



An appeal

- by -

Lei Wang  
("Wang")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2017A/110

**DATE OF DECISION:** December 6, 2017

## DECISION

### SUBMISSIONS

Lei Wang

on her own behalf

### OVERVIEW

1. This is an appeal filed by Lei Wang (“Wang”) pursuant to subsection 112(1) of the *Employment Standards Act* (the “ESA”). Ms. Wang appeals a Determination issued by Dan Armstrong, a delegate of the Director of Employment Standards, on July 26, 2017, pursuant to which her unpaid wage complaint, filed against Huamei Holdings Ltd. (“HHL” or the “employer”), was dismissed.
2. In my view, this appeal has no reasonable prospect of succeeding and, accordingly, I am dismissing the appeal pursuant to subsection 114(1)(f) of the *ESA*. My reasons for that conclusion now follow.

### THE DETERMINATION

3. The Determination was issued following a complaint hearing held on June 26, 2017. Ms. Wang claimed she had been employed by HHL under two separate employment agreements. The first, pursuant to which she received a \$5,000 monthly salary, was in relation to certain administrative and other clerical duties and, at the complaint hearing, she indicated that she had been paid in full in relation to her work under this agreement.
4. Ms. Wang claimed she was separately employed under a second agreement as “assistant” to HHL’s vice-president at an additional monthly salary of \$3,500. As noted by the delegate in his “Reasons for the Determination” (the “delegate’s reasons”) issued concurrently with the Determination, “[Ms. Wang] was expected to work five hours per day on average, five days per week” and that “these hours were in addition to the eight hours per day which she would have already worked under the terms of the first agreement”. Ms. Wang claimed she worked “after dinner, usually between 6pm and 11pm” (delegate’s reasons, page R3).
5. Ms. Wang did not have a copy of this alleged second agreement to produce at the hearing – she claimed someone had “stolen” it from her, but she did provide a record of the hours she allegedly worked under this agreement although it was an *ex post facto* record. “Ms. Wang was unable to produce her contemporaneous record of hours because it was on her personal computer which she said had been destroyed” (but at a later point in her testimony in response to the delegate’s questions, “she clarified it was not destroyed per se, but was not working”; see delegate’s reasons, page R4).
6. Ms. Wang also presented a number of text messages and other documents, but none was in English and she did not provide a certified translation.
7. The delegate ultimately determined that there never was any such alleged “second agreement”, and that her evidence in this regard was a “fabrication”; the delegate also stated that he had “serious concerns about her credibility as a witness” (page R7) and that a least one key document that she relied on – allegedly a listing of

the monies HHL agreed were owed to he – was “created after Ms. Wang resigned from her position with [HHL]”.

## REASONS FOR APPEAL: FINDINGS AND ANALYSIS

8. Ms. Wang appeals the Determination alleging all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice and that she now has “new” and relevant evidence (see subsections 112(1)(a), (b) and (c) of the *ESA*).

### *Errors of Law*

9. The alleged “errors of law”, although set out in somewhat different form, may be summarized as follows:
- the delegate erred in finding that her evidence, overall, lacked credibility and that there was no alleged second agreement;
  - the delegate erred in rejecting her “hours of work” record;
  - the delegate erred in refusing to give certain documents, not written in English and not accompanied by a certified translation, any probative value; and
  - the delegate did not address her claim for “wrongful dismissal”.
10. For the most part, Ms. Wang’s challenge to the Determination flows from her disagreement with the delegate’s findings of fact. A particular finding of fact may constitute an error of law, but only if there is no proper evidentiary foundation for it. “The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a ‘palpable and overriding error’ (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 10).
11. In the instant case, the delegate was faced with clearly conflicting versions of the relevant facts and, in making his factual findings, he had to assess the relative credibility of the parties bearing in mind that the burden of proving an entitlement to unpaid wages rested with Ms. Wang. As noted by our Court of Appeal in *Faryna v. Chorny*, 1951 CanLII 252:
- The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.
12. In my view, the delegate adequately explained why he considered Ms. Wang’s testimony to be unreliable and why her documents were not sufficiently probative (see delegate’s reasons at pages R7 – R8).
13. Although Ms. Wang is quite right in saying that documents must not be rejected merely because they were not prepared contemporaneously with the events being recorded, the lack of contemporaneity is certainly a factor that may be properly taken into account when assessing the reliability of the document. Thus, I am unable to conclude that the delegate erred in law in rejecting Ms. Wang’s “hours of work” record.

14. As for Ms. Wang's documents that were not written in English, and for which there was no proper translation (Ms. Wang purported to offer her own translation but her version was hotly disputed by the employer's witness who was fluent in the same language), the delegate, in my view, was absolutely correct in not relying on this evidence. In a complaint hearing, the parties are expected to each provide their own evidence and the delegate presiding at the hearing is not tasked to be an independent investigator. The parties are also advised, by way of a notice contained in the "Complaint Hearing" factsheet readily accessible (including Mandarin and Cantonese versions) on the Employment Standards Branch's website, as follows:

**Translation assistance:** If a party requires translation assistance, they must bring their own translator, as the Branch does not provide this service. The translator must be someone who is not involved in the complaint as a witness.

15. Finally, and with respect to the alleged claim for section 63 compensation, the simple answer to this assertion is that Ms. Wang never advanced such a claim in her complaint – the complaint listed only claims for regular wages, overtime pay, vacation pay and a claim for reimbursement for certain expenses. The section of the complaint form dealing with "compensation for length of service (sometimes called Termination Pay)" was left blank. Ms. Wang, in a memorandum appended to her complaint, stated the following: "My position...was terminated by my employer on March 15, 2017. My first day of work was January 3, 2017. I understand that I am not eligible for termination notice or termination compensation because I worked less than 3 months." Ms. Wang was correct in her understanding – section 63 compensation is not payable unless and until the employee has completed "3 consecutive months of employment".

### *Natural Justice*

16. As for her "natural justice" ground of appeal, Ms. Wang says that one of the employer's representatives "disappeared for a very long time during the hearing" and "we lost lots of time because of her". Ms. Wang says the employer's witness "asked lots of questions about the organizations that helped me" and that the hearing ended without Ms. Wang being given "the chance for me to refute her".
17. Ms. Wang also says that "all of the co workers who were my witness were fired after few days' work" and "they went back to China" [*sic*].
18. Ms. Wang appeared at the hearing with no other witnesses – there is nothing in the record to indicate that she made any effort to have other witnesses appear at the hearing by teleconference; she did not submit any written statements from these alleged witnesses, either before or after the hearing. I am unable to conclude, based on the record before me, that Ms. Wang was denied an opportunity to make a full and complete presentation to the delegate. Ms. Wang's complaint about the hearing process appears to have been raised, for the very first time, only after the delegate issued a decision adverse to her position.

### *New Evidence*

19. Ms. Wang checked off the "new evidence" box on her appeal form and in addition to appending several documents to her form that were before the delegate, she also submitted some documents that do not appear in the section 112(5) record. However, and with respect to this latter class of documents, none is new in the sense that it only came into existence (or into Ms. Wang's possession) after the Determination was issued.

Ms. Wang does not explain why these documents could not have been provided to the delegate, either at the complaint hearing, or prior to his issuing the Determination. As such, these documents are not admissible in accordance with the Tribunal's decision in *Davies et al.*, BC EST # D171/03.

### ***Summary***

20. Ms. Wang's appeal is predicated on all three statutory grounds but, after having considered each in turn, I am unable to conclude that any of her stated grounds of appeal has any presumptive merit. In my view, this appeal cannot succeed and thus must be dismissed as having no reasonable prospect of succeeding.

### **ORDER**

21. Pursuant to subsections 114(1)(f) and 115(1)(a) of the *ESA*, this appeal is dismissed and the Determination is confirmed as issued.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**