

An appeal

- by -

Sejung Jung
("Employee")

- 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: Sheldon Seigel

FILE No.: 2007A/86

DATE OF DECISION: October 12, 2007

DECISION

SUBMISSIONS

Sehi Jung	on behalf of the Employee
Jung Sook Park	on behalf of Sarang Enterprises Corporation, cba/ Taka Japanese Restaurant (“Employer”)
John Dafoe	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act (Act)* brought by the Employee, of a Determination that was issued on June 25, 2007 by a delegate of the Director of Employment Standards (Director). The Determination found that the Employer had contravened sections 40 and 58, of the *Act*, in respect of the employment of the Employee, and ordered the Employer to pay to the Employee the amount of \$\$1425.97. This amount included overtime (s.40 of the *Act*), vacation pay (s.58 of the *Act*), and accrued interest (s.88 of the *Act*).
2. The Director also imposed administrative penalties on the Employer under Section 29(1) of the Employment Standard Regulation (“Regulation”) in the amount of \$1000.00 relating to non-payment of overtime and failure to keep payroll records (s.40, and s.28 of the *Act*).
3. The Employee submits that information has become available that was not available at the time the determination was made.
4. The Employee also provides submissions that may be interpreted as a claim that the Director erred in law or failed to observe the principles of natural justice.
5. An oral hearing was not requested.

ISSUES

6. The issues in this appeal are:
 - Did the Director err in law or fail to observe the principles of natural justice in making the determination?
 - Has new evidence become available that was not available at the time the Determination was made, and if so, what impact does that new evidence have on the results of the Determination?

ARGUMENT

7. In his appeal documentation, the Employee submits that the Determination process was intentionally delayed by reason of the Employer's action in providing late documents.
8. The Employee also submits that the Director did not ask him for documentation to support the deficiency in wages paid, which was the basis of the original claim.
9. The Employee submits that the lack of a request for information only came to the attention of the Employee upon receipt of the published Determination, dealing with those matters.
10. The Employee submits that the Employer alleges to have paid the Employee more than was actually paid. He supports this claim with bank records showing deposits and withdrawals. The crux of this issue is the claim that the Employer gave cheques to the Employee from which the Employee was forced to kick back a portion in cash immediately.
11. The Employer submits that he diligently satisfied his contractual obligations to the Employee and was only at fault for failing to keep adequate records- for which he accepts responsibility.
12. The Director submits that all of the information contained in the Employee's submissions was available at the time of the investigation leading up to the Determination and that the Determination was based on a full analysis of the evidence available at that time.

ANALYSIS

13. There is no question that language and culture issues played a part in the administration of the Determination. Language and culture issues may also have played a part in the collection and submission of information for this appeal. Although I accept that the submissions of both the Employee (through a sibling) and the Employer appear to have been challenging to prepare, there is ample evidence from a close inspection of the documents, that each party was able to ultimately communicate its position. I find, therefore, that each party has had an adequate opportunity to be heard and that each party has capably presented the whole of its position for consideration.
14. The Employee's submissions appear to be designed equally to challenge the Determination and to alert the administration of the Branch and/or the Tribunal and perhaps the public to alleged abuses of foreign workers who are in Canada with temporary working visas.
15. With respect to the potential that there was an error in law committed by the Director, or that the Employee was denied natural justice by the Director, there is simply no evidence to substantiate that claim. In that regard, I find that the record leading up to the Determination appears on its face to be thorough with respect to the delegate's canvassing of the relevant issues with each party. The decision is reasoned and complete.
16. I find that the submissions provided by the Employee in this appeal, and the material provided in support of the submissions, were available to the Employee before the Determination was made. There is no evidence that suggests any impediment to this information being available in a timely fashion. The central issue was always the wages paid to the Employee. Submissions regarding how much was paid, and the claim that monies were kicked back immediately upon payment are fundamental to the central

issue. I find it incomprehensible that the Director could have failed to make reasonable requests of the Employee as to how much he was paid, and equally incomprehensible that the Employee could proceed with such a claim of his own choosing without disclosing that information.

17. Finally, having reviewed the bank documents provided with the Employee's submissions, I find that there is no information in those documents that confirms a larger shortfall than awarded in the Determination.
18. Ultimately, I have no jurisdiction to award damages based on mistreatment of a foreign national working under visa, and the claims of such mistreatment are not supported here by more than a contested submission.
19. In my view the Determination was favourable to the Employee and the purpose of this appeal was to voice the Employee's continuing sense of outrage for having been treated poorly by the Employer.
20. The Appeal fails on all grounds.
21. For the benefit of the parties, I find that the Employer's submission that he did nothing improper but for poor record keeping, is not credible in the face of the evidence to the contrary. The Employer also seems to ask for a reconsideration of the Determination in his favour, on the strength of his submissions. That request is similarly denied.

ORDER

22. Pursuant to section 115 of the Act, I confirm the Determination.

Sheldon Seigel
Member
Employment Standards Tribunal