

An appeal

- by -

Jenny Jang operating as New Moon Restaurant
(“New Moon”)

- 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.: 2005A/131

DATE OF DECISION: September 26, 2005

DECISION

SUBMISSIONS

Jenny Jang	on behalf of New Moon Restaurant
Amanda Welch	on behalf of the Director of Employment Standards
Chuck Lap Ng	on his own behalf

OVERVIEW

1. This is an appeal by Jenny Jang operating as New Moon Restaurant (“New Moon”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (“the Director”) issued June 13, 2005.
2. Chuck Lap Ng filed a complaint with the Director alleging that New Moon made illegal deductions from his pay, and failed to pay him all wages owing. Following an investigation into Mr. Ng’s complaint, the Director’s delegate found that New Moon had contravened Sections 16, 18, 27, 40 and 58 of the *Act*, and Section 46 of the *Employment Standards Regulations*. The delegate ordered that New Moon pay \$6,514.35 in wages and interest to the Director on behalf of the complainant. The delegate also imposed an administrative penalty on New Moon in the total amount of \$3,000 in respect of the contraventions for Mr. Ng and another employee.
3. New Moon alleges that new evidence has become available that was not available at the time the Determination was made, and seeks to have the Determination cancelled.
4. The appellant did not seek an oral hearing, and I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUE

5. Has new and relevant evidence become available that was not available at the time the Determination was being made such that the Determination should be changed?

THE FACTS AND ARGUMENT

6. Mr. Ng worked as a cook for New Moon, which is owned and operated by Ms. Jang, from August 2, 2003 until July 22, 2004.
7. Mr. Ng complained that New Moon had not paid his full wages for the months of January through July, 2004, and provided the delegate with a copy of a calendar in which he recorded his hours of work. He also said he had not been provided with records or wage statements, and did not know if he received vacation pay or if statutory deductions were taken. When Mr. Ng gave Ms. Jang his Self-Help kit detailing the claim, she sent him a letter contending that he owed her for meals he received while working at the restaurant, and an invoice for repairs to a door of a room he stayed in.

8. The delegate sent New Moon a Demand for Records on March 14, 2004, and was advised by telephone on three separate occasions that the demand had been sent. Ms. Jang refused to accept delivery of the demand, and did not provide the delegate with any payroll records. Subsequently, the delegate sent the documents by ordinary mail, and Ms. Jang acknowledged that she had received them. She also told the delegate that Mr. Ng owed her money for meals and damage to a door.
9. The delegate weighed the evidence, and found no evidence to contradict Mr. Ng's version of events. In the absence of any records from the employer, the delegate presumed that no statutory deductions were taken. She also concluded, based on the records, that Mr. Ng was not paid vacation pay.
10. The delegate was unable to consider whether the employer was entitled to offset any of Mr. Ng's wages for meals as Ms. Jang provided no evidence that Mr. Ng authorized any deductions from his wages.
11. The delegate concluded that Mr. Ng was entitled to wages, overtime wages and vacation pay, contrary to sections 40 and 58. She also concluded that New Moon had failed to pay Mr. Ng all wages owing within 48 hours of the termination of his employment, contrary to section 18 of the Act, and failed to pay him minimum wage, contrary to section 16. She also found New Moon in contravention of section 46(1) of the Regulations in failing to provide employment records.
12. Ms. Jang contends that there was never any written employment contract between her and Mr. Ng. She says that she had a verbal agreement with Mr. Ng that she would charge him room and board, and deduct those costs from his pay. She says the wages paid were recorded and paid monthly and "finalized on the T4". She claims that the T4 was prepared by an accountant from payroll records, that all source deductions were recorded, and that the returns all balanced with New Moon records. She contends this information was not available earlier since they were at the accountant's office, and the accountant's office was closed due to vacation and illness.
13. The Director's delegate submitted that Ms. Jang had many opportunities to respond to her request for information and did not do so. Furthermore, she submits that Ms. Jang's "new evidence" does not address the issues in Mr. Ng's complaint or establish that the Determination is in error. The delegate also submits that, at no time during her discussions with Ms. Jang did Ms. Jang indicate that she had an accountant, or that the accountant had any records which he was unable to provide her.
14. Mr. Ng's submissions paralleled his complaint submissions, and need not be repeated here.

ANALYSIS AND DECISION

15. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
16. The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

17. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
18. I am unable to find that the “new evidence” was unavailable to Ms. Jang during the investigation. Ms. Jang did not provide the records to the delegate, or tell her that the records were at her accountant’s office. In fact, it appears that Ms. Jang simply refused to communicate or co-operate in any way with the delegate during the investigation. . The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see *Tri-west Tractor Ltd.* BC ESTD# 268/96 and *Kaiser Stables Ltd.* BC EST #D058/97).
19. Having reviewed the “new evidence” I am not persuaded that, had this evidence been before the delegate at first instance, it would have led the delegate to a different conclusion. The documents consist of handwritten lists of wages paid and deductions taken. There is no evidence Mr. Ng. was given pay statements that complied with the *Act* or the *Regulations*, nor is there any evidence the employer kept records that were in compliance. Furthermore, there is no evidence that Mr. Ng was paid the amounts indicated, either by cancelled cheques or receipts. Furthermore, Ms. Jang provided nothing in writing from Mr. Ng indicating that New Moon could make deductions from his pay. There is nothing in the “new evidence: that, if believed or considered with other evidence, would have led the Director to a different conclusion.
20. The appeal is dismissed.

ORDER

21. I Order, pursuant to Section 115 of the *Act*, that the Determination dated June 13, 2005 be confirmed in the amount of \$6,514.35, in addition to the administrative penalties, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal