

An appeal

- by -

Tsunehisa (aka Rocky) Iida operating as Ohtako; Francine Melger operating as
Ohtako; Nagano Trading Inc. operating as Ohtako
(the "Appellants")

- 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: Ib S. Petersen

FILE No.: 2002/619

DATE OF HEARING: March 10, 2003

DATE OF DECISION: March 11, 2003

DECISION

APPEARANCES:

Mr. Tsunehisa Iida (“Iida”)	on behalf of himself
Ms. Francine Melger (“Melger”)	on behalf of herself
None	on behalf of Nagano Trading Inc. (“Nagano”)
Ms. Jackie Chow (“Chow”)	on behalf of herself
None	on behalf of the Director

OVERVIEW

This is an appeal by Iida and Melger, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director issued on November 22, 2002. The Determination concluded that Chow was owed \$816.82 by Tsunehisa Iida operating as Ohtako; Francine Melger operating as Ohtako; and Nagano Trading Inc operating as Ohtako.

Chow worked at Ohtako, a restaurant, from April 25 to June 1, 2002 as a cashier. The business apparently ceased to operate at that time and Chow remains unpaid for the last pay period. The Delegate considered that she was entitled to the amount set out above.

FACTS AND ANALYSIS

The Appellants have the burden to persuade me that the Determination is wrong. In the circumstances, I am persuaded that they have met the burden in part at least.

The parties agree, and I note that no one appeared for Nagano, that issues before me are whether the Delegate erred (1) with respect to the status as director/officers or employers of the Appellants and (2) with respect to the amount owed.

On these two issues, that parties take the position, in the case of Iida that he was simply managing the business for the Japanese owner, and, in the case of Melger that she had nothing to do with the business, except, essentially that she input payroll data into a computer and was listed as a contact on behalf of Iida, her common law spouse, because of his lack of English. If I find that Iida or Merger somehow attracted employer status, they say that the amount owed is only around \$750 because Chow did not work one of the days for which she was awarded compensation. Chow says she did work that day.

In my view, the Determination is--on its face--fundamentally flawed and cannot be allowed to stand. The Determination appears to name three persons or entities as the employer. The *Act* provides that the Delegate may find that more than one entity is an employer, namely Section 95, the so-called “common employer” declaration. The Delegate did not do that. Rather, it appears that the Delegate simply treated

all three--Iida, Melger and Nagano--as the employer. The Delegate did not properly identify the employer. I refer this question back to the Director.

With respect to Melger, the Delegate considered that she had knowledge of the business, forwarded documents to him and completed certain payroll records for the business. He was of the view that she was “part of the controlling mind of the business.

In my view, this conclusion is without any foundation in fact and must be set aside. It is, as well, wrong in law. Either she is a “controlling mind” or she is not. Her status is not referred back. She was never an officer or director of Nagano. She was a full-time employee of the Abbotsford school district on maternity leave at the material time. I accept that Melger did some payroll records for the business and that she was a contact person for her common law spouse because he was not computer literate and because his English was poor. She explained that the business was conducted in Japanese and, contrary the Delegate’s assertions, she did not know anything about the business. She attended the business only once. She did not appear to have anything to do with running the business. I do not see how the evidence set out by the Delegate could possibly support his conclusion that she was an employer.

In his submission to the Tribunal--and, indeed, in the Determination--the Delegate says that Iida and Melger failed to respond to the draft Determination faxed November 8, 2002. On the evidence, I do not consider that they generally failed to participate in the investigation and there is no such conclusion in the Determination itself. Quite the contrary, from the submissions by the Delegate to the Tribunal it appears that they provided information that was relevant to the determination of employer status and amounts owed.

As noted above, the Delegate must properly identify the employer. There are certainly some obvious candidates: Nagano and Iida, individually or as common employers. There may be others. Most likely, however, on the facts, Iida and Nagano are the likely candidates. If the Director considers that more than one entity is involved, Section 95 comes into play.

I regret the inconvenience to Ms. Chow who, regardless of the resolution of the employer issue, it would appear on the evidence before me, is owed money by the business. All the same, the employer-- and thus the person(s) or entity(ies)--liable to pay her, must be properly identified.

Unless it is found, as a result of further investigation, that there are other persons or entities--i.e. other than Iida and Nagano--possibly involved as Chow’s employer, I do not intend to refer the matter of amounts owed back to the Director. Iida participated in the appeal. Nagano’s directors and officers had notice of the appeal. Nagano did not participate.

Iida agreed that she was not paid some \$750 on account of wages for the last pay period. Chow says that she is owed some \$800. She testified that she worked May 31, 2003. Iida says she did not. He points to the written statement of hours in Chow’s handwriting. She says she forgot to write her hours. On the evidence, I am not persuaded that the Delegate erred with respect to amounts owed.

ORDER

Pursuant to Section 115 of the *Act*, I order that

1. the Determination dated November 22, 2002, be cancelled with respect to the conclusion that Melger was an employer;
2. the question of the identity of the true employer is referred back to the Director; and
3. unless other persons are found to be Chow's employer, individually or as associated businesses, the amount owed to Chow is confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal