



An appeal

- by -

Cathay Traditional Chinese Medical Centre Ltd.
("Cathay Medical")

- 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: Lorne D. Collingwood

FILE No.: 2000/780

DATE OF HEARING: March 22, 2001

DATE OF DECISION: April 11, 2001

DECISION

OVERVIEW

Cathay Traditional Chinese Medical Centre Ltd. (which I will refer to as “Cathay Medical”, “the appellant” and also “the employer”) appeals an October 24, 2000 Determination by a delegate of the Director of Employment Standards (“the Director”). The appeal is pursuant to section 112 of the *Employment Standards Act* (“the Act”). The Determination orders Cathay Medical to pay Chen (Sally) Wei Hsu, Wenquian Li (Helen Lee), Hong Liang Shen, Yue Wang (incorrectly referred to as Yuz Wang in the determination), Jenny Al Zhen Xie, Xiao Jin Xue, Yong Xue, Annie Ting Yu Yan and Xiao Yan (Amy) Zheng individual amounts of wages which total \$16,074.29, interest included.

On being contacted by the delegate, Cathay Medical denied that it had employed any of the above nine people. The delegate found evidence, however, which shows that it is obvious that Cathay Medical employed all nine of the Complainants. He has awarded minimum wages, overtime wages, statutory holiday pay and vacation pay using information which is said to have been supplied by the employees.

The orders which require Cathay Medical to pay Li (Helen Lee) and Xiao Jin Xue were appealed but they were settled. What remains of the appeal is a claim that the Determination is in all other respects wrong and excessive. Records supplied by the seven employees to which the appeal pertains are said to be false. The employer is now seeking to present what is said to be the true record of the employees’ work. And in respect to the order to pay Yan, the employer claims that it is being forced to pay twice for work by her and that she is not entitled to overtime pay as she was the manager of Cathay Medical.

APPEARANCES

Gainc Chu	Owner of Cathay Medical
May Chu	Assisting her father
Andy Chu	Assisting his father
Yue Wang	On his own behalf
Xiao Yan (Amy) Zheng	On her own behalf
Annie Ting Yu Yan	On her own behalf
Daniel Lai	Interpreter

ISSUES TO BE DECIDED

Conclusions reached in respect to hours worked are at issue. The employer is seeking to introduce new evidence and that in itself raises an issue, that being the matter of whether there is reason to consider this new evidence. The employer argues that it is essential that the Tribunal consider the new evidence for reason of its accuracy and because evidence supplied by the employees is misleading and false.

The decision to award Yan overtime wages is at issue. Underlying that issue is the matter of whether Yan is or is not a “manager” as the term is used in the *Act*.

The employer argues that it is being ordered to pay twice for work by Yan and it argues that the Determination should be varied so that it takes into account money paid to Yan.

What I must ultimately decide is whether it is or is not shown that the Determination should be varied for reason of an error or errors in fact or law.

FACTS

Cathay Medical provided acupuncture and other traditional Chinese treatments and remedies. The clinic was opened on the August 7, 1999.

Gainc Chu is the owner of Cathay Medical. He was asked to respond to the Complaints. He responded by claiming that he did not hire any of the Complainants, nor tell them or allow them to do any work.

Chu now accepts that the seven Complainants to which the appeal pertains were employed by Cathay Medical but, according to Chu, the seven did not work as the delegate has set out in the Determination. Yan’s employment is said to have commenced on the 7th of June, 1999 and the other six employees are said to have started work on the 7th of August, 1999. According to the employer, there was no work for anyone but Yan prior to the clinic’s opening as there were no customers until that point and there was no room to work, the clinic being under construction.

The employer produces new evidence, time sheets signed by the employees. The time sheets confirm that the employees performed work on and after the 7th of August but there are not time sheets to indicate work by any of the seven employees prior to the 7th. According to the employer, that proves that it was not until the 7th that the employees, Yan excepted, started work.

Hsu, Shen, Xie and Yong Xue are said to be owed only \$102.78, \$257.40, \$199.79 and \$57.20, respectively. The employer claims that Wang and Zheng are owed similar amounts and that Yan is not owed \$6,408.50 plus interest but only \$1,080.

I find that Cathay Medical had its employees pose for a staff photo on the 4th of August. The August 7, 1999 edition of the Sing Tao daily newspaper contains an advertisement for Cathay Medical and in that ad is a picture of Chu and his staff, the Complainants included. It is

obvious that the picture was not taken on the 7th as that would not have allowed for its publication in the Sing Tao on the 7th. Wang recalls that the picture was taken on the 4th and, no evidence to the contrary, I accept that that is in fact the date of the picture.

Wang and Zheng tell me that they worked to get the clinic ready for its grand opening and that there was a considerable amount of work to do as there was much to purchase, remedies and treatments had to be prepared, and they had to get everything ready for the grand opening. They show me that they kept track of their work. Nothing is heard or received from Hsu, Shen, Xie and Yong Xue.

Hours Worked by Hsu, Shen, Xie and Yong Xue

Wang, Zheng and Yan have produced evidence which shows that Hsu, Shen, Xie and Yong Xue were required to be present for the staff photo on the 4th. That is, however, the extent of evidence of work by Hsu, Shen, Xie or Yong Xue prior to the 7th of August. Beyond that there is only the evidence of the employer, the employer accepting that Hsu, Shen, Xie and Yong Xue had earnings of \$102.78, \$257.40, \$199.79 and \$57.20, respectively.

Hours Worked by Wang, Yan and Zheng

I am satisfied that Wang, Zheng and Yan performed work as set out in the Determination. The employer makes much of its time sheets and Chu's hand-written acknowledgement of Yan's rate of pay. But Yan produces invoices which indicate that she started work prior to the 7th of June (Polaris Water, June 2 and June 6). I am satisfied that the Sing Tao photo serves to demonstrate that Cathay Medical was issuing instructions to Wang and Zheng prior to the 7th of August and that they were acting on the employer's instructions at that point. And while the time sheets show work on the 7th but not before that point, I am led to believe that it is proof of nothing more than the employer's failure to keep track of work by the employees. In that last respect I note the employer accepts that Yan worked prior to August 7 but there are not time sheets for any of the work that Yan performed prior to that day.

As Wang, Zheng and Yan describe events, it is preferred over that of the employer. Chu has demonstrated that he does not always tell the truth. Wang, Zheng and Yan each give a clear, consistent and believable account of matters. It is likely that at least some of the employees were employed prior to the 7th of August as that is consistent with readying the clinic for its grand opening.

The Determination awards Yan overtime pay. The employer claims that Yan is not entitled to overtime pay because she is a "manager" as the term is defined by the *Act*. I therefore asked Yan to explain her duties. She did so and it is her uncontradicted testimony that she was required to answer the telephone, keep track of résumés and correspondence, purchase products like staff uniforms (lab coats) and handle employment applications, but that she did not have the power to hire or fire, she did not make major financial decisions and she neither directed staff, nor supervised any employees.

I am shown that Yan was paid \$2,000 on the 17th of June, 1999, which is equal to her rate of pay; \$520 on July 8; \$800 on July 20; and a further \$964.34 in August of 1999. The payments were

through cheques issued by Successful Venture Ltd., what appears to be another of Chu's companies. There is no mention of the payments in the Determination.

ANALYSIS

The Tribunal has said [through decisions which stem from *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97)], that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

“This Tribunal will not allow appellants to ‘sit in the weeds’, failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. ... The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.”

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Adjudicator in that decision states, “the Tribunal will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions”.

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the Act's decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute. Yet the Tribunal has not set an absolute bar to the production of new evidence on appeal. “There are many decisions of this Tribunal which follow the reasoning of *Tri-West Tractor Ltd.* but almost all qualify the rule to some degree using such words as ‘generally’ or ‘normally’ new evidence will not be allowed at the appeal stage” (*Re Poretsis*, BCEST No. D370/98). That is because there is in some instances good reason to allow a party to raise a new issue or introduce new evidence on appeal. As another Adjudicator has said in *Speciality Motor Cars (1970) Ltd. and Russell David Reid* (BCEST No. D570/98),

“... it should also be recognized that the Kaiser Stables principle relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer”

In this case, the employer seeks to introduce evidence of pay cheques which could have been submitted to the delegate. The employer does not have a legitimate reason for its failure to produce the evidence at the investigative stage, it is just that it could not very well do that and still deny that the Complainants were employed by it. I am not going to allow the employer to

pick at the details of the Determination but I am satisfied that this is one of those rare cases in which administrative fairness demands that I accept new evidence on appeal, that being the evidence of payments.

I am concerned that the Determination makes no mention of payments received by Yan. I am also concerned that the reason for that may be that Yan herself has misled the delegate with the result that the employer is being ordered to pay twice for work. It may be that the \$4,284.34 which Yan has received from Successful Investments Inc. is not wages but if it is wages, or any part of it, then the Determination should reflect that.

The Orders issued in respect to Hsu, Shen, Xie and Yong Xue

There is no evidence to support the orders which have been issued in favour of Hsu, Shen, Xie and Yong Xue. Each of those orders must be varied.

The employer accepts that Hsu, Shen, Xie and Yong Xue are owed \$102.78, \$257.40, \$199.79 and \$57.20, respectively. But I am shown that the employees were required to pose for staff photos. Even if that is all that the employees were required to do prior to the 7th of August, it entitles them to what is at least an additional 4 hours of pay and they are entitled to interest pursuant to section 88 of the *Act*.

- 34** (2) *An employee is entitled to be paid for a minimum of*
- (a) *4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or*
 - (b) *2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.*

- 88** (1) *If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
- (a) *the date the employment terminates, and*
 - (b) *the date a complaint about the wages or other amount is delivered to the director to the date of payment.*

I find that the amount which Chen Wei Hsu is owed is \$131.38 [\$102.78 + 4 hours at 7.15 an hour] with interest being over and above that.

I find that the amount which Hong Liang Shen is owed is \$286 [\$257.40 + 4 hours at 7.15 an hour] plus interest.

I find that the amount which Jenny Ai Zhen Xie is owed is \$228.39 [\$199.79 + 4 hours at 7.15 an hour] plus interest.

I find that the amount which Yong Xue is owed is \$85.80 [\$57.20 + 4 hours at 7.15 an hour] plus interest.

Orders issued in respect to Wang and Zheng

The employer neither shows that Wang and Zheng did not work as set out in the Determination, nor shows that the order to pay Wang or the order to pay Zheng is in error. The Determination is in respect to the order to pay Wang and the order to pay Zheng is therefore confirmed.

The order to pay Yan

The employer has not shown me that the delegate errs in respect to the number of hours worked by Yan.

The employer argues that Yan is not entitled to overtime pay because she was a manager. I am satisfied that Yan is entitled to be paid overtime wages.

The term “manager” is defined in section 1 (1) of the *Employment Standards Regulation* (“the Regulation”) as follows:

“manager” means

(a) a person whose primary employment duties consist of supervising and directing other employees, or

(b) a person employed in an executive capacity.

The current approach of the Tribunal to deciding whether a person is or is not a manager is set out in the decision *Director of Employment Standards*, (1997) BCEST No. D479/97 (Reconsideration of BCEST No. D170/97). That leading decision calls for me to look beyond job titles and consider the following objective factors: (1) the power of independent action, autonomy and discretion; (2) the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; (3) making final judgements about such matters as hiring, firing, authorising overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules, and training the employees; and (4) that the person’s job description included supervising and directing employees. The Tribunal has also said that these objective factors must be present in the person’s daily activities and that a manager is a person that actually exercises such power.

It is clear to me that if Yan was a manager, it was in name only. She did not direct staff, nor did she supervise staff. She did not have the power to hire and fire staff. I am not shown a job description which calls for her to supervise and direct employees. I am, moreover, satisfied that she did not have any appreciable amount of autonomy, the power of independent action, nor authority to make any important decisions regarding the running of the business.

I am satisfied that the delegate is correct in deciding that Yan earned \$6,408.50. That leaves one final matter to decide and that is the matter of the amount owed.

It is clear that Yan received \$4,284.34 from Successful Investments Inc. and there is at least some reason to believe that she has been paid some of her wages. As matters are presented to me, I find only that this is a matter which requires further investigation.

ORDER

The Determination which is against Cathay Traditional Chinese Medical Centre Ltd. and dated October 24, 2000 is confirmed in part while other parts are varied with matters being referred back to the Director.

The order to pay Yue Wang \$769.73 is confirmed but to that amount I add what further interest has accrued pursuant to section 88 of the *Act*.

The order to pay Xiao Yan (Amy) Zheng \$1,785.20 is confirmed but to that amount I add what further interest has accrued pursuant to section 88 of the *Act*.

The order to pay Chen Wei Hsu is varied. The amount which Cathay Medical must pay Hsu is \$131.38 plus interest.

The order to pay Hong Liang Shen is varied. The amount which Cathay Medical must pay Shen is \$286 plus interest.

The order to pay Jenny Ai Zhen Xie is varied. The amount which Cathay Medical must pay Xie is \$228.39 plus interest.

The order to pay Yong Xue is varied. The amount which Cathay Medical must pay Xue is \$85.80 plus interest.

I find that the delegate's determination in respect to Yan's earnings is confirmed but the matter of whether Yan has or has not been paid wages and the calculation of the amount owing is referred back to the Director.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal