

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

168228 Enterprises Ltd.
("168228")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Norma Edelman
FILE NO.:	96/522
DATE OF HEARING:	January 17, 1996
DATE OF DECISION:	February 10, 1997

DECISION

OVERVIEW

This is an appeal by 168228 Enterprises Ltd. ("168228") under Section 112 of the *Employment Standards Act* (the "Act") against Determination No. CDET 003669 which was issued by a delegate of the Director of Employment Standards on August 15, 1996. The delegate found that 168228 owed wages to Jennifer Qiao Ling Li ("Li"). Chi Kwan Lam ("Lam"), the owner of 168228, appealed the Determination on September 4, 1996. Lam argues that Li was not an employee of 168228.

A hearing was held on January 17, 1997 at which time evidence was given under oath. Wallace Wong ("Wong") appeared as counsel for Li. With him were Li, Andrzej Desynski ("Desynski"), Irene Fu ("Fu") and Hazel Robinson ("Robinson"). Vivian Fang ("Fang") appeared as a representative for Lam. With her was Lam. The Director of Employment Standards was not represented at the hearing. Richard Lee ("Lee") interpreted the evidence at the hearing until 2:30 p.m., when he had to leave. The parties agreed to proceed in Lee's absence.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Li was an employee of 168228 and if so, whether she is owed the sum set out in the Determination.

FACTS AND ARGUMENTS

Lam has owned and operated a Super Save gas station in Clinton since April 17, 1995.

On June 8, 1995, Lam was introduced to Li, who was visiting a friend in Clinton. Li was working in a restaurant in Cache Creek at the time.

According to Li, on the evening of June 8, 1995, Lam told her that he needed help at the gas station. He offered her a job as a manager at \$15.00 per hour for 40 hours of work per week. Li accepted the offer.

Li testified that she commenced work at the station on June 13, 1995. Her job duties included pumping gas and propane, cleaning windows, handling cash, and planning for an expansion to include the sale of groceries. She had signing authority for cheques drawn on the account of 168228. She said she worked up to 60 hours per week. She did not keep any records. The station is open 7 days a week from 6 a.m./7 a.m. to 11 p.m./midnight and she usually worked from 11 a.m. to 5:30 p.m. and then from 6:30 p.m./7:30 p.m. to closing. Ruth Park ("Park") and Robinson also worked at the station.

She said when Lam went to Vancouver by himself on 1 to 2 day trips, and when he went to Hong Kong for about 2 to 3 weeks, she alone managed the station. Li said she sometimes accompanied Lam on his trips to Vancouver.

Li further stated that not long after she met Lam, they commenced a common law relationship. Lam was already married, but his wife did not live in Clinton. Eventually Li's 6 year old daughter came to live with them in Lam's house. In approximately August, they all moved into a room at the gas station. Li said she paid various baby-sitters to look after her child when she worked at the station.

Li stated that Lam told her that he had wife and money problems and he would pay her as soon as he had some money, or he would give her some of the profits from the station, or half of the company. Li said that Lam suggested to her that since he was short of cash, she could pay for the renovations and he would reimburse her when his money problems were settled.

Li said that she felt sorry for Lam and trusted that he would come through with his promises so she proceeded with the renovation work to expand the station and personally paid for some of the renovation expenses by, at times, transferring money from her account to the company account. On various occasions she also paid for supplies and stock for the station from her personal account. After numerous requests, Lam did eventually pay her back for all these expenditures, but he never paid her any wages. Li stated she did not agree at any time to forego payment of her wages. She never expected to work for free. She never received any wages, nor profits, nor part ownership in the company. Lam did give her an inexpensive watch and about \$300.00 worth of clothes. She basically lived on her own money, some of which some was borrowed from the bank, during she period she worked for Lam.

Li stated that she believed in Lam and initially thought that he would pay her, but she finally realized in November, 1995 that she would never be paid. She decided she wanted Lam to provide a letter certifying that she had worked at the station. She was worried that if Lam's wife showed up, she would not get her money, and she was considering buying some property, and in order to get financing she needed a letter confirming she had worked at least 6 months. As a result, Lam gave her a letter dated November 26, 1995 which stated that she had worked as a manager since May 1, 1995 at \$15.00 per hour for 40 hours per week. They agreed that the letter would say she had started work on May 1, 1995, rather than June 13, 1995, so it would look like she had accumulated 6 months of employment. Li then quit her job on November 30, 1995.

Li claims she is owed the sum set out in the Determination which is based on the verbal contract she made with Lam on June 8, 1995.

In support of Li's claim, Wong submitted a letter from Park which states Li was the manager in charge of the station and her supervisor from June 1995 to November 1995.

In further support, Wong presented 3 other witnesses: Fu , Desynski and Robinson.

Fu, who lives in Vancouver and has been Li's friend for 10 years, testified that she placed calls to Li at the station during June to November 1995 and the calls were received by Li around 9 or 10 p.m.

Desynski, who resides in Vancouver, testified that Li hired him to do some renovations at the station and he went to Clinton to do the work on 3 weekends in September/October 1995. He said he worked long hours on these weekends (10 a.m. to 4 a.m.) and during this time, he saw Li pump gas, do cashier work, and accounting. He said she was working at the station whenever he was there, even until 1 a.m. in the morning, when she would be doing the books. He also said that Li bought all the materials for the renovations.

Robinson lives in Clinton. She testified she worked at the station from 1990 to October 15, 1995. She worked as the assistant manager until Lam took over in April and then he managed the station by himself until late May or June, when he brought Li into station. Robinson stated that she was laid off as a result of Li taking over her job. Lam told her she was going to be laid off because of Li and he told her to train Li, which she did during her shift from 6 a.m. to 2 p.m. Li came in around 10 a.m. or 11 a.m. and Robinson trained her to pump gas and do the books. Li did both of these tasks during the morning shift. Robinson said she also saw Li working in the evening. Robinson would bring her car in for gas in the evening, and Li would fill it up. She doesn't know the exact hours worked by Li, but she thinks Li was a full-time employee and she was like a manager. She signed all the cheques made out to the suppliers. When Lam went to Hong Kong, Li handled everything at the station. Robinson stated that she does not know if Li was ever paid for her work.

Lam testified that when he took over the station in Clinton, he had personal and financial problems. By June, however, things were getting better. His English had improved and although his wife had left him, he no longer had financial problems

Lam stated that when he met Li on June 8, 1995, they just talked about personal matters and not about work. At that time, he had no manpower problems and he did not need, nor could he afford another employee. On the following day, Li came to live with him in Clinton. She drove back and forth to Cache Creek to work in the restaurant until she left that job on June 12, 1995.

Lam stated that Li told him she wanted to get married and wanted her daughter to live with them in Clinton. He agreed to the latter, but told Li it was too early for the former. Lam said that Li also told him she had financial problems, so he gave her various amounts of money and gifts, such as rings worth several thousands of dollars.

Lam described his first few months with Li as a honeymoon time. He, Robinson and Ruth looked after the station. Sometimes he and Li went to Vancouver or took local day trips. Li would sleep in until 11 a.m./noon, take care of her daughter, cook, and then they might go to the lake. Li took care of her daughter most of the time and only paid sitters for a few hours at a time, when they would go for a drive. Lam also stated that when he

was busy, Li tried to help him at the station. She did this on her own. He didn't ask her. She did it, he guesses, because she was his girlfriend. She visited him at the work site and sometimes she helped him with the cash. She asked him how to do the accounts, so he asked Robinson to show her how to do them. She occasionally pumped gas (never propane as she doesn't have a license) and did volunteer work for about one-half hour to two hours per day. When he went to Hong Kong for 10 days in September, he gave her power of attorney to sign cheques for supplies. He asked her to take care of the night shift money because Robinson and Ruth did not work this shift.

Lam stated that around July, Li suggested that he should enlarge the station and carry videos and groceries, and he agreed to the renovations and paid for all the materials and Labour. Li also suggested that she might like to lease the groceries/ movies end of the business.

Lam said that Li sent her daughter to Vancouver in mid October, 1995. At that time, he also laid off Robinson, due to missing items and money. On October 31, 1995, Li asked him to take care of the shop so she could go to Vancouver to see her daughter. On the following day she went to Vancouver. On November 2, 1995 she called him, and after being told that it was snowing and business was slow in the winter, Li said she was no longer interested in leasing part of his business. About 2 weeks later, Li phoned again and said she had changed her mind about leasing part of his business. Lam said he told Li he would not lease anything to her. Lam said that the next time he saw Li was on November 17, 1995 when she came to Clinton looking to buy a shop. She told Lam that she couldn't find a shop but she had found a cheap house and she wanted him to join her in purchasing it. Lam refused. Lam said that Li then asked him for help because she was unable to borrow money given she had no job and was on welfare. Lam said he gave Li \$10,000.

Lam said that Li also asked him to write the November 26, 1995 letter. She wasn't working and she needed a letter to say she was working so she could borrow money from a credit union. Even though Li had left him by October 31, 1995, Lam said he still wanted to help her and so he wrote the letter. After this she wanted more money and he said no and she became angry.

In support of his position, Lam submitted a letter from J.L. Lowe, his bookkeeper, which states that Li was never an employee of the company. A letter from Barrie Lockoon, a supplier of videos, was also submitted which states that Li was Lam's wife and she was preparing to open a separate video location which he was invited to supply. Finally, a letter from Mike of M & C Sales was submitted which states that Robinson was employed as a manager of the Clinton Super Save from April 1995 to October 1995, and also employed were Park and Lam, and Li was Lam's girlfriend, though she did occasionally pump gas and operate the till.

Lam also submitted various cheques made out to Li signed by either him or Li. Initially, he said that he gave these cheques to Li as gifts and for living expenses. Then upon coaching from Fang, he said if Li was found to be an employee and worked for him, then the cheques represented wages.

Wong argues that Li is owed at least the amount set out in the Determination and the November 26, 1995 letter should be viewed as a “good guide” to the conditions under which Li worked for Lam. Wong also argues that Lam has no independent witnesses, whereas he has several witnesses which support Li’s claim, and Lam acknowledges that Li worked and that she provided input into the expansion. Further, Lam’s initial evidence was that Li was not an employee and the cheques were for gifts and living expenses and only after being coached did he say the cheques were for wages if Li was found to be an employee. Wongs states that Lam cannot have it both ways. He wants the appeal dismissed with costs pursuant to Section 79(4)(d) and any other relevant section of the *Act*.

Lam argues that everyone knew that Li was his girlfriend and not his employee. He states he never offered her a job or a rate of pay and the November 26, 1995 letter is not reflective of any employment contract that he had with Li. If Li is found to be an employee, however, she was paid all her wages.

ANALYSIS

In this appeal hearing, the appellant bears the burden of proving that the Determination was in error.

I find that the appellant has not met this burden of proof and has not persuaded me to cancel the Determination.

There is insufficient evidence to establish that Li was a director, officer, partner or shareholder of 168228. There is, however, sufficient evidence to establish that an employee/employer relationship existed between Lam and Li. In arriving at this conclusion, I give little weight to the letters provided by Lam which, for the most part, were not definitive, and the authors were not available to be cross-examined by the other parties. In contrast, I give substantial weight to Lam’s own evidence. Lam acknowledged that Li performed work at the station. Lam allowed Li to work. He stated that Li tried to help him and did help him with the cash. She also pumped gas and was shown how to do the books. Lam never testified that he tried, in any way, to stop Li from working. Lam also directed Li’s work. His evidence was that he asked Li to take care of the night shift money. Consequently, I find Li was an employee of 168228. The only remaining issues are how many hours did Li work, and was she paid in full.

I find, on a balance of probabilities, that Li worked the hours set out in the Determination. First, the testimony of Desynski and Robinson, both of whom I found to be credible witnesses, was consistent with Li’s claim that she worked at least 8 hours per day, and not with Lam’s unsupported claim that Li worked less than 2 hours per day. Second, the November 26, 1995 letter signed by Lam supports Li’s position regarding her hours of work, rate of pay and end date of employment. Third, Fu’s unchallenged testimony supports Li’s evidence regarding her end date of employment.

I further find that there is inadequate evidence to confirm that Li was paid any wages for the time she worked at the gas station. The cheques submitted by Lam do not necessarily represent cheques for wages. Lam may have given these amounts to Li, but it is not established that these amounts represented wages. The cheques could represent gifts or repayments for loans. Given the foregoing, as well as Lam's altered testimony on the cheques, I am not satisfied that Lam paid Li any wages.

Finally, regarding the issue of costs, there is no jurisdiction under the *Act* for the Tribunal to award costs. Section 79(4) (d) of the *Act* allows the Director to award out of pocket expenses incurred due to violations of Section 8 or Part 6 of the *Act*. Neither of these sections are relevant to this case.

For all the above reasons, I conclude that it has not been shown that the Determination is in error.

ORDER

I order pursuant to Section 115 of the *Act* that Determination No. CDET 003669 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal