

An appeal

- by -

Raymond Tran
(“Tran”)

- 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.: 2016A/93

DATE OF DECISION: November 22, 2016

DECISION

SUBMISSIONS

Keith Walkinshaw

counsel for Raymond Tran

Michael Thompson

on behalf of the Director of Employment Standards

INTRODUCTION

1. On June 10, 2016, and following a 3-day oral hearing, a delegate of the Director of Employment Standards issued a Determination under section 79 of the *Employment Standards Act* (the “*Act*”) ordering International Dent King Inc. (“Dent King”) to pay \$11,986.77 to its former employee and the present appellant, Raymond Tran (“Tran”), on account of unpaid wages and section 88 interest. The delegate issued her “Reasons for the Determination” (the “delegate’s reasons”) concurrently with the Determination.
2. Further, and also by way of the Determination, the delegate levied three separate \$500 monetary penalties against Dent King (see section 98) based on its contraventions of sections 18 (failure to pay wages on termination of employment), 21 (unlawful wage deductions) and 58 (failure to pay vacation pay) of the *Act*. Thus, Dent King’s total monetary liability under the Determination is \$13,486.77.
3. The delegate awarded Mr. Tran regular wages (\$5,425.17), vacation pay (\$5,604.12) and \$735.51 on account of unlawful wage deductions. It is only the “regular wages” award that is in question in this appeal. In this latter regard, the delegate determined Mr. Tran’s regular wage entitlement for September 2015 (\$6,854.00) and then deducted the sum of \$1,428.83 being an amount that “Mr. Tran was paid...on September 27, 2015” (delegate’s reasons, page R15) for a balance due of \$5,425.17. I shall refer to the \$1,428.83 payment as the “September 27th payment”.
4. Mr. Tran, through his legal counsel, appealed the Determination on the ground that the delegate erred in law. More specifically, counsel argued that the delegate should not have deducted the \$1,428.83 September 27th payment since it was for wages earned prior to September 1 and should not have been taken into account when fixing Mr. Tran’s regular wage entitlement for September 2015. Mr. Tran’s counsel provided some documentation that seemingly confirmed this latter position.
5. In light of this submission, and pursuant to subsection 114(2) of the *Act*, I referred this issue back to the Director for further investigation. By letter dated September 15, 2016, the Director was ordered to receive submissions from the parties and then prepare and deliver a report to the Tribunal. The Director – through another delegate since the original delegate was no longer “available” – prepared a report dated October 3, 2016. The Tribunal provided a copy of the Director’s report to the parties and requested their further submissions with respect to the report – neither Mr. Tran nor Dent King filed any reply submission.
6. I am now delivering my final reasons for decision as I indicated I would do in my September 15th correspondence to the parties.

FINDINGS

7. In his October 3, 2016, report, the delegate detailed his efforts to obtain Dent King's position with respect to this matter. Although both Dent King and its legal counsel were expressly invited to provide the delegate with their position, the delegate did not receive any sort of substantive response.
8. The delegate reviewed the documentary record that was before the original decision-maker and determined that there was a "clearly inconsistent" finding in the original delegate's reasons. The report continued:

...I find that the September 27 payment was for wages earned in August 2015. Mr. Tran's wages earned in the pay period ending August 31 would normally have become payable on or around September 15 according to the Contractor's Agreement between the parties. I find that the memo line of the cheque is most likely a reference to the date these August wages were payable under the parties' agreement. This finding is further supported by Mr. Tran's testimony at the hearing and the ledger, which evidence was not challenged by [Dent King] at the hearing.
9. The delegate concluded his October 3 report as follows: "I therefore find that Mr. Tran is owed \$6,854.00 in regular wages for work performed in September 2015". The delegate noted that there was no need to adjust the vacation pay award since it had already been calculated based on Mr. Tran's total earnings and that the additional unpaid regular wage award did not impact the vacation pay calculation.
10. The delegate asked the Tribunal to issue the following order: "Based on the findings of my further investigation, I respectfully submit that the Employment Standards Tribunal should exercise its authority under section 115(1)(b) of the Act to vary the Determination to reflect this correct amount of regular wages owed to Mr. Tran." [*sic*, the applicable subsection is 115(1)(a)].
11. Since neither Mr. Tran nor Dent King has suggested that such an order should not be issued, and I am of the view that the delegate has accurately characterized the September 27th payment, I will vary the Determination in accordance with the delegate's findings as set out in his October 3, 2016, report.

ORDER

12. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is varied by deleting the \$5,425.17 award on account of regular wages and substituting a regular wages award of \$6,854.00 in its place. I also order that the Director make the appropriate adjustment to the section 88 interest award. In all other respects, the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal