

An appeal

- by -

Mian Huang
("Huang")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/201

DATE OF DECISION: February 15, 2005

DECISION

SUBMISSIONS

Mian Huang	on her own behalf
Simon Wang	for Canada China News (Vancouver) Inc.
Ken J. MacLean	for the Director of Employment Standards

INTRODUCTION

Mian Huang (“Huang”) appeals, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on June 7th, 2004 (the “Determination”).

Ms. Huang appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in adjudicating her complaint [see section 112(1)(b) of the *Act*]. However, based on the principles set out in *Triple S Transmissions Inc.* (B.C.E.S.T. Decision No. D141/03), I am adjudicating the appeal on the basis of an alleged error in law [section 112(1)(a)].

This matter now comes back before me as a result of a “referral back” order I issued on September 9th, 2004 (see B.C.E.S.T. Decision No. D159/04).

THE DETERMINATION

The Determination was issued following an oral hearing (attended by Ms. Huang but not by any representative on behalf of the alleged employer) held before the Director’s delegate on February 20th, 2004. The delegate dismissed Ms. Huang’s unpaid wage complaint [filed against a firm known as “Canada China News (Vancouver) Inc.”; I shall refer to this firm as “Canada China News] stating (delegate’s “Reasons for the Determination” at p. 5):

While it is evident that [Ms. Huang] has earned and not received payment of wages per her written contract of employment with [Canada China News], I find that this complaint has not been filed within the time period allowed under the Act...

I have determined that the Act has not been contravened. Accordingly, no wages are outstanding.

Section 74(3) of the *Act* states that: “A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment”.

The delegate also concluded (delegate’s Reasons at pp. 4-5) that Ms. Huang’s unpaid wage claim was statute-barred by reason of section 80(1)(a) of the *Act*. Section 80(1)(a) of the *Act* states that an employer cannot be held liable for unpaid wages “that became payable in the period beginning...6 months before the earlier of the date of the complaint or the termination of the employment”.

THE TRIBUNAL'S SEPTEMBER 9TH, 2004 DECISION

The Parties' Written Agreements

Ms. Huang was engaged as a “chief script writer” for a documentary television project and her engagement was governed by two formal written agreements. She claimed unpaid wages in accordance with the second of these two agreements. I discussed these latter two agreements at pages 7 and 8 of my September 9th Reasons for Decision:

As is clear from the parties' submissions (see above), there were two separate written agreements between the parties, a 1-page “Agreement” and a 2-page “Supplementary Agreement”. Both are written in Chinese characters and signed by both parties; I also have before me what I understand to be English translations of the two documents. It is not clear whether the latter translations were prepared and/or executed contemporaneously with the Chinese-script documents, however, I am assuming them to be accurate translations.

The “Agreement” simply sets out the nature of Ms. Huang's duties as script-writer for a 10-episode documentary and certain of Canada China News' entitlements. The “Agreement” does not set out a wage rate for Ms. Huang's services nor is it a fixed-term employment contract. The “Agreement” refers to an agreement reached between the parties on May 12th, 2002 that will “take effect from the date of signature”. The only provision that speaks to compensation is paragraph 3.2:

3.2 Reward: [Ms. Huang] will share with [Canada China News] the commercial profits of the documentary. The proportion of distribution to [Ms. Huang] will be decided after negotiation between both parties.

* * * * *

I now turn to the “Supplementary Agreement”. This latter agreement reflects further negotiations between the parties that occurred on August 30th, 2002--a point in time when Ms. Huang had apparently completed and delivered to Canada China News several documents although (and this is not clear) not a formal final script. Paragraph 1 of this agreement states that Canada China News “employs [Ms. Huang] as the chief scriptwriter in Vancouver part for the documentary ‘Our True Lives of Studying Overseas’”.

The matter of Ms. Huang's compensation is addressed in two separate provisions of the “Supplementary Agreement”, namely, paragraphs 3.3 and 4.2:

3.3. [Ms Huang] deserves a commission of two thousand Canadian dollars per month and a one-time bonus (the exact amount of bonus will depend on the profits of the TV project)...

4.2 [Canada China News] will pay [Ms. Huang] \$7,000 CDN after getting the first commercial income as [Ms. Huang's] commission for the 1st period work from May 12th, 2002 to August 31st, 2002.

As for the term of her engagement, the “Agreement” is open-ended--it merely states that “This agreement will take effect from the date of signature”. The “Supplementary Agreement” speaks to the term of engagement in two separate provisions, namely, paragraphs 4.1 and 4.3:

4.1 Since [Ms. Huang] has successfully completed the work for phase one, as required by [Canada China News], [Ms. Huang] will *pause* the required work stated in this agreement by August 31st, 2002 except handing in all the materials to [Canada China News] (including the arranged materials after August 31st, 2002). *Once the CCTV production*

crew arrives in North America to commence shooting, [Ms Huang] will continue the unfinished work stated in this agreement.

4.3 This agreement is a supplementary one based on the [sic] both parties' cooperation starting on May 12th, 2002, which takes effect from the first cooperative date and will expired [sic] *after the completion of the said documentary.*

(my italics)

The Timeliness of Ms. Huang's Complaint

In my September 9th Reasons for Decision, I held (at pages 6 and 8), based on the record before me, that Ms. Huang's complaint was filed within the 6-month statutory limitation period set out in section 74(3) of the *Act*:

The section 112(5) record includes Ms. Huang's written complaint dated August 1st, 2003 that was filed on that same day at the Employment Standards Branch office in Burnaby. In her complaint, Ms. Huang identified her "start date" with Canada China News as May 12, 2002 and the "Last day you worked for this employer" as "Feb. 21, 2003". Thus, on the face of Ms. Huang's complaint, it was filed within the statutory 6-month limitation.

Before the delegate (and as recounted in the delegate's Reasons at p. 3), Ms. Huang testified that her employment continued until February 21st, 2003 when she was advised that her employment was terminated due to the fact that the CCTV crew would not be returning to North America. Ms. Huang's evidence with respect to her termination date was (obviously) uncontradicted by Canada China News since that firm never appeared at the Branch-level hearing. Ms. Huang testified that she continued to work for Canada China News after August 31st, 2002 as a "part-time teacher" and "free-lance reporter" although she was not seeking any wages in regard to this work--this evidence was also uncontradicted. The delegate never concluded that Ms. Huang's evidence as to her post-August 31st, 2002 employment activities was not credible. In his Reasons, the delegate stated that Ms. Huang "could not provide evidence of continued employment subsequent to August 31, 2002" (Reasons, p. 3), however, clearly Ms. Huang *did* provide such evidence in the form of her oral testimony. As previously noted, the delegate did not reject Ms. Huang's testimony as not being credible. In my view, the evidentiary record does not support the delegate's conclusion that there was no evidence of post-August 31st, 2002 employment.

* * * * *

...Ms. Huang's uncontradicted evidence was that she continued to provide services to Canada China News until February 21st, 2003 at which time she was advised by Canada China News that the documentary project would not be going forward. In my view, it was at that point when her employment was terminated. She filed her complaint within 6 months of this latter date.

Ms. Huang's Wage Entitlement

At page 9 of my Reasons for Decision I made the following observations with respect to Ms. Huang's wage claim:

Section 80(1)(a) of the *Act* states that an employer cannot be held liable for unpaid wages "that became payable in the period beginning...6 months before the earlier of the date of the complaint or the termination of the employment".

In this case, Ms. Huang's complaint was filed on August 1st, 2003 and, as I have previously found, her employment terminated on February 21st, 2003. Thus, Ms. Huang's wage claim must have crystallized 6 months (or less) before February 21st, 2003 or else Canada China News cannot be held liable for those unpaid wages under the *Act* (I leave aside its possible liability in a civil suit under the law of contract).

If, indeed, the parties were in an employment relationship, Ms. Huang was entitled to be paid, at least semi-monthly in accordance with section 17 of the *Act*, throughout the "first phase" of her work spanning the period from May 12th to August 31st, 2002. To the extent that the parties purported to defer Canada China News' payment obligation until certain conditions were satisfied (see Supplementary Agreement, paragraph 4.2), I consider that "deferral" to be null and void by reason of section 4 of the *Act*. The \$2,000 per month "commission" to be paid pursuant to paragraph 3.3 of the "Supplementary Agreement", similarly, should have been paid in semi-monthly installments.

The parties both acknowledged (see Supplementary Agreement, paragraph 4.1) that Ms. Huang completed the "first phase" of her work by August 31st, 2002. If Ms. Huang was not paid any wages prior to that latter date (and apparently she was not), she certainly was entitled to full payment as of August 31st, 2002--this latter date represents the very latest date when her wages became "payable". Indeed, as I previously observed, the greater share of her wages came due well before August 31st since she had a statutory right to payment on a semi-monthly basis as and from May 12th, 2002 when her "work" commenced.

Assuming that August 31st, 2002 is the latest date that Ms. Huang's wages became payable, Ms. Huang could only claim wages that became payable in the 6 month period prior to February 21st, 2003 (her termination date). Therefore, Canada China News could only be lawfully ordered to pay those wages that became payable in the period after August 21st, 2002--any wages that became payable prior to August 21st, 2002 cannot be claimed against Canada China News under the *Act* by reason of section 80(1)(a).

THE DELEGATE'S REPORT AND THE PARTIES' SUBMISSIONS

On November 16th, 2004 the Director's delegate filed a 1 1/2-page report as directed by my earlier order. In his report, the delegate indicated that he was not prepared to review the matter of the nature of the parties' relationship (*i.e.*, was it a partnership or employment relationship?) and, further, did not provide any calculation with respect to Ms. Huang's unpaid wage entitlement. The delegate suggested that since the employer never questioned the nature of the parties' relationship, he simply accepted Ms. Huang's position that the parties were in an employment relationship.

On November 17th, 2004, the Tribunal's Vice-Chair wrote to the parties enclosing the delegate's November 16th report and asking for their submissions with respect to the report. Ms. Huang, in her submission filed December 6th, 2004 asserted that she was not seeking payment of "bi-weekly wages or salary" but, rather, "a one time lump sum payment to be paid to me AFTER Aug. 31, 2002 according to the terms and conditions stipulated in the Supplementary Agreement". Canada China News, in its submission filed December 20th, 2004 asserted that it never employed Ms. Huang and that when, and if, the project generates any income it will pay Ms. Huang her share according the parties' agreement.

The delegate's November 16th report appears to have been prepared without any additional submissions from the parties. Further, the delegate's report did not directly address the two issues that were referred back (namely, Ms. Huang's wage entitlement, if any, and the nature of the parties' relationship), I

directed that the parties be given one final opportunity to make submissions to the Tribunal specifically in regard to those two issues. Accordingly, the parties, by way of the Vice-Chair's letter dated January 13th, 2005, were given a final opportunity to address the two issues raised in my referral back order. Ms. Huang, Canada China News and the delegate each filed a further submission with the Tribunal.

In a very brief quarter-page submission, Canada China News simply reiterated its position that the parties were partners and not in an employment relationship. Ms. Huang claimed \$7,000 pursuant to the parties' "Supplementary Agreement". Ms. Huang asserted:

The money I claimed was not my regular bi-weekly wages or salary, it was a one time lump sum payment to be paid to me AFTER Aug. 31, 2002 according to the terms and conditions stipulated in the Supplementary Agreement. So, it is not reasonable to divide the amount of the money I claimed by the total number of days I worked and pay me partially for the period from Aug. 21 to Aug. 31, 2002...

Even though the money to be paid to me was for the job I had done from May 12, 2002 to Aug. 31, 2002, the money had not become payable or due to me until Aug. 31, 2002 when the Supplementary Agreement was signed.

Ms. Huang also maintained that she was employed by Canada China News and referred to the Supplementary Agreement ("Party A *employs* Party B...") to corroborate her position (Ms. Huang's *italics*).

The Director's delegate also filed a submission, dated February 4th, 2004, in response to the Vice-Chair's January 13th invitation. The delegate calculated Ms. Huang's unpaid wage entitlement for the period August 21st to 31st, 2002 based on the \$2,000 per month figure contained in paragraph 3.3. of the Supplementary Agreement. The total amount calculated by the delegate, derived from Ms. Huang's own record of hours worked, was \$1,153.20 including regular wages, overtime and vacation pay. The delegate also stated that he was satisfied Ms. Huang was an employee since there was "a lack of evidence to the contrary".

FINDINGS AND ANALYSIS

The Parties' Relationship: Employment or Partnership?

Canada China News contracted Ms. Huang to write scripts for a documentary television project documenting the lives of Chinese students living in Canada tentatively entitled "Our True Lives of Studying Overseas". The documentary project was to be jointly produced by Canada China News and an organization identified merely as "CCTV" (CCTV is not more fully described in the material before me; I assume CCTV is a Chinese television network or television production company).

In any event, the project was divided into two phases. The first phase called for Ms. Huang to interview the student subjects (in person or by telephone) and prepare a final script. Ms. Huang prepared the scripts at her home using her own computer. However, Canada China News identified the subjects, provided the necessary audio and video recording equipment (used in the interviews) and also provided transportation to the subjects' locations. Ms. Huang was given Canada China News business cards that identified her as a "reporter". The first phase of the work was governed by a one-page written Agreement. The Agreement states that Canada China News "hires" Ms. Huang (and sets out her Social Insurance Number). However, the Agreement also states that the parties will "share the commercial profits" (in

proportions to be determined by future negotiation) of the project and jointly own the documentary scripts.

As I understand the situation, Ms. Huang completed the first phase of her work as of August 31st, 2002, as agreed, and submitted draft scripts. The second phase, namely, the actual production of the documentary, never proceeded and the project now appears to have been abandoned.

On August 31st, 2002, after the completion of the first phase, the parties entered into a second written agreement that was entitled “Supplementary Agreement”. By this latter agreement, Canada China News agreed to “employ” Ms. Huang as the “chief scriptwriter” for the documentary project, agreed to share copyright in the scripts with Ms. Huang and acknowledged that she “deserves a commission of two thousand Canadian dollars per month and a one-time bonus” (the bonus to be determined based on a share of the project’s profits). The parties also agreed that Ms. Huang’s duties would be suspended (“paused”) until the Chinese film production crew arrived in North America (as noted above, apparently the crew never arrived) and that Ms. Huang would be paid a “commission” of \$7,000 “after getting the first commercial income” for the project.

Although there are certainly aspects of the parties’ relationship that suggest a partnership--the sharing of profits; the joint ownership of intellectual property--it is my view that, on balance, the parties are fairly described to have been in an employment relationship. The parties’ themselves described their relationship as employer/employee, however, their own characterization of the relationship is not determinative. In addition, though, I do note that Canada China News exercised a certain amount of control over Ms. Huang’s activities (for example, final script approval), held her out as their employee, and provided some of the requisite tools and equipment she needed to carry out her duties. The Supplementary Agreement sets out a wage payment obligation on the part of Canada China News as well as a profit-sharing agreement. In sum, I am satisfied that Ms. Huang was employed by Canada China News during the relevant time period and, accordingly, their relationship was governed by the *Act*.

Ms. Huang’s Unpaid Wage Entitlement

Canada China News has not made a submission regarding Ms. Huang’s wage entitlement; its position was solely that the *Act* did not apply since the parties were partners. The Director’s delegate calculated Ms. Huang’s entitlement based on the wage rate set out in the parties’ Supplementary Agreement (paragraph 3.3) and Ms. Huang’s own record of hours worked. Ms. Huang says that she is entitled to \$7,000 pursuant to paragraph 4.2 of the Supplementary Agreement.

Although set out above, for ease of reference, I have reproduced paragraphs 3.3 and 4.2 a second time:

3.3. [Ms Huang] deserves a commission of two thousand Canadian dollars per month and a one-time bonus (the exact amount of bonus will depend on the profits of the TV project)...

4.2 [Canada China News] will pay [Ms. Huang] \$7,000 CDN after getting the first commercial income as [Ms. Huang’s] commission for the 1st period work from May 12th, 2002 to August 31st, 2002.

The parties appear to have negotiated a compensation scheme that included both wages and profit-sharing payments. There is nothing in the *Act* prohibiting such systems so long as the employee is paid at least the regulatory minimum wage for all hours worked. In this case, Ms. Huang is not entitled to, nor does she seek, any compensation on account of “profits”. Her claim is limited to “wages”.

In my view, paragraphs 3.3 and 4.2 must be read in concert. The parties agreed that Ms. Huang was to be paid \$2,000 per month and her work, spanning the period from May 12th to August 31st, 2002, covered about 3 1/2 months. In other words, Ms. Huang had earned, as of August 31st, 2002, approximately \$7,000 (based on a \$2,000 monthly “commission”) in wages.

Paragraph 4.2 is a provision purporting to create a condition precedent (see *Law and Equity Act*, section 49); in other words, the \$7,000 payment obligation is not triggered unless and until there is “commercial income”. While I agree that the \$7,000 sum was intended to be paid as a “lump sum”, it was nonetheless conditional on (and presumably was to be paid from) the receipt of “commercial income” from the project. There is no evidence before me that the project ever generated any commercial income (indeed, the project appears to have been abandoned) and, accordingly, the \$7,000 never became payable under the literal wording of the Supplementary Agreement.

However, and as I indicated in my earlier September 9th, 2004 Reasons for Decision, the employer’s intention (via paragraph 4.2) to put a further condition regarding the payment of wages that were already earned by Ms. Huang (i.e., receipt of “commercial income”) amounted to an unlawful attempt to defer wages (see section 4 of the *Act*). It does not matter that Ms. Huang apparently agreed to the deferral of her wages; the provision is nonetheless void for illegality.

“Wages”, as defined in section 1 of the *Act*, among other things, are paid or payable for work. Although the \$7,000 lump sum payment was never paid, it was expressly stated to constitute payment for Ms. Huang’s work for the period May 12th to August 31st, 2002. Pursuant to section 80(1)(a) of the *Act*, Canada China News can only be held liable for wages that became payable 6 months prior to the termination of Ms. Huang’s employment (i.e., 6 months prior to February 21st, 2003).

Paragraph 3.3 does not indicate when the \$2,000 per month commission was payable each month. However, under the *Act* (section 17) wages must be paid at least semi-monthly. Thus, Ms. Huang should have been paid \$1,000 (gross wage) on the 15th and at the end of each month during the May 12th to August 31st, 2002 period (the first payment to be pro-rated). The relevant period for purposes of calculating Ms. Huang’s unpaid wage entitlement, taking into account section 80(1)(a), is from August 21st to 31st, 2002. This latter time frame encompasses only one “pay day”, namely, August 31st, 2002 (\$1,000). As noted in the delegate’s February 4th report, Ms. Huang also earned \$142.21 in overtime during this latter period. Further, Ms. Huang’s accrued vacation pay (calculated by the delegate to be \$279.64) should have been paid within 48 hours after Canada China News terminated her employment on February 21st, 2003 [see section 58(3)]. Accordingly, Canada China News is liable to pay Ms. Huang, after accounting for the limiting effect of section 80(1)(a), the total sum of \$1,421.85 plus section 88 interest.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be varied to reflect the following findings:

1. Ms. Huang’s unpaid wage complaint is not statute-barred under section 74(3) of the *Act*;
2. After giving effect to section 80(1) of the *Act*, Canada China News is obliged to pay Ms. Huang unpaid wages in the total amount of \$1,421.85 together with additional interest to be calculated in accordance with section 88 of the *Act*.

In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal