

An appeal

- by -

Cellular Baby Cell Phone Accessories Specialist Ltd.
("Cellular Baby")

- 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.: 2007A/24

DATE OF DECISION: May 8, 2007

DECISION

SUBMISSIONS

Tony S.T. Kwan	on behalf of Cellular Baby Cell Phone Accessories Specialist Ltd.
Ivy Hallam	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Cellular Baby Cell Phone Accessories Specialist Ltd. (“Cellular Baby”) under Section 112 of the *Employment Standards Act* (“Act”) against a Determination of the Director of Employment Standards (the “Director”) issued February 5, 2007 (the “Determination”).
2. Raymond Chan (“Chan”) filed a complaint pursuant to Section 74 of the *Act* alleging that his employer, Cellular Baby, contravened the *Act* by failing to pay him commissions, overtime wages and regular wages (the “Complaint”).
3. The Director’s delegate (the “Delegate”) investigated the Complaint and held a hearing on November 30, 2006 (the “Hearing”). Subsequently, the Delegate issued the Determination finding Cellular Baby to have contravened Sections 17 and 40 of the *Act* for failing to pay Chan (i) regular as well as overtime wages for work performed by Chan on April 29 and 30, 2006, and (ii) annual vacation pay related to the said regular and overtime wages owing. The Delegate further ordered accrued interest pursuant to Section 88 of the *Act* for an all-inclusive sum of \$274.18.
4. The Delegate also issued two administrative penalties against Cellular Baby of \$500.00 each for contraventions of Sections 17 and 40 of the *Act* for a total sum of \$1,000.
5. Cellular Baby is appealing the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and additionally, on the ground that evidence has become available that was not available at the time the Determination was being made.
6. Cellular Baby is also asking the Tribunal to vary the Determination or to refer it back to the Director.
7. Cellular Baby has not requested an oral hearing of its appeal and the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal. Therefore, the Tribunal will determine the appeal based on a review of the Determination, the written submissions of Cellular Baby and the Director, and the Section 112(5) “Record”.

ISSUE

8. The issues to be determined in this appeal are:
 - Did the Director fail to observe the principles of natural justice in making the Determination?

- Is there new evidence which has become available that was not available at the time the Determination was made?

FACTS

9. The Appellant, Cellular Baby, is a cellular phone accessories retailer that falls within the jurisdiction of the Act.
10. Chan was employed with Cellular Baby from January 19, 2006 to July 20, 2006 at the rate of \$9.00 per hour.
11. Cellular Baby does not dispute the Delegate's Determination with respect to Chan's claim for commissions as that claim was dismissed. Accordingly, I will not review in any detail the Delegate's Determination on that issue. I will only deal with Chan's claims relating to overtime and regular wages which claims were resolved by the Delegate in favour of Chan.
12. Chan was initially hired by Cellular Baby as a sales representative.
13. A few months into his employment with Cellular Baby, Chan testified that a Ms. Elsie Leung ("Leung"), formerly the Human Resources and Finance Coordinator of Cellular Baby, indicated to him of Cellular Baby's desire to send him to Market Mall in Calgary to manage a new kiosk for Cellular Baby which was scheduled to open in May 2006.
14. Chan testified that Leung indicated to him that if he went to Calgary, he would be working in the capacity of Acting Manager responsible for setting up the kiosk, hiring and supervising employees and managing the operation. Chan further stated that he was advised by Leung that to compensate him for his new responsibilities, Cellular Baby would pay him an additional \$1,000.00 per month and that he would be evaluated subsequently to determine if he would be promoted to the position of Store Manager after he returned from Calgary.
15. Chan accepted Cellular baby's offer and arrived in Calgary on April 29, 2006.
16. Chan worked in Calgary for Cellular Baby until July 2, 2006 when he returned to Vancouver.
17. Chan indicates that when in Calgary, although he was performing all the duties of a manager, he did not in fact have that title or receive any additional benefits that managers were entitled to.
18. While Chan agrees that he received an increase in income of \$1,000.00 per month when in Calgary, he worked in excess of 100 overtime hours in Calgary for which he was not compensated.
19. Chan also indicates that he was not paid any overtime wages after he returned from Calgary.
20. Mr. Joey Wong ("Wong"), the General Manager of Cellular Baby, testified that Chan was promoted to the position of Manager on May 1, 2006 and, in support, adduced an e-mail at the Hearing dated April 28, 2006 from Leung to all sales staff of Cellular Baby announcing that Chan was promoted to the position of Store Manager effective May 1, 2006. Chan argued that he had not seen that e-mail and that it was a fraudulent document.

21. After Chan returned from Calgary, from July 4 to July 20, 2006, he received only his basic \$9.00 per hour wage and worked in the capacity of a sales representative for Cellular Baby at its outlets at the Lougheed Mall, Metrotown Mall and Park Royal Mall. All of these outlets had their own respective managers. Peter Wong was the Manager of Cellular Baby's outlet at the Lougheed Mall and Metrotown Mall, and Tai Hong at the Park Royal Mall.
22. Wong testified that Chan continued as a Manager after his return from Calgary but admitted that Cellular Baby was in a transitional period and had to decide which of its locations to place Chan in.
23. Wong also indicated that Chan trained new staff at the Lougheed Mall location and he considered that as part of Chan's responsibilities as a Manager.
24. Wong also indicated that Chan was not entitled to overtime wages because he was a Manager. In support of this position, Cellular Baby adduced two e-mails at the Hearing dated May 29, 2006 and June 7, 2006. The first was from Leung and the second from Elizabeth Poon ("Poon"), the sole director and officer of Cellular Baby. Both e-mails refer to Chan as the Acting Manager.
25. Chan, however, testified that he was not a Manager and therefore he was entitled to overtime wages.
26. The Delegate determined that Chan's job responsibilities, particularly when he was in Calgary, fit within the definition of "manager" within the meaning of the *Act* and he was, accordingly, compensated an extra \$1,000.00 a month in that role. Accordingly, the Director determined that Chan was not owed any overtime wages for the period he was in Calgary.
27. However, according to the Delegate, after Chan returned from Calgary, he was working as a sales associate at different locations of Cellular Baby and stopped receiving the \$1,000.00 he was previously receiving in his role as an Acting Manager in Calgary.
28. The Delegate also found that the e-mail sent by Poon to announce Chan as the Store Manager was dated April 28, 2006, and therefore inconsistent with the subsequent e-mails of May 29 and June 21, 2006 sent by Leung and Poon respectively, referring to Chan as the "Acting Manager". The Delegate determined that Chan was Acting Manager from May 1, 2006 to July 1, 2006, but he was a sales associate thereafter to July 20, 2006, and therefore entitled to overtime pay for any overtime worked after July 1, 2006 (after his return to Vancouver) until July 20, 2006 when he resigned from his employment.
29. The Delegate, on the basis of the payroll records submitted by Cellular Baby, found that Chan was owed 21.5 overtime hours for the period July 4, 2006 to July 20, 2006 and that Cellular Baby contravened Section 40 of the *Act* by failing to pay him overtime wages for the said period.
30. The Delegate further determined that since Chan quit his employment on July 20, 2006, the most recent unpaid overtime wages were in the last pay period, so for the purpose of monetary penalty administration, Section 40 of the *Act* was contravened on July 27, 2006.
31. With respect to Chan's claim for regular wages owed to him, the Delegate noted Chan's evidence that he arrived in Calgary on April 29, 2006 with his supervisor, Mr. Peter Wong, to set up Cellular Baby's kiosk at the Market Mall.

