Employment Standards TRIBUNAL

An appeal

- by -

Wang Wei-Ming also known as Wendy Wang carrying on business as Ming Spa
(the "Appellant")

– 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)

and

An application for suspension

- by –

Wang Wei-Ming also known as Wendy Wang carrying on business as Ming Spa
(the "Appellant")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2010A/126 & 2010A/127

DATE OF DECISION: February 1, 2011

DECISION

SUBMISSIONS

George Lee	Counsel for Wang Wei-Ming also known as Wendy Wang carrying on business as Ming Spa
Hsiu Hui (Lisa) Chang	on her own behalf
Yan Ping (Sophia) Huang	on her own behalf
Karpal Singh	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed pursuant to section 112(1) of the *Employment Standards Act* (the "*Act*"). I am adjudicating the appeal based solely on the parties' written submissions (see *Act*, section 103 and *Administrative Tribunals Act*, section 36). In adjudicating this appeal, I have considered the submissions filed by the Appellant's legal counsel, the two complainants and by the Director of Employment Standards. I have also reviewed the section 112(5) record.

2. Hsiu Hui (Lisa) Chang ("Ms. Chang") and Yan Ping (Sophia) Huang ("Ms. Huang") filed unpaid wage complaints alleging that their former employer, Wang Wei-Ming also known as Wendy Wang carrying on business as Ming Spa (the "Appellant"), failed to pay them wages in accordance with the *Act*. According to the information set out in the delegate's reasons, the Appellant operated a massage parlour in Surrey known as "Ming Spa" and the two complainants provided massages for what I gather was almost exclusively a male clientele.

3. A delegate of the Director of Employment Standards (the "delegate") investigated these two complaints and, on September 13, 2010, issued a Determination (the "Determination") and accompanying Reasons for the Determination (the "delegate's reasons") upholding both complaints. The delegate rejected the Appellant's position that the complainants were self-employed independent contractors (in which case the *Act* would not apply to them), found that the Appellant did not pay either complainant *any* wages in accordance with the *Act* and had dismissed the complainants without proper cause and, indeed, as retaliatory measure because they had asserted their rights under the *Act*. The delegate awarded each complainant unpaid wages based on the statutory 6-month claim period (see section 80(1)) dating from December 1, 2009.

4. The delegate awarded Ms. Chang $18,213.22 on account of unpaid wages and section 88 interest including $5,880.82 awarded under section 79(2) based on a section 83 contravention – this latter provision states that employees must not be mistreated for having filed an unpaid wage complaint or for otherwise participating in an investigation. The delegate awarded Ms. Huang $31,952.85 including $10,375.04 under sections 79(2) and 83. Further, and also by way of the Determination, the delegate levied eight separate $500 monetary penalties against the Appellant (see *Act*, section 98). Thus, the total amount payable under the Determination is $54,166.07.

5. The record before me includes serious allegations of misconduct advanced by both the Appellant and the two complainants against each other. One complainant says that another worker was regularly selling sexual services (with full knowledge of the Appellant), that workers were pressured into providing sexual services

and that the clientele of a supposedly female "spa" was virtually all male who only sought "massage" services. Counsel for the Appellant says that his client on various occasions found the complainants to be naked with their clients – an allegation that the complainants denied. The business was apparently shut down as a result of RCMP intervention. One complainant was employed for about 18 months and the other for about 7 months but both maintain that throughout their entire tenure they received no wages; they only received "tips" from their clients.

6. It is not immediately clear why the parties advanced these allegations of misconduct before the delegate and again before this Tribunal. I do not have the jurisdiction to launch an inquiry into these allegations and, accordingly, I do not propose to deal with these allegations in my reasons. If one or more of the parties believes that another party was engaging in some sort of illegal activity then those allegations should be taken to the proper police authority.

THE APPEAL

7. On September 21, 2010, the Appellant's legal counsel filed an appeal with the Tribunal (File No. 2010A/126) seeking to have the Determination cancelled or, alternatively, referred back to the Director of Employment Standards, on the grounds that the delegate erred in law, breached the principles of natural justice and because new and relevant evidence was available. The Appellant's notice of appeal simply identified each of the three section 112 statutory grounds. These grounds were more fully illuminated in the Appellant's counsel's submission filed on November 4, 2010 as follows:

> We respectfully submit that the Delegate erred in the following areas:
>
> 1. Calculations of the regular wages;
> 2. Calculations of overtime pay;
> 3. Calculations of Section 83 penalty; and
> 4. Failure to include source deductions in the calculations.

8. The above matters are separately addressed in the body of counsel's 4-page submission.

9. The Appellant, in her appeal form, also requested that the Determination be suspended pending the final adjudication of the appeal pursuant to section 113 of the *Act* (File No. 2010A/127). This application was not supported by any evidence or argument beyond that submitted in the main appeal. By letter dated January 14, 2010, I advised the parties that I was not prepared to rule on the suspension application and that I would provide my reasons for that ruling in my reasons given in the main appeal. Accordingly, I will now briefly turn to the suspension application.

THE SUSPENSION APPLICATION

10. Section 113 of the *Act* gives the Tribunal the discretionary authority "to suspend the effect of [a] determination". In the instant case, the full amount of the Determination (net of, I understand, required payroll deductions for income tax, Canada Pension Plan contributions and employment insurance remittances) has been deposited with the Director of Employment Standards and is now being held in trust pending the outcome of this appeal. The Director apparently secured these funds through enforcement proceedings taken when it appeared to the Director that the Appellant was attempting to liquidate her B.C. holdings and leave the jurisdiction. I understand that, in fact, the Appellant's business has been shut down and that she has left British Columbia.

11. Section 113(2) states that if the Tribunal decides to suspend a determination either the full amount of the determination or, in an appropriate case, some lesser sum, be deposited with the Director of Employment Standards. In this case, the sum of $48,136.2 has now been deposited into the Director's trust account. This sum supposedly represents the entire amount of the Determination less statutory deductions; however, there is nothing in the material before me confirming that the deductions have actually been forwarded to the Canada Revenue Agency.

12. As noted above, the Appellant did not provide any evidence or argument supporting her suspension application. In effect, she simply asks the Tribunal to issue a section 113 order. The Tribunal has stated in a number of separate decisions that the deposit of the full amount of the determination is the "default order" and if a party wishes to have some lesser sum deposited, it is incumbent on that party to demonstrate by clear and cogent evidence why the Tribunal should depart from the usual order. In the absence of any material that would support a lesser deposit, and given that the Director is now holding the "net amount" of the Determination in trust, I see no reason to issue any order under section 113 and thus I decline to do so.

13. I now turn to the merits of the appeal.

FINDINGS AND ANALYSIS

14. For reasons that are not clear to me, the Appellant's counsel set out his arguments under four subheadings dealing with how various unpaid wage claims set out in the Determination were calculated rather than focussing on the individual statutory grounds. The Appellant did not provide any evidence or argument in support of her assertion that the delegate failed to observe the principles of natural justice. Similarly, the Appellant has not tendered any new evidence (that is, evidence that was not before the delegate when he was making the Determination). The thrust of the Appellant's arguments appears to be that the delegate erred in law. Accordingly, I shall endeavour to extract the essence of the Appellant's arguments as they relate to this latter statutory ground of appeal.

Calculation of Regular Wages

15. There was disputed evidence before the delegate regarding the nature of the relationship between the parties. The Appellant's position was that the complainants were "independent contractors" who "rented" space from the massage parlour and who, in turn, negotiated a fee for service with the client directly. The complainants, on the other hand, stated that the Appellant charged clients a flat $40 fee and that they only received whatever "tip" the client decided to pay to them although occasionally the Appellant would pay them a small fee (say, $10) if the client did not pay any "tip". I might parenthetically note that "tips" (or "gratuities" as they are described in section 1 of the *Act*) are not considered to be "wages" for purposes of the *Act* and thus the delegate correctly refused to make an allowance for any "tips" that the complainants received during the 6-month wage recovery period.

16. After considering the conflicting evidence, the delegate concluded (delegate's reasons at page R21):

> The Complainants only received gratuitous payments from clients and there is no evidence before me that [the Appellant] paid the Complainants wages for the hours they were at Ming Spa. I find that [the Appellant] did not pay any wages to her employees…
>
> In the absence of any payroll records from the Employer, I accept the records from the Complainants showing the days and the total hours worked. A copy of these records were [sic] disclosed to the Employer.

17. Accordingly, the delegate awarded the complainants regular wages based on the $8 per hour minimum wage in accordance with their time records. This calculation resulted in an award of $8,704 for Ms. Chang and $6,544 for Ms. Huang. I might add that overtime pay, statutory holiday pay, and vacation pay were similarly awarded based on the complainants' time records.

18. The Appellant's attack on this score amounts to nothing more than a simple statement of disagreement with the delegate's conclusions. The Appellant, through her counsel, acknowledges that she did not maintain any payroll records but also says that the complainants' records are unreliable. Counsel says that the complainants' records are "miscalculated and there should be a re-adjustment". In essence, counsel says that the delegate's conclusion regarding regular wages constitutes an error of law. However, an appeal to the Tribunal does not proceed as a hearing *de novo* and it is clear from the delegate's extensive reasons that he was very much aware of the factual disagreement between the parties. He carefully weighed the conflicting evidence (including witness statements from independent third parties) and I am not persuaded that his conclusion amounts to a wholly erroneous assessment of the matter.

Calculation of Overtime Pay

19. Once the delegate determined that the complainants' time records represented the "best evidence" regarding their hours worked, it logically followed that they were entitled to overtime pay based on the number of hours worked beyond 8 in a day or 40 in a week. The uncontroverted evidence before the delegate was that the Appellant did not pay any overtime pay to the complainants.

20. Counsel for the Appellant submits that an employer cannot be held liable for overtime hours worked without employer authorization or worked without some other form of employer acquiescence. In my view, this submission is a broadly accurate statement of the governing legal principles. Counsel then asserts that the complainants controlled their own working hours and often worked additional hours in an effort to earn greater compensation. While this may be true, the stubborn fact remains that at all times they were working at the Appellant's premises and under her direct supervision; it is also true that the Appellant financially benefited from the complainants' overtime hours. I see no merit whatsoever in the Appellant's argument on this aspect of the Determination.

Section 83 Order

21. Section 83 of the *Act* is a form of "whistleblower" provision. The overwhelming majority of unpaid wage complaints are not filed until the employment relationship has ended. Undoubtedly, some employees are reluctant to file complaints while employed for fear that they will be jeopardizing their continued employment. Thus, the legislature has thought it necessary to provide statutory protection for those employees who wish to file complaints while still employed. Section 83 protects employees who have filed a complaint but also protects employees who have not filed a complaint but are the subject of an ongoing investigation or who might otherwise be likely file a complaint:

> 83. (1) An employer must not (a) refuse to employ or continue to employ a person…because a complaint or investigation may be or has been made under this Act…

22. In the instant case, the two complainants were dismissed on June 12 (Ms. Huang) and 13 (Ms. Chang), 2010, and filed their complaints on June 21 and 29, 2010, respectively. The delegate determined that the Appellant terminated both complainants because they were involved in an ongoing investigation and were likely to file unpaid wage complaints. In reaching this conclusion, the delegate noted that following the filing of a confidential complaint by another person, he attended at the Appellant's place of business (June 9, 2010). At

that time, he delivered a Demand for Employer Records. On June 15, 2010, the delegate learned that the two complainants were terminated when they refused to sign a letter in which they would have confirmed their "self-employment" status. On June 16, 2010, the Appellant met with the delegate at his Employment Standards Branch office. The delegate recounted, at page R25 of his reasons, the following evidence:

> …I interviewed [the Appellant] and she informed me that Ms. Chang and Ms. Huang were no longer with Ming Spa. [The Appellant] asked them to sign a letter confirming that they were self-employed but they refused. She told them to leave because they refused to co-operate. [The Appellant] acknowledged that she asked them to sign the letter because of the letter I gave her on June 9, 2010…
>
> The Complainants stated that after my visit to Ming Spa on June 9, 2010, [the Appellant] consulted her lawyer and then asked them to sign an "Explanation" letter. The letter stated that they were voluntarily working at Ming Spa's property as self-employed and that they can terminate their duties in Ming Spa without any reasons at anytime. [sic]
>
> One of the Complainants told [the Appellant] that she didn't want to sign the letter immediately but [the Appellant] told her that she needed the letter signed immediately or she will be fired. Both Complainants claimed that [the Appellant] threatened to fire them if they did not sign the letter. Their employment was terminated immediately when they refused to sign the letter.

23. In light of the foregoing evidence, the delegate concluded at page R26 of his reasons:

> …I find that [the Appellant's] decision to terminate Ms. Huang's and Ms. Chang's employment was motivated by her need to provide signed letters from them to the Employment Standards Branch as proof that they were self-employed and excluded from the protection and minimums [sic] standards of the Act and Regulation. The Complainants were only given two options – sign the letter or be terminated. Based on the information and evidence before me, I find that [the Appellant's] actions were motivated because of the investigation conducted by the Branch and there is no other rational explanation as to why [the Appellant] suddenly required the Complainants to sign the letter. I find that [the Appellant] contravened Section 83 of the Act when she terminated their employment.

24. Counsel for the Appellant says, firstly, that the delegate's section 83 finding cannot stand since the Appellant only required the complainants' signature on letters to clarify their present status *vis-à-vis* the massage parlour. There are, in my view, two fundamental problems with this assertion – the proffered letter was not accurate since, from the outset of their engagement, the complainants were employees not self-employed contractors and, in any event, the Appellant has not advanced any *bona fide* justification for the complainants' summary dismissal. I do not believe that the employees' refusal to sign a letter that was factually inaccurate and that would only be used to undermine their legal position in proceedings before the Employment Standards Branch, constitutes insubordination justifying their summary dismissal "for cause". I am unable to conclude that the delegate erred in law in determining that the Appellant contravened section 83 of the *Act*.

25. Secondly, counsel says that if a section 83 contravention occurred, the remedy ordered was "out of proportion, unreasonable or excessive under the circumstances". Counsel says:

> The Delegate awarded a compensation amount equivalent to 14-week wages. [sic] The Complainants had worked 18 months and 7 months respectively. They were terminated on June 12, 2010 and June 13, 2010, respectively. There is no evidence that the Complainants were still suffering damages due to loss of employment at the time of the investigation. It is our submission that the reasonable remedy in this case is to award as compensation two-week wages for the former and one-week wage for the latter. [sic]

26. The broader "make whole" remedies set out in section 79(2) are available to remedy a section 83 contravention:

> 79. (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

27. The delegate's rationale for his award is set out at page R27 of his reasons:

> …As of September 13, 2010 (date of Determination), three months has lapsed [sic] since their termination and they were still not gainfully employed. There is no evidence before me to show that they have any source(s) of income or the likelihood of any employment offer(s) in the near future. In the absence of any set formula and in consideration of their unemployment, I am awarding them compensation equivalent to 14 weeks [sic] wages. This would be equivalent to the 14th week from the day they were terminated to the date of my Determination. It is impossible to determine what they would have or could have earned during this period. Accordingly, my calculation is based on the average weekly wages multiplied by 14 weeks plus 4% vacation pay.

28. The delegate could have – consistent with his statutory powers – reinstated the complainants with full backpay (i.e., a subsection 79(2)(b) remedy) but instead chose to order compensation in lieu of reinstatement (subsection 79(2)(c)). Had the delegate opted for the former route, the complainants would have been awarded the same sum as was ultimately awarded for the section 83 contravention but presumably they would have continued to be employed after September 13, 2010 (assuming, of course, the business was still operating – the information in the record suggests that the business ceased operations in the late summer of 2010). Nevertheless, since the section 79(2)(c) award simply constitutes the equivalent of a reinstatement with backpay order, I see no reason to disturb this aspect of the Determination.

Calculation of Source Deductions

29. Counsel for the Appellant submits that since all employers are legally required to make certain deductions and remittances to the Canada Revenue Agency (e.g., income tax, Canada Pension Plan premiums, employment insurance premiums), the amount payable under the Determination should be adjusted to reflect the net amount payable. This submission is wholly without merit.

30. Wages payable under the *Act* are calculated as gross amounts – the *Act* contains no provisions for wages, otherwise payable, to be reduced to reflect, for example, deductions and remittances required under the federal *Income Tax Act*. Determinations must set out the total amount of wages that are payable under the *Act*. Legislatively mandated deductions and remittances are matters that must be sorted between the relevant government agency and the employer. When it comes time for an employer to *pay* an amount ordered under a determination, the Director of Employment Standards properly allows employers to withhold mandated deductions and remittances provided they are, in fact, deducted and remitted as required by law. The Appellant is directed to page 2 of the Determination where the direction to pay the Director includes the following statement: "If statutory deductions are withheld from the wages payable to the employee (line A), include a statement indicating the individual amounts remitted to Canada Revenue Agency." [sic]

Recalculation of Ms. Huang's Claim

31. In my view, none of the "grounds" advanced by the Appellant constitute errors of law on the part of the delegate and, accordingly, I would dismiss the appeal. However, that does not end the matter. The delegate now says that Ms. Huang's wage claim was not correctly calculated. Ms. Huang, in her submission to the Tribunal, says that she ought to have been awarded more money than was actually ordered. The delegate apparently accepts this view. However, in my view, if Ms. Huang wished to challenge the delegate's unpaid wage calculation, she should have appealed the Determination. She did not do so.

32. The delegate now says that the unpaid wage claim was incorrectly calculated. That may or may not be so – the evidence does not clearly justify a firm conclusion that Ms. Huang, as she now her asserts, was actually working 13 hours per day rather than the 12 hours per day originally accepted by the delegate. If one accepted that Ms. Huang actually worked 13 hours per day during the period in question, her wage claim would increase from $31,952.85 to 34,226.95 and the delegate says that I should vary the Determination accordingly. Since I am unable to conclude that the original unpaid wage award was clearly wrong, I decline to make such an order.

ORDER

33. Pursuant to section 115 of the *Act*, I confirm the Determination as issued in the total amount of $54,166.07 together with whatever further interest that may have accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal