

An appeal

- by -

Jason Wong
("Mr. Wong")

- 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: David B. Stevenson

FILE No.: 2012A/68

DATE OF DECISION: September 19, 2012

DECISION

SUBMISSIONS

Jason Wong	on his own behalf
Jaclyn Leong	counsel for Mrs. Convenience – Meat, Hot Pot BBQ & Specialty Store Ltd.
Greg Brown	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Jason Wong (“Mr. Wong”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 18, 2012.
2. The Determination found that Mr. Wong’s employer, Mrs. Convenience – Meat, Hot Pot. BBQ & Specialty Store Ltd. (“Mrs. Convenience”), had contravened Part 4, section 34, Part 7, section 58 and Part 8, section 63 of the *Act* by failing to pay Mr. Wong wages, annual vacation pay and length of service compensation and ordered Mrs. Convenience to pay Mr. Wong an amount of \$3,719.55, an amount which also included interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on Mrs. Convenience under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,000.00.
4. The total amount of the Determination is \$5,719.55.
5. Mr. Wong appeals the finding that he was entitled to wages calculated at minimum daily pay and minimum wage. He says the Director failed to observe principles of natural justice in making the Determination. He also says there is “new evidence” that was not available at the time the Determination was being made. The nature of this “new evidence” will be examined later in this decision.
6. Mr. Wong has not indicated on the appeal form what he seeks to have the Tribunal do with the Determination, but it is apparent from the nature of the appeal and the tenor of his submissions that he wishes the Tribunal to either refer the matter back to the Director to recalculate the wages he claims to be owed or have the Tribunal recalculate the wages owing.
7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

8. The issues in this appeal are whether the Director failed to observe principles of natural justice in making the Determination and whether there is new evidence that should be allowed to be entered into this appeal.

THE FACTS

9. The facts are well organized in the Determination and are generally not in dispute. I do not need to recite all of the facts in detail. By way of background, it suffices to say Mr. Wong filed a claim for wages against Mrs. Convenience, alleging he was owed a substantial amount of wages for work he performed in the six month statutory claim period prior to his termination.
10. Mrs. Convenience opposed the claim, arguing he was never an employee of the business and was not entitled to any wages under the *Act*.
11. The Director found Mr. Wong was an employee of Mrs. Convenience and entitled to wages under the *Act*. However, in the absence of a credible record of the hours worked by Mr. Wong and of any evidence of an agreed wage rate, Mr. Wong's wage entitlement under the *Act* was calculated on the minimum statutory entitlements found in the *Act* – minimum daily pay and minimum wage – for a 180 day period. His claim for length of service compensation was accepted and calculated on the same basis. His claims for overtime and statutory holiday pay were rejected by the Director for the reasons stated in the Determination. Neither of the claim for length of service compensation nor the claim for statutory holiday pay has specifically been raised in this appeal and will not be addressed in this decision, although the amount of length of service compensation to which he was found to be entitled might be varied if the appeal is successful.
12. The Director found Mrs. Convenience did not keep a record of the hours worked by Mr. Wong and Mr. Wong kept no contemporaneous record of the hours claimed to have worked. The Director found the claim by Mr. Wong that he had worked “12 hours a day, seven days a week over a period of 21 months without taking any time off” and without being paid any wages was “patently unreasonable” and was not believed or accepted.
13. On the other hand, Ms. Ida Woo, a director and majority owner of Mrs. Convenience, acknowledged during the complaint investigation that Mr. Wong, with whom she was in a personal relationship at the time, had accompanied her to the workplace “almost every day” and did not deny that he performed some tasks daily with her, such as opening the store. She also said Mr. Wong's contribution to the work required to be done in the business was almost non-existent, but it is apparent her assertion on this was not accepted by the Director.

ARGUMENT

14. Mr. Wong argues the Director failed to observe the principles of natural justice in finding he worked only two hours a day. He says, and to some extent I am summarizing his position, the reality of the business, aspects of which are described in his submission, that involved only he and Ms. Woo working each day should have caused the Director to find he worked more than just two hours a day. He says there is evidence which has become available that would support his claim of hours worked. While this evidence is not particularly well organized in the appeal submission, it appears to include the following items:
 - Four pages of notes made by Ms. Woo recording salary payments allegedly made to Mr. Wong and Peter Yang, who was, according to the Determination, initially a partner

with Ms. Woo in Mrs. Convenience who had ceased to have any involvement in the business.

- A list of 27 customers of Mrs. Convenience.
- A hand written page of notes with reference to Mr. Wong providing the telephone number for Mr. Yang.
- Canada Revenue Agency documents containing information concerning the business.
- Two pages that are headed “Quotation for Refrigeration”.
- A notice allegedly posted on the main gate of the business on, or about, July 1, 2010.

15. The Director and Mrs. Convenience have both responded to the appeal.
16. The Director submits Mr. Wong is only attempting to re-argue his case, adding additional information concerning the work he performed. The Director says the reasons for the wage calculation are found in the Determination and has nothing to add to those reasons.
17. The Director says Mr. Wong did not provide contact information for Mr. Yang or any of the 27 customers and did not tell the Director that Mr. Yang should be contacted in respect of his complaint.
18. In respect of the additional, or “new”, evidence provided with the appeal, the Director says none of the additional information appears to be “new”; that it was all available and could have been provided during the complaint investigation.
19. The Director says the appeal challenges findings of fact and, as such, is not a proper appeal.
20. The response made on behalf of Mrs. Convenience is similar to that of the Director. Counsel for Mrs. Convenience responds first to the factual allegations made by Mr. Wong in his appeal, saying those allegations either are not established or are not relevant to the appeal. Counsel also submits the “new” evidence provided by Mr. Wong does not satisfy the conditions imposed by the Tribunal for allowing such material as evidence in an appeal.
21. In his final reply, Mr. Wong expresses some surprise that the Director would say that Mr. Yang’s phone number was not received. He says he recalls providing that number in the first interview with the Director concerning his complaint. Otherwise, the reply reiterates his position that he worked more hours at the business than the two hours a day found by the Director and provides more detail on the work he performed.

ANALYSIS

22. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*

(c) *evidence has become available that was not available at the time the determination was made.*

23. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.
24. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
25. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
26. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
27. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made: *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
28. I shall first address whether the additional material Mr. Wong has submitted should be allowed and considered in this appeal.
29. It is apparent the material sought to be submitted by Mr. Wong with the appeal was reasonably available at the time the Determination was being made and, in my view, could have been provided to the Director during the complaint process. Mr. Wong has not provided anything in the appeal that would lead me to take

a different view. On that basis alone it will not be accepted or considered. As well, I am not satisfied the material is sufficiently credible or probative to be accepted and considered.

30. As such, the appeal will be decided on the facts and material that was before the Director at the time the Determination was made.

31. Notwithstanding the appeal being grounded in an alleged breach of natural justice, the true substance of the appeal is Mr. Wong's assertion that the Director erred in finding he was only entitled to minimum daily pay at minimum wage. That finding was predominantly one of fact, based on the evidence, or more appropriately the lack of evidence, that was before the Director when the Determination was made and which led the Director to say:

“I cannot determine or even estimate with any mathematical certainty the hours allegedly worked by Mr. Wong in order to support his claim for unpaid regular wages in the amount of \$12,000.00 which would represent 1500 hours of work based on an hourly wage of \$8.00.”

32. Similarly, the Director found it appropriate to use the minimum wage rate in the *Act* in the absence of evidence of any agreement between the parties on a wage rate. The finding on the wage rate was also predominantly one of fact.

33. As indicated above, the Tribunal's authority to consider an appeal based on alleged errors of fact is limited to circumstances where the error of fact is shown to give rise to an error of law.

34. In this appeal, Mr. Wong's burden in raising the challenged findings of fact to an error of law is to show the alleged error on the facts has occurred because the Director acted without any evidence justifying the finding made or on a view of the facts which could not be reasonably entertained, which effectively means making findings that are “inconsistent with and contradictory to the evidence or are without any rational foundation”. In assessing the position taken by Mr. Wong, I must respect the caution expressed by the Tribunal in *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, at paras. 40-43, that to engage in a reassessment of findings of fact made by the Director in the context of an alleged error of law would be inconsistent with direction of the legislature in limiting the grounds of appeal to those set out in section 112 of the *Act*.

35. I find that no error of law has been shown in the Director's findings of fact. The findings made by the Director on the hours worked and the wage rate were entirely justified on the evidence made available during the complaint process. It was also a correct response to those findings to rely on the minimum requirements of the *Act* to determine the statutory entitlements for Mr. Wong.

36. In respect of the chosen ground of appeal, the natural justice concerns which arise are those summarized by the Tribunal in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

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 *BWT Business World Incorporated*, BC EST #D050/96.

37. I can see nothing in the appeal that raises any concern that the Director failed to accord the parties the required procedural rights. No natural justice issues are apparent in either the process adopted by the Director or in the Determination. Mr. Wong has alleged he provided the phone number of Mr. Yang and the list of names and numbers of 27 people to the Director as people who would verify his claim of hours worked. The Director says no such information was received. There is no reference to such information in the section 112(5) “record”. I would add that if there were any validity to this allegation, that would raise a serious concern and most certainly justify intervention by the Tribunal. The burden, however, to establish this allegation is on Mr. Wong and he has failed to meet this burden.
38. For the above reasons, this ground of appeal is rejected and, in sum, the appeal is dismissed.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination dated May 18, 2012, be confirmed in the amount of \$5,719.55, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal