

Appeals

- by -

Ronald Rogers

("Rogers")

- and 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.: 2002/518 & 2002/523

DATE OF HEARING: December 19, 2002

DATE OF DECISION: January 6, 2003

DECISION

APPEARANCES:

Jack C. Lee, Barrister & Solicitor	for Shun Chi Company Ltd.
Paul G. Mendes, Barrister & Solicitor	for Ronald Rodgers
Interpreter	David Tan (Cantonese)

OVERVIEW

I have before me two appeals, both filed pursuant to section 112 of the *Employment Standards Act* (the “Act”). Shun Chi Company Ltd. (“Shun Chi”) is the appellant in E.S.T. File No. 2002/518; Mr. Ronald Rodgers (“Rodgers”) is the appellant in E.S.T. File No. 2002/523. Each of Shun Chi and Rodgers appeals a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 24th, 2002 pursuant to which Shun Chi was ordered to pay \$2,387.90 on account of unpaid wages and interest to its former employee, Mr. Rodgers.

The two appeals were 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 and Mr. Rodgers on his own behalf. 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.

THE DETERMINATION

The Director’s delegate determined that Mr. Rodgers was employed by Shun Chi as a night desk clerk at a rooming house it operated (the 42-room New Sun Hotel situated at 100 East Pender Street in Vancouver’s downtown east side). Mr. Rodgers was (and still is) also a tenant in the rooming house which caters to low- and fixed-income individuals.

In the absence of any Shun Chi payroll records, the delegate concluded that Rodgers worked from May 1st to October 31st, 2001, a period that included 4 statutory holidays. For most of this latter period, the delegate held that Rodgers worked 4 shifts each week (Monday to Friday) and that he worked 7 shifts each week for the last 12 weeks of his employment.

The delegate’s calculations were based on the application of section 34(2)(a) of the *Act* (the 4-hour minimum pay provision) and the minimum wage rate in effect during the relevant time frame (\$7.60 per hour). The “wage calculation summary” appended to the Determination indicates that Rodgers earned \$5,525.42 in wages (including statutory holiday and vacation pay) and was paid \$3,225 for a balance due of \$2,300.42 together with an additional \$87.48 on account of section 88 interest.

ISSUES IN DISPUTE

Shun Chi firstly maintains that the Determination ought to be cancelled since Mr. Rodgers was never employed by the company. Alternatively, Shun Chi says that if Mr. Rodgers was a Shun Chi employee, he has been paid all of the wages to which he was entitled and, accordingly, the delegate erred in awarding him additional compensation.

Mr. Rodgers, on the other hand, says that his unpaid wage claim was significantly greater than that allowed by the delegate. Mr. Rodgers says that he is owed something in excess of \$11,000.

ANALYSIS AND FINDINGS

Was there an employment relationship between Rodgers and Shun Chi?

As previously noted, 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 it would appear that expenditures from this fund were never properly accounted for. Thus, there are no employer records that can verify either Shun Chi's or Mr. Rodgers' position with respect to the number of hours worked by, or the amount of wages paid to, Mr. Rodgers.

There is a conflict in the evidence as between Mr. Abar and Mr. Rodgers regarding the duration and nature of Mr. Rodgers' employment. However, it is clear, regardless of whose evidence I prefer, 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 and he had the authority, either express or implied, to hire casual labour (very often a tenant was so engaged) at the rooming house. 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 9 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.

Mr. Abar testified 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 from a cash fund provided 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. I am fully satisfied that Rodgers was employed by Shun Chi during 2001.

Mr. Rodgers' unpaid wage claim: The employer's position

Mr. Abar testified that Mr. Rodgers approached him sometime in late August or the early fall of 2001 seeking work as his pension income was insufficient. Some time later, Mr. Abar offered Mr. Rodgers the opportunity to work as a night desk clerk for a 3- to 4-hour shift; he would be paid \$25 for each shift worked. Mr. Rodgers accepted the proposal and commenced his duties in late August or early September 2001. Mr. Abar paid Mr. Rodgers each week from the petty cash fund and Mr. Rodgers' earnings ranged from \$100 to \$175 each week (Rodgers worked 7 nights per week for the last two weeks of his employment). According to Mr. Abar, Rodgers quit in early October when Mr. Abar indicated that his hours would be reduced.

Mr. Abar testified that Rodgers was specifically informed that he would only be paid \$25 for each shift and that he was to man the night desk for no more than 3 or 4 hours during the period from 11 P.M. to 9 A.M. Mr. Abar's expectation was that Mr. Rodgers would man the desk for a total of 4 or hours each night. The manning schedule was left to Mr. Rodgers' discretion. Since Mr. Abar was in his own room sleeping during this period, he agreed that Mr. Rodgers might well have manned the desk for a longer period--indeed, throughout the entire 10-hour period--and may have done so since the night office was a comfortable space and was equipped with a television and radio. However, if Mr. Rodgers worked for more than 4 hours during any one shift that was entirely his own choice and Mr. Abar characterized such work as "volunteer work". Mr. Abar testified that "our arrangement was for 3 to 4 hours, he was welcome to sit there longer". Mr. Abar noted--and this is not contested--that Mr. Rodgers never demanded, during his period of employment, any further compensation for having worked additional hours.

Mr. Abar says that Mr. Rodgers' duties did not include sweeping or washing the hallways in the common areas and that he was paid, in total, about \$1,000 during his 2-month (or less) period of employment. While Mr. Rodgers may have recorded his shifts in a "logbook"--a small notebook in which incidents that might require the manager's attention the next day were recorded--the logbooks were, as a matter of course, thrown out after they were filled up and no such logbooks spanning the time in question are now available.

Rodgers' position

Mr. Rodgers, on the other hand, told quite a different story. He testified that he moved into the New Sun Hotel in late April 2001 and a few weeks later was asked by Mr. Abar if he would like to work the night shift at the hotel--sweeping and washing common hallways and manning the night desk. Rodgers stated that he understood he would be paid only \$25 for a 10-hour shift but wanted the work in order to "keep busy". He stated that he did not have a pressing need for paid employment since he was quite able to manage on his pension income of about \$1,100 per month.

Mr. Rodgers accepted the job and started working in mid to late May; his duties included manning the night desk (which included determining who would be admitted into the rooming house), sweeping and washing floors and recording incidents in a logbook.

Mr. Rodgers testified that he worked Monday to Friday initially but later on his work increased to 7 nights per week. He says that he was paid about \$3,200 in wages before he quit sometime in October 2001.

Findings

The first issue that I must address is the duration of Mr. Rodgers' employment. Mr. Abar says that Mr. Rodgers' employment lasted no more than a couple of months whereas Mr. Rodgers maintains that he worked for some 6 months. My task is complicated by the fact that Shun Chi did not maintain any payroll records regarding Mr. Rodgers' employment and the only document(s) that might assist me, namely the so-called "logbooks", have been discarded. Further, neither Mr. Rodgers nor Mr. Abar's testimony is obviously lacking credibility although, undoubtedly (given the mutually exclusive nature of their respective versions of events), one or the other (or perhaps even both) is not accurately recalling the events in question.

On balance, I am of the view that Mr. Rodgers' employment spanned about 6 months. I note that for the 2001 tax year Mr. Rodgers reported (and paid income tax on), the sum of \$3,000--being his cash payments from Shun Chi--in addition to his pension income. Based on the weekly wages that both parties agree he received, Mr. Rodgers must have been employed for about 6 months in order to generate that income level--\$3,200 (Mr. Rodgers' current estimate of his total wages paid) earned over 6 months amounts to about \$125 per week. This latter figure is entirely consistent with both Mr. Abar's and Mr. Rodgers' evidence with respect to the latter's weekly wages.

As for the number of hours worked, once again, the evidence is conflicting and far from satisfactory. I do not think it probable that Mr. Rodgers would have willingly accepted an arrangement that called for an hourly wage of only \$2.50 (\$25 for a 10-hour shift). Mr. Rodgers impressed me as someone who is well aware of his legal rights and entitlements (I have before me a extensive record of residential tenancy arbitrations instigated by Mr. Rodgers) and he did not strike me as someone who could be easily manipulated and deceived. I note that he never claimed any unpaid wages during the currency of his employment.

I do not doubt that Mr. Rodgers may well have manned the night desk for up to 10 hours and that he may have done so on several occasions. I accept Mr. Abar's suggestion, however, that Mr. Rodgers might have done so in order to watch television (so far as I am aware, he did not have a television in his room) or simply to occupy his time. Mr. Abar was clear that the only expectation was for 3 to 4 hours work each night (and strictly manning the desk) for the \$25 shift payment and thus it cannot, in my view, be said that the employer allowed--either directly or indirectly--Mr. Rodgers to work a nightly 10-hour shift. Mr. Abar had neither the cash resources to pay, nor the obvious need to have, a night desk clerk for a 10-hour shift.

Accordingly, and in conclusion, I find that I am in very substantial agreement with the findings made by the delegate. In the circumstances, I see no need to vary the Determination and thus I would dismiss both appeals.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$2,387.90** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal