



An appeal

- by -

Liu Liu Enterprises Ltd. carrying on business as Moutai Plus Restaurant
(“Moutai”)

- 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.: 2017A/99

DATE OF DECISION: August 28, 2017

DECISION

SUBMISSIONS

Ming Fang Liu

on behalf of Liu Liu Enterprises Ltd. carrying on business
as Moutai Plus Restaurant

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Liu Liu Enterprises Ltd. carrying on business as Moutai Plus Restaurant (“Moutai”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 13, 2017 (the “Determination”).
2. The Determination found that Moutai had contravened Part 4, section 40 (overtime); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (annual vacation pay) and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Gui Lan Yang (“Ms. Yang”) and ordered Moutai to pay wages to Ms. Yang in the total amount of \$7,399.08 inclusive of accrued interest. The Determination also levied six administrative penalties against Moutai in the total amount of \$3,000.00 for breach of sections 16, 17, 40, 45, 58 and 63 of the *Act*. The total amount of the Determination is \$10,399.08.
3. Moutai’s appeal is grounded in an assertion that the Director failed to observe the principles of natural justice in making the Determination. Based on the appeal form, Moutai seeks the Tribunal to change or vary the Determination but the appeal submissions of Moutai suggest the latter wants the Determination cancelled.
4. On July 25, 2017, the Tribunal corresponded with the parties advising them that it had received and was enclosing Moutai’s appeal. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) “record” (the “Record”) and notified the other parties that no submissions were being sought from them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.
5. The Record was provided by the Director to the Tribunal on July 25, 2017, the same day the Tribunal requested it. A copy of the record was sent by the Tribunal to Moutai on July 26, 2017, and the latter was given an opportunity to object to its completeness. Moutai has not objected to the completeness of the Record and the Tribunal accepts it as complete.
6. On August 16, 2017, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. Consistent with the notice contained in the correspondence from the Tribunal dated July 25, 2017, I have reviewed the appeal, the appeal submissions and the Record. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Determination, the Appeal Form, written submissions of Moutai and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that section 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite Ms. Yang and the Director to file reply submissions on the appeal.

ISSUE

7. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

8. Moutai is a company incorporated under the laws of British Columbia on August 19, 2003, and operates a restaurant. A BC Online; Registrar of Company's search of Moutai shows that Min Fang Liu ("Ms. Liu") is its sole director.
9. Moutai employed Ms. Yang as a waitress and cashier from May 1, 2010, to October 26, 2016, at a salary of \$2,400 per month.
10. Based on the record submitted in the Appeal, on January 13, 2017, Ms. Yang appears to have sent Moutai a Request for Payment form seeking overtime wages, statutory holiday pay and compensation for length of service.
11. As the Request for Payment of Ms. Yang was not fulfilled, on January 30, 2016, Ms. Yang filed a complaint under the *Act*, claiming that her employment was terminated by Moutai without notice and she was owed compensation for length of service, overtime, and statutory holiday pay (the "Complaint").
12. On April 25, 2017, a delegate of the Director conducted a complaint hearing by telephone (the "Hearing"), at which Ms. Yang gave evidence on her own behalf and Feng (Steven) Xi Liu ("Mr. Liu") and Luis Huang ("Mr. Huang") gave evidence on Moutai's behalf. Each party also had an interpreter present.
13. At the Hearing, the delegate considered the following five questions: (i) was Ms. Yang's employment terminated by Moutai or did she quit? (ii) is Ms. Yang owed regular or overtime wages? (iii) is Ms. Yang owed statutory holiday pay? (iv) is Ms. Yang owed compensation for length of service? (v) is Ms. Yang owed annual vacation pay?
14. Based on the evidence presented at the Hearing, which is meticulously summarized in the reasons for the Determination (the "Reasons"), the delegate found Ms. Yang did not quit or abandon her employment but Mr. Liu terminated it on December 8, 2016, when he informed her that there was no work for her. In coming to this conclusion, the delegate reviewed section 63 of the *Act* and the common law principles governing the question of whether or not the employee exercised her right to quit. The delegate paid particular attention to the subjective and objective elements to an employee's decision to quit and reasoned as follows:

I find Ms. Yang did not quit or abandon her employment. I accept that she booked a return ticket with the help of an agent who then delivered it to Ms. Liu at workplace. I accept that Ms. Yang[s] attempt to mitigate the impact of her absence by assisting with the training of her replacement. I accept Ms. Yang's evidence that she cared about her employment and intended to return to work for Moutai after she returned from her vacation. And she did return to work, only to be turned away. While Ms. Yang's departure could be seen as lengthy and abrupt, I find that any perceived assertiveness with respect to the length and timing of her vacation must also include a consideration of her father's illness and the fact that Mr. Liu neglected to ensure that she took annual vacation during the past year. I also note that the Act requires that employees receive at least 3 weeks' worth of vacation after 5 consecutive years of employment, and that she would have been entitled to at least 3 weeks' vacation during that year. Where Ms. Yang's evidence conflicts with Mr. Lui, I prefer the evidence of Ms. Yang.

Mr. Liu said that Moutai had no obligation to wait for her return, but did so for compassionate reasons. I find that Mr. Liu's decision to wait for Ms. Yang to return contradicts the notion that he believed that she would not do so. Moutai's decision to issue an ROE on January 4, 2017, indicating a shortage of work further undermines its argument that it considered her to have abandoned her position.

I find that Ms. Yang's employment was terminated by Ms. Liu on December 8, 2016 when he informed her that there was no work for her.

15. With respect to the question of whether Ms. Yang was owed regular or overtime wages, the delegate noted that the amount of wages an employer may be required by a determination to pay an employee is limited, by section 80(1) of the *Act*, to the amount that became payable in the period beginning six months before the earlier of the date of the complaint or the end of the employment relationship. In this case, the delegate determined that the wage recovery period is June 9, 2016, through December 8, 2016, with the latter being the date when Ms. Yang's employment was terminated by Mr. Liu. The delegate then went on to determine the hours Ms. Yang worked during the wage recovery period. In preferring the evidence of Ms. Yang that she worked 10 hours per day and 6 days per week over Moutai's, the delegate reasoned as follows:

I find that the wage statements prepared by Moutai are unreliable for the following reasons. Even if I accept Mr. Liu's suggestion that Ms. Yang worked 39 hours each week and was paid a "bonus" hour each week, one would expect to [*sic*] Ms. Yang's total hours worked each month to fluctuate according the number of days in each month; they do not. Instead, the wage statements indicate that she worked exactly 160 hours every month. Ms. Yang ought to have worked the following number of days and hours according to her schedule:

Month	Days	Hours (if 6.5)
June	26	169
July	27	175.5
August	26	169
September	26	169

In the scenario proposed by Mr. Liu, it would seem that rather than having paid bonus hours, Ms. Yang was still paid for fewer hours than she actually worked. Consequently, I find Mr. Liu's account of Ms. Yang's work schedule to be unreliable.

I accept Ms. Yang's evidence that her limitations with respect to the English language and lack of understanding of her potential entitlements under the Act significantly hindered her ability to identify and pursue claims for additional wages. I also accept Ms. Yang's suggestion that she believed the 160 hours represented in the wage statement only represented her regular hours. The wage statements do not indicate an hourly wage or provide a calculation with respect to her hours, which I find would limit her ability to discover discrepancies.

Ultimately, it was Moutai's responsibility as the employer to prepare accurate wage statements which it failed to do, to the detriment of Ms. Yang. Mr. Liu's testimony did not explain the wage statement errors and in fact lent additional support to Ms. Yang's contention that she had been significantly underpaid on a regular and ongoing basis. While Ms. Yang provided several witness statements pertaining to her hours of work, I have given little weight to these documents due to the fact that the witnesses identified did not attend the hearing and consequently, Moutai was unable to test the evidence of these individuals. I have however, determined that Ms. Yang's account as to the number of hours worked is more credible than

that provided by Moutai, and have preferred her evidence on this basis. Consequently, I find that she worked 10 hours per day, 6 days per week for a total of 60 hours per week.

16. The delegate next went on to determine Ms. Yang's rate of pay. He noted that Ms. Yang's testimony, ROE and wage statements confirm that she was paid on a monthly basis while section 17 of the *Act* requires that employees be paid at least semi-monthly within eight days after the end of the pay period. More particularly, the delegate noted that wages earned by Ms. Yang in the first half of October 2016 were due no later than October 23, 2016, but she was not paid until October 31, 2016. Accordingly, Moutai contravened section 17 on October 24, 2016, for which the delegate assessed a mandatory administrative penalty of \$500.00.

17. The delegate then noted that it was undisputed evidence that Ms. Yang was paid a monthly salary of \$2,400.00. He then converted this monthly wage rate into an hourly wage based on the lesser of Ms. Yang's normal or average hours of work. Based on the following calculations, the delegate determined that Ms. Yang's hourly wage \$9.23, which is below the minimum wage required to be paid under the *Act* to Ms. Yang:

$$\begin{aligned} \$2,400.00 \text{ (Monthly Salary)} \times 12 \text{ (months)} &= \$ 28,800.00 \text{ (annual salary)} \\ \$28,800.00 \text{ (annual salary)} / 52 \text{ (weeks)} &= \$ 553.85 \text{ (weekly salary)} \\ \$553.85 \text{ (weekly salary)} / 60 \text{ (weekly hours)} &= \$ 9.23 \text{ (hourly wage)} \end{aligned}$$

18. In levying an administrative penalty of \$500 against Moutai for contravening section 16 (minimum wage) of the *Act*, the delegate stated:

All employees in British Columbia are entitled to be paid minimum wage. The minimum wage for employees who do not serve liquor was \$10.45 per hour as of September 15, 2015, which was subsequently increased to \$10.85 per hour on September 15, 2016. Ms. Yang's unchallenged testimony was that she did not serve liquor to Moutai customers in her capacity as waitress. As Ms. Yang's hourly rate is less than the minimum wage required by the Act, will [sic] apply the appropriate minimum wage when calculating her entitlement.

19. The delegate then determined Ms. Yang's regular wage earnings noting that she worked 552 regular hours during the period commencing June 9, 2016, and ending September 14, 2016, at a rate of \$10.45 and an additional 234 regular hours during the period commencing September 15, 2016, and ending December 8, 2016, at a rate of \$10.85. The delegate calculated her total regular wage earnings during the recovery period to be \$8,307.30 and she received \$11,360.00 in wages at a regular wage rate during the same period based on her monthly income of \$2,400. That is, she was overpaid \$3,052.70 and therefore, the delegate found she was not owed any regular wages.

20. With respect to overtime wage rate earnings of Ms. Yang, the delegate found that Ms. Yang worked 278 overtime hours during the period commencing June 9, 2016, and ending September 14, 2016, when the minimum wage rate was \$10.45. She also worked an additional 118 overtime hours during the period commencing September 15, 2016, and ending December 8, 2016, when the minimum wage rate was \$10.85. He also found that all of the overtime hours claimed by Ms. Yang were for payment at time and a half and none at double time. He then calculated her total overtime wage earnings during the recovery period to be \$6,278.10 and subtracted the excess regular wages she was paid from this amount to determine that Ms. Yang is owed \$3,225.40 for overtime wages.

21. The delegate also levied an administrative penalty of \$500 against Moutai for contravention of section 40 of the *Act* for failing to pay overtime to Ms. Yang at the rate required under the *Act*.

22. With respect to the question of whether Ms. Yang was owed any statutory holiday pay, the delegate noted that Ms. Yang claimed that she had never been properly paid statutory holiday pay during her employment with Moutai. Mr. Liu, on behalf of Moutai, argued that Ms. Yang's salary included statutory holiday pay, and that she was not entitled to additional pay for unworked statutory holidays as they usually fell on Mondays which is her regularly scheduled day off. In preferring the evidence of Ms. Yang and finding in her favour on this question, the delegate stated:

I have already found that Ms. Yang worked on Canada day (a Friday), but that she did not work on any subsequent statutory holidays, which fell on Mondays.

The payroll records provided by Moutai did not show any itemized payment with respect to statutory holiday pay. Nor did they reveal any difference in her salary between those months which included a statutory holiday and those that did not.

As the parties agree that Ms. Yang regularly worked 6 days per week, I have determined that she is entitled to additional wages in the form of an average day's pay for the following statutory holidays. I have calculated her average day's pay to be \$83.60 for those holidays which occurred prior to the September 15, 2016 minimum wage increase, and \$86.80 for the one that occurred after.

Canada Day	\$83.60
BC Day	\$83.60
Labour Day	\$83.60
Thanksgiving Day	\$86.80

I have found that she worked Canada day, and find that she is entitled to be paid one and a half times her regular wage rate for the 10 hours that she worked.

Canada Day	\$156.75
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I find that Ms. Yang is owed \$494.35 for statutory holiday pay.

23. The delegate also issued an administrative penalty of \$500 against Moutai for contravening section 45 of the *Act* for failing to pay Ms. Yang statutory holiday pay.
24. With respect to the question of whether Ms. Yang was entitled to compensation for length of service, the delegate, having determined previously that Ms. Yang was terminated without notice by Moutai, concluded in the affirmative. As both parties agreed that Ms. Yang began working for Moutai on May 1, 2010, and the delegate determined that she was terminated on December 8, 2016, she therefore worked for Moutai for more than six years but less than seven. In the result, the delegate determined that Ms. Yang was entitled to six weeks' wages as compensation for length of service and awarded her compensation in the amount of \$2,577.60.
25. The delegate also levied \$500 in administrative penalty against Moutai for contravening section 63 in failing to pay Ms. Yang compensation for length of service.
26. Finally, on the question of whether Ms. Yang was owed annual vacation pay, the delegate noted that both parties agreed that Ms. Yang began her employment on May 1, 2010. However, there was no evidence to indicate that the parties agreed to a common anniversary date for the purpose of calculating vacation pay. As a result the delegate decided that Ms. Yang's anniversary date for calculating vacation pay was May 1, and that she had completed her fifth year of employment with Moutai on April 30, 2015. Therefore, she became entitled to 6% vacation on all wages earned in her fifth year of employment and beyond, pursuant to section 58 of the *Act*. The delegate then calculated the vacation pay owing to Ms. Yang as follows:

Ms. Yang was paid annual vacation pay on her salary of \$2,400.00 at a rate of 4% (or \$96.00) until June 1, 2016, when it was increased to 6% (\$144.00). I find that she received \$48.00 less than her full entitlement under the Act during the 13-month period commencing May 1, 2015, and ending May 31, 2016. As a result, I find that she is entitled to additional vacation pay in the amount of \$624.00.

I find that Ms. Yang is entitled to additional annual vacation pay in the amount of \$377.84 with respect to unpaid wages earned during the recovery period....

27. Having concluded that Moutai owed Ms. Yang vacation pay, the delegate also levied an administrative penalty of \$500 against Moutai for contravening section 58 of the *Act* for failing to pay Ms. Yang annual vacation pay at the rate required within 48 hours of the termination of her employment.
28. The delegate also ordered interest to be paid to Ms. Yang with respect to all outstanding wages pursuant to section 88 of the *Act*.

SUBMISSIONS OF MOUTAI

29. Accompanying the Appeal Form of Moutai is written submissions of Ms. Liu. The submissions are brief and contained in four paragraphs with three descriptive headings reiterating the position and evidence of Moutai advanced at the Hearing, which are largely also summarised in the Reasons by the delegate. The relevant parts of the submissions are set out verbatim below:
 1. Ms. Yang quit the position
Ms. Yang, who gave us oral notice 3 days before leaving for China on Oct. 26 2016 on a-more-than-30 days-leave without duly report [*sic*] in advance and insisted leaving the job no matter [*sic*] we would agree or not [*sic*]. She didn't tell us if she wanted to keep this job nor [*sic*] the return date. She knew very clearly at this moment we had no any [*sic*] substitute for her position but she never cared about the duty she should be responsible since she worked here for more than six years [*sic*]. It was very clear that her action was deemed quitting the job. At [*sic*] complaint hearing, she argued that her father was sick in China but we were not informed at that time nor [*sic*] she has never [*sic*] brought forth any evidence from either a doctor or hospital [*sic*].
 2. We did not owe overtime wages to Ms. Yang
Ms. Yang's working hours is [*sic*] supported by her wage statements which hasn't [*sic*] been adjusted for 6 years. She got off work 2 hours earlier 2 to 3 days per week in the evening, [*sic*] normally were Tuesday, Wednesday and Sunday night which are the least busiest nights during the week. If the working hours was [*sic*] not correct and she received less than what she earned, why [*sic*] she had never complained in the past 6 years [*sic*]. Further, if we treated her unfair, why she still wanted [*sic*] go back to work in [*sic*] our restaurant after coming back from China.
 3. We did not owe compensation for length of service to Ms. Yang
Ms. Yang left her position without duly report [*sic*] in advance and insisted leaving the job no matter we [*sic*] would agree or not. Obviously she quit the position.
 4. Before Ms. Yang left for China, we asked her if she needed ROE, she said no. After she was back from China and learned that we did have a position for her, she asked us to give her ROE to apply EL. We told her she was not qualified for EL, but she kept asking, so we issued ROE to her. The next day she phoned our manager Louis Huang that [*sic*] Service Canada told her she was not qualified for EL.

ANALYSIS

30. Section 112(1) of the *Act* states that a person served with a determination may appeal the determination on three grounds, including that “[t]he director of Employment Standards failed to observe the principles of natural justice in making the Determination”- the ground of appeal invoked by Moutai in this case.
31. It is important to note that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05)
32. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST #D050/96)
33. The onus is on Moutai, as the appellant, to demonstrate, on a balance of probabilities, a violation of its natural justice or procedural rights. Having reviewed the Record and the Reasons, it is clear to me that Moutai was afforded the procedural rights referred to within the above statement and that there are no different or additional natural justice concerns arising in this case.
34. I also note that the arguments of Moutai in its appeal submissions disputing the findings of fact made by the delegate do not amount to much more than re-argument of Moutai’s position at the Hearing of the Complaint. These arguments, too, do not identify any natural justice or fair hearing concerns in the process leading to and the adjudication of Ms. Yang’s Complaint by the Director.
35. I echo the following very instructive comments of the Tribunal in *099368 B.C. Ltd. carrying on business as Bear Mountain Liquor* (BC EST # D097/16):
- Natural justice does not require the Director to accept the evidence and assertions that each party advances in support of their position. Nor does it prohibit the Director from reaching a conclusion on all of the evidence that might be inconsistent with the position of one of the parties, so long as reasons are provided for that conclusion and it is based on relevant considerations....
36. In this case, the delegate of the Director preferred the evidence of Ms. Yang over Moutai’s where there was conflicting evidence and I find the conclusions of fact reached by the delegate on each of the questions he decided in the Determination well-reasoned and amply supported in the evidence presented.
37. In the result, I find that the natural justice ground of appeal advanced by Moutai is without any merit.
38. Pursuant to section 114(1)(f) of the *Act*, I dismiss Moutai’s appeal of the Determination as there is no reasonable prospect that the appeal will succeed.

ORDER

- ^{39.} Pursuant to section 115 of the *Act*, I confirm the Determination made on June 13, 2017, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal