

An appeal

- by -

Ningfei Zhang
("Zhang")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2000/857

DATE OF DECISION: March 15, 2001

DECISION

OVERVIEW

This matter originally came before the Tribunal as an appeal brought by Ningfei Zhang (“Zhang”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Zhang appealed a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 8th, 2000 under file number ER 052159 (the “Determination”).

By way of the Determination, a Director’s delegate held that Zhang was an employee of Aurora Instruments Ltd. (“Aurora”) and not merely an independent contractor. The delegate further determined that Zhang’s wage rate was not, as had been asserted by Zhang, \$10 per hour; accordingly, the delegate calculated Zhang’s unpaid wage entitlement based on the minimum wage of \$7.15 per hour. In the absence of any employer records showing Zhang’s actual working hours, the delegate relied on certain records, submitted by Zhang, in the form of notations on a monthly calendar. In the end result, the delegate concluded that Aurora did not owe Zhang any monies on account of unpaid wages.

Zhang’s appeal was heard at the Tribunal’s offices in Vancouver on May 23rd, 2000. Zhang testified (through a mandarin interpreter) on his own behalf and, in addition, called two other witnesses, namely, Jinfu Yang and Steven Yan. The respondent employer did not call any *viva voce* evidence. The Director did not appear at the appeal hearing.

THE ORIGINAL TRIBUNAL DECISION

Following the hearing of Zhang’s appeal, I delivered written reasons for decision (B.C.E.S.T. Decision No. D219/00, issued on June 9th, 2000). My principal findings (found at pp. 4-5 of my June 9th decision) are reproduced below:

...Aurora did not maintain a record of Zhang’s working hours but nonetheless took the position before the delegate that Zhang worked no more than 100 hours. Zhang, for his part, maintained that he worked some 324 hours during the 1 1/2 months that he was employed by Aurora. The delegate held that Zhang worked 72 hours but in so doing, by necessary implication, rejected his oral evidence as to his hours worked...

I am of the view that the Determination cannot stand as issued. The delegate had before her a situation in which the employer had not maintained *any* proper payroll records relating to Zhang despite its legal obligation in that regard. Obviously, both Zhang and Aurora had markedly divergent views regarding the number of hours Zhang worked during the period in question (July 16th to September 1st, 1998). The delegate appears to have resolved the matter by simply stating that Zhang’s records only recorded 72 working hours but this

finding ignores Zhang's apparent position that he recorded *only* weekend and holiday hours on his calendar. Zhang says that he told the delegate that he only recorded his weekend and holiday hours and that evidence stands wholly uncontradicted before me.

Further, and more importantly, Zhang was not obliged to maintain *any* record of his hours worked. The delegate simply did not turn her mind to the credibility of Zhang's *oral evidence* regarding his total working hours; the delegate did not attempt to corroborate Zhang's oral evidence by interviewing his witness, Mr. Yang. While it was certainly open to the delegate to reject Zhang's oral evidence as to his total working hours, the delegate--at least in the Determination itself--has not set out any basis for so doing and, so far as I can gather based on the evidence before me, on the balance of probabilities, it would appear that Zhang worked far more than the 72 hours credited to him by the delegate.

As noted above, the delegate found that there was insufficient evidence to support Zhang's assertion that the agreed wage rate was \$10 per hour. Indeed, at one point in his testimony Zhang stated: "I *think* I was to get \$10 per hour" (my *emphasis*). Neither Mr. Yang nor Mr. Yan (Zhang's two witnesses) were able to provide any evidence regarding Zhang's wage rate. Zhang also submitted a handwritten one-page document that apparently represents notes made by Aurora's principal, Mr. Dong Liang, during a meeting between two shortly after Zhang's employment commenced. This document (Exhibit 1 at the appeal hearing) contains many, seemingly unrelated, notations but nowhere clearly sets out an agreed \$10 per hour wage rate. Overall, the document appears to be a rather confusing array of numbers and words, some of which are in English while others in Mandarin. In my opinion, it certainly does not corroborate Zhang's position that his base hourly rate was \$10. Accordingly, I see no reason to interfere with the delegate's finding that Zhang's unpaid wages ought to be calculated based on the minimum wage of \$7.15 per hour.

Accordingly, I upheld the delegate's finding as to the relevant wage rate but was not satisfied that the delegate had correctly determined Zhang's total working hours during the period in question (July 16th to September 1st, 1998). Inasmuch as I did not have a sufficient evidentiary record before me, and in light of the fact that the delegate's investigation was in some sense incomplete (since certain witnesses had not been interviewed), I made the following order:

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that Zhang's complaint be referred back to the Director so that it may be reinvestigated, taking into account the findings set out herein, by a delegate other than the delegate who issued the Determination. Following the reinvestigation, the Director may vary the Determination pursuant to section 86 of the *Act*.

THE SUBSEQUENT INVESTIGATION

I would not have thought that my order was the least bit ambiguous. I directed that the matter of Zhang's unpaid wage entitlement be reinvestigated by a delegate *other than the delegate who conducted the original investigation and issued the Determination*. My direction that the matter be reinvestigated by a new delegate was made in light of the fact that I had expressed some concerns about the initial investigation. While I did not then--and do not now--have any concerns about the integrity of the particular delegate, I could envision Mr. Zhang having such concerns. Further, at least by implication, the delegate had found Zhang to be not fully credible--she rejected his evidence with respect to both his hours worked and his wage rate. The delegate also rejected Zhang's assertion that the notations on his calendar reflected only weekend and holiday hours, not his entire working hours. As I read the Determination (and that is all I had to go by since the delegate did not appear at the appeal hearing), Zhang's seeming lack of credibility was of central concern to the delegate.

It is, of course, an old (but nonetheless fundamental) saw that justice must not only be done but be seen to be done. Thus, I thought it best that the reinvestigation be conducted by another delegate. My rationale for making such an order was not materially different from that of Mr. Justice Hall (chambers judge) and the justices of appeal (Lambert, Southin and Hollinrake, JJ.A.) in *British Columbia Nurses' Union v. British Columbia's Women's Hospital* [1997] B.C.J. No. 855. In that latter case, a Labour Relations Board order remitting a grievance to be reheard by the original arbitrator was quashed even though the reason for setting aside the arbitrator's decision was not related to the arbitrator's conduct of the hearing or his decision-making process (the basis for remittance was the employer's apparently inadvertent failure to fully comply with an order for production of documents). Mr. Justice Hall, in the chambers decision, observed that "Where decisions on credibility have been reached after due consideration and reflection, I should think it could scarcely ever be appropriate that the matter be remitted [to the original decision-maker]".

Although section 115(1)(b) of the *Act*, which empowers the Tribunal to refer matters back to the Director for reinvestigation or reconsideration, does not specifically give the Tribunal the authority to refer matters back *with directions*, the power to give directions can be reasonably implied into section 115(1)(b)--see *Interpretation Act*, section 27(2); *Johnston v. Langley School District No. 35* (1979), 12 B.C.L.R. 1 (B.C.S.C.); *B.C. (Minister of Health) v. B.C. (Environmental Appeal Board)* [1996] B.C.J. No. 1531 (B.C.S.C.); *B.C. (Liquor Control and Licensing Branch, General Manager) v. Smillie* [1992] B.C.J. No. 2883 (B.C.C.A.).

I take it, based on the material before me, that the Director took some umbrage with my direction perhaps because she felt it was an unlawful fettering of her discretionary authority to delegate her functions, duties or powers under section 117 of the *Act*. Nevertheless, the Director did *not* make application under section 116(2) to have the propriety of my order reconsidered. Rather, the Director simply ignored my order and instructed the original delegate to reinvestigate Mr. Zhang's unpaid wage claim.

Mr. Zhang, in a letter dated November 1st, 2000, specifically objected to the original delegate reinvestigating the complaint:

“In the decision made on June 9, 2000, the adjudicator ordered a delegate other than the one who signed the previous determination to reinvestigate the case. But now I find that this case is still investigated by the same delegate...I think the wrong procedure should be stopped.”

Mr. Dong Liang, Aurora’s principal, also expressed, in a letter dated November 24th, 2000, some confusion about the original delegate reinvestigating the matter.

On November 3rd, 2000, the original delegate wrote to Aurora (this letter was copied to Zhang) stating that following her reinvestigation she concluded that Zhang was owed an additional \$2,249.51 on account of unpaid wages and interest. The first paragraph of the delegate’s November 3rd letter reads as follows:

“Please be advised that the delegate of the Director has now completed the reinvestigation of the above-noted matter. I was instructed by my manager to interview the witnesses of Ningfei Zhang, *as per the instructions of the adjudicator*, and report back to the parties with any revised findings.” (my *italics*)

I should note that, in my view, the delegate did *not* follow my instructions; indeed, her continuing involvement in the matter amounts to a clear *refusal* to follow my directions. However, I should also note that I do not wish to ascribe any bad faith to the delegate--she was simply doing that which her manager had instructed her to do. In any event, the delegate reported her conclusions to the Tribunal in a letter dated December 20th, 2000 in which she reiterated that she had been instructed to conduct the reinvestigation:

“This is my report back to the Tribunal, with regards to the above-noted decision. I consulted with my manager on the matters, which were referred back to the Director. My manager instructed me, in accordance with our Branch Procedure Directive, that I was to interview the witnesses of Ningfei Zhang, and that the matter would not be referred to another Delegate of the Director.”

In a letter dated December 21st, 2000 the Tribunal’s vice-chair wrote to the parties seeking their submissions with respect to the original delegate’s December 20th report. Perhaps not surprisingly, Zhang did not object to the delegate’s conclusion that Aurora owed him a further \$2,249.51 (letter to the Tribunal dated January 3rd, 2001). Perhaps equally unsurprisingly, Aurora did object both to the amount of wages found to be owing and to the Director’s failure to comply with my order (letter dated January 9th, 2001):

“According to the decision made on June 9, 2000, the adjudicator ordered a delegate other than the one who signed the previous determination to reinvestigate the case. The letter dated December 20 was written by [the original delegate]. We are a little confused on who has the authority to over-write this decision...”

COMPLIANCE WITH THE ORIGINAL TRIBUNAL ORDER

I am tempted, of course, to overlook the failure to comply with my original order especially given the amount of money in issue and the time it has taken, to date, to address Zhang's unpaid wage complaint. However, Aurora has, in effect, objected to the delegate's jurisdiction to reinvestigate Zhang's complaint as did, initially, Zhang, himself. I do not believe that I can sidestep the jurisdictional issue simply because it would be convenient to do so.

I originally made a order directing that Zhang's unpaid wage complaint be reinvestigated by another delegate. Although the Director could have challenged that direction by way of an application for reconsideration under section 116(2), the Director chose not to do so. Accordingly, in my view, the direction was part of a valid and subsisting order and it was not open to the Director to unilaterally decide not to abide by that order. Zhang objected to the original delegate reinvestigating his complaint but the matter proceeded apace in any event.

However, absent an order from the Tribunal, I am inclined to the view that even if Zhang had not objected, the original delegate was not at liberty to reinvestigate Zhang's unpaid wage complaint. The decisions of the Director (unlike those of the Tribunal) are not protected by a privative clause; the *Act* is structured such that the Tribunal's orders are binding on the Director, not the reverse. There is an important principle at stake here that, in my view, cannot be overridden simply because it might be expedient to do so.

In my opinion, the Director has not complied with my original June 9th, 2000 order. Until that order is varied or cancelled (either by way of reconsideration, or failing that, through judicial review), it stands.

ORDER

Accordingly, I see no option but to reiterate my original order (set out earlier in these reasons) and I hereby do so. Pursuant to section 115(1)(b) of the *Act*, I order that Zhang's complaint be referred back to the Director so that it may be reinvestigated by a delegate other than the delegate who issued the Determination.

KENNETH WM. THORNICROFT

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