

An appeal

- by -

Tri-Star Seafood Supply Ltd.
("Tri-Star")

- 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.: 2008A/60

DATE OF DECISION: September 2, 2008

DECISION

SUBMISSIONS

Marvin Lithwick	on behalf of Tri-Star Seafood Supply Ltd.
M. Elaine Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Tri-Star Seafood Supply Ltd., (“Tri-Star”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued May 7, 2008.
2. Tri-Star is a wholesale supplier of live seafood. William Wai Tsang worked for Tri-Star as a warehouse worker from May 3, 2005 until January 2006 and as a supervisor and warehouse worker from March 10 to December 31, 2006. Mr. Tsang filed a complaint alleging that Tri-Star had contravened the Act in failing to pay him overtime wages.
3. The Director’s delegate held a hearing into Mr. Tsang’s complaint on January 15, 2008. The employer was represented by counsel, Mr. Lithwick, Mr. Tsang was represented by a student with the UBC Law Students’ Legal Advice Program. At issue before the delegate was whether Mr. Tsang was a manager pursuant to section 1 of the *Employment Standards Regulation*, and if he was not, his entitlement to overtime pay.
4. Following the hearing, the delegate determined that Mr. Tsang was not a manager and that he was therefore entitled to overtime wages. She concluded that Tri-Star had contravened Section 40 of the Act in failing to pay Mr. Tsang overtime wages. She determined that Mr. Tsang was entitled to wages, vacation pay and interest in the total amount of \$9,907.26. The delegate also imposed a \$500 penalty on Tri-Star for the contravention, pursuant to section 29(1) of the *Employment Standards Regulation*.
5. Tri-Star contends that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Tri-Star submits that the delegate erred in finding that Mr. Tsang was not a manger. In the alternative, Tri-Star argues that if Mr. Tsang was correctly determined to be a manager, the delegate erred in the calculation of hours for which Mr. Tsang had been paid as well as failing to take into consideration other payments that had been made to Mr. Tsang.
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Tri-Star sought an oral hearing and the opportunity to made additional written submissions, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue of whether there is a denial of natural justice. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

7. Whether the delegate erred in law in concluding that Mr. Tsang was not a manager;
8. Whether the delegate erred in calculating Mr. Tsang's wage entitlement

FACTS AND ARGUMENT

9. The following facts and arguments are set out in the Determination.
10. In March, 2006, Charles Tchao ("Tchao") the founder, President and CEO of Tri-Star, and Dennis Luck ("Luck"), the manager of the local sales department, offered Mr. Tsang the position of supervisor for local deliveries. Mr. Tsang was paid a monthly salary and after his three month probationary period, was to also receive medical benefits. Because Mr. Tsang was considered to be such a good employee, his medical benefits became effective May 1, 2006. Mr. Tsang worked under the supervision of Luck in the sales department. At that time there were three people working in that department, Luck, Mr. Tsang and a truck driver.
11. Although Mr. Tsang agreed he had been told he was a supervisor for his second period of employment, he did not consider himself one. The parties had no written employment agreement. Tri-Star did not issue Mr. Tsang a record of his hours of work nor provide him with anything in writing about his working conditions. Mr. Tsang agreed that Tchao told him he would be required to work 9 hours per day, 6 days per week, and that he would be paid a monthly salary.
12. Mr. Tsang denied that he had any responsibility for hiring staff, authorizing staff to work overtime or to grant them leaves of absences, establishing work schedules, directing how work was to be done, developing or delivering programs or services, monitoring or evaluating projects, preparing, delivering or evaluating marketing plans, establishing prices of product, determining who suppliers would be or deciding how many employees were to work, among other things. His evidence was that his job was to train new truck drivers, direct them on how to perform their job, and ensure that they did it properly. Luck decided which routes the drivers would take. After the drivers finished the routes, it was Mr. Tsang's responsibility to clean the trucks, check their oil and gas levels and ensure they were parked correctly. He also checked the invoices for correctness. If a customer refused a delivery, he would report that to Luck or another manager and that manager usually decided what to do about the problem.
13. Tchao testified that when Luck was not present, Mr. Tsang was responsible for local deliveries, which included taking orders, packing product, directing the drivers, checking the trucks and directing other employees to do the clean up. He agreed that Mr. Tsang had no authority to hire any employees, was not involved in budgeting, purchasing, preparing or delivering marketing or sales plans, deciding what the company's services would be or pricing. He testified that 50% of Mr. Tsang's job was packaging, receiving, delivering and shipping, which was the same as other warehouse employees. His evidence was also that Mr. Tsang's primary employment duties were to receive orders and chose product, coordinate drivers and, when necessary, help with the deliveries.
14. Mr. Tsang agreed that he attended managers' meetings along with Tchao, Luck and other managers. He attended weekly meetings dealing with issues relating to product, sales and operations to share information and to listen.

15. The delegate considered the definition of manager as set out in section 1 of the *Regulation*:

A manager is defined as

 - a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
 - b) a person employed in an executive capacity.
16. As Tri-Star did not advance an argument that Mr. Tsang was employed in an executive capacity, she considered whether Mr. Tsang's principal employment duties consisted of supervising or directing human or other resources. She considered Tribunal decisions *Amelia Street Bistro* (BC EST #D479/97) and *Howe Holdings Ltd.* (BC EST #D131/04) and concluded that Mr. Tsang was a supervisor but not a manager. She found no evidence he had any measure of authority or discretion while doing his job outside of selecting fish products. She found that he did not participate in decisions about hiring, disciplining or firing staff, authorizing overtime or granting leaves of absences, or directing how work was to be done. She found that the evidence established that he worked under the close supervision of Luk. She found that although Mr. Tsang sat in on the managers' meetings, he took no managerial role at those meetings. She concluded that his duties did not represent those of a manger and determined that he was entitled to overtime wages.
17. Although Tri-Star contended that the delegate erred in finding Mr. Tsang was not a manger, no submissions were made as to the nature of that error. In the request for an oral hearing, counsel submits that it was necessary for the Tribunal to "assess the relevant facts and the credibility of the parties relating to the material issues involved in the Complaint".
18. The delegate submits that the analysis in the Determination is self evident and made no further submissions.
19. Having found Mr. Tsang was entitled to overtime wages, the delegate determined that his wage claim was limited to the last six months of his employment, that is, July 1 to December 31, 2006. During that time, Mr. Tsang's wage was \$2,400 per month. Tri-Star contended that if Mr. Tsang was entitled to overtime, the overtime ought to be calculated based on his rate of pay while he was a warehouse worker only, or the period May 2005 to January, 2006. The delegate found no basis to accept this argument. She concluded that the wage rate was the rate he was paid as a supervisor. She calculated Mr. Tsang's hourly rate at \$10.26 per hour based on a 54 hour work week. She determined that Mr. Tsang often worked in excess of 9 hours per day, 6 days a week. She deducted one half hour from his daily totals for lunch breaks. She found there was no time bank established as required under s. 42 of the *Act*.
20. The delegate determined that Mr. Tsang ought to have been paid time and one half rates for 608.98 hours and 1.93 hours at double time, for a total of \$9,411.80. She determined that Tri-Star had paid him no overtime but had paid him \$600.01 for his "banked hours". She calculated his total overtime entitlement at \$8,811.79.
21. Tri-Star argues that Mr. Tsang's regular work week was 54 hours and that he was fully compensated for those hours, including any overtime payable, according to the terms of his agreement. The delegate found that she was unable to respond in the absence of any demonstrated calculation error.

22. In its reply submissions, Tri-Star argued that Mr. Tsang's contract indicated that he would be paid \$2,400 per month for a 54 hour work week, inclusive of all overtime. In the alternative, it submits that, for the hours worked in a week in excess of 40 hours, Mr. Tsang is only entitled to half of his imputed rate, rather than 1.5 times that wage as determined by the delegate. It contends that the delegate's calculations award Mr. Tsang 2.5 times his hourly entitlement for those hours in excess of 40 hours per week, since he had already been paid straight time for those hours.
23. Tri-Star submits that Mr. Tsang's salary was based on 40 hours per week at straight time and 14 hours per week at 1.5 times the hourly rate. Therefore, it contends, Mr. Tsang's hourly wage was \$9.08 per hour, rather than \$10.26 as calculated by the delegate.
24. Finally, Tri-Star contends that the delegate erroneously failed to deduct one half hour from Mr. Tsang's hours for two 15 minute breaks he took each day. Counsel for Tri-Star says that the employer was not statutorily obligated to provide two 15 minute breaks per day and allowed the breaks pursuant to an agreement that Mr. Tsang would not be paid for that time.

ANALYSIS

25. 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; or
 - (c) evidence has become available that was not available at the time the determination was being made
26. The burden of establishing the grounds for an appeal rests with an Appellant. Tri-Star must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

Error of Law

27. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
- 1. A misinterpretation or misapplication of a section of the *Act*;
 - 2. A misapplication of an applicable principle of general law;
 - 3. Acting without any evidence;
 - 4. Acting on a view of the facts which could not be reasonably entertained; and
 - 5. Exercising discretion in a fashion that is wrong in principle

28. Although Tri-Star submitted that an oral hearing was necessary in order for the Tribunal to “assess relevant facts and the credibility of the parties”, assessments of credibility and questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.* (BC EST #D260/03), the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained. Tri-Star did not indicate what factual findings of the delegate were in error, if any. Tri-Star advanced no argument on the delegate’s application of the facts to the law, or her interpretation of the relevant sections of the *Act* and *Regulations*. Having reviewed her analysis, I am not persuaded that the delegate erred in her conclusion that Mr. Tsang was not a manager.
29. Tri-Star’s reply submission was limited to the issue of the delegate’s calculation of Mr. Tsang’s overtime wages. In this respect, I find that the delegate erred in her determination of Mr. Tsang’s hourly rate. In other words, I find that she acted on a view of the facts which could not be reasonably entertained, which constitutes a reviewable error of law.
30. Section 1 (d) of the *Act* provides that an employee’s regular wage for an employee paid monthly is “the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee’s normal or average hours of work”. In *Re McIver’s Appliance Sales & Services Ltd.* (BC EST #D526/98), the Tribunal held that there was nothing in the definition of “regular wage” that suggested that normal or regular weekly hours could not exceed 40 and that there is no 40 hour “cap” on normal or average weekly hours for the purpose of calculating a salaried employee’s regular wage. However, the *Act* does not permit an employer to pay a flat rate that purports to incorporate overtime entitlements. (see *Master Pool Coatings Inc.* (BC EST #D569/98)).
31. In the absence of any apparent submissions from the parties on the issue of Mr. Tsang’s regular and overtime wage entitlement, the delegate calculated Mr. Tsang’s hourly wage rate based on his yearly wage divided by his hours of work, for an hourly amount of \$10.26. I find no error in the delegate’s conclusion in this respect.
32. However, I find that the delegate failed to consider that Mr. Tsang had been paid at his regular rate when calculating his overtime wages. In other words, when calculating Mr. Tsang’s overtime, she did not consider that he had already been paid straight time for the 54 hours. As a consequence, when calculating his overtime, she awarded him 2.5 times his hourly entitlement for the first 14 hours per week in excess of 40 hours rather than the 1.5 he is entitled to.
33. In addition, the record indicates that Mr. Tsang was paid 1.5 times his regular wage for some periods. Therefore, I refer the matter of the calculation of Mr. Tsang’s overtime wages back to the delegate for reconsideration.
34. I am not persuaded that the delegate erred in not deducting the two fifteen minute coffee breaks Mr. Tsang took daily, from his hours worked. Although Tri-Star contended that it gave its employees, including Mr. Tsang, two coffee breaks under an agreement that they would not be paid for them, the Determination found no such agreement. Tri-Star says that Mr. Tsang agreed to this by accepting unpaid coffee breaks during the first period of his employment. I need not make a decision on that point since it is the second period of employment which was at issue before the delegate. In the absence of any evidence that Mr. Tsang agreed to this unpaid break, I find no error in the delegate’s conclusion.

Natural Justice

35. 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.
36. Tri-Star's appeal document fails to describe how it was denied natural justice. As there is nothing on the face of the record that suggests Tri-Star did not know the case against it, was denied an opportunity to fully respond, or that the delegate was biased, I find no merit in this ground of appeal.

ORDER

37. I Order, pursuant to Section 115 of the Act, that the Determination, dated May 7, 2008, be referred back to the delegate for a recalculation of Mr. Tsang's overtime wage entitlement.

Carol L. Roberts
Member
Employment Standards Tribunal