

An appeal

- by -

David Kim carrying on business as Myong-Seong Food Equipment
("Kim")

- 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: David B. Stevenson

FILE No.: 2008A/16

DATE OF DECISION: April 30, 2008

DECISION

SUBMISSIONS

1. David Kim on his own behalf
2. Glen Smale on behalf of the Director

OVERVIEW

3. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by David Kim carrying on business as Myong-Seong Food Equipment (“Kim”) of a Determination that was issued on January 9, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Kim had contravened Part 3, Sections 17 and 18, Part 4, Section 40, Part 5, and Part 7, Section 58, of the *Act* in respect of the employment of Woon Seok Yang (“Yang”) and Mak Dong Yu (“Yu”) and ordered Kim to pay those employees an amount of \$19,705.27, an amount which included wages and interest.
4. The Director also imposed administrative penalties on Kim under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$1500.00.
5. The total amount of the Determination is \$21,205.27.
6. The appeal was filed February 18, 2008, the final day of the appeal period fixed under Section 112(3) of the *Act*. The appeal documents are incomplete. A page attached to the appeal documents lists several matters that appear to form the grounds and/or the reasons for the appeal:
 1. The Director erred in law in determining that Woon Seok Yang and Mak Dong Yu were employees pursuant, to the Employment Standards Act, R.S.B.C. 1996, c. 113 (the “Act”).
 2. The Director further erred in law in determining that David Kim was an employer, pursuant to the Act.
 3. The Director erred in law by imposing administrative penalties on David Kim for contravention of sections 17, 18 and 28 of the Act.
 4. The Director did not have jurisdiction or authority to determine the wages of Woon Seok Yang and Mak Dong Yu and exceeded its jurisdiction in doing so.
 5. The Director failed to observe principles of natural justice in determining the amount of wages of Woon Seok Yang and Mak Dong Yu in the absence of any factual basis for what their wages were as employees.
 6. The Director failed to observe principles of natural justice when he failed to provide any reasons for his determination respecting the calculation of hourly wages for Woon Seok Yang and Mak Dong Yu.

7. The appeal is unaccompanied by any argument or analysis of the grounds listed above or the alleged errors. In the appeal as it was filed on February 18, 2008, Kim requested an oral hearing, but provided no reasons for the request
8. Following the receipt of the Section 112 record and a response to each of the matters listed above from the Director, Kim filed a revised appeal form and a substantial submission on the grounds of appeal. In the submission he says such a hearing is necessary “because there are too many conflicts . . . to explain on paper”. He also contends there is a language barrier. Kim has not suggested there is any language barrier impeding his ability to communicate his position in the appeal and Yang and Yu have not filed any reply on the appeal.
9. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

10. The issue in this appeal is whether Kim has shown the Director failed to observe principles of natural justice in making the Determination, or committed any other reviewable error in making the Determination.

THE FACTS

11. The following background facts are provided in the Determination:

Kim is a supplier of restaurant food equipment and also does restaurant renovation work under the name “Myong-Seong Food Equipment” from a location in Burnaby, B.C. Both businesses fall within the jurisdiction of the Act. Yang and Yu were employed as construction workers at a job site in Penticton, B.C. Yang was employed from May 25, 2007 and Yu was employed from June 4, 2007. Both Yang and Yu worked until June 20, 2007. Neither Yang nor Yu received any wages and their rates of pay are to be determined. Kim takes the position that Yang and Yu were not employees pursuant to the Act.
12. The Director conducted an oral hearing on the complaints. The Determination indicates that prior to the hearing, and with sufficient notice, Kim was issued a Demand for Employer Records for Yang and Yu. No records were received by the Director and Kim indicated at the oral hearing that he had not kept any records for Yang or Yu.
13. The Determination set out the issues raised by the complaints:
 - Are Yang and Yu employees pursuant to the Act?
 - If they are employees, what are their rates of pay?
 - What wages, if any, are owing under the Act?

14. The Determination sets out the evidence and argument of the parties and the findings and analysis of the Director on that evidence and argument.
15. The Determination notes Kim took the position that Yang was a partner in a venture with him and that Yu was not an employee because there was an agreement to barter each other's assistance in renovation work.
16. The Director found the evidence did not support a conclusion that Kim and Yang were in a partnership, but even if he were that there was nothing in the facts that suggested he should not be treated as an employee of the business.
17. The Director found that both Yang and Yu were employees of Kim. The analysis on that issue is extensive and need not be repeated in this decision. It suffices that the Director reached the conclusion on the complainants' status under the *Act* based on findings of fact applied to relevant provisions in the *Act*, relevant legal principles relating to the application of those provisions and relevant legal tests.
18. The Director found that Yang and Yu, as employees, were entitled to be paid wages and, based on an assessment of the evidence and applying the formula set out in the definition of "regular wage" in Section 1 of the *Act*, concluded Yang's rate of pay was \$26.88 per hour and Yu's rate of pay was \$13.33 per hour.
19. The Director made findings of fact relating to the number of hours worked by each Yang and Yu. Applying the respective rates of pay to the hours each worked, and applying the provisions of Section 40 and Section 58, the Director arrived at the amount of wages each was owed.
20. Administrative penalties were imposed. The Director found the contravention of Sections 40 and 58 of the *Act* were subsumed in the contravention of Section 18.

ARGUMENT

21. As I have indicated above, Kim provided no analysis or argument of the listed errors in the appeal when it was filed on February 18, 2008. The revised appeal form was accompanied by a more detailed submission that has somewhat crystallized the basis for the listed grounds of appeal.
22. Kim says the Director erred in law for the following reasons, which I will only summarize:
 1. He and Yang had a verbal contract as partners on the project to renovate the restaurant in Penticton;
 2. There was no contract of employment with Yang; he was not under any supervision at the time and was contracted to complete the work within an estimated amount of time; he was the person responsible for the project; and
 3. There is no proof of employment because there were no time sheets or supervision.
23. Kim says the Director failed to observe principles of natural justice for the following reasons:
 1. During the complaint hearing, Yang and Yu had translators who were family members and who gave inaccurate translation and faulty answers to the Director;

2. The Director did not give him a “fair chance to speak his side of the story; he felt the complainants were favoured;
 3. Yu made a false witness statement regarding employment for Yang.
24. For the first time in the March 31, 2008 correspondence, Kim says there is evidence which has become available which was not available at the time the determination was being made. This “new” evidence comprises three cheques made out in April 2007.
25. Kim argues that if Yang and Yu were employees, he should have been given a record of time worked by them. He says given the absence of a time sheet recording time worked, there was no evidence how many hours they worked or that they worked overtime hours. He says Yang did not work on one of the days which the Director found that he had worked.
26. He disagrees with the calculation done by the Director and suggests an alternative finding.
27. Kim says interest should not have been added to wage amounts owing.

ANALYSIS

28. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was made.
29. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. An appellant alleging a denial of a fair hearing must provide some objectively cogent evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).
30. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;

3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

31. This appeal is based almost entirely on Kim's disagreement with findings of fact made by the Director in the Determination. None of these findings have been shown to raise an error of law. Not only does the appeal disagree with virtually every relevant finding of fact made by the Director, it introduces new, and largely irrelevant, assertions of fact. Kim also seeks to introduce "new" documentary evidence which was clearly available to him during the complaint investigation and hearing. It is material that was created by him in April 2007. None of these matters satisfy the conditions established by the Tribunal for receiving "new" evidence on an appeal (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05). Nor do these assertions of fact fall within Section 112(1)(c); none of it is information that was not reasonably available to Kim at the time the Determination was being made.
32. There is an implication in the appeal that Kim was not given a fair opportunity to be heard. There is no basis for such a suggestion.
33. For the above reasons, the appeal is denied.
34. Kim disagrees with the imposition of administrative penalties and interest. Both are mandatory requirements of the *Act*: see *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04 and Section 88 of the *Act*.

ORDER

35. Pursuant to Section 115, I order the Determination date January 9, 2008 be confirmed in the amount of \$21,205.27, plus any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal