

An appeal

- by -

0731794 B.C. Ltd. carrying on business as
Success Seafood Chinese Restaurant
("Success")

- 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: Shafik Bhalloo

FILE No.: 2010A/75

DATE OF DECISION: July 30, 2010

DECISION

SUBMISSIONS

Chang-Qing Peng Chun Hua Zhang Lai Mui	on their own behalf
Mei Lin & Raymond Ng	on behalf of 0731794 B.C. Ltd. carrying on business as Success Seafood Chinese Restaurant
Stephanie Bogaert	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), by 0731794 B.C. Ltd., carrying on business as Success Seafood Chinese Restaurant (“Success”), of a determination (the “Determination”) that was issued by a delegate of the Director of Employment Standards (the “Delegate”) on April 23, 2010. The Determination found that Success contravened sections 18, 40, 45, 58 and 63 of the *Act* for failing to pay Chang-Qing Peng (“Ms. Peng”), Chun Hua Zhang (“Ms. Zhang”) and Lai Mui (“Ms. Mui”) (collectively referred to as the “Complainants”) wages, overtime pay, statutory holiday pay, annual vacation pay and compensation for length of service.
2. The Determination ordered Success to pay the Complainants a total of \$11,278.92, inclusive of \$241.40 in accrued interest, pursuant to section 88 of the *Act*.
3. The Determination also levied four (4) administrative penalties of \$500.00 each against Success, pursuant to section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “*Regulation*”), for contraventions of sections 17, 18, 45 and 46 of the *Act*.
4. Success, through its director and officer, Ms. Mei Lin (“Ms. Lin”), appeals the Determination on the “new evidence” ground of appeal in section 112(1)(c) of the *Act*, namely, that there is evidence that has become available that was not available at the time the Determination was being made.
5. As for remedy, while Success and Ms. Lin have not checked any particular box in the Appeal Form, the written submissions of Ms. Lin seek an “adjustment” of the Determination. In reviewing the entire written submissions of Ms. Lin, it would appear that Success is seeking cancellation of the Determination.
6. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* pursuant to section 103, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the reasons for the Determination.

ISSUE

7. Is there new evidence that has become available that was not available at the time the Determination was being made, and, if so, does that evidence justify cancelling or varying the Determination in any manner?

FACTS

8. Success operated a restaurant at 8130 Park Road, Richmond, British Columbia (the “Park Road Address”), and employed the Complainants as waitresses at the rate of pay of \$8.00 per hour until their employment was terminated on May 10, 2009.
9. On May 20, 2009, pursuant to section 74 of the *Act*, the Complainants filed their complaints (the “Complaints”) with the Director alleging that Success contravened the *Act* by failing to pay them regular wages, vacation pay, statutory holiday pay and compensation for length of service.
10. The Complainants supplied evidence in support of their allegations in the form of copies of their schedules and all hours worked from March 2009 to May 2009. In the case of one (1) of the Complainants, she additionally supplied a copy of a paycheque issued to her on April 5, 2009.
11. All the Complainants claimed that they did not receive annual vacation pay at any point during their short-lived employment, which exceeded three (3) months, but ended within twelve (12) months. They also claimed that they did not receive any written notice of termination.
12. The Delegate, on April 30, 2009, conducted a corporate search of Success and discovered on that search that Ms. Lin appeared as its sole director and Success’ registered and records office was at 9520 Thomas Drive, Richmond, British Columbia (the “Thomas Drive Address”). The Delegate also conducted a BC Assessment Registry search of the Thomas Drive Address and discovered that the property owner of the said address was Ms. Lin.
13. On May 26, 2009, the Delegate telephoned Success’ restaurant to speak with Ms. Lin, but received no answer. The Delegate then called Ms. Lin’s home number at the Thomas Drive Address and left a message for Ms. Lin to call her back regarding the Complaints, but received no response from Ms. Lin. The Delegate then mailed a copy of the Complaints and a request for the employer’s response to Ms. Lin at her home address, the Thomas Drive Address, as well as to the business address and, further, faxed a copy of the Complaints to the fax number for Success’ restaurant, but received no reply from Ms. Lin.
14. On October 13, 2009, the Delegate sent a Demand for Records by registered mail to the Park Road Address of Success setting a deadline of October 27, 2009 for Success to respond. No response was forthcoming and the letter was returned to the Delegate.
15. On November 6, 2009, the Delegate sent a further Demand for Records by registered mail to the Thomas Drive Address that was shown on the corporate search of Success as the registered and records office address. The deadline imposed by the Delegate for responding to the request was November 20, 2009. However, there was no response to the request and the letter was not returned on this occasion.
16. On November 5, 2009, the Delegate contacted Raymond Ng (“Mr. Ng”), the former supervisor of the Complainants at the restaurant. His telephone number was the same as Ms. Lin’s home telephone number. Mr. Ng informed the Delegate that Success’ restaurant business was closed and that the Complainants, at the end of their employment, each received some cash payment from Success. When asked by the Delegate to supply evidence of the said cash payment, Mr. Ng agreed to provide evidence, but never followed through.
17. The Delegate also noted that Success was notified that a determination would be issued with or without its input, and that a failure to respond to a Demand for Records would result in a penalty.

18. In the face of Ms. Lin's and Success' failure to respond to the Complaints, the Complainants' evidence in support of their claims went undisputed. Further, the Delegate found the evidence of the Complainants pertaining to their employment including their records of hours worked and wage rates credible, and concluded that Success had breached sections 17, 18, 40, 45, 58 and 63 of the *Act*. The Delegate then went on to conclude that the Complainants were entitled to wages as shown in the Determination and awarded them wages accordingly.

SUBMISSIONS OF SUCCESS

19. Ms. Lin does not make any submissions as to why she did not respond to the Delegate's numerous inquiries and attempted contacts through correspondence and telephone calls during the investigation of the Complaints but submits, for the first time in the appeal, substantive evidence in response to the Complaints.
20. First, she states that Success gave \$500.00 to each of the Complainants on May 16, 2010, along with their Record of Employment. She states that Success regards the Record of Employment as written notice of termination and, therefore, the Complainants are incorrect when they state that they never received a written notice of termination of their employment.
21. She submits that the \$500.00 provided to each employee was not documented, but rather handed to each employee in person. This is a traditional custom in Chinese restaurants, according to Ms. Lin. She states that when a business closes or terminates, the money paid to employees is "good-bye pay, and, termination pay" and it "covers the compensations [sic] or it serves the well-wishes and the symbolic compensations [sic] for the employee".
22. On the subject of overtime pay, Ms. Lin states that when Success hired new employees at the restaurant, it explains to employees that the restaurant business is not a profitable business or a low-profit margin business and that the restaurant can only pay an "hourly wage". She further states that in this case the Complainants understood that.
23. Ms. Lin also submits that all of the Complainants received fully their statutory holiday pay when due.
24. With respect to compensation for length of service, Ms. Lin states that the Record of Employment each employee received constitutes sufficient notice of termination and, therefore, "(t)he restaurant should not be punished by 'Compensation for length of service'".
25. Finally, Ms. Lin notes that the closure of Success' restaurant was due to the landlord serving notice to Success to vacate the premises by May 10, 2010. As a result, Success has lost "a lot of money" and it is "actually broke and bankrupt".

SUBMISSIONS OF THE DIRECTOR

26. The Director submits that the Delegate attempted to contact Success and Ms. Lin during the investigation of the Complaints using various means, including leaving messages for Ms. Lin at her home telephone number, and sending both registered and regular mail to her home address as confirmed in the BC Assessment Registry search which showed her living at the Thomas Drive Address. This same address also appeared as the registered and records office address of Success on the corporate search, and both regular and registered mail were addressed to Success at the same address during the investigation, but there was no response from Success or Ms. Lin.

27. The Director notes that during the investigation, however, the Delegate was able to speak directly with Mr. Ng, whose personal telephone number is the same as the home number of Ms. Lin. In her conversation with Mr. Ng on November 5, 2009, the Director notes that Mr. Ng stated to the Delegate that the Complainants had received some cash payment at the end of their employment and while Mr. Ng agreed to provide proof of this payment, no such proof materialized at any time before the Determination was made.
28. The Director submits that Success, Ms. Lin and Mr. Ng were all provided with “every opportunity to provide evidence at the time of the investigation and failed to do so”. The Director further notes that the evidence Success now wishes to submit is not new evidence, but evidence that could have been provided during the course of the investigation. Notwithstanding, the Director responds to the substance of the evidence adduced by Success.
29. First, with respect to the issue of compensation for length of service, the Director notes that Success did not provide the Complainants with written notice commensurate with their length of service when the Complainants’ employment was terminated. The Director also notes that there was no record of any money paid to the Complainants for length of service.
30. With respect to the contention of Success that it is exempt from paying overtime because it explained to its employees at the time of their hiring that no overtime would be paid to them, the Director notes that the minimum requirements of the *Act*, pursuant to section 4 of the *Act*, cannot be waived, and, therefore, the overtime provisions in section 40 apply to Success.
31. With respect to Success’ contention that the Complainants were paid fully their statutory holiday pay, the Director notes that no payroll records were supplied by the employer to verify any payment for statutory holiday pay to the Complainants.
32. In sum, the Director requests that Success’ appeal be dismissed and the Determination confirmed.

SUBMISSIONS OF THE COMPLAINANTS

33. In their joint and very brief submissions, the Complainants admit that they received \$500.00 each when Mr. Ng presented them with their Records of Employment, but they never received a notice of termination. They also submit that Mr. Ng said to them that the \$500.00 payment to each of them was for “rents as an urgency”.
34. With respect to the overtime issue, the Complainants indicate that Success’ submissions on this matter “did not make sense” to them and that they “did not agree to that kind of situation” in reference to working over and above their regular hours without receiving overtime pay.
35. With respect to statutory holiday pay, the Complainants state that they feel they are owed unpaid wages for statutory holidays.

FINAL REPLY OF SUCCESS

36. Mr. Ng, on behalf of Success, submitted a final reply. Much of this final reply is simply pointing out that the restaurant Success was operating had to close and that the business was hurting financially and suffered a significant loss.

37. With respect to the issues addressed by the Complainants in their submissions, Mr. Ng repeats that the Record of Employment he submitted to each of the Complainants was the written notice of termination.
38. With respect to the \$500.00 payment he made to each of the employees at the time of the termination of their employment, he states that the payment implied that the restaurant was indeed concerned for its employees.
39. With respect to the matter of overtime pay, Mr. Ng simply repeats that in the restaurant business the practice of employees working overtime, presumably receiving regular pay rather than overtime pay, “is understood and both the restaurant and the worker are happy” with this sort of an arrangement, in his view. Otherwise, he states, the restaurant could hire new employees to work the overtime hours as their regular shift.
40. He also submits that there is not “big money in the restaurant food business” and that restaurant employment is merely a job that provides “small income” and there is “really no money in food business”.
41. With respect to the statutory holiday claim of the Complainants, Mr. Ng notes “the restaurant owed them ‘wages’” and that “when the situations [sic] turns around it will be address and look after [sic]”. However, he goes on to further state that he does all the payroll for the restaurant and he is quite certain that statutory holiday pay was paid to the Complainants.

ANALYSIS

42. Success’ appeal is based on the ground that new evidence has become available that was not available at the time the Determination was made. The Tribunal, in *Re: Merilus Technologies Inc.*, BC EST # D171/03, delineated the following four (4) conditions that must be met before new evidence will be considered on appeal:
- 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;
 - The evidence must be relevant to a material issue arising from the complaint;
 - The evidence must be credible in the sense that is reasonably capable of belief; and
 - 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.
43. The four (4) criteria above are a conjunctive requirement and therefore the party requesting the tribunal to admit new evidence, in this case Success, has the onus to satisfy each of them before the Tribunal will admit any new evidence.
44. In this case, I am not satisfied that Success has met the first criterion for admitting new evidence set out in the *Merilus Technologies* decision. All of the evidence Success wishes to adduce as new evidence in this appeal is not evidence that could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the investigation or adjudication of the Complaints or prior to the Determination being made. There is ample evidence of numerous attempts made by the Delegate to contact Success and its director, Ms. Lin, set out under the headings “Facts” and “Submissions of the Director” above, which I shall not reiterate here. All of these efforts were futile as Ms. Lin and Success did not respond when they should have responded.

45. I also note that in the appeal submissions of Success, neither Ms. Lin nor Mr. Ng explained why Success did not respond to the Delegate's queries during the investigation. I do not disregard the single instance where the Delegate was able to contact Mr. Ng and obtain limited information from him, but there was no full response by Success or Ms. Lin. There is nothing in the written submissions of Success to suggest that neither Success nor Ms. Lin knew of the Complaints or the investigation into the Complaints by the Delegate. In my view, Success' decision not to respond to correspondence and/or telephone calls from the Delegate and its failure to comply with the Demand for Employer Records and participate in the investigation of the Complaints effectively forecloses Success from adducing the evidence it is now seeking to adduce as new evidence. This Tribunal has indicated previously that evidence that is otherwise available during the investigation of a complaint is not "new evidence" particularly where a party turns a blind eye to telephone calls and correspondence from the delegate during the investigation stage of a complaint.
46. Accordingly, I find that Success has failed the first of the four-part test in *Re: Merilus Technologies Inc.*, *supra* for adducing new evidence. While I am not, at this stage, required to review or consider the balance of the tests in *Merilus Technologies*, I find, based on my *prima facie* view of the evidence adduced by Success, that Success' evidence would not qualify as possessing high potential probative value such that if believed by the Delegate, it would have led the latter to a different conclusion on any of the material issues.
47. It is also noteworthy that section 2(d) of the *Act* provides that one of the purposes of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". It would be contrary to this very important purpose of the *Act* to allow Success, at this late stage, to adduce for the first time evidence that it could otherwise have adduced during the investigation of the Complaints. As a result, I dismiss Success' appeal.

ORDER

48. Pursuant to section 115(a) of the *Act*, I order that the Determination dated April 23, 2010, be confirmed as issued, together with any further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of the issuance of the Determination.
49. I also confirm four (4) administrative penalties of \$500.00 each ordered in the Determination against Success.

Shafik Bhalloo
Member
Employment Standards Tribunal