

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/132

**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
Jordan Stewart	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. Jordan Stewart filed a complaint with the Director alleging that New Moon failed to pay him minimum wage, overtime wages and annual vacation pay. Following an investigation into Mr. Stewart’s complaint, the Director’s delegate found that New Moon had contravened Sections 16, 27, 40 and 58 of the *Act*, and Section 46 of the *Employment Standards Regulations*. The delegate ordered that New Moon pay \$680.81 in wages and interest to the Director on behalf of the complainant. The delegate also imposed an administrative penalty in the total amount of \$3,000 in respect of the contraventions in respect of Mr. Stewart 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. Stewart worked as a prep cook and delivery person for New Moon, which is owned and operated by Ms. Jang, from December 1, 2004 until January 3, 2005.
7. Mr. Stewart claimed that New Moon paid him a training wage of \$6.00 per hour although he had made it clear to Ms. Jang that he had been previously employed for the Canadian Forces and did not qualify for the training wage for entry level workers. He also claimed that he did not receive wage statements with his pay, and when he requested explanations of payroll deductions, Ms. Jang became very angry with him.

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. Stewart owed her money for meals she provided him during his employment.
9. Ms. Jang advised the delegate that she paid Mr. Stewart \$6.00 per hour because he had not worked in a kitchen before and was a very slow worker. Ms. Jang also contended that Mr. Stewart agreed to work for \$6.00 per hour. She said asked the delegate that if she determined Mr. Stewart was entitled to \$8.00 per hour, she be credited with the meals she provided to him for free.
10. The delegate found no evidence to contradict Mr. Stewart's records of his hours of work. In the absence of any records from the employer, the delegate presumed that no statutory deductions were taken. She also determined that New Moon failed to pay him minimum wage, contrary to section 16, since Mr. Stewart had paid employment before November 15, 2001.
11. The delegate was unable to consider whether the employer was entitled to offset any of Mr. Stewart's wages for meals as she provided no evidence that Mr. Stewart authorized any deductions from his wages.
12. The delegate concluded that Mr. Stewart was entitled to wages, overtime wages and vacation pay, contrary to sections 40 and 58. She also found New Moon in contravention of section 46(1) of the Regulations in failing to provide employment records.
13. Ms. Jang argues that Mr. Stewart ate every day for free, that he agreed to work for \$6.00 per hour, that she spent many hours training him, and that she paid for mistakes that he made. She also contends that "deductions were made as required by law". Finally, Ms. Jang says that, as a person of Chinese descent, she did not have a clear understanding of "Labour laws". She says that she is the one taken advantage of, and that the penalties are too harsh and unfair to her.
14. 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. Stewart'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 any difficulty understanding her, and refused her offer to travel to Prince Rupert to meet with her and arrange for a translator. She seeks to have the Determination upheld.
15. Mr. Stewart provided proof of his prior employment with the Canadian Forces.

## **ANALYSIS AND DECISION**

16. 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

17. 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.
18. 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.
19. Ms. Jang’s appeal does not contain any “new evidence”. Her submission contains arguments, which are, in essence, a repeat of the arguments made to the delegate at first instance.
20. I have reviewed the record before the delegate and the submissions of the employer and find no grounds for the appeal. Ms. Jang did not co-operate with the delegate at first instance, and does not appear to have maintained the records an employer is required to maintain in order to substantiate her position. In any event, her arguments simply do not establish any error on the part of the delegate. Ms. Jang is not entitled to pay Mr. Stewart less than minimum wages, or to make deductions from his pay unless she has authorization in writing to do so.
21. The delegate imposed administrative penalties in the total amount of \$3,000 for the employer’s contraventions of the Act and Regulations. While Ms. Jang may feel they are unfair, once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation.
22. The appeal is dismissed.

## **ORDER**

23. I Order, pursuant to Section 115 of the *Act*, that the Determination dated June 13, 2005 be confirmed in the amount of \$680.81, in addition to the administrative penalties, plus whatever interest might have accrued since the date of issuance.

---

**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**