

An appeal

- by -

Shun Chi Company Ltd
("Shun Chi")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/475

DATE OF HEARING: December 19, 2002

DATE OF DECISION: January 6, 2003

DECISION

APPEARANCES:

Jack C. Lee, Barrister & Solicitor	for Shun Chi Company Ltd.
Interpreter	David Tan (Cantonese)

OVERVIEW

This is an appeal filed by Shun Chi Company Ltd. (“Shun Chi”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Shun Chi appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on August 20th, 2002 (the “Determination”) pursuant to which the Director assessed a \$500 penalty against Shun Chi for failing to keep payroll records.

This appeal was heard at the Tribunal’s offices in Vancouver on December 19th, 2002 at which time I heard the testimony of Ms. Betty Wu (via an interpreter) and Mr. Bradley Abar on behalf of Shun Chi. No one appeared at the appeal hearing on behalf of the Director. In addition to the witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

RELEVANT LEGISLATION

Section 28(1) of the *Act* states that an employer must keep, *for each employee*, a payroll record that includes, among other things, the employee’s personal information, date of hire, wage rate, hours worked, vacation and statutory holidays taken. Section 85(1)(f) of the *Act* gives the Director the power to demand that employee payroll records be produced for inspection.

Section 98(1) of the *Act* states that the Director may impose a monetary penalty, in accordance with the provisions of the *Employment Standards Regulation*, if a person has contravened a requirement of the *Act*.

Finally, section 28 of the *Regulation* mandates a \$500 penalty for each contravention of, *inter alia*, section 28 of the *Act* (*i.e.*, the statutory obligation to keep payroll records for each employee).

FACTS

By way of a formal demand issued on April 10th, 2002, the Director required Shun Chi to deliver certain payroll records relating to Mr. Ronald Rodger by 4:00 P.M. on Friday, April 19th, 2002. The correct surname of the individual in question is Ronald Rodgers, however, I do not consider that error to be significant nor to affect the validity of the demand (see section 123 of the *Act*). Further, it should be noted that Shun Chi was penalized for failure to *keep* records, not for its failure to *produce* records pursuant to demand (the latter being a breach of section 46 of the *Regulation*; see *Mega Tire Inc.*, B.C.E.S.T. Decision No. D406/97).

In any event, Shun Chi’s response to the demand, contained in a letter dated April 18th and received by the Employment Standards Branch on April 19th, 2002, was that Shun Chi “has never employed Ronald

Rodger, therefore, the company has no payroll record for him...the company can not present to you what, to our knowledge, does not exist.”

Shun Chi took the identical position on this appeal--namely, that since Mr. Rodgers was never employed by Shun Chi, the company was not obliged to keep or produce any payroll records with respect to Mr. Rodgers. Before me, counsel for Shun Chi advanced the alternative position that even if the company did contravene section 28 of the *Act*, the \$500 penalty was excessive in all the circumstances. Counsel abandoned this latter argument when it was drawn to his attention that the amount of the penalty was prescribed by *Regulation*.

FINDINGS

The evidence shows that Mr. Rodgers was (and still is) a tenant in a rooming house known as the New Sun Hotel, a facility comprised of some 42 rooms. The rooming house is operated by Shun Chi under a lease arrangement with the building's owners. There are two resident caretakers at the New Sun Hotel-- Mr. Bradley Abar (the manager) and Mr. Martin Smith (the assistant manager).

Mr. Abar engaged Mr. Rodgers to do some tasks in the rooming house and the latter was paid \$25 in cash for each shift. Mr. Rodgers was paid from a petty cash fund maintained by Mr. Abar and due to the fact that expenditures from this petty cash fund were not properly accounted for, it is entirely possible that Ms. Wu (a Shun Chi principal) was never aware that Mr. Rodgers was working at the New Sun Hotel.

There is a conflict in the evidence as between Mr. Abar and Mr. Rodgers regarding the duration and nature of Mr. Rodgers' employment. However, I need not resolve that conflict since, based solely on the evidence of Mr. Abar, it is clear that Mr. Rodgers was a Shun Chi employee.

Mr. Abar has a great deal of autonomy with respect to the management of the New Sun Hotel. Each week he is given \$225 in cash to cover minor expenditures and, it would appear, to pay for casual labour (most often, tenants in the rooming house were engaged for particular tasks). As previously noted, Mr. Rodgers was hired by Mr. Abar and was paid, in cash, each week from the petty cash fund. The payments to Mr. Rodgers were not documented in any fashion and no payroll records of any description were kept with respect to Mr. Rodgers.

Mr. Rodgers moved into the New Sun Hotel in late April 2001 and, according to Mr. Abar, about 4 months later was hired to “watch to night desk” for 3 to 4 hours during the period from 11 P.M. to 8 A.M. on Monday through Friday. He was paid \$25 for each shift. According to Mr. Abar, Mr. Rodgers “quit” in early October 2001 after a dispute arose regarding the number of hours that Mr. Rodgers would work. Mr. Abar maintains that Mr. Rodgers worked for less than 2 months and was paid about \$1,000 in total during this period. Mr. Rodgers maintained that he earned over \$3,000 and was employed for a much longer period.

I need not resolve the factual dispute between Messrs. Rodgers and Abar in order to adjudicate this appeal since, even on Mr. Abar's evidence, it is clear that he had the discretionary authority to hire casual employees on behalf of Shun Chi and regularly did so. Mr. Rodgers was hired by Mr. Abar and was paid by Shun Chi. Mr. Abar, on behalf of Shun Chi, directed and controlled Mr. Rodgers' work. Mr. Rodgers' services were intended to benefit Shun Chi. Mr. Rodgers was a Shun Chi employee at least during the period from August to October 2001 and it is conceded that no payroll records of any description were kept with respect to Mr. Rodgers.

The \$500 penalty was levied on the basis of a failure to keep payroll records with respect to Mr. Rodgers, a contravention of section 28 of the *Act*. The prescribed penalty for failing to keep such records--by section 28 of the *Regulation*--is \$500. In my view, there is absolutely no factual or legal basis for cancelling the \$500 penalty levied against Shun Chi.

It follows that this appeal is without merit and must be dismissed.

ORDER

Pursuant to subsections 114(1)(c) and 115(1)(a) of the *Act*, I order that this appeal be dismissed and that the penalty Determination be confirmed as issued in the amount of **\$500**.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal