

An appeal

- by -

IND Diagnostic Inc.  
("IND")

- 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:** Lorne D. Collingwood

**FILE No.:** 2002/464

**DATE OF HEARING:** November 27, 2002

**DATE OF DECISION:** January 6, 2003

## DECISION

### APPEARANCES:

Selen Zhou & Shuli Wang

On behalf of IND

Jacques Laperrriere

For Ping Weng

### OVERVIEW

IND diagnostic Inc. (I will use “IND” and “the Appellant” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 13, 2002. The Determination is that IND must pay Ping Weng an additional \$651.81 in wages plus interest, a total of \$705.59.

The delegate has decided that the employer misrepresented a condition of employment -- the rate of pay. The delegate found that Weng, on the basis of an agreement called a wage subsidy agreement, was led to believe that she would be paid \$1,750 a month as salary.

IND, on appeal, argues that the employee has been paid all of what she is owed. The Appellant claims that it did not promise Weng \$1,750 a month. According to the employer, it did not discuss salary with the employee: The employee was merely told to expect a raise of some sort. The employer then decided that it would pay her \$1,682.70 a month plus overtime.

I have decided to confirm the Determination. The wage subsidy agreement clearly provides for a pay rate of \$1,750 a month based on a 40 hour workweek. The employer is, moreover, bound by the agreement to pay that rate of pay.

An oral hearing was held in this case.

### ISSUES

The issue goes to the rate of pay. The employer argues that it did not misrepresent a condition of employment, that it did not tell the employee that she would be paid \$1,750 per month for working a 40 hour workweek.

The employer claims that the Determination should not have been issued because all has been settled.

The employee, on appeal, seeks to argue that she has not been paid vacation pay. That is not something that I can decide. The employee has not appealed the Determination.

What I must ultimately decide is whether the Appellant does or does not show that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

## FACTS

IND develops, manufactures and sells hi-tech immunoassay devices, instruments and proprietary materials. That includes kits for testing pregnancy, hepatitis, STD and tumours. IND is also developing a new way of testing body fluids.

Ping Weng was born in China. She speaks almost no English. Her husband does speak English.

Weng held different jobs at IND. In the period, the 25<sup>th</sup> of May, 2000 to October 31, 2001 she worked as a research scientist. In this period, her employment was subsidized by Future Works. Future Works is an agency of the federal government which provides funding that is designed to assist with the employment of new immigrants.

I am told by the employer that it did not discuss a wage rate with the employee. According to the employer, Weng was only told that her new duties would mean a raise. I am prepared to accept that as fact, the employee presenting nothing to the contrary.

On the 25<sup>th</sup> of May, 2001, the employer, the employee and Future Works signed a wage subsidy agreement. The agreement makes specific mention of a pay rate, \$1,750 per month for a 40 hour workweek, under the heading “PROJECTED REGULAR GROSS PAY AND MAXIMUM SUBSIDY”. The term “projected regular gross pay” is defined in the agreement as “pay per hour or year”. The amount of the subsidy is specified in the agreement. The agreement also provides that IND may not claim overtime wages, annual vacation pay or for benefits received by the employee.

The employer claims that the wage subsidy agreement is not an agreement to pay \$1,750 a month but is only the maximum salary which Future Works would subsidize. And I find that the employer did not in fact pay Weng \$1,750 a month. It paid Weng \$1,682.70 per month and \$9.71 an hour for overtime.

The employer has settled a claim for minimum wages by the employee, a claim for overtime pay, and a claim for compensation for length of service. The employer, on appeal, questions whether it is not all claims that have been settled. My reading of the Determination is that there was one claim that remained to be decided, namely, the matter of whether the employee was or was not led to believe that she would be paid \$1,750 a month. And I am not shown that there is any conflict between the Determination and the two settlements, the payment of \$1,584.05 in minimum wages and overtime pay and another \$640.00 as length of service compensation.

## ANALYSIS

The employer did not discuss a specific rate of pay with the employee prior to her employment as a research scientist on the 25<sup>th</sup> of May, 2000. It then entered into a three way agreement with the employee and Future Works, the wage subsidy agreement. In that agreement it is said that the employee’s pay rate is \$1,750 per month. The employee is led by the agreement to expect a salary of \$1,750 based on a 40 hour workweek.

It may be that the agreement should have been clearer on what is meant by the term “projected regular gross pay”. But the term is not defined and so common definitions apply, not one that is obscure or unique to the agreement. Given the common usage of the term “projected”, the employee had reason to believe that the agreement was referring to her estimated or anticipated gross salary, or the proposed rate

of pay, so long as she was not absent from work (in which case there was to be a deduction in pay equal to the length of the absence).

I am satisfied that the employer influenced and persuaded the employee to work by misrepresenting the rate of pay, a condition of employment. To do so is contrary to section 8 of the *Act*.

- 8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
- (a) the availability of a position;
  - (b) the type of work;
  - (c) the wages;
  - (d) the conditions of employment.

The wage subsidy agreement is, however, an agreement between employer and employee as well as the employer and Future Works. The agreement itself requires that the employer pay Weng \$1,750 a month based on a 40 hour work week.

The employee was paid only \$1,682.70 but that is contrary to the agreement. The agreement is that Weng would receive \$1,750 based on a 40 hour workweek for 23 weeks.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated November 13, 2002 be confirmed in the amount of \$705.59 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**