

Appeals

- by -

Wei (Sophia) Zhao
("Zhao")

and

Li Na (Shine) Zhang
("Zhang")

- 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 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE Nos.: 2012A/60 and 2012A/121

DATE OF DECISION: January 17, 2013

DECISION

SUBMISSIONS

Terry J. Hewitt	counsel for Wei (Sophia) Zhao
Li Na (Shine) Zhang	on her own behalf
Nikki Ellis UBC Law Student's Legal Advice Program	on behalf of Li Na (Shine) Zhang
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. There are two appeals before me. Both Wei (Sophia) Zhao (“Zhao”) and Li Na (Shine) Zhang (“Zhang”) appeal a determination (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards on May 10, 2012.
2. The Determination followed a complaint filed by Zhang claiming that Zhao had contravened the *Employment Standards Act* (the “Act”) when she failed to pay Zhang regular wages, overtime wages, statutory holiday pay, and annual vacation pay.
3. The Determination ordered that Zhao pay wages to Zhang, together with statutory holiday pay, annual vacation pay, and accrued interest totalling \$5,466.62. In addition, the Determination imposed \$2,500.00 in administrative penalties. The total the Determination found that Zhao was required to pay was, therefore, \$7,966.62.
4. I have before me the Determination, the Delegate’s Reasons for the Determination, the Appeal Forms delivered by both Zhao and Zhang, the Record the Director has delivered pursuant to section 112(5) of the *Act*, and submissions from each party and the Delegate regarding the two appeals.
5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of these appeals on the basis of the written documentation now before me.

FACTS

6. In his Reasons, the Delegate stated that Zhang was employed as a caretaker to look after Zhao’s dogs from May 27, 2011, to November 9, 2011.
7. Zhang subsequently complained that she had been paid no wages, overtime wages, statutory holiday pay, and annual vacation pay, during the time she was employed.
8. The Delegate conducted a hearing of Zhang’s complaint, at which both Zhang and Zhao attended and gave evidence.

9. The parties agreed that Zhang answered an advertisement Zhao posted on the internet looking for someone to look after her dogs while she was in Toronto for six months. In exchange, the person retained would receive accommodation free of charge for the six month period.
10. The Delegate noted that section 20 of the *Act* requires an employer to pay all wages in Canadian currency. The provision of free accommodation, not being a payment in the form of Canadian currency, could not, therefore, constitute the proper payment of wages in this instance.
11. The Delegate noted further that section 21 of the *Act* prohibits an employer from withholding an employee's wages for any reason, except as permitted by law. A deduction in respect of the cost of providing accommodation is not the type of obligation permitted by law that it would be permissible for an employer to make.
12. The issue that consumed the bulk of the hearing time was contradictory evidence from both parties concerning the number of dogs Zhang was required to look after, and the number of hours per day she spent performing that work. On these matters, the Delegate decided that the evidence of Zhao should be preferred, and that the amount of wages owed to Zhang should be calculated accordingly.

ISSUE

13. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

14. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
 - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
15. Section 115(1) of the *Act* should also be noted. It says this:
 - 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

The Zhao appeal

16. Zhao's appeal is grounded on the assertion that the Delegate erred in law. Zhao asserts that the Delegate erred when he failed to determine the fundamental question whether Zhang was an employee, rather than an independent contractor. This is made clear, Zhao says, by the fact that the Delegate did not specifically consider the question, and therefore failed to apply any applicable legal standard to the resolution of the issue, having regard to the facts presented.

17. Zhao says further that there was no evidence supporting Zhang's contention that she was an employee, and that the Delegate simply proceeded on the unproven assumption that an employment relationship existed. Finally, Zhao argues that since she exercised no overriding control over the manner in which Zhang carried out her duties, or the hours she worked, the Delegate should have concluded that Zhang was an independent contractor.
18. It is axiomatic that the remedial benefits provided in the *Act* are reserved for employees, and not independent contractors.
19. The submission delivered on behalf of Zhang argues that deference should be shown to the Delegate's findings of fact, and that it is not necessary for the Delegate to have reported on every finding of fact made by him during the course of his making the Determination. Zhang says that it is obvious from the tenor of the Delegate's Reasons that he decided the parties had entered into an employment relationship.
20. Zhang also argues that control is not the overriding factor. She refers to the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.* [2001] SCR 983 as authority for the proposition that the nature of the relationship as a whole must be considered, including such other factors as ownership of tools, chance of profit, and risk of loss.
21. Zhang points to the fact that she was using Zhao's equipment and facilities to care for the dogs, and had no control over the money generated from the sale of some of the dogs in support of her assertion that she was an employee, and not a contractor. As for control, she says that the record of emails from Zhao giving directions as to the manner in which Zhang should care for the dogs demonstrates that Zhao did, in fact, exercise a significant degree of control over Zhang's work.
22. The Delegate's submission focuses on the fact that at no time during the hearing did Zhao put into issue that Zhang was a contractor, and not her employee. For the Delegate, "[t]he issue of whether or not the complainant was an employee or not was not one that was before me." Despite the inelegant phrasing, it seems to me that what the Delegate was meaning to say was that no one at the hearing argued that Zhang was anything other than an employee. This did not mean that the Delegate could ignore evidence that suggested Zhang might be a contractor. However, it is my view that since Zhao did not raise the matter as an issue at the hearing, it was unnecessary for the Delegate to examine in any detail in his Reasons the factors that clearly seem to have induced him to conclude that Zhang was an employee, and not a contractor.
23. In *Budget Rent-a-Car of Victoria Ltd.*, BC EST # D021/12, I said this, based on the reasoning of the Supreme Court of Canada in *Housen v. Nikolaisen* (2002) 286 NR 1:
- I digress to say that the mere fact the Delegate did not allude to a particular piece of evidence in her Reasons is insufficient, on its own, to warrant my deciding that she erred in law, unless the circumstances give rise to a reasoned belief that she must have forgotten, ignored or misconceived the evidence in a way that affected the Determination. I must also assume, absent good cause, that the Delegate considered and weighed all the evidence and found every fact it was open to her to find based on that evidence which was necessary to support the conclusions she reached ...
24. In *Bogie & Bacall Hair Design Inc.*, BC EST # D062/08, the Tribunal also said this:

At an oral hearing, the parties are expected to provide whatever evidence they have in support of their respective positions.

...While I agree that it is incumbent on the delegate to inquire into all the facts and circumstances that may be relevant to a complaint particularly if the parties are lay litigants, as they often are, it is not the delegate's duty to make arguments on their behalf.

25. Further, I agree with the submissions tendered on behalf of Zhang to the effect that there was evidence on the basis of which the Delegate could conclude, correctly, that Zhang was an employee, and not a contractor. These include the factors referred to above, namely, that Zhao did give Zhang directions on the way she should care for the dogs, Zhang made use of Zhao's facilities and equipment, and appears to have had no opportunity for profit or loss as a result of her work. All of these factors point to an employment relationship at common law.
26. Of course, these proceedings are statutory, and so I must pay heed to the provisions of the *Act* that are applicable to the matters raised. There are several decisions of the Tribunal which have noted that while the common law tests are useful, they must be applied in a way that conforms to the language contained in the *Act*, and the manner in which that language has been interpreted to reflect the policy objectives embedded in the legislation.
27. The definition of "employee" in section 1 of the *Act* is broad. Arguably, it captures within the scope of "employment" under the *Act* relationships which might not be characterized in the same way at common law. In addition, the Supreme Court of Canada has stated that statutes like the *Act* are remedial, and should receive such fair, large and liberal interpretation as will best ensure the attainment of their benefits-conferring objects. This means that they should be interpreted in a way that encourages the maintenance of the minimum standards referred to in them, and the extension of those benefits to as many potential recipients as possible (see *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27; *Machtiger v. HOJ Industries Ltd.* [1992] 1 SCR 986).
28. As evidence of a sort that would compel a finding that Zhang was a contractor appears to be absent in this case, I cannot conclude that a basis has been shown for disturbing the Determination on the grounds advanced by Zhao in this appeal.

The Zhang appeal

29. Zhang's appeal asserts that the Delegate failed to observe the principles of natural justice in making the Determination. She also submits that evidence has become available that was not available at the time the Determination was made.
30. I will deal with these issues separately.

Natural Justice

31. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by a delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case she is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
32. Zhang says that the hearing conducted by the Delegate was unfair, for several reasons. I will attempt to list them:
- The Delegate accepted evidentiary material from Zhao days before the April 17, 2012, hearing date, but refused to accept "late evidence" from Zhang. The Delegate also

neglected to consider the evidence that Zhang did provide at the hearing, and shortly thereafter.

- The Delegate refused to grant Zhang an adjournment, either to “verify” the evidence delivered late by Zhao, to permit Zhang to arrange for further evidence from witnesses who were unavailable to attend the April 17, 2012, hearing, or to obtain representation.
- Due to the fact that English is Zhang’s second language, Zhang argues that the Delegate misunderstood key parts of her evidence, especially as it related to the number of dogs she was required to manage, which in turn affected the Delegate’s conclusions regarding the amount of time she spent attending to that task.
- Zhang was emotional at the hearing, due in part to her frustration at being denied an adjournment, and the fact that she lacked representation. Her demeanour should not, therefore, have been “automatically” construed by the Delegate as being a factor that undermined her credibility.
- Zhang states that she was denied a fair hearing because she did not receive an opportunity to cross-examine Zhao at the hearing.
- The Delegate limited the scope of his inquiry to the number of hours Zhang spent caring for the dogs, and did not consider the time Zhang spent on other tasks, including email correspondence with Zhao, housework, and taking dogs to the veterinarian.
- The Delegate failed to consider the issue whether Zhang was entitled to compensation for length of service pursuant to section 63 of the *Act*, and whether Zhao should therefore pay another administrative penalty.

33. I am not persuaded that the Determination should be disturbed on the basis that the Delegate failed to observe the principles of natural justice.

34. The Determination states quite clearly that Zhang gave evidence at the hearing. She was also cross-examined, and the Delegate also asked her questions. The Determination also says that the Delegate reviewed all the witness statements provided by the parties, but did not find them to be helpful. In his submission on this appeal, the Delegate states that Zhang did deliver material before, and at, the hearing, which he considered before issuing his Determination. The Record that was before the Delegate at the time the Determination was made has been delivered to the Tribunal pursuant to section 112(5) of the *Act*. It contains voluminous material from Zhang, including several witness statements from persons she said were unavailable to give oral evidence at the hearing. I see no basis on which I might decide that the Delegate did not hear Zhang, or consider the material she had delivered during the period up to, and including, the hearing.

35. A related issue is Zhang’s claim that her wages should be calculated having regard to the evidence she submitted as to the usual rates paid for pet groomers and animal caregivers in Canada. I cannot accept this submission. The Delegate determined that the agreement between Zhao and Zhang regarding wages was that Zhang would receive free accommodation in Zhao’s home in return for her work. That agreement was found to be unenforceable as an agreement for the payment of wages under the *Act*. There was no other agreement relating to wages entered into by the parties. In those circumstances, it was the duty of the Delegate to determine that Zhang should be paid minimum wages for the hours she worked for Zhao. What others doing similar work in other circumstances might have been paid was irrelevant, in my opinion.

36. As for the material Zhang appears to have delivered to the Branch after the hearing concluded, the Delegate was under no obligation to consider it, notwithstanding that another Branch employee might have encouraged Zhang to forward it. The hearing had concluded. The Delegate's declining to consider it was an exercise of discretion, with which the Tribunal will be loath to interfere unless it can be said that the Delegate misdirected himself or if the decision is so clearly wrong as to amount to an injustice (see *Bistro Aubergine*, BC EST # D163/04). No such grounds for interfering have been established here.
37. Regarding the refusal to grant an adjournment, it appears that Zhang made a request for an adjournment on two separate occasions.
38. After her employment with Zhao came to an end in November 2011 Zhang remained in Vancouver before travelling to China on February 13, 2012, the day a mediation of her complaint had been scheduled to take place. As Zhang was unable to attend on that day, the mediation was re-scheduled for March 13, 2012.
39. Owing to her having to undergo dental work in China, for which she stated she had no insurance coverage in Canada, Zhang remained overseas until sometime near the end of March. Early on March 13, 2012, Zhang emailed the Branch stating that she "just recall" the mediation meeting later that day, but as she was still in China she would be unable to attend. She said that she was "super busy with some unfinished staffs (*sic*: "stuff"?) in China." She asked the Branch to "set up a hearing between Wei Zhao and me any Friday after April 12, 2012." She also stated that "I will bring all the evidences from police officer, Canada revenue company, SPCA, neighbors, phone bills and all emails between us to proof What exactly (Sophia) Wei Zhao did to me... I will bring all evidences with my work hours to meet with her in your office after April 12, 2012 in the mediation or hearing."
40. After arriving back in Canada late in March, and learning that the hearing of her complaint had been scheduled for April 17, 2012, Zhang emailed the Branch on April 2, 2012, requesting a further adjournment. The grounds she provided were these:
- I went back to China on February 13, 2012 and just came back to Canada in one or two weeks. Although I tried my best to gather/serve evidences to your office by tomorrow (evidences submit deadline is April 3, 2012), but I still can not gather all the evidences by your deadline due to so short time. so I really need more time to collect all evidences to submit to your office before hearing.
- 1 There is a police report which can proof exactly employer-Wei Zhao is lying (which is related to my salary), This report I only can get it from Ontario police record department about after 30 days by police records policy.
- 2 Some witnesses (Including one neighbor) are away from Vancouver for Vacation, another one important witness who will come back to Canada on May 8, 2012. Their evidences can not submitted to your office by tomorrow.
- 3 There are some evidences from government will submit to your office at least after two weeks. Sorry, I talked with them they can not make it faster.
41. The Delegate declined to grant the adjournment sought. However, as I have said, it appears that the Delegate permitted Zhang to produce further material up to and including the end of the hearing, which the Delegate considered in making the Determination.
42. Zhang says she requested an adjournment for the second time at the commencement of the hearing on April 17, 2012, principally because she had only received some further material from Zhao a few days prior. Again, she says, her application was denied.

43. In his submission, the Delegate refers to the purposes of the *Act* set out in section 2, and states that he declined Zhang's request(s) for an adjournment because:
- ...the Branch has a duty to be fair to both parties and resolve disputes in an efficient manner. Constantly, cancelling dates in the dispute resolution process at Ms. Zhang's request would not have been fair to the employer and cancelling yet another date would not be resolving the complaint in an efficient manner.
44. There can be no doubt that in an appropriate case, the refusal to order an adjournment can constitute a failure to observe the principles of natural justice. Whether it will, or will not, will depend on the context in which the decision is made. Here, the factual circumstances persuade me that no violation of natural justice principles occurred.
45. Zhang filed her complaint in November 2011. She left for China in February 2012. That means that she had three months in order to prepare her case for presentation through the resolution procedures on offer at the Branch. While I am prepared to accept that Zhang had legitimate reasons for returning to China, there is no evidence that she advised the Branch that she would be travelling before she left, or indeed how long she would be away. Accordingly, she was unable to attend the mediation sessions scheduled in her absence. On the occasion of her failure to attend the last mediation session, in March 2012, she asked the Branch to set a hearing date for any Friday after April 12, 2012. This is what the Branch did. She also told the Branch that she would have all her "evidences" ready to present at that hearing.
46. When Zhang requested an adjournment of the hearing on April 2, 2012, she stated that some of the evidence that she wanted to present would be unavailable to her if the hearing occurred as planned on April 17, 2012. Yet she did not explain what the evidence was, or why it would be significant for the purposes of resolving the issues at hand. Indeed, I do not discern that Zhang has even now produced evidence substantially different from what she did produce up to and at the hearing. Instead, the focus of Zhang's submission is that the Delegate misapprehended the evidence before him when he failed to accept her position as to the number of dogs she was made to care for, and the number of hours she spent performing that work.
47. As for the request for an adjournment made at the hearing, Zhang has provided no particulars as to what it was about the material that Zhao delivered late that she needed to "verify." She has also provided no particulars as to why she could not verify the information within the short time before the hearing commenced. In the result, I cannot say that she has demonstrated the late delivery of Zhao's material was prejudicial to her in the absence of an adjournment.
48. Regarding Zhang's claim that her difficulty with English – it is her second language – meant that the Delegate misconstrued her evidence on key points, I have reviewed the many documents and written submissions prepared by Zhang that are included in the Record supplied by the Delegate, and also her submissions delivered for the purpose of these appeals. While Zhang's grammar and word usage are at times suspect, I cannot say that I have had any difficulty in understanding the arguments she has presented. The Determination makes no reference to any communication difficulties, or problems in understanding what Zhang had to say at the hearing. In my view, there is insufficient evidence for me to conclude that Zhang was at a linguistic disadvantage at the hearing. If she felt that she was, she could have requested an interpreter. There is no evidence that a request of that sort was ever made.
49. I believe that similar considerations apply to the question of representation. There is no evidence that Zhang misunderstood the nature of the hearing, its purpose, or her role within it. If she felt that she required representation she should have arranged for it in advance. If there was a difficulty in her arranging for representation prior to the hearing, she could have requested an adjournment for that reason. It does not

appear that she did so. Coming to believe, after the hearing, that representation might have assisted in the presentation of her case is of course an entirely different matter, but it is not one that raises the spectre of a failure of natural justice.

50. I agree that demeanour, on its own, is a weak basis on which to ground a finding of unreliability in the testimony of a witness. The Determination does not say, however, that the Delegate questioned Zhang's credibility on the basis of her demeanour alone. To the contrary, the Delegate specifically referred to *Faryna v. Chorny* (1952) 2 DLR 354, the leading authority on credibility in this province, and its references to the several different factors on which a finding on credibility should be based. In addition to the demeanour of the witnesses he heard, the Delegate also considered the fact that Zhang's evidence was internally inconsistent, and that she contradicted her own evidence on key points.
51. It is trite to say that a Delegate presiding over a hearing at first instance is far better positioned to deal with matters of credibility than is the Tribunal when it considers appeals. In cases such as the one before me, where the evidence on key points is disputed, a delegate must consider the reliability of the evidence given by the various players in order to establish the relevant facts. That is part of a delegate's role, and the Tribunal will not interfere with a delegate's findings, absent palpable and overriding error. I am not persuaded that the Delegate committed an error of that sort in this instance.
52. Zhang states further that she was denied an opportunity at the hearing to cross-examine Zhao. In his submission, the Delegate does not address this issue directly, but he does say that Zhang was given every opportunity to present her case and any supporting evidence up to and at the complaint hearing. It is clear from the Delegate's Reasons that Zhao asked Zhang questions in cross-examination. The Reasons also say that Zhang did not ask any questions in cross-examination. The inference to be drawn from this is that Zhang was offered the chance to cross-examine, but declined. The right to cross-examine is such a fundamental element of a fair hearing that I find it highly improbable the Delegate would have refused to allow Zhang, a party, to cross-examine Zhao, or any other witness. I decline to accept that he did so.
53. I also reject Zhang's assertion that the Delegate did not consider the hours of work she performed on tasks other than hands-on care of the dogs. Zhang says that she also engaged in voluminous email correspondence with Zhao, did housework, and took dogs to the veterinarian. The Reasons for the Determination refer to Zhang's selling some of the dogs, purchasing supplies and food for the dogs, cleaning the house, and emails between Zhang and Zhao. I cannot conclude, therefore, that the Delegate ignored Zhang's evidence in this regard.
54. Zhang argues that the Delegate failed to consider whether Zhang was entitled to compensation for length of service pursuant to section 63 of the *Act*, and whether a further administrative penalty should be imposed on Zhao for failing to pay it when Zhang's employment was terminated. To be sure, the Delegate did not deal with this issue in the Determination, at least directly. This is probably due to the fact that Zhang did not claim compensation for length of service on her complaint form, nor does it appear to have been raised as an issue at any time prior to Zhang's commencing her appeal. Further, in his Reasons, the Delegate states that it was Zhang, not Zhao, who terminated her employment on November 9, 2011.
55. On these facts, I am unable to say that the Delegate erred in failing to decide that Zhang was entitled to compensation for length of service. I accept that if the evidence reveals an obvious contravention of the *Act*, it may be that a delegate should draw it to the attention of the parties and request submissions, at least where it appears that they have not considered it previously. However, the right to exercise that type of discretion does not bestow on the Delegate a roving commission to examine all potential contraventions that could

possibly have arisen in the circumstances. It is, after all, the parties who are obligated to establish the parameters of the inquiry, in most cases.

New Evidence

56. Zhang claims that evidence has now become available that was unavailable at the time of the hearing, principally because the Delegate declined to grant her requests for an adjournment.
57. The new evidence that Zhang says was unavailable consists of her records of her daily hours of work, bills for expenses she incurred in caring for Zhao's dogs, and the evidence of witnesses who could not attend the hearing on April 17, 2012.
58. The Tribunal's right to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. A rationale for this approach is embedded in section 2(d) of the *Act*, which stipulates that it is a purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. It would discourage the vindication of that purpose if an appellant were to be permitted, as a matter of routine, to seek out new evidence to bolster a case which failed to persuade at first instance. Rather, proceedings under the *Act* are likely to be more fair and efficient if parties are encouraged to take care to seek out all relevant information during the investigation phase, and present it to the Director before he issues a determination.
59. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been presented to the Director during the investigation or adjudication of a complaint and prior to a determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if an appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars*, BC EST # D570/98).
60. Applying this formula, I have decided that Zhang's submission based on subsection 112(1)(c) of the *Act* cannot succeed.
61. Zhang says that important evidence relating to the hours she worked for Zhao was unavailable to her at the hearing because she had left her "employment records," and her receipts for her expenses incurred while caring for Zhao's dogs, at the home of a lady ("LL") who was out of the country at the time. Zhang also submits that the evidence of LL could not be given at the hearing, for the same reason. Another witness whom Zhang says she wished to call ("HW") was "unavailable" on the hearing date, and a third individual ("MC") was in the hospital.
62. A review of the Record delivered to the Tribunal by the Delegate shows notes setting out the hours Zhang claimed she worked caring for Zhao's dogs. This material was before the Delegate at the time he made the Determination, and he has stated that he reviewed it. The Delegate also noted in his Reasons that Zhang testified she did not record her daily hours anywhere. Now, Zhang has produced work sheets, which I assume are the "employment records" Zhang said she could not access for the April 17, 2012, hearing. Regardless, the work sheets appear to contain the same information as the notes of her hours Zhang tendered at the hearing. I cannot see, therefore, how the work sheets add appreciably to the evidence of Zhang that the Delegate considered, and rejected, following the hearing.

63. The bills for expenses Zhang incurred do not appear to have been tendered so Zhang can recover reimbursement. Rather, they seem to have been presented to demonstrate that Zhang performed more duties relating to the dogs than the Delegate gave her credit for. I note in the Delegate's Reasons, however, that he refers to Zhang's evidence that she purchased supplies and food for the dogs. It is clear, therefore, that the Delegate was aware that Zhang had incurred expenses caring for the dogs, when it came time for the Delegate to prepare the Determination.
64. Even if it could be said that the work sheets and receipts that Zhang has tendered on appeal are probative, I am not persuaded that they were not available to Zhang for the purposes of the hearing. LL may have been out of the country, but Zhang nowhere explains why these records were at LL's premises, and why she could not secure copies prior to the hearing.
65. As for the witnesses, LL, HW and MC, the Delegate had their statements in hand when he issued the Determination. The statements of these individuals that were delivered with Zhang's Appeal Form are exactly the same as the statements Zhang presented to the Delegate, either before, or at, the hearing. The Delegate decided that these statements, and the statements tendered by Zhao, were of limited value. Insofar as the statements of the individuals referred to by Zhang are concerned, I cannot but agree. The statements from HW and MC do not deal in any substantive way with Zhang's hours of work. As for the statement from LL, it appears that much of the information contained in it is based on what Zhang told her, rather than personal observation. I note, too, that the statement is dated April 13, 2012. It is unexplained why LL could not have been made available, even by telephone, for the purposes of the hearing, when she prepared a statement but days before it occurred.

ORDER

66. Pursuant to section 115 of the *Act*, I order that the Determination dated May 10, 2012, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal