Employment Standards TRIBUNAL

An appeal

- by -

Fonerus Enterprises Inc.
(the "Fonerus")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2009A/002

DATE OF DECISION: March 23, 2009

DECISION

SUBMISSIONS

Xiao Zheng	on behalf of Fonerus Enterprises Inc.
Charles Cao	on behalf of Xi Miao Yang
Megan Roberts	for the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Fonerus Enterprises Inc. ("Fonerus"), pursuant to section 112(1) of the *Employment Standards Act* (unless otherwise indicated, all statutory references in these reasons are to the *Employment Standards Act*) of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on January 5th, 2009 pursuant to which Fonerus was ordered to pay its former employee, Xi Miao Yang ("Yang"), the sum of $8,614.29 on account of unpaid wages and section 88 interest (the "Determination"). In addition, the delegate also levied three separate $500 monetary penalties (see *Employment Standards Act*, section 98) against Fonerus. Accordingly, the total amount payable under the Determination is $10,114.29. The Determination was issued following an oral hearing conducted on December 8th, 2008 at which both parties were represented by legal counsel.

2. The delegate concluded that Mr. Yang was employed by Fonerus in the latter's retail piano business and was not paid his agreed $2,000 monthly salary for March through June 2008. The delegate also awarded 4% vacation pay on this latter sum but did not award Mr. Yang his claimed overtime pay since she concluded Mr. Yang was a "manager" and thus not entitled to overtime pay pursuant to section 34(f) of the *Employment Standards Regulation*. Further, the delegate concluded that Mr. Yang did not have any separate contractual entitlement to overtime pay.

3. This appeal is being adjudicated based solely on the parties' written submissions. I have before me Fonerus' initial appeal notice as well as its submission dated February 13th, 2009; Mr. Yang's submission dated January 14th, 2009; the section 112(5) record that was before the delegate as well as a brief submission from the delegate dated January 16th, 2009.

THE ISSUE AND THE PARTIES' POSITIONS

4. In its Appeal Form, Fonerus requests that this matter be referred back to the Director for reconsideration on the basis that the delegate erred in law (section 112(1)(a)) and that it has new evidence that was not available at the time when the Determination was being made (section 112(1)(c)). Each of these grounds relates to a B.C. Provincial Court (Small Claims Court) action between the parties that was filed on December 15th, 2008 by Fonerus seeking nearly $22,000 against Mr. Yang (Richmond Registry No. 2008-21910). Mr. Yang filed a counterclaim in the same action on January 2nd, 2009. Fonerus sued Mr. Yang seeking to recover certain monies allegedly received by Mr. Yang on Fonerus' behalf that have not been remitted to it. Mr. Yang counterclaimed for "outstanding wages", "overtime wages" and "annual vacation pay" in the total amount of $25,000.

5. It is important to note that Fonerus does not attack any of the factual or legal conclusions reached by the delegate. Rather, Fonerus says that the Tribunal should refer this matter back to the Director "to terminate the complaint because a similar proceeding (small claims court) relating to the same subject matter has been commenced before a court (the BC Small Claims Court)". Fonerus says that Mr. Yang's original Employment Standards Act complaint, filed September 4th, 2008, ought not to have been adjudicated in light of section 76(3)(f) which provides as follows:

> 76. (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if …
>
> (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator, …

6. Mr. Yang, among other things, says that the Small Court proceedings do not amount to new evidence; in any event, that section 76(3)(f) is inapplicable, and that he "is not seeking to recover in the counterclaim in the Provincial Court action wages or other payments which were the subject of the complaint before the Director".

FINDINGS AND ANALYSIS

7. In evaluating the issues raised by this appeal, the following timeline may be helpful:

Date	Event
September 4th, 2008	ESA Complaint filed
November 5th, 2008	ESA Demand for Employer Records issued & ESA Complaint Hearing Notice issued
December 8th, 2008	ESA Complaint Hearing conducted
December 11th, 2008	Deadline for further written submissions to delegate
December 15th, 2008	Small Claims action filed by Fonerus
January 2nd, 2009	Small Claims Reply and Counterclaim filed by Wang
January 5th, 2009	Determination issued

8. Section 76(3)(f), pursuant to which the Director may suspend or terminate an ongoing complaint investigation or adjudication process, is a discretionary power. The evidence before me indicates that the delegate was never made aware of the parallel Provincial Court proceedings until some time after the Determination was issued. I suppose it was possible for Fonerus to have contacted the Employment Standards Branch immediately after it became aware of the counterclaim and perhaps an application might have been made, at that point, to suspend the complaint proceedings, however, no such notice or application was ever given or made. This latter course of action may not have even been possible since, accordingly to Fonerus, it was not even aware of the counterclaim until January 9th, 2009 some four days after the Determination was issued. Nevertheless, it does not strike me as sensible to suggest that the delegate should somehow be faulted for neglecting to suspend or terminate the complaint proceedings before her on the basis of some other court proceedings of which she had

absolutely no knowledge. I hardly think the delegate's "failure" to act on an application that was never before her amounts to an error of law in these circumstances. Furthermore, the delegate says that even if she had been aware of the Small Claims Court action prior to issuing the Determination, she would have nonetheless proceeded to issue the Determination since, among other reasons, the complaint was limited to unpaid wages earned in the six months prior to the termination of the parties' employment relationship and thus represented "only a portion of [the] monies claimed in the Small Claims action". If Fonerus had made a timely application to suspend or terminate the investigation/adjudication process prior to the Determination being issued, and if the delegate had nonetheless decided to proceed with issuing the Determination, I do not consider that would have amounted to an unfair exercise of her discretion and therefore would not have constituted an error of law. I say this for two reasons.

9. First, the complaint hearing was completed and thus the delegate would have then been in the process of making her formal determination. Delaying or terminating the complaint adjudication process would have meant that the adjudication of Mr. Yang's unpaid wage claim would have been postponed until the Small Claims Court was in a position to hear it—that further delay would not have been in keeping with the section 2(d) purpose that disputes be fairly and efficiently adjudicated. Second, Mr. Yang's complaint included a statutory claim for overtime; the civil courts do not have the jurisdiction to adjudicate such claims since statutory overtime claims must be adjudicated under the dispute resolution scheme provided for in the *Employment Standards Act* (see *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, leave to appeal to the Supreme Court of Canada refused: 2008 CanLII 53790). Accordingly, the delegate would still have been obliged to adjudicate Mr. Yang's overtime (and possibly also the vacation pay claim).

10. As for the "'new evidence" submission, this ground of appeal is also predicated on the counterclaim. Although the fact that this particular proceeding had been filed did not apparently come to the attention of Fonerus until after the Determination was issued (and, at least in that strict sense, this fact could be said to be a "new" fact), I do not consider this evidence to be "material" or "probative" (see *Davies et al.*, B.C.E.S.T. Decision No. D171/03) in the sense that had it been presented to the delegate, she would have (or even should have) decided to suspend or terminate her adjudication of the complaint. I say this for substantially the same reasons as are noted above regarding the "error of law" issue.

11. As the delegate notes in her submission, there is some (but far from complete) overlap as between the matters adjudicated by way of the Determination and the claims raised by Mr. Yang in his counterclaim. Fonerus may be rightly concerned about having to fend off claims for unpaid wages and overtime that have already been adjudicated (and not wholly in Mr. Yang's favour). To the extent that the counterclaim duplicates wage claims that have already been resolved by the Determination, Fonerus may make the appropriate application to the Small Claims Court under section 82 of the *Act*; with respect to the other wage claims that were not resolved in Mr. Yang's favour (*e.g.*, overtime), Fonerus may advance an issue estoppel argument before the Small Claims Court (see *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460). In other words, I am not persuaded by Fonerus' argument that the Small Claims Court process will produce a "different decision or judgment [as compared to the Determination] which will breach the rule of natural justice".

ORDER

12. Pursuant to section 115(1)(a) of the *Employment Standards Act*, I order that the Determination in this matter dated January 5, 2009 be confirmed in the amount of $10,114.29 together with any further interest that may have accrued pursuant to section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal