EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Kitto Japanese House on Granville Ltd.
("Kitto")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/16

DATE OF HEARING: April 2, 1997

DATE OF DECISION: April 15, 1997

DECISION

OVERVIEW

The appeal is by Kitto Japanese House on Granville Ltd. ("Kitto") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") which is dated December 24, 1996. In the Determination, Kitto is found to owe Harrison Yue Jiang Li ("Li") overtime pay.

APPEARANCES

Ken Wong	Owner of Kitto Japanese House
Sam Wong	Manager of Kitto Japanese House
Harrison Yue Jiang Li	Complainant
Linda Yu	Interpreter for Li
Chris Finding	For the Director

ISSUE TO BE DECIDED

At issue is the amount of overtime worked by Li. The appeal argues that Li did not work anywhere near the hours that he is found to have worked in the Determination.

FACTS

Harrison Li is from Shanghai and is just learning to speak English.

Li tested as a cook for Kitto Japanese House on February 22, 1996. That led to an offer of employment. Li began his new job on March 1, 1996. He worked at both Kitto's Granville Street location and also at its new restaurant on Bute Street. His employment was terminated on April 24, 1996.

Li punched a clock. His time cards for the first three days of his employment are accepted by both parties as an accurate record of his hours with one exception, lunch. Throughout his employment, the employee was given a half hour for lunch but was often required to remain in the restaurant.

There is substantial disagreement on the number of hours worked by Li in the period March 4 to March 24, 1996. In this period, start and finish times are disputed beyond whether there should be a deduction for the lunch period.

The Determination is based on Li's record of hours in that period. Despite being asked for payroll records, Kitto refused to make them available to the Employment Standards Officer assigned Li's complaint. The employer now submits the time cards of Li and tables of his scheduled work hours. The employer argues that the time cards overstate Li's hours by a significant margin but submits no convincing evidence of that. Kitto merely points to the hours Li was scheduled to work versus the hours shown by his time cards, the hand-written start and finish times of some cards, and the fact that many are not initialled by a supervisor. Li on the other hand presents me with a credible explanation for the hand-written entries on the time cards, namely that at the new Bute Street restaurant there was simply no clock to punch. And I note that while Kitto now finds fault with Li's time cards, it once accepted them as an accurate record of Li's hours. It paid him on that basis, albeit at his straight-time pay rate. The fact that Kitto relied on the time cards in paying wages, and the plausible explanation of Li for the hand-written time card entries, leads me to conclude that the time cards are an accurate record of Li's actual hours of work in the disputed period.

There is no disagreement in respect to Li's hours of work after March 24, 1996.

On April 4, 1996, Li signed Kitto's "Condition of Employment" contract. Part 3 of the contract states that:

> As a monthly employee, my required weekly working hours will be in the range of fifty (50) to fifty-two (52) hours. Any time during the term of my employment, I agree to accept the Company's assignment for me to work at 833 Bute Street, Vancouver, B.C. if requested by the Company.

Evidence submitted by Kitto shows that it paid Li for 146.5 hours of work at straight-time pay rates for the two week period, March 1 to March 16, 1996. Time cards reveal that Li often worked more than 12 hours in a day and that he worked as many as fourteen hours on some days. They also show that Li would work 8 and 9 days straight before getting a day off and that he commonly got only one day off in a week, not two.

ANALYSIS

The employee Li filed a complaint with the Employment Standards Branch, as he is entitled to do as an employee in British Columbia. The Director's delegate requested payroll records but Kitto chose not to co-operate with the Director's delegate prior to the Determination. The Director's delegate was forced to rely on the records of the employee.

The Director's delegate found that Li worked a substantial amount of overtime and that the employer paid for none of those hours at overtime rates. As matters are presented to me, there is clear support for both conclusions.

The employer now disputes the Determination and in doing so, wants the Tribunal to give detailed consideration to records which it could have, indeed should have, submitted to the Director's delegate. To allow that, to consider such information, in the absence of any good reason why that information was not submitted to the Director's delegate, is in my view quite inconsistent with both fairness and the nature of the appeal body which is the Employment Standards Tribunal. As another Adjudicator dealing with a discharge matter has said, appellants cannot be allowed "to 'sit in the weeds', failing or refusing to co-operate with the delegate . . . and later filing appeals of the Determination when they disagree with it" [*Tri-West Tractor Ltd.* (1996) BC EST No. D268/96].

The employer did not provide, at the investigation stage of the Director's delegate, the records on which it now seeks to rely. The reason for that is not one of mere oversight but a deliberate refusal to co-operate with the Employment Standards Branch. Kitto chose not to provide them. In my view, the consequence of that must be that Kitto be prevented from relying on that information now. To do otherwise would greatly distort the dispute handling machinery of the *Act*.

The *Act* requires that an employer pay overtime after 8 hours of work in a day and after 40 hours of work in a week. Section 35 is as follows:

> *35 An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or directly, or indirectly, allows an employee to work*
> *a) over 8 hours a day or 40 hours a week,...*

Li often worked more than 8 hours in a day and 40 hours in a week and he is owed overtime wages as a result. The fact that he signed an employment contract calling for a work week in the neighbourhood of 50 to 52 hours a week does not change that. The requirement that overtime be paid after 8 hours of work in a day and after 40 hours of work in a week is a **minimum** standard. Agreements to waive the minimum standards of the *Act* are void under the legislation, as s. 4 of the *Act* makes plainly clear. Section 4 is as follows:

> *The requirements of the Act or the Regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 refer to employees covered by collective agreements. Li was not covered by a collective agreement.

In summary, Kitto refused to co-operate with the Director at the investigation stage, and refused to make available to the Director's delegate information requested of it. As a result, it cannot rely on that information now. There is clear support for the main conclusions of the Determination, that Li worked substantial overtime hours and that Li was paid no overtime pay. The contract of

employment between Li and Kitto is null and void, to the extent that it purports to establish a regular work week in excess of 40 hours with no overtime pay. Kitto must now pay Li overtime pay of $4,698.12, the amount of the Determination.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination which is against Kitto Japanese House on Granville Ltd. and dated December 24, 1996, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc