



An appeal

- by -

0896022 B.C. Ltd. carrying on business as Fuji Japan
("Fuji Japan")

- 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: Carol L. Roberts

FILE No.: 2016A/90

DATE OF DECISION: September 14, 2016

DECISION

SUBMISSIONS

Li Yi on behalf of 0896022 B.C. Ltd. carrying on business as Fuji Japan

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 0896022 B.C. Ltd. carrying on business as Fuji Japan (“Fuji Japan”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on June 7, 2016. In that Determination, the Director found that Fuji Japan had contravened sections 18, 40 and 58 of the *Act* in failing to pay Holland Gauthier \$1,642.98, representing regular and overtime wages, annual vacation pay and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for the contraventions, for a total amount owing of \$2,642.98.
2. Fuji Japan appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination.
3. This decision is based on Fuji Japan’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Mr. Gauthier was employed as a prep cook for a restaurant operated by Fuji Japan, from April to August 2015. On August 21, 2015, Mr. Gauthier filed a complaint alleging that Fuji Japan had failed to pay him wages.
5. Mr. Gauthier, a high school student, was hired by Mr. Li, the sole director of Fuji Japan, on April 13, 2015.
6. Fuji Japan did not maintain a record of Mr. Gauthier’s hours of work as required by the *Act*. Mr. Gauthier recorded his hours of work in his calendar. If he did not end up working the hours he was scheduled for, Mr. Gauthier amended the hours recorded in that calendar, which was provided to the delegate in support of his complaint. That calendar indicated that Mr. Gauthier worked a total of 219 hours over the course of his employment, primarily on the weekends.
7. During his employment, Mr. Gauthier received two cheques in the total amount of \$409.80 and two cash payments in the total amount of \$120. Fuji Japan did not provide him with any wage statements so he was not aware whether deductions were made from his wages. On August 21, 2015, Mr. Gauthier informed Mr. Li that he would be filing a complaint with the Employment Standards Branch and that he would no longer work for Fuji Japan.
8. Mr. Li informed the delegate that although he did not maintain a record of Mr. Gauthier’s hours of work, he would prepare an accounting of those hours and the wages paid based on the schedules he had available to him. Ultimately, Mr. Li provided the delegate with a record indicating that Mr. Gauthier worked a total of 149.5 hours between May 2 and August 21, 2015. He stated that Mr. Gauthier had been paid \$120 cash and produced two wage statements dated August 5 and September 4, 2015, indicating gross wages payable were \$1,135. Mr. Li also produced copies of cashed cheques indicating payments of \$150 in June, \$200 in July and \$89.80 in August.

9. Mr. Li disputed the accuracy of Mr. Gauthier's calendar, noting several entries that he believed were in error. Mr. Li also contended that Mr. Gauthier recorded his shifts ending at 8:00 p.m. although the restaurant closed at 7:30, and also contended that Mr. Gauthier took long meal breaks.
10. At Mr. Li's request, the delegate also spoke with two restaurant employees. The first of those employees worked exclusively on weekdays. Because Mr. Gauthier worked largely on the weekends the first employee could not recall Mr. Gauthier's precise schedule. The second employee was also unable to recall Mr. Gauthier's schedule.
11. The delegate found Mr. Gauthier's calendar to be the most reliable record of his hours of work. The delegate was satisfied that Mr. Gauthier maintained the record on a contemporaneous basis unlike Mr. Li, who re-created Mr. Gauthier's hours based on a schedule that was not produced for the delegate. The delegate noted that Mr. Gauthier's hours were mainly on the weekend, which was consistent with the fact that he was a student, and that his hours of work for June were crossed out, consistent with Mr. Li's assertion that the restaurant was essentially closed that month.
12. The delegate further noted that neither of the other employees was able to corroborate Mr. Li's evidence as to Mr. Gauthier's hours of work. Finding that Mr. Gauthier took one half hour meal breaks, the delegate calculated Mr. Gauthier's hours of work to total 203.5 hours. In the absence of any agreement as to Mr. Gauthier's hourly rate of pay, the delegate determined that to be the minimum wage of \$10.25.
13. The delegate determined that Mr. Gauthier was entitled to outstanding wages in the total amount of \$1,608.84 after calculating his wages owing less the amounts paid.

Argument

14. Fuji Japan says that it would "like to make a fair resolution" with Mr. Gauthier and submitted "updated files" requested by the delegate.
15. Fuji Japan also contended that it was under the understanding that the matter was still under consideration, and asks that the matter be referred back to the delegate for a "fair resolution." Based on Fuji Japan's calculations, the amount owed to Mr. Gauthier is \$900.
16. Fuji Japan says that it provided the delegate with detailed records of Mr. Gauthier's hours of work along with the evidence of two witnesses and contends that Mr. Gauthier's record was inaccurate and therefore unacceptable.

ANALYSIS

17. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
18. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Fuji Japan has not met that burden.

Failure to observe the principles of natural justice

19. Natural justice does not equate with what one party feels is a “fair resolution” to the complaint. Rather, it is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.
20. There is nothing in the appeal submission or the record that persuades me that Fuji Japan was denied natural justice.
21. The delegate considered Fuji Japan’s documents and its record of Mr. Gauthier’s hours. He also spoke with two witnesses at Mr. Li’s request. He considered evidence submitted over a period of time by Fuji Japan along with the evidence of Mr. Gauthier. I am not persuaded that Fuji Japan was not afforded the right to be heard.
22. Fuji Japan’s appeal consists almost entirely of a re-argument of the case it made before the delegate. Indeed, one of the documents submitted on appeal, which essentially contends that Mr. Gauthier’s record of hours of work was inaccurate, was identical to the document submitted to the delegate when he was conducting his investigation of the complaint.
23. I find no basis for this ground of appeal.
24. In the absence of employer records, the delegate must make a determination based on the best evidence available. Having reviewed all of the evidence, I am not persuaded he erred in arriving at the conclusions he did.
25. The appeal is dismissed.

ORDER

26. Pursuant to section 115 of the *Act*, I order that the Determination, dated June 7, 2016, be confirmed in the amount of \$2,642.98 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal