per annum to be taken upon completion of a year of service.
- Conditions of employment:

"17. The employee during the entire term of the employment with 1073026 Alberta Ltd. shall not be allowed to take up any other part-time job with any other employer. It is illegal to seek and take these kinds of part-time jobs and also received cash wages and the employees will be prosecuted for such actions. It is Canadian Law that all wages paid to or received must be reported to Canada Revenue Agency by both the employer and employee".

"18. LMO Conditions – The employer and employee are bound by the approved labour market opinion confirmation for #7600080 dated 2010-02-08 (3 pages) enclosed."

4. Raj Saunder and Bistro India had previously received a Labour Market Opinion (“LMO”), on February 8th, 2010, confirming their offer of employment to Meganathan for a 12 month period. The LMO confirmed a wage of \$13.00 per hour, 40 hours per week, and 14 days paid holidays.
5. On May 4th, 2010, as shown on Page 3 of Exhibit 10, arrangements were made through an Edmonton travel agent for Meganathan to travel to Edmonton to arrive June 11th, 2010. Prior to that time, between May 12th, 2010 and June 2nd, 2010, a number of emails were exchanged amongst J.R., Shanthi Saunder and Meganathan, culminating in Shanthi Saunder sending Meganathan \$2,500.00, on or about June 2nd, 2010, for the purposes of Meganathan purchasing and bringing with him, specified kitchen equipment. One of those emails, May 27th, 2010, referred to Meganathan potentially incurring extra baggage charges to bring the kitchen equipment to Canada. Shanthi Saunder, in an email dated May 26th, 2010, was clearly mindful of Meganathan’s plans to travel to Canada shortly thereafter. These emails are also contained in Exhibit 10.
6. Raj Saunder testified that Meganathan was advised, prior to June 10th, 2010, that the Bistro India restaurant would not be opening in the near future, and that Meganathan was told by him, and perhaps others, that he should delay his travels. The email exchange involving Shanthi Saunder as late as June 2nd, 2010, makes no reference at all to Meganathan delaying his travel to Canada. It is notable that Shanthi Saunder did not testify at this hearing.
7. Meganathan arrived in Canada on June 11th, 2010, as shown on the airline itinerary dated May 4th, 2010, contained in Exhibit 10. He received a Work Permit from Citizenship and Immigration Canada dated June 11th, 2010, Exhibit 1, Tab 7, that was valid until June 11th, 2011, and that prohibited him from working for any other employer or at any other location than the 1073026 Alberta Ltd. company. A subsequent Work Permit was issued on December 16th, 2010, also contained in Exhibit 1, Tab 7, permitting him to work with Bistro India. The parties have agreed that at all material times Meganathan was employed by the two numbered companies, operating as Bistro India.
8. J.R. testified that Raj Saunder had initially planned on opening the Bistro India restaurant in mid-July 2010, but this was contradicted by Raj Saunder’s initial testimony when he stated that the restaurant would open several months later, and his rebuttal testimony when he clearly stated that Meganathan knew or ought to have known that the restaurant was not going to open until November 10th, 2010.
9. There is no evidence, other than the testimony of Raj Saunder, that Meganathan had been told to delay his travel. There is no email, letter, or any other corroborating evidence of this. In fact, the weight of the evidence, including Shanthi Saunder’s emails, and J.R.’s testimony, is that the

Saunders and Bistro India did not advise Meganathan to defer his travel because the restaurant opening was being delayed.

10. Furthermore, Raj Saunder testified clearly that he was aware that development, building occupancy and food handling permits were required, and that this was a process that might take a number of months. He would have known this when he signed the Employment Contract on February 26th, 2010. If Raj Saunder, armed with this knowledge, did in fact advise J.R. or Shanthi Saunders of the delayed restaurant opening, it is clear that this information was not conveyed to Meganathan. As a result, Meganathan proceeded to book a costly airline ticket to Canada, quit his stable job in India and leave his family in India, believing that he would begin work as a chef with Bistro India shortly after his arrival in Canada. It is inconceivable that Meganathan would have taken these steps had he been told that there was no work available for him for a number of months after his arrival in Canada and it is also inconsistent with the Employment Contract which contemplated commencement of employment as early as April 1st, 2010. Furthermore, it is made still more inconceivable that Meganathan would make these sacrifices knowing that the Employment Contract, LMO, and any subsequent work permit would prohibit him from working with any other employer, consistent with the rules which govern temporary foreign workers.
11. The evidence is clear that the Bistro India Restaurant opened on November 10th, 2010. The Employer, in Exhibit 8, which is a memo of August 10th, 2011 to the Employment Standards Officer, stated that from the time of his arrival in June 2010 and “until November 10, 2010 when Bistro India officially opened, he [Meganathan] was staying in his apartment, doing virtually nothing”. Bistro India maintained, in the memo, that Meganathan “was not working at Bistro India from June 10, 2010 to November 10, 2010”. They maintained that Meganathan received gratuitous benefits of \$6,980.00 for the time he was not working at the restaurant, being free rent, utilities, cell phone and groceries, as well as being supplied with a bed and bedding.
12. Conversely, Meganathan testified that during that time period of June 2010 to November 2010, he worked with Bistro India in dealing with contractors who were working on construction of the restaurant, setting up the kitchen, developing recipes, and establishing food and drink menus. In support of this contention, Meganathan produced in this hearing, three diaries which are Exhibits 12, 13 and 14 that contain voluminous handwritten notes regarding such things as menus, spices and other ingredients, phone numbers and addresses and some time entries. Exhibit 13 contains some notes that are dated as early as July 28th, 2010. The phone records produced as Exhibits 4, 11 and 23, relate to the three cell phones apparently given to Meganathan by Bistro India and these records generally show dates and numbers of calls made and charges incurred for the period of June 2010 to December 2010. Evidence was provided at this hearing of various telephone numbers for members of the Saunder family, contractors who were working on the restaurant and other personnel involved in the construction project, such as Raghbir Singh Jagdev, who was

employed by Raj Saunder's architectural firm and acted as an architectural consultant on design, preparation of drawings and supervision of construction of the Bistro India Restaurant.

13. The phone records in question show hundreds of phone calls made, presumably by or to Meganathan, and an analysis of these calls, even on a cursory basis, reveals that a large number of them were made to the Saunder family, Bistro India staff, or contractors and suppliers on the restaurant project.
14. Several things become apparent from a review of those telephone records. Firstly, numerous calls were made from Meganathan's cell phone to sub-trades or suppliers commencing as early as June 15th, 2010. Secondly, numerous calls were made to Raghbir Singh Jagdev commencing June 14th, 2010, with a significant number of calls with him being made in August and September, 2010. This is inconsistent with Mr. Jagdev's evidence given at this hearing, wherein he stated that he never spoke to Meganathan regarding the restaurant project.
15. Meganathan also produced as evidence Exhibit 15, an email dealing with such things as a menu for the restaurant and recipes. Exhibit 10 contains a September 28th, 2010 email from Shanthi Saunder to Meganathan regarding his recipes and addressing an issue for an October 1st [2010] dinner for 25 people.
16. While in large part the subject matter of this hearing is restricted to the six months prior to termination of Meganathan's employment, which was April 10th, 2011, and hence no earlier than October 10th, 2011, (s. 90(4)(a) of the *Employment Standards Code*) his employment prior to that timeframe is relevant with respect to payment of vacation pay or general holiday pay (s. 90(4)(b) of the *Employment Standards Code*).
17. Therefore, I need not, and do not, make any finding regarding the overtime hours worked by Meganathan prior to October 10th, 2011. However, I find that he was actively employed by Bisto India during the time period of June 14th, 2010, to April 10th 2011.
18. Meganathan produced time records contained in Exhibit 1, Tab 12, which were Bistro India staff timesheets for the period of June 14th, 2010 to November 7th, 2010. He testified that he maintained these records on a daily basis and typically the entries were made at the end of each day upon his conclusion of the workday. While there are some inconsistencies between the daily diaries he kept which are Exhibits 12, 13 and 14, and these time records, there are a number of days for which the diaries and timesheets coincide, such as October 17th, 26th, 27th, 28th and 29th, as well as November 5th and 6th, 2010. Where there are inconsistencies in the records, the timesheets generally reflect one or two more hours per day than recorded in the diary. For example, timesheets for September 16th, September 20th, October 14th and October 25th in each case have a time entry one or two hours greater than the diary entry. Meganathan sought to justify

these discrepancies by testifying that he did not record time after the kitchen closed when he would do such tasks as clean-up and dishwashing. While it may be that there are occasional overstatements by Meganathan of the hours worked, those are relatively insignificant in that the entries invariably show that he did work a minimum of 8 hours per day for most of those dates shown on Exhibit 1, Tab 12, starting June 14, 2010.

19. This finding is also substantiated by considerable evidence given by a number of parties at this hearing that Meganathan worked at two social functions away from Bistro India and prior to it opening, being a wedding of the daughter of Raj and Shanthi Saunder, and a subsequent Diwali festival, both of which events entertained hundreds of people. Raj Saunder and Bistro India maintain that Meganathan did little or no work at these events, and that any work done was done on a volunteer basis. These are suggestions which I do not accept, as they are not supported by the evidence. Exhibit 10 contains several emails relating to the final menu for "Hindu Wedding" including an email of September 2nd, 2010 to Meganathan saying "please let us know what ingredients we need to tell Goldie to have ready for you at 3:00 a.m. on Sunday, September 12th". Furthermore, the testimony of J.R. was clear that both he and Meganathan worked on the wedding, which, according to him, involved "doing all the parties, and doing functions for the weddings, and we did catering for her wedding". J.R. is a former employee of Bistro India who has no existing claims against Bistro India, and has no vested interest in the outcome of this hearing, and I have therefore been given little reason to doubt his testimony.
20. I also do not accept that Meganathan was a "volunteer" at these functions. There is no written confirmation, or even suggestion of this and it does not make sense that a temporary foreign worker, who is not being paid his full agreed upon wage which contractually was specified to be \$13.00 per hour, for no less than 40 hours per week would take on such tasks on a volunteer basis. Even the suggestion that a temporary foreign worker, under such circumstances, would or should do this work on a volunteer basis demonstrates the inequality of the bargaining position which Meganathan was in as a temporary foreign worker, handcuffed to a single employer who was not providing the work or wages contractually agreed to.
21. I am asked by the Employer to cast doubt on these timesheet entries as shown on Exhibit 1, Tab 12, because they appear to be in the same pen and in similar form, thus suggesting that they were fabricated, and prepared after the fact. I note that there are some entries such as October 25th and 27th, 2010 where corrections have been made. The fact that they may be in the same form and pen throughout is at least as consistent with the forms being filled out on a regular basis from the same location at the same time of day, as they are with the notion that they are fabricated. Given the sworn testimony of Meganathan about these entries, the general consistency between the timesheets and the diaries kept by Meganathan, the testimony of J.R. about work done by Meganathan and the absence of any time records kept or produced by the Employer as required by s. 14 *Employment Standards Code*, I find that the timesheets for the period June 14th to November

7th, 2010, generally establish the hours worked by Meganathan on a balance of probabilities, with the exceptions noted below.

22. With respect to the time period between November 10th, 2010 and April 11th, 2011, I make additional note of the evidence of Shyam Saunder who was the full-time manager of the Bistro India Restaurant. He testified that he did not see the Employment Contract between Bistro India and Meganathan until after the Employment Standards Complaint was made, which was well after Meganathan left the employment of Bistro India. He testified that all such contractual matters were dealt with by his father, Raj Saunder.
23. Shyam Saunder described Meganathan as a “full time” employee whose hours worked were in accordance with the weekly work schedule which is Tab 14 of Exhibit 1. This schedule provides for 2 shifts each day, Monday to Saturday, with Sundays off and totalling 39 hours per work. Shyam Saunder testified clearly that Meganathan’s day off was always Sunday but that Tuesdays were a regular workday for him. This was inconsistent with the evidence of Mr. Raj Patel who worked at Bistro India for approximately 1 year, commencing January 2011. Mr. Patel was very clear in his testimony that J.R. had Mondays off, Meganathan Tuesdays off, and this was consistent with the evidence given by J.R..
24. Shyam Saunder testified that no time records were kept by Bistro India regarding the time Meganathan worked. The employer payroll records which are included in Exhibit 2 as well as Exhibit 1, Tab 8, reflect no time records for Meganathan and specifically no records as required by s. 14 of the *Employment Standards Code*, which requires the following:

“Records to be maintained

14(1) Every employer must keep an up-to-date record of the following information for each employee:

 - (a) regular and overtime hours of work;
 - (b) wage rate and overtime rate;
 - (c) earnings paid showing separately each component of the earnings for each pay period;
 - (d) deductions from earnings and the reason for each deduction;
 - (e) time off instead of overtime pay provided and taken.

(2) At the end of each pay period, an employer must provide a written statement to each employee setting out, in respect of the employee,

 - (a) the information described in subsection (1), and
 - (b) the period of employment covered by the statement.”
25. As no such records were kept, no such information was provided to the employee as required by s. 14(2) *Employment Standards Code*.

26. Shyam Saunder testified that Meganathan was paid in accordance with the hours specified on the work schedule, Exhibit 1, Tab 14, on a monthly basis, on the assumption that Meganathan worked the hours as set out in the schedule. It is apparent that the schedule in question does not accurately reflect the hours worked by Meganathan, as the schedule is not even accurate with respect to the days off to be taken by Meganathan. When asked whether any record of overtime hours worked by Meganathan was kept, Shyam Saunder said that because it rarely changed, he thought the schedule was “more than enough”. He testified that the only information he submitted to the accountant for purposes of payroll was the schedule, without any specific reference to time records.
27. Raj Saunder testified that Meganathan was paid a monthly salary of \$2,300.00 which was based on an 8 hour day, \$13.00 per hour, for 52 weeks divided 12 months. This clearly takes no account of any potential overtime, and is intended to avoid the contractual obligation of the Employer to pay overtime. While the November and December 2010 monthly gross income payments made to Meganathan were \$2,700.00, Raj Saunder testified that the extra \$400.00 per month was a loan to Meganathan provided to him because Meganathan’s wife was calling from India and requesting that money be sent to her.
28. Meganathan testified that after the restaurant opened on November 10th, 2010, upon his arrival at the restaurant each day he would log into the Bistro India computer. Shyam Saunder acknowledged that Bistro India did have a computerized time recording system, which they used starting when the restaurant initially opened in November 2010. All employees had a four-digit code that they would enter when they arrived, took a break, and ultimately left for the day. He stated that the system was “totally flawed” but that for a few weeks, initially, the employees’ hours were being tracked by punching in and out. In his rebuttal testimony, Shyam Saunder stated that these records did exist, and were at his dad’s office, but were not produced because the total hours were “way off” or “not accurate”.
29. At some point, as early as November 2010, Bistro India raised a concern with Meganathan about the amount of the cell phone charges he was incurring. Bistro India had a cell phone plan which provided basic minutes for a flat \$30.00 a month fee, with no long distance coverage. Raj Saunder testified that he was concerned with the long distance charges incurred, as well as extra minutes. I note that the phone records produced, Exhibits 4, 11, and 23, show absolutely no charges for long distance. Raj Saunder estimated that total cell charges incurred because of Meganathan’s usage over the \$30.00 plan were \$2,375.39, as set out in Exhibit 3, Tab 5. No reconciliation of these charges was done by Bistro India, in particular to identify any extra minutes that may have been involved in Meganathan talking with contractors, suppliers, the architect or the Saunder family. Similarly, Meganathan did no reconciliation to identify what extra minutes may have been personal in nature.

30. Arising out of the expenses relating to the cell phone, Bistro India withheld the March 31st month-end cheque owing to Meganathan of \$1,300.00 gross. There was no provision in the Employment Contract permitting set off-of such charges by the Employer as required by s. 12 of the *Employment Standards Code*, which states as follows:

“Deductions from earnings

12(1) An employer must not deduct, set off against or claim from the earnings of an employee any sum of money, unless allowed to do so by subsection (2).

- (2) An employer may deduct from the earnings of an employee a sum of money that is
- (a) permitted or required to be deducted by an enactment or a judgment or order of a court,
 - (b) authorized to be deducted by a collective agreement that is binding on the employee, or
 - (c) personally authorized in writing by the employee to be deducted.”

31. On April 10th, 2011, as shown in Exhibit 5, Meganathan submitted his written resignation, enumerating a number of complaints, including that he had “not yet received my paycheque”. Thereafter, Bistro India withheld gross pay owing to Meganathan to April 10th, 2011, of \$767.00 and vacation pay of \$521.52 gross. Those payments have not been made as yet to Meganathan and the Employer acknowledges that Bistro India is in breach of s. 12 of the *Employment Standards Code*.
32. The parties acknowledge that the following payments totalling \$8,400.00 were made to Meganathan between November 15th and March 15th, 2011:

November 15, 2010	\$1,500.00
November 30, 2010	\$1,200.00
December 15, 2010	\$1,500.00
December 31, 2010	\$1,200.00
January 17, 2011	\$1,000.00
February 15, 2011	\$1,000.00
March 15, 2011	\$1,000.00

33. As Raj Saunder testified that \$400.00 for each of November and December were loans to Meganathan, only \$7,600.00 of that would be payments made toward employment earnings.
34. Meganathan also received \$1,500.00 on October 12th, 2010 as an “allowance”.

ANALYSIS

35. Temporary foreign workers in Canada are typically in a very vulnerable position. They are reliant upon the contracts made with the prospective employer and the covenants provided by that

employer. In this case, Meganathan, in reliance upon the contract he entered into with Bistro India, decided to move from India to Canada, quit his job in India, leave his family and friends behind, and travel to Canada for the opportunity to work as agreed to in the Employment Contract. Here, the Employment Contract provided that he was to be employed by Bistro India as an ethnic food cook at a starting wage of \$13.00 per hour, for no less than 40 hours per week. The subsequent work permit issued by Citizenship and Immigration Canada prohibited him from working in any other occupation, or for any employer or at any other location.

36. In this case, Meganathan arrived in Canada only to be told that the Bistro India restaurant would not open for a number of months, perhaps as late as November 10th, 2010, and that there was no work for him. While Raj Saunder testified that Meganathan had been told prior to his departure from India that the restaurant would not be opening for quite some time, there is no other evidence of this, such as an email or even verbal testimony from people who may have dealt with Meganathan prior to his departure from India, such as Shanthi Saunder. Indeed, the emails from Shanthi Saunder contained in Exhibit 10 established to my satisfaction that not only did she know that Meganathan was travelling from India to Canada in late May or early June, 2010, she made no suggestion that his travel should be deferred because the opening of the restaurant was delayed.
37. I choose to draw an adverse inference from the fact that Shanthi Saunder did not testify in these proceedings. Not only did she have numerous dealings with Meganathan prior to his departure from India, she was very frequently in the restaurant, she dealt with matters such as recipes, menus and drink lists, but she also was intimately involved in other pertinent events relating to this dispute, such as her daughter's wedding and the Diwali celebration. She was a very significant participant in many of the events relevant to this litigation, not the least of which was being able to provide some information about the number of hours worked by Meganathan.
38. The Employer, in responding to a request for information from the Employment Standards Officer, in Exhibit 8, which was written by Raj Saunder, said "until November 10, 2010, when Bistro India officially opened, he was staying in his apartment, doing virtually nothing". The evidence establishes that certain payments were made to Meganathan by Bistro India prior to November 10th, 2010, and were termed "allowances" by Bistro India. However, Raj Saunder testified clearly that he considered these to be loans to Meganathan, as opposed to employment income. Hence, the facts are clear that Bistro India did not pay any employment income to Meganathan prior to November 10th, 2010, in breach of the Contract of Employment they entered into with him, Exhibit 1, Tab 5, where they agreed to employ him a minimum of 40 hours per week at \$13.00 per hour, starting April 1st, 2010. Meganathan was ready, able and willing to work immediately upon his arrival in Edmonton on June 11th, 2010, and it is Bistro India's position that they did not employ him until November 10th, 2010, when the restaurant opened.

39. Meganathan maintains that he was put to work by Bistro India shortly after his arrival in June 2010, doing such tasks as opening the restaurant each morning for contractors, dealing with contractors and suppliers, and later on, in August and September, 2010, dealing with recipes, menus and drink lists. The evidence of J.R. is that beginning in July 2010, he would walk to the restaurant each morning with Meganathan at 8:00 a.m. or 9:00 a.m. as Meganathan would start his shift, and open the restaurant for workers.
40. Bistro India called Raghubir Singh Jagdev, an architect with Raj Saundar's architectural firm, who was responsible for preparation of drawings and supervision of construction of the restaurant, and he testified that he did not recall having any discussions or other dealings with Meganathan regarding construction of the restaurant. However, the telephone records produced as Exhibits 4, 11 and 23, show otherwise. The phone records show a number of telephone calls being made between Meganathan and Jagdev, for example, three calls on August 23rd, 2010, three on August 24th, four on August 26th and at least 10 during the month of September, 2010. I am satisfied that Meganathan did deal with Jagdev regarding the restaurant construction and that Jagdev's testimony in this matter is inaccurate.
41. The evidence supports a finding that Meganathan worked for Bistro India prior to November 1st, 2010, including his staff timesheets from Bistro India which are Tab 12 of Exhibit 1, and his diaries which are exhibits 12, 13 and 14. While Bistro India argues that these records are inaccurate, I note that Bistro India failed to maintain and provide to Meganathan the time and wage records as required by s. 14 of the *Employment Standards Code*. The legal authorities on this point are consistent that an employer who fails to keep and provide time records as required by the legislation does so "at its peril", as stated by Judge Skitsko acting as Umpire in *Environment Refueling Systems Inc. v. Kenworthy*, March 25, 2009.
42. The rationale for those provisions of the *Employment Standards Code* is well stated in *Beiseker Battery Barn Inc. v. Sibernagel* by Woods, J. acting as Umpire (August 17th, 1989) where he stated: "Counsel for the appellant [employer] had argued that there is a question of credibility here. The very purpose of section 14 is to eliminate any question of credibility from disputes between employers and employees."
43. Woods, J., went on further to say that the *Employment Standards Code*:
"imposes obligations on the employer regarding maintenance of records. It does not impose on an employee any such obligation. The legislation is entirely social in its nature for the protection of employees against employers who are by the very nature of their relationship in a dominant position".
44. He went on further to say:
"in the absence of any records maintained by the employer, there is no alternative but to accept Sibernagel's word in regard to the situation".

45. The inequity in the bargaining position between employer and employee, particularly a temporary foreign worker, is exemplified by the unilateral change by Bistro India in, they allege, altering the Employment Contract from \$13.00 per hour plus overtime to a monthly salary of \$2,300.00. There is no evidence that this alteration of the terms of employment was agreed to by Meganathan. Rather, the evidence is that the change was attempted to be imposed by Bistro India upon Meganathan.
46. Furthermore, the telephone records produced, while showing a number of personal calls made by Meganathan, also show a considerable number of telephone calls made by him to sub-trades and suppliers, cooks and staff at other restaurants, Bistro India staff, the construction supervising architect and the Saunder family. It is implausible that the number of calls shown, dating from June 14th, 2010, to November 1st, 2010, to these parties would be social or inadvertent calls. The common sense conclusion is that they were calls involving Meganathan that related to either the Bistro India business, including construction, or the Saunder wedding or Diwali celebration.
47. The Employer has suggested that Meganathan either did nothing with respect to the Saunder wedding or was a volunteer at that function, as well as at the Diwali function. Again, this does not accord with the evidence presented. The emails contained in Exhibit 10 involving Meganathan confirm that he was actively involved in recipe planning for the wedding, as I can see no other reason for him to be in receipt of emails dealing with wedding planning. To suggest, as the Employer does, that Meganathan “volunteered” for these 2 events is untenable, and once again, points to the inequity in the bargaining position between the employer and the employee in these circumstances. It is not credible to suggest that Meganathan agreed to do this work for free. If the Employer’s position is accepted that Meganathan was not employed until after these 2 events, why would he agree to work for nothing when he has not been paid any employment income for at least 4 months? In any event, it would be unfair and inequitable for Meganathan not to be paid for the work he did for these functions.
48. I therefore find that Meganathan was employed by Bistro India from June 14th, 2010 until April 10th, 2011. In accordance with the mandate I have pursuant to section 90(4) of the *Employment Standards Code*, I find that he is entitled to wages for the six months preceding the date of his termination of employment, and to vacation pay and general holiday pay for the period from June 14th, 2010 to April 10th, 2011. The issue then becomes the value of the outstanding wages, including overtime from October 11th, 2010 to April 10th, 2011 and vacation pay and general holiday pay for the period June 14th, 2010 to April 10th, 2011, and ultimately whether the decision of the Employment Standards Officer is correct.
49. With respect to my review of the Order of Officer, which is the subject matter of this appeal, Exhibit 1, Tab 1, I am guided by the binding authority of *Osteria DeMedici Restaurant Ltd. v. Yaworski*, 2009 ABQB 563, a decision of Mr. Justice Jeffrey, and by sections by 95 to 108

Employment Standards Code. Those sections and that case direct that this matter is to proceed as a hearing *de novo* and not on the record. Furthermore, I am to proceed without any assessment of, regard for, or deference to the work product of the Employment Standards Officer. While I have reviewed the Order of Officer and Officer's worksheets contained in Exhibit 1, Tab 1 and Exhibit 9, I have given them no deference.

50. The Employer has suggested that the onus of proof is on the Employee to prove the time that he worked, and if unable to do so, the benefit of the doubt should be given to the Employer. That is not a position that is entirely consistent with the decision and rational in *Biesecker, supra*. Furthermore, the evidence from a number of sources is that Bistro India had a computer system and that employees including Meganathan logged in at the beginning of each day and logged out during breaks and at the end of each day. These records were never produced, despite requests by the Employment Standards Officer and despite the Employer's obligation to make disclosure for the purposes of this hearing. Mr. Shyam Saunder testified that they were not produced because they were not accurate. That is a position often taken by litigants who refuse to produce documents, and it is an unacceptable position. The fundamental obligation is to produce the records, and if they are inaccurate, explain those inaccuracies under oath at the hearing. As a result of those records not being produced, I draw an adverse inference against Bistro India with respect to the hours worked by Meganathan. Essentially, this achieves the same result as was arrived at in *Biesecker, supra*, that "in the absence of any records maintained and produced by the employer, the employee's word is to be accepted".
51. In assessing the number of hours worked by Meganathan from the period October 11th, 2010 to April 10th, 2011, I have considered the Complaint by the Employee, Exhibit 1, Tab 3, the staff timesheets prepared by him, Exhibit 1, Tab 12, the Statutory Declaration taken by him, Exhibit 1, Tab 13, and the diaries produced by him, Exhibits 12, 13 and 14. As indicated, the Employer has produced no time records with the exception of the schedule, Exhibit 1, Tab 14, which has been shown to be inaccurate, as stated earlier.
52. For the time period October 11th to November 9th, 2010 for the reasons previously stated, I accept the timesheets and diaries prepared by Meganathan with one exception. I am satisfied that these timesheets do not accurately reflect breaks which Meganathan may have taken during the course of the day. Based upon all of the evidence, including Meganathan's testimony about the nature of work done during this time, I am satisfied that Meganathan would have averaged breaks during each working day of none if 6 or fewer hours were worked that day; ½ an hour if between 6 and 15 hours were worked that day; and 1 hour if 15 or more hours were worked that day. This appears to be generally consistent with the Employment Officer's conclusions as stated on Exhibit 9. This results in 189.75 regular hours and 75.5 overtime hours for the time period October 10th to November 9th, 2010, which at \$13.00 and \$19.50 respectively, per hour, results in \$3,939.00 earnings during that time period.

53. Meganathan testified that after the restaurant opened on November 10th, 2010, he stopped keeping time records himself, as he was logging on to the computer each day. By and large, his diaries entries also ended at about that same time. Therefore, for the period November 10th, 2010 to April 10th, 2011, I must rely upon his Complaint, as well as his testimony given at this hearing. There is also the testimony of the Employment Standards Officer which is helpful wherein she indicated that she had been a Temporary Foreign Worker Investigation Officer since 2007, and based upon her knowledge, 9 to 11 hours per day was normal for a cook. While I am not to give deference to the decision of the Employment Standards Officer, I find that I can accept evidence such as this when provided under oath at the hearing.
54. Therefore, for the time period November 10th, 2010 to April 10th, 2011, in the absence of any time records, I find that the best evidence is that of the Complaint filed by Meganathan, Exhibit 1, Tab 3, which I prefer over the Statutory Declaration, Exhibit 1, Tab 13, as it was prepared at a time closer to the termination of employment. As well, I accept the evidence of Ms. Andriuk, who testified that she assisted Meganathan in preparing the Complaint and that she did the best she could to present the complaint based on information given by him.
55. The Complaint suggests that from November 10th to December 2010, which I accept to be until December 4th, 2010, Meganathan worked 84 hours per week, which is an understandably greater number than average, given that the restaurant had just opened and given that Meganathan stated he had no days off in November, 2010. This results in 154 regular hours for that time period of 3.5 weeks and 140 overtime hours for total earnings of \$4,732.00 during that time period.
56. The Complaint states that, with the exception of November 2010, a typical workweek was 9:00 a.m. to 10:30 p.m., Sundays, Mondays and Wednesdays, and 9:00 a.m. to 11:30 p.m. Thursdays, Fridays and Saturdays, with a 2 hour break each day. That results in 72 hours per week from December 5th to April 10th, a period of 18 weeks plus one day. I have not factored in the statutory holidays of December 25th, January 1st and February 21st, as they are days for which Meganathan ought to be paid in any event, and there is no evidence that he worked those days.
57. Therefore, for each week between December 5th, 2010 and April 10th, 2011, Meganathan would work 72 hours and the excess over 44 hours, pursuant to the contract, would be overtime. Thus, for each of the 18 weeks there would be 44 regular hours and 28 overtime hours, at \$13.00 per hour and \$19.50 per hour respectively, again, as pursuant to the Contract. Adding to this, 8 hours regular plus 3.5 overtime for Sunday, April 10th, 2011, yields 800 regular hours and 507.5 overtime hours, yielding gross pay earned for December 5th, 2010 to April 10th, 2011 of \$20,296.25.
58. This then results in total earnings, including statutory holidays for the time period of 6 months preceding his termination date of April 10th, 2011, of \$28,967.25. In addition to that, for that same

period, Meganathan would be entitled to vacation pay of 4% of regular wages, or 4% of \$14,868.75 which equals \$594.75.

59. There is also the issue of vacation pay due to Meganathan from June 14th, 2010 to October 10th, 2010, which I am authorized to address by virtue of s. 90(4)(b) *Employment Standards Code*. The subject of the regular hours worked during that period is relevant in calculating the vacation pay due and owing to Meganathan. As indicated, since Raj Saunder maintained that all allowances paid to Meganathan prior to November 15th, 2010, were loans, they are not properly allocated as employment earnings paid, and thus, I find that no wages, or vacation pay were paid to Meganathan for this period of June 14th, 2010 to October 10th, 2010. For the reasons stated previously, I rely upon the staff timesheet kept by Meganathan, Exhibit 1, Tab 12, in assessing the regular wages earned by him, and calculating the vacation pay due to him.
60. As further foundation for this finding, I reiterate that the Employment Contract entered into between Meganathan and Bistro India provided that he would be “asked to work no less than 40 hours per week”, and that any hours over 8 per day or 44 per week would be considered overtime. The Employment Contract must be given some meaning.

61. Accordingly, his regular hours worked during that period would be as follows:

Week	Regular Hours
June 14	40
June 21	40
June 28	40
July 5	44
July 12	44
July 19	44
July 26	40
August 2	44
August 9	44
August 16	44
August 23	44
August 30	44
September 6	44
September 13	44
September 20	44
September 27	44
October 4	44
TOTAL HOURS:	732

62. While there are no timesheets for the week of October 4th, the terms of the Contract provide that Meganathan would work 40 hours, yet his average hours worked are close to 44 per week.
63. Accordingly, at \$13.00 per hour for that total number of 732 regular hours, total regular wages for the period June 14th, 2010 to October 10th, 2010 would be \$9,516.00. Vacation entitlement of 4% of that amount would be \$380.64.
64. The timesheets also show that Meganathan worked on the following statutory holidays during that period: July 1st, August 2nd and September 6th. Thus, he would be entitled to 8 hours per day for each of those general holidays, for a total of 24 hours at \$13.00 per hour which equals \$312.00.
65. The subject of overtime hours worked for the period June 14th, 2010 to October 10th, 2010 is beyond the scope of this hearing.
66. Meganathan also pursues a claim for wages allegedly not paid for January 31st, 2011 and February 28th, 2011, each in the amount \$1,300.00. Meganathan alleges that his bank records do not show deposits on those days, however, his testimony regarding these two payments was equivocal. He said that they primary basis for this \$2,600.00 claim is that the payments do not appear on his bank statement, as they ordinarily would. On cross-examination, he acknowledged that he simply did not recall whether he received those payments, and indeed acknowledged that he may have received the cheques from the Employer and simply cashed them without making any deposit in his account.
67. The Employer's records, including Exhibit 3, Tabs 3 and 4, confirm that cheques in the net amount of \$903.03 were provided to Meganathan on each of January 31st, 2011 and February 28th, 2011, and the endorsements show that both of those cheques were cashed.
68. Therefore, Meganathan has not established, on the balance of probabilities, that he did not receive those cheques, and therefore his claim for the \$2,600.00 gross income for those two payments fails.

CONCLUSION

69. In summary, and within the constraints placed upon me by the *Employment Standards Code*, I find Meganathan is entitled to the following:

- Vacation pay for June 14 th , 2010 to October 10 th , 2010 :	\$380.64
- General holiday pay for June 14 th , 2010 to October 10 th , 2010:	\$312.00
- Regular wages for October 11 th , 2010 to April 10 th , 2011:	\$14,868.75
- Overtime wages for October 11 th , 2010 to April 10 th , 2011:	\$14,098.50
- Vacation pay for October 11 th , 2010 to April 10 th , 2011:	\$594.75
- Total:	\$30,254.64

70. I find that the following payments of employment income were made by the Employer:

November 15, 2010	\$1,500.00
November 30, 2010	\$1,200.00
December 15, 2010	\$1,500.00
December 31, 2010	\$1,200.00
January 17, 2011	\$1,000.00
January 31, 2011	\$1,300.00
February 15, 2011	\$1,000.00
February 28, 2011	\$1,300.00
March 15, 2011	\$1,000.00
TOTAL:	\$11,000.00
LESS Loans	<u>- \$800.00</u>
TOTAL:	\$10,200.00

71. I must subtract \$800.00 from the total regarding the November and December payments, as Raj Saunder testified that \$400.00 per month were loans, which I find cannot be attributed to employment earnings paid by the Employer.
72. Accordingly, there is owing to the employee the amount of \$20,054.64 and the Order of the Employment Standards Officer is varied to reflect these conclusions.
73. Fees to the Director of Employment Standards are awarded in the amount of \$2,005.46 in accordance with the *Employment Standards Regulation*. Additional costs may be spoken to if they cannot be agreed upon.

Delivered orally at the Courthouse, in the City of Edmonton, Alberta, on the 19th Day of December, 2013.

UMPIRE: _____
Judge G.W. Sharek - Umpire

Mr. Robert D. Gillespie for the Appellant

Ms. Sarah Eadie for the Claimant

For the Third Party – Jason Andruchuk, Appeals Officer