

An appeal

- by -

Asia - North America International Trading Ltd.  
operating as Gourmet House Restaurant  
(the "Employer")

- 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:** Irene G. Peters

**FILE No.:** 2002/405

**DATE OF HEARING:** November 14, 2002

**DATE OF DECISION:** April 1, 2003

## DECISION

### APPEARANCES:

Din-Yi Coosemans, on behalf of Asia – North America International Trading Ltd., operating as Gourmet House Restaurant

David Dunster, on behalf of Mary Elizabeth McCallum

John Dafoe, on behalf of the Director of Employment Standards

### OVERVIEW

This is an appeal by the Asia – North America International Trading Ltd., operating as Gourmet House Restaurant (the "Employer") under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination, which was issued on July 5, 2002 by a delegate of the Director of Employment Standards (the "Director") under File No.ER104-620 (the "Determination"). The Director's delegate determined the following:

- (a) Mary Elizabeth McCallum ("McCallum") was owed wages for regular and overtime hours worked in the amount of \$1,438.83;
- (b) further annual vacation pay in the amount of \$572.94 was owed to McCallum as well as compensation for length of service for two weeks wages based on the average of her last eight week earning, in the amount of \$737.05, with interest added, for a total of \$2,825.52.

Employer's appeal is based on three grounds:

- (a) The Director's delegate did not investigate or interview the individuals requested by the Employer and as such only received part of the story.
- (b) There was a language barrier for many of the people that the Delegate interviewed and he misunderstood the facts.
- (c) The Director's Delegate only received partial information from the Employer's accounting office, and for all of the above reasons, there was an incomplete investigation, which failed to consider certain relevant facts in making the Determination.

The Hearing was held at the Tribunal's offices, over a very long day, which extended from 9:30 a.m., until approximately 8:30 p.m.

The Respondent, Mary Elizabeth McCallum, appeared from a Tribunal office in Vancouver, B.C. by telephone, as did one of the witnesses for the Appellant, Benny Wai Liu ("Liu").

After speaking to a number of the potential witnesses and David Yu, owner of the Gourmet House, and in view of the fact that one of the grounds of appeal was the fact that it was alleged that there was a language barrier when the Director's delegate did the investigation, it was determined that the Tribunal offices

would make available a translator. A translator was provided who was competent in Mandarin, as it was determined that Mandarin was the language common to all the witnesses who had English as a second language.

The Appellant called the following witnesses:

- (a) Liu, the manager at the time of McCallum's dismissal and the following witnesses;
  - (i) David Yu, owner of Gourmet House ("Yu"),
  - (ii) Buu Du ("Du"),
  - (iii) Won Sek Leung ("Leung"),
  - (iv) Kristen Leigh Baker ("Baker"),
  - (v) Jacqueline Dale Nicole Solomon ("Solomon"),
  - (vi) Megan Emily Phillips ("Phillips"),
  - (vii) Megan Lee McCalpine ("McCalpine")

The Respondent, McCallum, gave evidence on her own behalf.

### **ISSUE(S) TO BE DECIDED**

1. Did the Director's delegate err in determining that the Employer contravened Section 18(1), 34(2), 40(1), and 40(2) of the Act in failing to pay overtime and regular wages as required, in the amount of \$1,438.83, from the period of June 1, 2001 through November 3, 2001?
2. Did the Director's delegate fail to conduct a proper investigation by not interviewing individuals suggested by the Employer and because there was a language barrier, did the Director's delegate therefore fail to both investigate and examine relevant facts in rendering the determination?
3. Did the Director's delegate, as a result of the failure outlined in number 2 herein err in finding that the Employer contravened Section 58(3) of the Act in failing to pay annual vacation pay?
4. Did the Director's delegate err in finding the Employer contravened Section 63(2) of the Act in failing to pay McCallum compensation for length of service?

### **FACTS:**

The Determination sets out the following findings:

#### Facts not in Dispute

McCallum was employed at the Gourmet House, operated by the Employer from on or about 1 October 2000 through 3 November 2001 inclusive. For the periods in questions, 1 June 2001 to 3 November 2001, McCallum was paid on a monthly salary. The salary was \$1,600.00 per month from June through to September and \$1,800.00 from October to November.

## ANALYSIS

### Hours of Work

McCallum submitted for the Determination, a calendar on which she indicated she kept her hours of work (see A11 to A16 of the Delegate's submissions). The Employer provided a spreadsheet prepared by Liu, which was based on a schedule supplied by the Employer and appended as E4 to E30 of the Delegate's submissions. Further, there was a time sheet for Betty Herman ("Herman") for August and September 2001, which was provided by the Employer and testimony of witnesses Yu, Baker, McCalpine, Solomon, and Phillips.

The Tribunal has taken the position that when faced with the absence of accurate records by the Employer, they will favour the evidence of the employee, even when the evidence is flawed. See *Hi-Rise Salvage Ltd. B.C. EST#D293/97* ("Hi-Rise Salvage Ltd.") which states:

"In several previous decisions, this Tribunal has found that where the Employer has not kept accurate records of the hours worked, the evidence of the employee should be preferred and that any partial records should be accepted, unless there is substantial credible evidence to establish the facts alleged by the Employer"

I find that the Director's delegate did not have available the significant *viva voce* evidence heard at the hearing of this matter. That is, the witnesses, who stated that all of the employees were advised they had to have overtime approved, and none of them, in essence, had worked overtime. Indeed, witness Baker was quite clear that all employees knew that overtime had to be authorized, and they would consider it "time theft" to claim for hours not worked. I find the witnesses I have noted to be credible, and I do accept their evidence, that there was little or no authorized overtime, and it was a rare occasion for any employee to work overtime. I find despite the deficits in both parties' records, that the Employer has overcome the burden of providing the "substantial, credible evidence" required by *Hi-Rise Salvage Ltd.* As such, the Employer is not obliged to pay overtime hours, between June 1, 2001 and November 3, 2001.

### Regular Time

I find based on the evidence from McCallum that she did work regular time as recorded and, as such, should be paid for that regular time. I dismiss the Employer's appeal with respect to regular time worked.

### Annual Vacation Pay:

There could well have been a misunderstanding with respect to this issue, in view of the fact that McCallum indicates in July 2001 several days were taken for sick leave for which she submitted a doctor's note to the Employer. However, I accept that the Record of Employment ("ROE") attached as C1 of the Delegate's submissions, where it is stated in box 18 that "salary hours calculated at min. wage. Holiday pay is unpaid at time ROE issued" as correct. I did not hear any convincing evidence that would lead me to overturn the decision of the Director's delegate and I do accept the Director's delegate's evidence that there was a conversation with the Employer's accountant to ensure that the ROE had been correctly interpreted. I do, however, ascribe this to a misunderstanding and perhaps an attempt to make sense retroactively of a state of affairs that the Employer believed was factual. I dismiss this aspect of the Employer's appeal and find that the amount of \$572.94 is owing to McCallum for vacation pay.

Compensation for Length of Service:

This was a confusing issue. After listening to the evidence of McCallum, and listening to Liu, and the various accounts given by the people present, it was clear that there might well have been a misunderstanding on the part of the Employer about McCallum's status after leaving the Gourmet House on November 3, 2001. McCallum admitted that she did submit a letter of resignation, however, McCallum testified that she had been asked to withdraw that letter and reconsider and that she in fact did so. What the parties do agree upon is that the resignation letter was handed in on October 15, 2001. It was also clear that if it was a two-week notice provision, the parties acted as though the letter had been withdrawn, in that McCallum was at work on November 1, 2, and 3, 2001. The Employer argued that there was a breach of company rules and of McCallum's duty as a cashier, in that she had not paid for food ordered. McCallum argues that the food was to be paid for later. The Employer claims that this was dishonesty and enough to constitute just cause for dismissal.

It is my finding that there was most likely a misunderstanding between Liu and McCallum. Clearly tempers flared, words were exchanged (heard by none of the witnesses) and McCallum left the Gourmet House, taking her younger sister with her. The younger sister was also employed at the Gourmet House. It was McCallum's evidence, that since this was her sister's first job, she did not want her to be in that kind of atmosphere. It was the evidence of McCallum that Liu had not fired McCallum but that Liu sent her home "for the rest of the day". It seems quite strange to me that, if in her mind, McCallum was only going home for the day, she would take her sister with her. This action is far more consistent with somebody leaving their employment because they had either quit or believed themselves to be fired. However, I do not accept that there was just cause for dismissal, or a resignation, as is claimed by the Employer. I do believe that the Employer was not clear about the status of McCallum and as such put the Code "A" on McCallum's ROE. Despite the somewhat contrary evidence, I find there was ambiguity around McCallum's leaving, and that that ambiguity should be resolved in favour of McCallum. As such, I dismiss the Employer's appeal on this issue.

In Summary, I find there are no overtime wages due and owing and a recalculation should be made with respect to wages owed to McCallum. I dismiss all other aspects of the Employer's appeal.

**ORDER**

Pursuant to Section 115 of the Act, I cancel the Determination of the Director dated July 5, 2001 with respect to the finding that overtime wages are due and owing to McCallum, and I confirm all other issues of the Determination of July 5, 2001.

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**Irene G. Peters**  
**Adjudicator**  
**Employment Standards Tribunal**