32. The Delegate noted Wong's testimony that he was the only one scheduled by Cellular Baby on April 29 and April 30 to supervise the setting up of the kiosk at the Market Mall after the Mall was closed. The Delegate also noted that on both April 29 and April 30, Wong and Chan toured the city together during the day, in the same car, and then went to the Mall together at night. The kiosk was delivered at the Mall and required assembly there. Wong testified that he did not assist the construction workers who were assembling the kiosk, but rather he was responsible or assigned to make sure that the kiosk was put up properly.
33. On cross-examination, Wong admitted that Chan assisted the construction workers in assembling the kiosk while he watched to make sure the work was done. Wong denied that Chan had asked him to approve his hours worked and sign his timesheet for the work he performed on April 29 and April 30, 2006.
34. While Wong testified that both he and Chan were at the Mall on April 29 and April 30, 2006 after 8:00 p.m. to 3:00 a.m. and around 6:30 p.m. to 1:00 a.m. respectively, states that it was from 6:00 p.m. to 2:00 a.m. and from 6:00 p.m. to 3:00 a.m. respectively.
35. Cellular Baby's position is that Chan was not scheduled to work on April 29 or April 30 and did not submit any timesheet to show that he worked on those dates. In support of its position, Cellular Baby submitted an e-mail received from Chan on May 3, 2006 reporting on the store or kiosk in which Chan states, "the first two days was slow ...". According to Cellular Baby, this e-mail indicates that Chan only started working on May 1, 2006 and not earlier. However, Chan explained that his e-mail was referring to the first two days after the kiosk opened for business. Chan also indicated that he did not want to jeopardize his prospect of becoming a Manager, so he did not pursue his claim for wages for April 29 and April 30 when Wong did not submit a timesheet for those two days on his behalf.
36. The Delegate rejected Cellular Baby's argument and found that Chan worked on April 29 and April 30 and that Cellular Baby owed Chan regular wages as well as overtime wages as Chan was not a Manager until May 1, 2006.
37. The Delegate, consequently, determined that Cellular Baby contravened Section 28 of the *Act* as a result of its failure to keep a record of Chan's hours of work on April 29 and April 30.
38. The Delegate also determined, based on payroll records submitted by Cellular Baby, that it also contravened Sections 17 and 40 of the *Act* by failing to pay Chan 7.75 hours in regular wages and .25 hours in overtime wages on April 29, 2006 and 8 hours in regular wages and 1 hour in overtime wages on April 30, 2006.
39. The Delegate further ordered an administrative penalty for Cellular Baby's breach of Section 17 of the *Act* for the latter's failure to pay Chan all his wages at least semi-monthly and within eight days after the end of the pay period with respect to Chan's wage claim for April 29 and April 30, 2006.

ARGUMENT

Cellular Baby's Submissions

40. With respect to the determination on overtime wages, Cellular Baby, through its counsel, submitted that the Director, in making the Determination, was mistaken in concluding that the extra \$1,000 per month (when Chan started work in Calgary for Cellular Baby) “was solely as a result of (Chan’s) promotion to store manager”. Cellular Baby further asserted that the additional \$1,000 per month paid to Chan was “mainly ... temporary relocation compensation” which Cellular Baby gave to store managers who went from British Columbia to Calgary (to work on a short-term basis due to staff shortages). Cellular Baby further submitted that upon the return of such employees to Vancouver, the \$1,000 additional payment would cease. In the case of Chan, Cellular Baby indicates that he was not issued a demotion notice at any time and he remained a Manager when he returned to British Columbia from Calgary. Moreover, according to Cellular Baby, Chan was offered a managerial position well before he quit in July 2006 and was scheduled to be the Manager of the City Square location in Vancouver whenever it was scheduled to open.
41. Cellular Baby also submits that the Director failed to take into account, in making the Determination, that “many store managers for the Company are not situated in an individual store” and that “it is not uncommon for store managers not to have an individual store to manage for a few months while their store is being set up” and that “some managers have worked several years with the Company without being assigned to a specific store since the needs of the Company change constantly”.
42. With respect to the Determination pertaining to Chan’s claim for regular wages owed to him, Cellular Baby submitted that the Director either misunderstood or misinterpreted Wong’s testimony at the Hearing. In particular, according to Cellular Baby, when Wong responded that it was “Raymond” who was assembling the kiosk at the Mall, he meant Raymond Ching, a contractor responsible for constructing the kiosk, and not Chan who bears the same first name as Ching’s. In this regard, Cellular Baby is suggesting that Wong is “prepared to provide further oral evidence or a statutory declaration to clear up this misunderstanding”.
43. Cellular Baby further submits that while Wong and Chan were periodically at the site at the Mall when the kiosk was being set up, they were not present for the entire 8-hour period or helping with the construction of the kiosk.
44. Finally, Cellular Baby submits that “the fact that the Internet connection was not fixed (at the kiosk) until May 3” supports its position that Chan only had experience with set up of the store and not with the actual construction of the kiosk.

Director's Submissions

45. The Director unequivocally refutes Cellular Baby’s submissions that the Director failed to observe the principles of natural justice in making the Determination and that there is new evidence that has now become available but was not available at the time of the Determination. With respect to the latter the Director submits that there was no misunderstanding or misinterpretation of the statements made by Wong on the part of the Delegate. According to the Director, at the Hearing, Wong testified that there were two construction workers assembling the kiosk and Chan was helping them. Wong himself did not

assist the construction workers, as his job was more of a supervisory role, which entailed making sure those workers, performed their job.

46. With respect to the first ground of appeal, the Director, in denying that there was a breach of natural justice principles, states that the evidence at the Hearing before the Delegate was that \$1,000 was given to Chan as compensation for working in Calgary in the managerial capacity. In support of this position, the Director points to Leung's email of May 29, 2006 in which Leung stated "for this trip to Calgary, we appoint you as the Acting Manager of our kiosk in Market Mall while you are responsible for set up, hiring, and monitoring the operations. As a result, the \$1,000 allowance is intended as a bonus. While it is a bonus, it is taxable and is the same as commissions we pay to our staff monthly."
47. Moreover, the Director submits that there is no evidence at the hearing that Chan was offered the Store Manager position at the City Square location or signed an employment contract that made him eligible for store bonuses (similar to other managers) after he returned from Calgary. Instead, according to the Director, the evidence at the hearing supported that Chan was directed to work as a sales associate after his return from Calgary and compensated as such, while Cellular Baby was considering if he would be offered a managerial position in one of its stores. The Director also refers to the emails sent by Leung and Poon, on May 29 and 30, 2006 respectively, when Chan was in Calgary, referring to Chan as the Acting Manager. The Director submits that even if Cellular Baby decided to promote Leung to the position of a Manager in August 2006 that would be an irrelevant factor at this stage as he had already left his employment in July 2006.

Chan's submissions

48. Chan did not make any submissions in the appeal.

ANALYSIS

49. As previously indicated, Cellular Baby appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination and that there is new evidence, which has become available, that was not available at the time the Determination was made. I will deal with each ground separately under the descriptive headings below.

I. The Director failed to observe the principles of natural justice

50. Having reviewed both the submissions of Cellular Baby and the Director as well as the Determination and the Record of the proceeding before the Delegate, it is important to note that a breach of the principles of natural justice can occur where the Delegate fails to consider relevant evidence proffered by a party. Accordingly, any challenge of a determination based on an allegation that a Delegate of the Director has failed to consider relevant evidence requires the Tribunal to assess both the reasons given by the Delegate for making the determination, and an analysis of the issue to which the evidence is relevant. In the case at hand, I do not find that the Delegate, when concluding that Chan was a sales representative and not a manager after he returned from Calgary, failed to consider that many managers of Cellular Baby are not situated at an individual store while their store is being set up or that some managers, due to the company's business priorities, are not assigned a store for several years. While it may be that the Delegate's statement that "(t)here is no evidence that Raymond Chan was offered the store manager position ... after he returned from Calgary" is not completely accurate, I find that it simply reflected his

assessment and analysis of the evidence before him at the Hearing and his preference of Chan's evidence over Cellular Baby's. I also find that the ultimate decision of the Director is supportable on the whole of the evidence presented by both parties at the Hearing.

51. With respect to Cellular Baby's further assertion under the natural justice ground of appeal, namely, the Director was mistaken in interpreting the extra \$1,000 of compensation paid by Cellular Baby to Chan as compensation for his responsibilities as acting manager in Calgary and not "temporary relocation compensation", I think that this dispute is more appropriately dealt with under the error of law ground of appeal in Subsection 112(1)(a). I say this only because the manner in which counsel for Cellular Baby has phrased this dispute is in the language of an error on findings of fact. In some situations, errors on findings of fact may amount to an error of law. However, for Cellular Baby to be successful on this ground of appeal it must show either that there was no evidence to support the finding of fact made, or that the Director took a view of the facts that could not be reasonably entertained on the evidence before the Director (see *Re Britco Structures Ltd.*, [2003] B.C.E.S.T.D. No. 260 (QL), (27 August 2003), BCEST #D260/03). In the case at hand, Cellular Baby has failed to discharge this burden. In addition, there is evidence to the contrary supporting the Director's conclusion on the issue. In particular, there is an email from Leung to Chan dated May 29, 2006 wherein Leung states "for this trip to Calgary, we appoint you as the Acting Manager of our kiosk in Market Mall while you are responsible for set up, hiring, and monitoring the operations. As a result, the \$1,000 allowance is intended as a bonus. While it is a bonus, it is taxable and is the same as commissions we pay to our staff monthly." The email does not say that the \$1000 increase in pay to Chan was a relocation bonus. Instead, the increase in pay is "(a)s a result" of his appointment as Acting Manager in Calgary and therefore in concert with the interpretation of the Director in the Determination.
52. Accordingly, I reject Cellular Baby's appeal on the ground of natural justice as well as on the ground of error of law.

II. New Evidence

53. Cellular Baby's appeal based on Subsection 112(1)(c) of the *Act* that new evidence is available that was not available at the time the Determination was being made is strictly based on its argument that the Director misinterpreted or misapprehended certain evidence of Wong at the Hearing. In particular, Cellular Baby argues that when Wong, at the Hearing, stated that it was "Raymond" who was assembling the kiosk at the Mall, he meant Raymond Ching, a contractor responsible for constructing the kiosk, and not Chan who bears the same first name as Ching's. Cellular Baby also indicates that that Wong is "prepared to provide further oral evidence or a statutory declaration to clear up this misunderstanding". The Director, in reply, states that there was no misunderstanding or misinterpretation of Wong's evidence at the Hearing. According to the Director, Wong stated at the Hearing that there were two construction workers assembling the kiosk and "Raymond Chan was helping the two construction workers".
54. In my opinion, while new evidence may be allowed at the appeal if it appears that the failure to lead the evidence at the time of the hearing was as a result of a misunderstanding between the delegate and the appellant and if such evidence is considered to have an impact on the result or the decision of the delegate in the Determination, this is not the case here. In my opinion, the Delegate of the Director, at the Hearing, heard the testimony of Wong and referred to it clearly in the Determination when she said "(w)hen cross-examined, Peter Wong admitted that Chan assisted the construction workers to assemble the kiosk while he watched to make sure the work was done...". It is not the task of this Tribunal on appeal to second guess or interfere with the findings of facts of the Delegate, particularly when those findings of facts arise

from a witness who was subject to cross-examination on the very issue raised by the appellant in the appeal. While it is clear that Cellular Baby disagrees with the finding of the Delegate that Chan was indeed assisting the construction workers with the assembly of the kiosk, I am not satisfied that the Delegate misapprehended the evidence before him. Accordingly, I reject Cellular Baby's ground of appeal based on new evidence.

55. In my view, Cellular Baby simply disagrees with the findings of the Delegate and consequent conclusions in the Determination and is seeking in this appeal to reargue the case. I am not prepared to allow that because the legislature did not intend that an appeal to the Tribunal should proceed as trial *de novo*.

ORDER

56. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued with any further interest that has accrued under Section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal