

An appeal

- by -

Mian Huang  
("Huang")

- 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

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2004A/123

**DATE OF DECISION:** September 9, 2004

## DECISION

### SUBMISSIONS:

Mian Huang

on her own behalf

Ken J. MacLean

for the Director of Employment Standards

### INTRODUCTION

This is an appeal filed by Mian Huang (“Huang”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Ms. Huang appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on June 7th, 2004 (the “Determination”). The Determination was issued following an oral hearing held before the delegate on February 7th, 2004.

By letter dated August 24th, 2004 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). The only material I have before me is the original submission from Ms. Huang (appended to her notice of appeal), the section 112(5) record and a submission dated July 28th, 2004 from the delegate. The respondent employer, Canada China News (Vancouver) Inc. (“Canada China News”) did not file any submission with the Tribunal nor did it appear before the delegate at the original Branch-level hearing.

### THE DETERMINATION

Ms. Huang was engaged as a “chief script writer” for a documentary television project and her engagement was governed by two formal written agreements. She claimed unpaid wages in accordance with the second of these two agreements.

The Director’s delegate dismissed Ms. Huang’s complaint on the basis that it was not filed within the statutory 6-month time limit or otherwise related to wages that were outside the employer’s statutory 6-month “backpay liability” [see sections 74(3) and 80(1)(a) of the *Act*]. The delegate concluded (“Reasons for the Determination”, p. 4) that “I am satisfied through the evidence and testimony of [Ms. Huang] that [she] has earned and is entitled to the wages that she was contracted to earn” but nevertheless dismissed her complaint since it was untimely and, in any event, the wage claim was outside the section 80(1)(a) 6-month “employer backpay liability” provision.

Ms. Huang’s position (set out at p. 3 of the “Reasons for the Determination”) was that:

...she remained in the employ of the employer subsequent to the end of her written contract of employment, August 31, 2002, and was finally terminated on February 21, 2003 at which time she was advised that the China Cable Television Crew (CCTV Crew) would not be returning to North America and as such the project was finished.

However, the delegate rejected Ms. Huang's position and concluded that she "could not provide evidence of continued employment subsequent to August 31, 2002 up to the alleged date of termination" (Reasons, p. 3). The delegate then ruled (Reasons, p. 5):

I am persuaded by [Ms. Huang's] testimony and documented evidence that her term of employment with [Canada China News] was only for the period of May 12, 2002 - August 31, 2002. Therefore, a complaint relating to a claim to wages for this period of employment must have been filed with the Employment Standards Branch on or before the end of February, 2003, not August 1, 2003 as was received by the Employment Standards Branch...

While it is evident that [Ms. Huang] has earned and not received payment of wages per her written contract of employment with [the Canada China News], I find that this complaint has not been filed within the time period allowed under the Act...

I have determined that the Act has not been contravened. Accordingly, no wages are outstanding.

## REASONS FOR APPEAL

Ms. Huang says that the Determination should be varied since the delegate failed to observe the principles of natural justice in adjudicating her complaint [see section 112(1)(b) of the *Act*]. However, it appears to me, after having reviewed Ms. Huang's submission, the thrust of her appeal is that the delegate erred in law.

There is absolutely nothing in the material before me indicating that the delegate failed to observe the principles of natural justice. Ms. Huang was given a full and fair opportunity to present her case to the delegate; her appeal is predicated on an assertion that the delegate came to the wrong result and not that the process utilized by the delegate to determine that result was tainted by bias or some other unfair procedural failing.

In *Triple S Transmissions Inc.* (B.C.E.S.T. Decision No. D141/03) I made the following observations with respect to a situation where an appellant has selected an inappropriate ground of appeal on the Tribunal's preprinted appeal form:

In preparing the form, an appellant need only "check off" one or more of the boxes that the appellant believes describes the basis for their appeal. And therein lies the rub...

While some appellants are represented by legal counsel or otherwise obtain legal advice prior to filing their appeal, the vast majority of appellants do not have any formal legal training and, in essence, act as their own counsel...

Although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off...

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the

appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

In my view, Ms. Huang's appeal is more properly addressed on the basis of an alleged error of law and, accordingly, I propose to proceed on that basis. In essence, Ms. Huang asserts that the delegate erred in law in dismissing her complaint on the basis that it was not timely [section 74(3)] or, alternatively, that her wage claim was statute-barred [section 80(1)(a)].

These latter assertions raise questions of mixed fact and law and, as such, this appeal cannot succeed unless it is demonstrated that the delegate erred in his interpretation of the relevant sections of the *Act* and/or clearly erred in applying those provisions to the relevant facts.

## THE PARTIES' SUBMISSIONS

### *Ms. Huang's Position*

I quote from the submission Ms. Huang appended to her notice of appeal:

The term of my employment was defined from May 12, 2002 to August 31, 2002 in [the] "Reasons for the Determination". This definition is incorrect because it was not the term of my employment stated in the Agreement between the employer and me. I was hired by the employer...and both the employer and I have been bound by the Agreement and Supplementary Agreement since May 12th, 2002. Based on the agreements, the term of my employment should start from May 12th, 2002 and end upon the completion of the documentary project.

Actually, the project was divided into two periods: The 1st period was from May 12th, 2002 to August 31st, 2002 and the 2nd period was supposed to start by the end of the year 2002 and end upon the completion of shooting documentary.

I completed all the 1st period work and was asked by the employer to *pause*, instead of *terminate or end*, the required work and to continue the unfinished work (the 2nd period work) stated in the Supplementary Agreement once the CCTV shooting group arrives in Vancouver...

In the Supplementary Agreement, the Item 2 of Article 4 states: "Party A *will* pay Party B \$7,000 CDN *after getting the first commercial income* as Party B's commission for the 1st work period...". *This means that my entitled compensation was not due or did not become payable to me on or before the date of August 31, 2002.* It was supposed to become payable to me someday after August 31, 2002 or [at] the latest on the day when the project has been terminated or completed. Therefore, I could not ask for the payment until it becomes payable to me or my employment was terminated...

I was verbally informed by my employer on Feb. 21, 2003 that the project was no longer alive for some reason. Between the [sic] Aug. 31, 2002 and Feb. 21, 2003, there had not been any notification that the project or my employment term was terminated. Therefore, I believe that the termination date of my employment should have been Feb. 21, 2003 instead of Aug. 31, 2002 as defined by [the delegate] in [the] "Reasons for Determination"...

In my case, the termination of my employment was on Feb. 21, 2003, and the amount of wages I claimed became payable on or after Feb. 21, 2003. The complaint I filed with the Employment

Standards Branch was [filed] on August 1, 2003. Therefore, it was within the timeframe stated in the said section [s. 80(1)(a)] of the Employment Standards Act.

*(emphasis in original text)*

### ***Canada China News' Position***

Canada China News, despite being invited to do so, never filed any submission with the Tribunal. I note that Canada China News also failed to participate in the proceedings before the delegate.

### ***The Director's Position***

The Director's position is set out in the delegate's submission dated July 28th, 2004. Ms. Huang apparently testified before the delegate that she worked for Canada China News after August 31st, 2002 as a "part-time teacher" and a "free-lance reporter" but that she was *not* seeking any wages for this latter work. According to the delegate, Ms. Huang restricted her wage claim to those wages earned during her employment "for the period of the written agreement, May 12, 2002 - August 31, 2002".

I quote from the delegate's July 28th submission:

The Directors [sic] position is that the work for which [Ms. Huang] is claiming payment of wages...was during the period May 12, 2002 - August 31, 2002. These wages would have been payable during the period in which they were earned, ending August 31, 2002...

The evidence indicates that the employer did not pay any wages to [Ms. Huang], nor at the least minimum wages for each hour worked during May 12, 2002 - August 31, 2002.

Given that [Ms. Huang] did not provide evidence at the complaint hearing of continued employment subsequent to August 31, 2002, the total wages claimed would have been payable either on August 31, 2002 or after 13 weeks of layoff, if the **pause** referred to in the agreement could be interpreted as a temporary layoff, per Part 1, Introductory Provisions, section 1.1 [sic], definitions of the Act.

If it were accepted that the **pause** referred to in the agreement could not exceed that of a temporary layoff (13 weeks), that period would have ended November 30, 2002. The six month period for filing a complaint would expire May 30, 2003 not August 1, 2003.

[Ms. Huang] did not provide a self-help kit to the employer and file a complaint with the Employment Standards Branch until August 1, 2003, well after the six month time limit per section 80 of the Act pertaining to work performed ending August 31, 2002.

It is the Director's position that the complaint filed with the Employment Standards Branch on August 1, 2003 representing a claim to wages in the amount of \$7,000 earned by [Ms. Huang] during the period May 12, 2002 - August 31, 2002, was filed out of time.

The Director would respectfully request that the appeal of [Ms. Huang] be set aside and the determination confirmed.

**(boldface in original text)**

## FINDINGS AND ANALYSIS

In my view, there are two issues in this appeal that, while overlapping in the circumstances of this case, should nonetheless be separately addressed. The first issue concerns whether the complaint was filed within the statutory time limit [section 74(3) of the *Act*]; the second issue relates to Canada China News' backpay liability separate and apart from the timeliness of the complaint [section 80(1)(a) of the *Act*].

I shall deal with each issue in turn.

### *Was Ms. Huang's complaint timely?*

Section 74(3) of the *Act* states that: "A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment".

The section 112(5) record includes Ms. Huang's written complaint dated August 1st, 2003 that was filed on that same day at the Employment Standards Branch office in Burnaby. In her complaint, Ms. Huang identified her "start date" with Canada China News as May 12, 2002 and the "Last day you worked for this employer" as "Feb. 21, 2003". Thus, on the face of Ms. Huang's complaint, it was filed within the statutory 6-month limitation.

Before the delegate (and as recounted in the delegate's Reasons at p. 3), Ms. Huang testified that her employment continued until February 21st, 2003 when she was advised that her employment was terminated due to the fact that the CCTV crew would not be returning to North America. Ms. Huang's evidence with respect to her termination date was (obviously) uncontradicted by Canada China News since that firm never appeared at the Branch-level hearing. Ms. Huang testified that she continued to work for Canada China News after August 31st, 2002 as a "part-time teacher" and "free-lance reporter" although she was not seeking any wages in regard to this work--this evidence was also uncontradicted. The delegate never concluded that Ms. Huang's evidence as to her post-August 31st, 2002 employment activities was not credible. In his Reasons, the delegate stated that Ms. Huang "could not provide evidence of continued employment subsequent to August 31, 2002" (Reasons, p. 3), however, clearly Ms. Huang *did* provide such evidence in the form of her oral testimony. As previously noted, the delegate did not reject Ms. Huang's testimony as not being credible. In my view, the evidentiary record does not support the delegate's conclusion that there was no evidence of post-August 31st, 2002 employment.

The section 74(3) time limit commences running "after the last day of employment". The term "employment" is not defined in the *Act*, however, the term "work" is defined as the provision of labour or services for an employer. However, in light of the definition of "employee" it is clear that a person can be an "employee" (and thus, by logical extension, in an "employment" relationship) even though they are not actively performing "labour or services" for an employer (i.e., even though they are not "working"). For example, an employee may be on some sort of leave or on temporary layoff; in these latter circumstances, the employment relationship subsists. In other words, a leave or temporary layoff does not *terminate* the employment relationship.

Ms. Huang testified (and her testimony was both uncontradicted and not rejected for want of credibility) that she did, in fact, continue to provide labour or services to her employer after August 31st, 2002. Ms. Huang was not seeking wages for this latter work; perhaps she was entitled to do so and should have sought to enforce her right to payment for this work under the *Act*. In any event, the fact that she did not assert a wage claim for this latter work simply does not speak to the question of whether she was

*employed* by Canada China News after August 31st, 2002. I think it important to note that section 74(3) speaks in terms of “the last day of employment” rather than the last day of “work”.

As is clear from the parties’ submissions (see above), there were two separate written agreements between the parties, a 1-page “Agreement” and a 2-page “Supplementary Agreement”. Both are written in Chinese characters and signed by both parties; I also have before me what I understand to be English translations of the two documents. It is not clear whether the latter translations were prepared and/or executed contemporaneously with the Chinese-script documents, however, I am assuming them to be accurate translations.

The “Agreement” simply sets out the nature of Ms. Huang’s duties as script writer for a 10-episode documentary and certain of Canada China News’ entitlements. The “Agreement” does not set out a wage rate for Ms. Huang’s services nor is it a fixed-term employment contract. The “Agreement” refers to an agreement reached between the parties on May 12th, 2002 that will “take effect from the date of signature”. The only provision that speaks to compensation is paragraph 3.2:

3.2 Reward: [Ms. Huang] will share with [Canada China News] the commercial profits of the documentary. The proportion of distribution to [Ms. Huang] will be decided after negotiation between both parties.

Although paragraph 1 states that Ms. Huang is being “hired” as the chief script writer for the project, in my view, the thrust of the “Agreement” suggests a partnership rather than an employment relationship. Not only are the parties to share the “*commercial profits* of the documentary” but the actual documentary scripts for the 10 episodes (the main product of their joint enterprise) were also, by paragraph 3.3, to be *owned* by both parties: “[Ms. Huang] and [Canada China News] will share the ownership for the script of the documentary”. In general, ownership of intellectual property created by an employee vests in the employer; the fact that these parties agreed to share ownership suggests that perhaps their relationship was not, in fact, intended to be an employment relationship.

I now turn to the “Supplementary Agreement”. This latter agreement reflects further negotiations between the parties that occurred on August 30th, 2002--a point in time when Ms. Huang had apparently completed and delivered to Canada China News several documents although (and this is not clear) not a formal final script. Paragraph 1 of this agreement states that Canada China News “employs [Ms. Huang] as the chief scriptwriter in Vancouver part for the documentary ‘Our True Lives of Studying Overseas’”.

The matter of Ms. Huang’s compensation is addressed in two separate provisions of the “Supplementary Agreement”, namely, paragraphs 3.3 and 4.2:

3.3. [Ms Huang] deserves a commission of two thousand Canadian dollars per month and a one-time bonus (the exact amount of bonus will depend on the profits of the TV project)...

4.2 [Canada China News] will pay [Ms. Huang] \$7,000 CDN after getting the first commercial income as [Ms. Huang’s] commission for the 1st period work from May 12th, 2002 to August 31st, 2002.

As for the term of her engagement, the “Agreement” is open-ended--it merely states that “This agreement will take effect from the date of signature”. The “Supplementary Agreement” speaks to the term of engagement in two separate provisions, namely, paragraphs 4.1 and 4.3:

4.1 Since [Ms. Huang] has successfully completed the work for phase one, as required by [Canada China News], [Ms. Huang] will *pause* the required work stated in this agreement by August 31st, 2002 except handing in all the materials to [Canada China News] (including the arranged materials after August 31st, 2002). *Once the CCTV production crew arrives in North America to commence shooting, [Ms Huang] will continue the unfinished work stated in this agreement.*

4.3 This agreement is a supplementary one based on the [sic] both parties' cooperation starting on May 12th, 2002, which takes effect from the first cooperative date and will expired [sic] *after the completion of the said documentary.*

(my italics)

In my view, neither the "Agreement" nor the "Supplementary Agreement" contain immediate termination provisions. Both agreements appear to document an ongoing relationship between the parties, albeit one where there would be a temporary "pause" with respect to some (but clearly not all) aspects of the work to be done by Ms. Huang. As noted above, Ms. Huang's uncontradicted evidence was that she continued to provide services to Canada China News until February 21st, 2003 at which time she was advised by Canada China News that the documentary project would not be going forward. In my view, it was at that point when her employment was terminated. She filed her complaint within 6 months of this latter date.

Ms. Huang never claimed that the earlier "pause" in her duties amounted to a constructive dismissal. Both Ms. Huang and Canada China News seemingly operated on the assumption that their relationship was subsisting after the date of the Supplementary Agreement and would continue until the documentary project was itself completed--an eventuality both parties presumed would occur although perhaps not in accord with their original timetable.

I might note, simply for the sake of completeness, that it is certainly arguable the parties were not in an employment relationship but rather were in some form of partnership. This latter issue was never raised before the delegate nor has it been argued before the Tribunal. Accordingly, and in light of my ultimate disposition of this appeal, I do not intend to make any finding on this latter issue although it may be that the Director may wish to examine this issue further since it speaks directly to the Director's (and this Tribunal's) jurisdiction to adjudicate Ms. Huang's complaint.

Since Ms. Huang filed her complaint within 6 months after her last day of employment (assuming she was employed by Canada China News), the delegate, in my view, erred in finding that Ms. Huang's "complaint has not been filed within the time period allowed under the Act" (Reasons, p. 5).

I now turn to the separate question of Canada China News' backpay liability.

### ***Canada China News' unpaid wage liability***

Section 80(1)(a) of the *Act* states that an employer cannot be held liable for unpaid wages "that became payable in the period beginning...6 months before the earlier of the date of the complaint or the termination of the employment".

In this case, Ms. Huang's complaint was filed on August 1st, 2003 and, as I have previously found, her employment terminated on February 21st, 2003. Thus, Ms. Huang's wage claim must have crystallized 6 months (or less) before February 21st, 2003 or else Canada China News cannot be held liable for those unpaid wages under the *Act* (I leave aside its possible liability in a civil suit under the law of contract).



If, indeed, the parties were in an employment relationship, Ms. Huang was entitled to be paid, at least semi-monthly in accordance with section 17 of the *Act*, throughout the “first phase” of her work spanning the period from May 12th to August 31st, 2002. To the extent that the parties purported to defer Canada China News’ payment obligation until certain conditions were satisfied (see Supplementary Agreement, paragraph 4.2), I consider that “deferral” to be null and void by reason of section 4 of the *Act*. The \$2,000 per month “commission” to be paid pursuant to paragraph 3.3 of the “Supplementary Agreement”, similarly, should have been paid in semi-monthly installments.

The parties both acknowledged (see Supplementary Agreement, paragraph 4.1) that Ms. Huang completed the “first phase” of her work by August 31st, 2002. If Ms. Huang was not paid any wages prior to that latter date (and apparently she was not), she certainly was entitled to full payment as of August 31st, 2002--this latter date represents the very latest date when her wages became “payable”. Indeed, as I previously observed, the greater share of her wages came due well before August 31st since she had a statutory right to payment on a semi-monthly basis as and from May 12th, 2002 when her “work” commenced.

Assuming that August 31st, 2002 is the latest date that Ms. Huang’s wages became payable, Ms. Huang could only claim wages that became payable in the 6 month period prior to February 21st, 2003 (her termination date). Therefore, Canada China News could only be lawfully ordered to pay those wages that became payable in the period after August 21st, 2002--any wages that became payable prior to August 21st, 2002 cannot be claimed against Canada China News under the *Act* by reason of section 80(1)(a).

I am unable to determine, based on the material before me, whether Ms. Huang worked during the period from August 21st to 31st, 2002 (or some later date) or if any wages otherwise became payable during this latter period. Accordingly, I am referring this matter back to the delegate to determine what, if any, wages became payable as and from August 21st, 2002. In addition, the delegate may wish to further explore the question as to whether the parties were in an employment relationship thus entitling Ms. Huang to file a complaint under the *Act*.

## **ORDER**

Pursuant to section 115(1)(b) of the *Act*, I order that this matter be referred back to the Director for further investigation in accordance with these reasons for decision.

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