

An appeal

- by -

7568126 Canada Ltd. carrying on business as Thai Express
(“Thai Express”)

- 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: Carol L. Roberts

FILE No.: 2014A/43

DATE OF DECISION: June 19, 2014

DECISION

SUBMISSIONS

Jian Zeng

on behalf of 7568126 Canada Ltd. carrying on business as Thai Express

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 7568126 Canada Ltd. carrying on business as Thai Express (“Thai Express”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on March 6, 2014. In that Determination, the Director found that Thai Express had contravened sections 40 of the *Act* and 46 of the *Employment Standards Regulation* (the “*Regulation*”) in failing to pay its former employee, Haiyan (Paul) He, \$842.89, in overtime wages, annual vacation pay, and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for Thai Express’ contravention of section 63, for a total amount payable of \$1,842.89.
2. Thai Express appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination. Thai Express also contends that evidence has become available that was not available at the time the Determination was being made.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provide that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based only on the written submissions of Thai Express, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Mr. Zeng is the sole director of Thai Express, a BC Company operating a restaurant business. Mr. He was employed as a chef for Thai Express from May 15, 2012, until June 26, 2013. Mr. He filed a complaint on August 30, 2013, alleging that Thai Express had failed to pay him overtime wages.
6. Mr. He provided the delegate with his time sheets in support of his allegation that he worked in excess of 40 hours a week along with paystubs indicating that his rate of pay was \$14 per hour. Mr. He also provided the delegate with a March 6, 2013, e-mail from Mr. Zeng informing Mr. He that all his hours would be paid at his regular rate of pay. Mr. He said that although he did not agree with this condition, he accepted it because his wife was ill and he required the employment. Mr. He informed Mr. Zeng that he agreed to the conditions.
7. During a fact-finding meeting at the Employment Standards Branch on October 25, 2013, Mr. Zeng took the position that Mr. He’s wage rate was \$12 per hour, but provided no evidence of that. However, he also confirmed Mr. He was paid wages at the rate of \$14 per hour. Mr. Zeng also said that he had an agreement with Mr. He that his hours would be paid at straight time regardless of the number of hours worked in the day or week. In the e-mail agreement, Mr. Zeng states that if there was any trouble with this arrangement in the future, the parties agreed that Mr. He’s hourly rate included overtime wages in the past and the future.

8. On November 12, 2013, Mr. Zeng advised the delegate that he would be retaining a lawyer. The delegate gave Mr. Zeng until November 26, 2013, to provide her with the name and contact information of the lawyer. Mr. Zeng was subsequently granted until December 3, 2014, to retain a lawyer. When the delegate realized that she made an error in granting the extension to December 2014 rather than December 2013, she advised Mr. Zeng that he would have until January 10, 2014, to retain a lawyer.
9. On December 6, 2013, the delegate issued a Demand for Employer Records to be delivered by December 18, 2013. On December 16, 2013, Mr. Zeng advised the delegate that he had some of the documents in Ottawa, where he is currently residing, but the balance were in Surrey, BC.
10. On January 10, 2014, the delegate received a telephone call from a translator for Mr. Zeng who provided the name and contact number for Mr. Zeng's lawyer. The translator indicated that the lawyer would not be available to assist Mr. Zeng until after January 20, 2014. The translator further advised the delegate that Mr. Zeng would not be able to provide payroll records until March or April 2014. The delegate informed Mr. Zeng through the translator that she would speak directly with Mr. Zeng's lawyer and that she would not extend the deadline for payroll records.
11. On January 15, 2014, the lawyer informed the delegate that he had not spoken to Mr. Zeng at any time and had not been retained by him.
12. The delegate concluded that Mr. Zeng had been made aware of the allegations and given an opportunity to respond. She noted that Mr. Zeng had participated in a fact-finding process and had not provided any records at that time or since. The delegate further noted that Mr. Zeng had been given an extension of over one month to retain a lawyer and had not done so. Noting that one of the purposes of the *Act* was to provide a fair and efficient procedure for resolving disputes over the application and interpretation of the *Act*, the delegate decided to issue the Determination based on Mr. He's evidence and the information provided by Mr. Zeng.
13. The delegate found that Mr. He's hourly rate was \$14 based on the undisputed paystubs. She noted that the parties had agreed to pay Mr. He the rate of \$14 for all hours of work. The delegate determined this agreement of no effect as it contravened section 40 of the *Act*.
14. The delegate found that Mr. He was entitled to overtime wages in the amount set out above based on the hours Mr. He provided.
15. The delegate determined that Thai Express had contravened section 40 of the *Act* in failing to pay Mr. He all outstanding wages after he quit his employment. She also found Thai Express in contravention of section 46 of the *Regulation* in failing to deliver records to the Director as required by the Demand for Employer Records.
16. Mr. Zeng says that he advised the delegate on many occasions that he was unable to present documents before December 18, 2013, because he had "criminal, business and family courts" to attend to in Ottawa. He says that he will be in Vancouver in "April or May" and "deserves the chance to present more documents and legal evidence" for his case.
17. Mr. Zeng submits that his agreement with Mr. He "should have some legal effect" and contends that it is "unfair" that Mr. He's wage is "above the average wage" and Mr. He is "taking the advantage to ask for overtime pay."

18. Mr. Zeng further submits that he needs time to confirm that the overtime wages have been properly calculated because all his records are in Surrey.

ANALYSIS

19. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
20. Having reviewed the section 112 “record” and Thai Express’ submissions, I find no reasonable prospect that the appeal will succeed.
21. Section 112(1) of the *Act* provides that a person may appeal a determination on 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 being made.
22. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
23. Although Thai Express’ first ground of appeal is that the Director failed to observe the principles of natural justice, there is nothing in the submissions or the “record” that supports that ground of appeal.
24. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
25. There is no evidence that Thai Express did not know the case it had to meet. Mr. He provided Thai Express with a “self-help kit” outlining his wage claim in August 2013. On September 12, 2013, the Employment Standards Branch sent Thai Express a Notice of a Fact Finding Meeting for September 17, 2013. The Notice required that Thai Express bring two copies of any documents he intended to rely on to support his case, including payroll records, pay stubs, calendars and time sheets. The Notice, as well as a covering e-mail, also advised Thai Express to bring its own translator. Mr. Zeng appeared at the Fact Finding meeting in person in October 2013. Although Mr. Zeng does not say when he went to Ottawa to deal with the criminal, business and family matters, I find that he had well over one month before departing to provide the delegate with whatever records he believed would support his position. Furthermore, Mr. Zeng sought, and was granted,

significant additional time to respond. On December 6, 2013, the delegate advised Thai Express that it was to provide its records no later than December 18, 2013, and that she was continuing to proceed with the investigation of Mr. He's wage complaint. The delegate decided that Thai Express had sufficient time to respond, and in keeping with one of the purposes of the *Act*, made a determination in Mr. He's favour.

26. I am not persuaded that there is a reasonable prospect the appeal will succeed on this ground. Thai Express had knowledge of the case it had to meet in August 2013. Mr. Zeng went to Ottawa at some point after October 25, 2013. I find that Thai Express had sufficient time in which to provide documents in response to the complaint.
27. One of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* (section 2(d)). As the Supreme Court of Canada recently stated in *Hryniak v. Mauldin* (2014 SCC 7):

A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable.... If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.
28. Mr. He attempted to resolve his dispute directly with Thai Express in August 2013. After receiving no response from Mr. Zeng, he filed a complaint with the Employment Standards Branch. Mr. He has yet to be paid the wages the delegate has determined owing. I find no error in the delegate's decision to proceed with the Determination in the absence of any further records from Thai Express.
29. Although Thai Express also says that there is new evidence that was not available when the delegate made the Determination, it does not say what that new evidence is.
30. The Tribunal has established a stringent test for the admissibility of new evidence: (see *Davies et. Al*, BC EST # D171/03):
 - (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 other evidence, have led the Director to a different conclusion on the material issue.
31. If that new evidence is those documents Thai Express says are in Surrey and were demanded by the delegate in December 2013, such evidence does not meet the Tribunal's test for the admissibility of new evidence and would not be considered on appeal.

ORDER

32. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated March 6, 2014, is confirmed in the amount of \$1,842.89 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance

Carol L. Roberts
Member
Employment Standards Tribunal