

An appeal

- by -

Thanh Tan Nguyen

- 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

**ADJUDICATOR:** Norma Edelman

**FILE No.:** 2001/833

**DATE OF DECISION:** January 25, 2002

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Thanh Tan Nguyen ("Thanh") of a Determination issued by a delegate of the Director of Employment Standards on November 1, 2001. The delegate found that Sung Fish Company Limited ("Sung Fish") owed Thanh \$23,050.65 representing overtime pay, an adjustment for "32 hours free from work", statutory holiday pay and vacation pay. The delegate further found that Thanh was not owed compensation for length of service. Thanh appealed the Determination on the ground that he is owed additional overtime and holiday pay, as well as compensation for length of service. This appeal was decided based on the written submissions of the parties.

### ISSUE TO BE DECIDED

Is Thanh entitled to additional wages from Sung Fish?

### FACTS

On November 1, 2001, the delegate issued a Determination regarding complaints filed by Thanh and his wife, Joung Ah Nguyen ("Joung") that Sung Fish owed them wages. Thanh's complaint was filed on July 26, 2001. Both Thanh and Joung appealed the Determination. I have issued a concurrent decision (BCEST #D048/02 ) regarding Joung's appeal.

Respecting Thanh's complaint, the delegate said Thanh alleged he commenced work at Sung Fish on October 4, 1988 and was dismissed on November 18, 2000. She included a Record of Employment issued by Sung Fish which showed Thanh's start date as January 4, 1991 and his end date as November 18, 2000. The delegate concluded that Thanh was owed \$23,050.65 for overtime, an adjustment for "32 hours free from work", statutory holiday pay and vacation pay for the period November 18, 1998 to November 18, 2000. The delegate further concluded that Thanh was not owed compensation for length of service as he in effect quit his employment.

Thanh appealed the Determination on November 26, 2001. He said as follows:

- 1) The settlement amount: The amount paid on overtimes and holidays is not enough, as I worked from 24 Oct, 1988 to November 18, 2000. The calculation somehow was not accurate.
- 2) I still want to sue the Sung Fish Co., that the company dismissed me, to hire a new employee to take my job. This is illegal.
- 3) The company also dismissed my wife, a month after I got my dismissal.

(Reproduced as written)

The delegate and Sung Fish were invited to reply to Thanh's appeal. The Tribunal received a submission from the delegate dated December 3, 2001. The delegate said Thanh's first two reasons for the appeal were dealt with in the Determination and therefore she had nothing further to add. Regarding the issue of whether Joung was entitled to compensation for length of service, the delegate said she dealt with that issue in her response to Joung's appeal.

Thanh and Sung Fish were invited to reply to the delegate's submission. The Tribunal received no replies.

## ANALYSIS

In an appeal, the burden is on the Appellant, Thanh, to show the Determination is an error. In this case, I am not satisfied that the burden has been met.

Section 80 out of the Act states:

80. Limit on amount of wages required to be paid -- (1) the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

(a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment

Thanh filed his complaint after his employment ended on November 18, 2000. Therefore the date to be used to calculate his wage entitlement is November 18, 2000. According to Section 80 of the Act, Thanh is entitled to recover wages for the two-year period prior to November 18, 2000. That is exactly the period that the delegate considered and used in her calculation for the amount of wages owed to Thanh. The delegate made no error regarding Thanh's entitlement to overtime and holiday pay. Under the Act, Thanh is not entitled to recover wages that were payable prior to November 18, 1998.

Section 63 of the Act states that an employer is liable to pay an employee compensation for length of service unless the employee quits, retires or is dismissed for just cause.

The delegate stated that although Thanh claimed his employer dismissed him in order to hire a new employee she preferred the employer's evidence that Thanh wanted to be laid off in order to open a store. She said Thanh's evidence contained a number of inconsistencies, the employer's evidence was supported by five witnesses who said Thanh left his employment to open a store, and Thanh's own evidence was that around the end of October he told Kim Sung ("Kim") he was going to leave at the end of November because Kim gave him a headache. As a result she concluded Thanh was not owed compensation for length of service as he effectively quit his employment.

In his appeal, Thanh simply reiterates his position that Sung Fish dismissed him in order to hire a new employee. The Determination clearly sets out the position of Thanh, the position of the employer and the five witnesses, and an analysis of why Thanh is not entitled to compensation for length of service. Thanh has not provided any information that challenges the evidence of the 5 witnesses who say he left his job to open a store, nor does he provide any particulars to support his claim he was dismissed. The delegate considered Thanh's position and did not accept it. She preferred the employer's position and she provided reasons for her decision. I find nothing unreasonable about her preference for the employer's evidence. Thanh has not shown any reason to change the conclusion of the delegate that he is not owed compensation for length of service.

Finally, the fact that Sung Fish dismissed Thanh's wife is not pertinent to the issues on this appeal.

For the above reasons I find no basis to vary or cancel the Determination and the appeal is dismissed.

## **ORDER**

Pursuant to section 115 of the Act, I order that the Determination dated November 1, 2001 be confirmed.

---

**Norma Edelman**  
**Adjudicator**  
**Employment Standards Tribunal**