

An appeal

- by -

Maggie K. W. Chiu

- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2002/600

DATE OF DECISION: March 25, 2003

DECISION

OVERVIEW

Maggie K. W. Chiu (“the Appellant”), pursuant to section 112 of the *Employment Standards Act* (“the Act”), appeals a November 13, 2002 Determination by a delegate of the Director of Employment Standards (“the Director”). The Determination is that Dr. James K. K. Lee Inc. (“the employer”) must pay Ms. Chiu \$212.63, interest included.

Ms. Chiu, on appeal, suggests that the Determination may be in error. She asks that the Tribunal verify the delegate’s calculations. In doing so, she draws attention to the fact that, in the case of some pay periods, she is paid less than the amount to which she is entitled.

I have decided that the Determination should be confirmed. The onus for showing that a Determination is wrong and in need of change is on the Appellant. The Appellant has in this case failed to show me that the Determination is in error. The Director, on the other hand, explains that the Appellant was paid less than the required amount in some pay periods and overpaid in other pay periods. The Director goes on to point out that the Determination is for a two year period and that, unlike the Appellant, it takes into account all of what was paid in that two year period, overpayments as well as underpayments.

This case has been decided on the basis of written submissions.

ISSUES TO BE DECIDED

The issue is whether there is or is not reason to vary or cancel the Determination, or send a matter or matters back to the Director.

FACTS

Ms. Chiu worked for the employer, Dr. James K. K. Lee Inc. from May 29, 1998 to October 28, 2001.

In filing her complaint, the employee claimed minimum daily pay, overtime pay and other wages. I am shown that the employer, when notified of the complaint, undertook recalculation the employee’s wages for the entire length of her employment and that he, in July of 2002, offered to pay the employee \$1,226.10 plus deductions (income tax and other deductions required by the Receiver General of Canada) if that would settle matters. The employee did not accept the employer’s offer and the offer was withdrawn when the employer realized that the Director is only concerned with the amount of wages which are due for work in the last two years of the employment.

There was a second offer to settle in October of 2002. The employer undertook calculation of the amount that is due for reason of work in just the last two years of the employment and offered to settle for \$964.57 plus deductions. I am shown that the offer was put to the employee and that she was asked to decide whether she did or did not want to accept the employer’s offer. In an email dated October 10, 2002, Chiu, in Hong Kong at the time, is asked to choose between the offer to settle (the employer’s second offer) and a determination by the delegate. She was given until October 24, 2002 in which to respond. She was also told that, should she not want to settle, “This is your opportunity to provide me

with any other information that you feel would support your position that Dr. Lee owes you additional outstanding wages beyond the amount he has already paid into the Employment Standards Branch on your behalf.”

Subsequent emails from Chiu make it clear that she was suspicious of the offer to settle and that she chose not to accept the employer’s offer.

The Determination was issued. As is commonly the case, the Determination includes a set of detailed calculations which take into account the amount of wages which is due for reason of work in the last two years. That includes any overtime wages that are due and daily minimum pay, statutory holiday pay and vacation pay. According to the Determination, it is based on the employer’s record of work. The delegate explains that the employer’s records were found to be credible, the employee producing nothing to the contrary.

The delegate has calculated that the employee should have been paid \$20,403.69 for work in the last two years of the employment and that the employee was paid \$20,200.11.

The Appellant, on appeal, notes that, in the case of some pay periods, she has been paid less than the amount to which she is entitled to under the *Act*. The Director has pointed out that the employee, in doing so, ignores pay periods in which she was overpaid by her employer.

I have reviewed the employee’s appeal submission and find that she is comparing apples with oranges. The employee singles out certain pay periods and notes that she was paid \$15,494.88 for work in those pay periods and that she should have been paid quite a bit more than that. I find that she ignores what is important, namely, the need to consider all of what was paid for work in the last two years of her employment and the entire amount that she is entitled to receive for the work.

ANALYSIS

Ms. Chiu is unhappy with the Determination because it awards less than the amount of the employer’s second settlement offer. She asks that the Tribunal verify the delegate’s calculations in the hope of obtaining a more favourable decision.

The onus for showing that a Determination is in wrong and in need of change is, however, on the Appellant. It is for the Appellant to find, and draw attention to, errors, should there be any. In this case the Appellant fails to do that.

The Determination covers the last two years of her employment as it should. The delegate has calculated the total amount that the employer should have paid and subtracted the total amount that she was paid. He has found that the difference is \$203.58. As matters have been presented to me, there is in fact no evidence that the calculations are in error.

The Determination is confirmed. The onus is on the Appellant to show that a Determination is wrong. The Appellant has not met that onus in this case.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 13, 2002 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal