

An appeal

- by -

Xiaoming Lu

- 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:** Paul E. Love

**FILE No.:** 2003A/289

**DATE OF DECISION:** March 9, 2004

## DECISION

### OVERVIEW

This is a referral back from a Decision issued on July 23, 2003. Xiao Ming Lu (“Lu ” or “Employee”), an employee appealed from a Determination dated March 31, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). In the original decision I found that the Delegate did not give Lu an adequate opportunity to participate in the investigation.

The Determination found that Ms. Lu was not entitled to wages. The Employee filed a complaint on December 7, 2001, which included an allegation that the Employer failed to pay minimum wages. The Delegate met with the Employer on December 4, 2002, and issued a Determination on March 31, 2003 finding no entitlement to wages, without giving Lu an opportunity to respond to the employer’s information.

I therefore referred the matter to the Delegate for further investigation or oral hearing. I note as follows:

It is my view that the entire Determination is flawed, and ought to be re-investigated, or set for an oral hearing to provide both the Employer and the Employee an opportunity to participate in providing information and evidence to the Delegate

A different Delegate, than the Delegate issuing the Determination, was then involved in the referral back. On October 10, 2003 the Delegate convened a meeting at the Burnaby Branch offices which was attended by Lu and the Delegate. On the basis of information obtained from the Employee, the Delegate concluded that Lu was owed the sum of \$1,191.67 by Label Express. In particular, the Delegate found Lu worked 204 hours at \$7.15 per hour (\$1458.60), and was paid \$500.00. Lu was entitled to the balance of \$958.60, plus vacation pay of \$58.34 and interest from August 1, 2000 to October 10, 2003 of \$174.73, for a total of \$1191.67.

The Delegate noted:

The Complainant confirms she maintained a daily record of hours on the loose paper submitted.

The records appear to be too tidy to be contemporaneous but the complainant stated that she created the calendar at the beginning of each month and every day, after work, upon arriving at home removed the calendar from the envelope and entered the daily hours with the same pencil.

The Complainant stated she trained as an accountant in china and also is in the habit of keeping meticulous records pertaining to purchases and expenses. Further, she submitted records for other months that were of the same character.

It was noted that the form (calendar) created by Ms. Lu was made using a ball-point pen but the entries were in pencil as previously stated.

I am obliged to accept the Complainant’s evidence on the question of contemporaneously maintained records.

After the Tribunal received the referral back report, the Vice-Chair of the Tribunal wrote to the parties requesting submissions, and all documents and records supporting a party’s position. The Employer

provided submissions on November 30, 2003 and January 8, 2004. The Employer's point is that the documents submitted by Lu to the Delegate were fabricated.

As I noted in the original Decision, the Employer did not keep records of hours worked by Lu during the training period. The Delegate accepted that Lu did keep records during the training period. The Delegate based his decision in the referral back report on Lu's records and oral information. In my view, the Employer has not shown that the Delegate erred in finding that Lu was entitled to the sum of \$1191.67, plus interest in accordance with the *Act*.

## **ORDER**

Pursuant to s. 115 of the *Act*, the Determination dated March 31, 2003 is varied to provide for payment to Xiao Ming Lu in the amount of \$1191.67 in accordance with the referral back report dated November 13, 2003, together with interest pursuant to section 88 of the *Act*.

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**Paul E. Love**  
**Member**  
**Employment Standards Tribunal**