

An appeal

- by -

IND Diagnostic Inc.

- and by -

Xiao Ling Ju

- 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.: 2003A/28 and 2003A/47

DATE OF HEARING: April 22, 2003

DATE OF DECISION: May 6, 2003

DECISION

APPEARANCES:

James Yang, Human Resources Manager	for IND Diagnostic Inc. and IND Lifetech Inc.
Xiao Ling Ju	on her own behalf
David Tan	Interpreter (Mandarin)

INTRODUCTION

I have before me two appeals both filed pursuant to section 112 of the *Employment Standards Act* (the "Act") by IND Lifetech Inc. and Ms. Xiao Ling Ju ("Ju"), respectively. Each appellant appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on December 31st, 2002 (the "Determination") pursuant to which a third company, IND Diagnostic Inc., was ordered to pay Ms. Ju the sum of \$2,067.98 on account of 2 weeks' wages as compensation for length of service, overtime pay, statutory holiday pay and section 88 interest.

As noted above, this appeal was filed by IND Lifetech Inc. even though this firm is not named in the Determination. Mr. James Yang, who appeared on behalf of this firm, advised me that it was Ms. Ju's "actual employer" and that was the reason for filing the appeal in the name of that company. I understand that both IND firms are closely related and could well be considered to be "associated corporations" within section 95 of the *Act*. In light of the foregoing, and with the consent of all parties, I amended the notice of appeal to include IND Diagnostic as an appellant and the Determination to include IND Lifetech Inc. as a co-employer. I shall refer to both IND firms jointly as the "Employer".

This appeal was heard at the Tribunal's offices in Vancouver on April 22nd, 2003 at which time I heard the testimony (under oath) of Mr. James Yang, on behalf of the Employer, and Ms. Ju on her own behalf. Ms. Wei Fu, a former employee of the Employer, also testified on behalf of Ms. Ju. No one appeared at the appeal hearing on behalf of the Director. Ms. Ju and her witness both testified with the assistance of a mandarin interpreter.

REASONS FOR APPEAL

The Employer appeals only that aspect of the Determination awarding Ms. Ju compensation for length of service on the ground that the Director's delegate failed to observe the principles of natural justice [section 112(1)(b) of the *Act*]. However, as Mr. Yang developed the Employer's argument both in written submissions and at the appeal hearing, it is clear that the Employer's challenge more properly falls under section 112(1)(a)--the Director erred in law. More specifically, the Employer says that Ms. Ju was not entitled to any compensation for length of service since she received at least two weeks' written notice of termination pursuant to section 63(3)(a)(ii) of the *Act*. If the delegate's finding that the Employer did not provide proper written notice was not based on a proper evidentiary foundation, the delegate would have erred in law.

Ms. Ju, for her part, also alleges that the Director's delegate failed to observe the principles of natural justice and, as with the Employer, her position is more accurately addressed as an assertion of error of law. Ms. Ju agrees with the Determination insofar as the matter of compensation for length of service is concerned, but says she ought to have been awarded a greater sum on account of overtime pay and that the delegate did not calculate her overtime entitlement in the manner directed by the *Act*.

Finally, I should add that there is no evidence before me from either appellant that would suggest the delegate failed to observe the principles of natural justice.

FINDINGS AND ANALYSIS

The Employer's appeal

As noted above, the Employer asserts that it provided Ms. Ju more than 2 weeks' written notice of termination. In that regard, Mr. Yang submitted a letter, dated July 6th, 2001 under the signature of Mr. Johnny Yau (identified as the president of IND Lifetech Inc.), which the Employer says fully satisfied its statutory obligation under section 63(3)(a)(ii) of the *Act*.

There are, however, several evidentiary problems with this submission.

Ms. Ju says that this letter, although dated July 6th, 2001, was not provided to her until August 8th, 2001 when she was formally notified that her employment was terminated. According to Ms. Ju, on July 18th she was sent home on a form of "mandatory vacation" since the firm did not have enough work for her to do. She returned to work and attended at the Employer's offices on August 7th and was at that time told she was being "laid off" which in turn lead to an argument about termination pay (the Employer refused to pay anything on this account). She returned to the office the next day and was then told that her employment was terminated and she was given the Employer's July 6th letter.

Mr. Yang is not in a position to contradict Ms. Ju's evidence (he was not involved in this particular issue in any fashion until after the events in question occurred) and I do not have before me any other testimony from the Employer that would call into question Ms. Ju's version of events. The individuals who would have been able to provide relevant evidence on this matter for the Employer did not appear before me--I draw an adverse inference from their failure to testify. I might add that I do not have before me a signed acknowledgement by Ms. Ju that she received the Employer's letter on July 6th, 2001.

Ms. Ju's evidence is, in part, corroborated by the fact that the Employer did not issue her a Record of Employment until August 8th, 2001 which is consistent with Ms. Ju's evidence that she received both the record of employment and the July 6th termination letter at the same time and on the same day. Finally, Ms. Fu's evidence is entirely consistent with Ms. Ju's testimony.

The Employer bears the burden of proving that the Determination was clearly wrong with respect to the matter of compensation for length of service. The Employer has simply not discharged its evidentiary burden.

The Employer's appeal is dismissed.

Ms. Ju's appeal

In her appeal documents, Ms. Ju concedes that "I don't know how to calculate overtime pay exactly". During her employment (from February 2000 to July 2001) Ms. Ju was paid on a "piece rate" basis. Accordingly, her "regular wage" (which must be derived in order to calculate her entitlement to overtime pay) must be based on her total hours of work in a pay period, not on the basis of either an 8-hour work day or a 40-hour work week. Ms. Ju, as became apparent during the hearing, did not appreciate this fact and I am of the view that this appeal is predicated entirely on her misunderstanding the relevant provisions of the *Act*.

I have reviewed the delegate's calculations and find them to be in accord with the provisions of the *Act*. I might add that the delegate relied on the Employer's time records which, in turn, were based on daily time records provided by Ms. Ju herself.

Ms. Ju's appeal is also dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied by including IND Lifetech Inc. as a co-employer (together with IND Diagnostic Inc.) of Ms. Ju. In all other respects the Determination is confirmed as issued in the amount of **\$2,067.98** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal