Employment Standards TRIBUNAL

An appeal

- by -

Yuen Kwan Li
("Ms. Li")

- 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: Shafik Bhalloo

FILE No.: 2015A/27

DATE OF DECISION: March 23, 2015

DECISION

SUBMISSIONS

Yuen Kwan Li	on her own behalf
Suki Cheung	on behalf of Yuen Kwan Li

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Yuen Kwan Li ("Ms. Li") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on January 9, 2015 (the "Determination"). In the Determination, the Director concluded that BFF Food Enterprises Ltd. carrying on business as Hot Pot Legend ("HPL") did not contravene the *Act* in respect of the employment of Ms. Li and three (3) other employees and, accordingly, no wages were outstanding.

2. Ms. Li appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made.

3. Section 114 of the *Act* provides that the *Employment Standards Tribunal* (the "*Tribunal*") may dismiss all or part of an appeal without seeking submissions from the other parties or from the Director if it decides the appeal does not meet certain criteria. I have decided that this appeal is an appropriate case for consideration under section 114. At this stage, I will assess the appeal based solely on a review of the Reasons for the Determination (the "Reasons"), the written submissions of Ms. Li, and the "record" that was before the delegate when the Determination was being made (the "Record"). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, HPL and the Director will be invited to file further submissions. Alternatively, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

4. The issue in this appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

5. HPL operates a restaurant and employed Ms. Li from June 6, 2014, to July 20, 2014.

6. Ms. Li filed a complaint against HPL on September 6, 2014, alleging that the latter contravened the *Act* by: (i) failing to pay her wages, including overtime from July 1, 2014, to July 20, 2014, and annual vacation pay from June 27, 2014, to July 20, 2014; and (ii) deducting one hour's pay from her wages for her meal breaks and charging her for a meal and drink she consumed at the restaurant during that break (the "Complaint").

7. A delegate of the Director conducted an investigation into the Complaint at the same time as he investigated into three (3) other employees' complaints against HPL. However, since only Ms. Li's appeal is before me, I will only refer to the evidence in the Reasons relevant to Ms. Li's Complaint.

8. During the investigation, Ms. Li provided the delegate with copies of her work schedule, including an estimation of hours she worked. She stated that she was paid for her meal breaks until the beginning of July, 2014, after which her breaks were unpaid and she had to work during her breaks. She stated that the kitchen staff at HPL would be able to support her claim in this regard, but she failed to provide any names or contact information for any witnesses, or any witness statements.

9. Ms. Li also complained that HPL deducted from her wages one hour's pay for a meal break she took, and also deducted the cost of a meal and drink she consumed.

10. On the part of HPL, the delegate notes it did not dispute copies of shift schedules, as well as cheques made out to Ms. Li for her final paycheque. HPL also provided copies of wage statements for Ms. Li and others. HPL admitted that the cost of a meal and drink was deducted from Ms. Li's wages.

11. HPL also provided images from the security camera footage at the restaurant that appeared to show that Ms. Li, together with another complainant, was sitting with people and eating during work hours. According to HPL, these people were friends of Ms. Li and it was against the company policy for her to be taking a break and having a meal during her working hours. It would appear that is why HPL also deducted one hour's pay from her wages.

12. When HPL was provided with information about the *Act* (presumably section 21 of the *Act*), the delegate notes that HPL voluntarily paid Ms. Li and her colleagues the amounts deducted for the break, meals and drinks from their wages. The delegate states HPL admitted that it was normal practice for Ms. Li and other complainants to be provided a complimentary meal to eat during their break. Further HPL also paid employees for breaks but when it learned in July that the *Act* did not require employers to pay employees for breaks, HPL informed staff that they would not be paid for their meal breaks.

13. HPL also submitted that a shift schedule at the restaurant was structured so that staff could cover each other's breaks and that Ms. Li and other complainants were not required to work during their meal breaks. Therefore, HPL contended that neither Ms. Li, nor other complainants, worked during their meal breaks.

14. The delegate also notes in the Reasons that after investigating the Complaint, he completed his preliminary findings and, in the case of Ms. Li, determined that HPL owed her $138.98 and HPL paid her the said amount before the Determination.

15. In dismissing the Complaint, the delegate reasoned as follows:

> Analysis of the shift schedules show that there was likely coverage for staff to take meal breaks.
>
> While the employer states that meal breaks were paid prior to July, 2014, the decision by the employer to not pay for meal breaks does not constitute a significant change in working conditions as per section 66 of the Act.
>
> The letter from the complainants stating they had to work during breaks and were not given 30 minute breaks is not supported by any evidence beyond the submitted letter. The complainants failed to provide any witness statements or contact information for anyone who could substantiate their claim that they had to work during their breaks.
>
> The employer voluntarily paid for the previously deducted mean and drinks for … and Ms. Li.
>
> The employer voluntarily paid the balance of wages that were found to be owed … in preliminary findings to …. Ms. Li.
>
> …

> Therefore I have determined that the *Employment Standards Act* has not been contravened. Accordingly, no wages are outstanding.

SUBMISSIONS OF MS. LI

16. In support of her appeal, Ms. Li has made written submissions and provided various documents, all of which I have reviewed carefully but do not find it necessary to set out verbatim here and will only refer to them to the extent necessary.

17. The first two pages of the written submissions appear to be cut and pasted from Ms. Li's emailed submissions to the delegate on January 7, 2015, before the Determination was made. These submissions are contained in the Record adduced in the appeal by the Director.

18. The third page of the submissions also appears to be submissions that Ms. Li previously made to the delegate. In these submissions, Ms. Li is disputing, firstly, HPL's "Statement of the Last Payment – Yuen Kwan Li" which HPL appears to have produced during the investigation sometime in August, 2014. Substantively, Ms. Li disputes that the statement does not include her break, overtime and vacation pay and, therefore, it incorrectly sets out the tax, EI and CPP numbers for her.

19. In the balance of her submissions, in the third page, she disputes the deduction HPL made in the amount of $34.98 from her wages in relation to the meal and drink she consumed during the meal break. She also contends, in the same submissions, that she was paid for her breaks until the beginning of July, 2014, and, thereafter, HPL ceased paying her for meal breaks. She also states that she worked on her meal breaks and the kitchen staff could serve as witnesses to support her contention, but she does not provide any names or contact details. She also submits that she worked overtime hours, and HPL was aware of this, particularly because the restaurant was busy and short of workers.

20. In addition to the above submission, Ms. Li submits a page and a quarter of new submissions dated February 2, 2015. In these new submissions, she states that the delegate made the Determination "without notice" to her. She states that she was "still providing new evidence" in her case when the delegate, without her "consent", closed her file. Therefore, she argues that she was denied an opportunity to present more evidence.

21. She further states that she had been communicating with the delegate through email from October 23, 2014, to January 5, 2015. She states that she tried to call him but he never returned her calls prior to issuing the Determination. After she received the Determination, she tried to follow up with the delegate and tried to email him, but received no reply. She states that she was asked to provide new evidence to support her claim and when she sent the new evidence on January 7 and 8, 2015, the delegate did not consider this evidence before he made the Determination on January 9, 2015.

22. She also submits that since she rejected HPL's "proposed settlement" before the Determination, she has the "right to appeal the decision and provide more evidence".

23. She states she wants the Tribunal to review her case "along with [her] new evidence and documents again in order to receive fair and reasonable reparation of [her] loss".

24. She attaches to her submissions, documents previously produced to the delegate; namely, a copy of the shift schedule and her written estimate of hours she worked, as well as HPL's payroll record.

25. I also note that on February 13, 2015, Suki Cheung ("Ms. Cheung"), a representative of Ms. Li, sent two (2) separate emails. The first sets out a summary of amounts Ms. Li claimed she was owed by HPL for overtime work; meal breaks during which she worked; and the wage differential between wages she claims she was promised at the time she was hired ($13.00 per hour) - and what she was paid - $12.50 per hour. Ms. Cheung's email also presents Ms. Li's claim for a meal and drink for which she was charged by HPL (although she was reimbursed the full amount voluntarily by HPL before the Determination).

26. The second email from Ms. Cheung contains, what appears to be, an unsigned summary of evidence of three (3) witnesses in first hand in the same language and writing style. This is presented to support Ms. Li's claims summarized in Ms. Cheung's previous email of same date.

ANALYSIS

27. Section 112(1) of the *Act* sets out the following grounds upon which a person may appeal a determination:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination; or
>
> (c) evidence has become available that was not available at the time the determination was being made.

28. In this case, Ms. Li is appealing the Determination on two (2) grounds; namely, the Director failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made.

29. The onus lies on Ms. Li to establish her grounds of appeal. More particularly, she must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice and that new evidence has become available that was not available at the time the Determination was being made.

30. Having reviewed the Reasons, the Record and the submissions of Ms. Li and her representative, Ms. Cheung, I do not find any merit in Ms. Li's appeal. I find that Ms. Li is simply re-arguing the points she previously advanced before the delegate during the investigation of the Complaint. I also find that she is disputing the delegate's findings of fact for the most part. I will, however, consider Ms. Li's submissions on both the natural justice and the new evidence grounds of appeal below.

(a) Natural Justice

31. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal comprehensively explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST #D050/96).

32. In this case, Ms. Li claims in her appeal submissions dated February 2, 2015, that the delegate did not afford her an opportunity to provide all the evidence she wanted to provide and made the Determination without the benefit of all her evidence. She states that she sent to the delegate her submissions and documents on January 7 and 8, 2015, and the delegate made his decision on the following day. She believes that the delegate failed to consider those submissions in the Reasons. I am not persuaded with Ms. Li's submissions. First, the submissions she is speaking of were sent on January 7, 2015. The Record does not show any submissions sent on January 8, 2015, nor has Ms. Li produced any evidence of submissions she sent on January 8, 2015, in the Appeal. The delegate received the January 7, 2015, submissions however and they are contained in the Record. I have reviewed those submissions and I find that the delegate considered them in making the Determination, although he may not have reiterated all of them in the Reasons.

33. I also note that the delegate was in contact with Ms. Li throughout the investigation process leading up to the Determination. His first attempted contact with Ms. Li was by way of an email on October 23, 2014, requesting Ms. Li to communicate with him regarding the Complaint. I also note that his later email of December 29, 2014, to Ms. Li is very instructive. In that email, he informs Ms. Li of a settlement offer from HPL. He also advises her that he has completed his preliminary findings and concluded that there is an amount of $138.98 owing to her by HPL and HPL has offered to settle with her for an amount that is higher. He then asks her to let him know by December 31, 2014, how she would like to proceed, and advises that he will otherwise write his final findings if he does not hear back from her by the said date.

34. After the delegate's December 29, 2014, email to Ms. Li, I have found no evidence of a response to that email from Ms. Li until her email submissions of January 7, 2015, which, as indicated earlier, I find the delegate considered in making the Determination. In these circumstances, I do not find that Ms. Li was denied natural justice in the process leading to the Determination. While she wants the Tribunal to consider her January 7, 2015, submissions, I find that the delegate did so in his Reasons. Having said this, I find that Ms. Li's appeal is largely, if not wholly, based on her dissatisfaction with the delegate's conclusions of fact and this is evident in the "new evidence" she is presenting in her appeal to buttress her case, and which I will deal with below.

(b) New Evidence

35. As indicated previously, Ms. Li also appeals the Determination on the basis of the new evidence ground of appeal. In *Bruce Davies and others*, *Directors or Officers of Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal delineated four conjunctive requirements that must be met before new evidence will be considered. More particularly, the appellant must establish that:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value in the sense that, if believed, it could on its own, or when considered with the other evidence, have led the Director to a different conclusion on the material issue.

36. In this case, Ms. Li's appeal submissions contain evidence she previously adduced during the investigation, namely, the submissions and documents she sent to the delegate on January 7, 2015, which form part of the Record, as well as purported "new evidence" and argument contained in Ms. Cheung's two (2) emails of February 13, 2015.

37. With respect to the January 7, 2015, submissions that Ms. Li submitted to the delegate during the investigation of the Complaint and before the Determination was made, I find these submissions clearly do not constitute "new evidence", and basically amount to a re-argument of her case. As indicated earlier, the delegate appears to have considered them in making the Determination.

38. With respect to the "new evidence" and arguments contained in Ms. Cheung's two (2) emails of February 13, 2015, the first email summarily outlines Ms. Li's claims for:

(i) Overtime wages;

(ii) Wages for the period she was working, or available to work, during her meal breaks;

(iii) Wages for the differential between the hourly rate of $13.00/hour Ms. Li claims she was promised by HPL and the $12.50/hour she was paid; and

(iv) Reimbursement for the meal break and the meal and beverage she consumed during the break totalling $34.98.

39. I find that some of this evidence was previously presented to the delegate in the investigation of the Complaint and is effectively a re-argument of Ms. Li's position. If I am wrong in this regard, I find that none of this evidence satisfies the first of the four-fold criteria set out in *Re: Merilus Technologies Inc., supra.* That is, none of the evidence contained in the first email could not, with the exercise of due diligence, have been discovered and presented to the Director by Ms. Li during the investigation or adjudication of the Complaint and prior to the Determination being made.

40. I also note that with respect to the evidence in the email pertaining to Ms. Li's overtime wage claim and her claim for wages for meal brakes during which she was allegedly working, I find that Ms. Li is effectively disputing the delegate's conclusions of fact in the Determination. More particularly, prior to the Determination, the delegate, in the preliminary findings, concluded that Ms. Li was owed an overtime premium for 16 hours, and not 20, and in the Reasons, the delegate notes that HPL paid these wages to Ms. Li before the Determination. Therefore, Ms. Li is effectively disputing the delegate's conclusions of fact.

41. She is also disputing the delegate's conclusions of fact in terms of her claim for wages for meal breaks during which she was allegedly available to work or working. In the Reasons, the delegate dismissed this claim after concluding that " (t)he letter from the complainants stating they had to work during meal breaks and were not given 30 minute breaks is not supported by evidence beyond the submitted letter. The complainants failed to provide any witness statements or contact information for anyone who can substantiate their claim that they had to work during their breaks".

42. It should be noted that the Tribunal has indicated repeatedly in appeal cases that it does not have jurisdiction over questions of fact, unless of course the matter involves errors on findings of fact which may amount to an error of law (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re: Koivisto operating as Finn Custom Aluminum*, BC EST # D006/05). The Tribunal in *Re: Funk,* BC EST # D195/04, expounded on the latter point stating that the appellant would have to show that the fact finder make a "palpable and over-riding error" or that the finding of fact was "clearly wrong" to establish error of law. Ms. Li has not established the delegate's findings of fact are "clearly wrong" or that he made a palpable and over-riding error".

43. As for her claim for the hourly wage differential between the $13.00 per hour she was allegedly promised when she was hired and the $12.50 she was actually paid, I find that the time for making such an argument and for adducing evidence in support of same was before the Determination was made, and not the first time during the appeal of the Determination. In any event, this evidence also fails the first of the four-fold criteria

set out in *Re: Merilus Technologies Inc., supra*, because it is evidence that could, with the exercise of due diligence, have been discovered and presented to the Director by Ms. Li during the investigation or adjudication of the Complaint and prior to the Determination being made.

44. With respect to the evidence for reimbursement of the $34.98 that HPL deducted from Ms. Li's wages for her meal and drink at the restaurant, this is not only not "new evidence" but it is a claim that should not be included in the appeal since it was resolved before the Determination because HPL voluntarily reimbursed Ms. Li the full amount, as set out in the Reasons.

45. With respect to the second email of Ms. Cheung of February 13, 2015, it purportedly sets out statements of three (3) witnesses who worked with Ms. Li. The statements are contained in the body of the email of Ms. Cheung and in addition to being unsigned, they are written first hand and in the same or identical writing style. I find these statements are probably not written by the purported witnesses. In any event, these statements, even if they were written by the witnesses themselves, do not constitute "new evidence", and there is no explanation as to why these witnesses and their statements were not provided during the investigation of the Complaint and before the Determination was made. In my view, the witness statements would also fail on the first of four-fold test in *Re: Merilus Technologies, supra*.

46. In the result, I do not find Ms. Li's appeal has any reasonable prospect of succeeding, and I dismiss it.

ORDER

47. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated January 9, 2015, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal