

An appeal

- by -

Silver Sky Garment Manufactory Ltd.
("Silver Sky")

- 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: Ian Lawson

FILE No.: 2004A/125

DATE OF DECISION: October 15, 2004

DECISION

OVERVIEW

This is an appeal by Silver Sky Garment Manufactory Ltd. ("Silver Sky") pursuant to section 112 of the *Act*. The appeal is from Determination ER#099-038 issued by Ken Elchuk, a delegate of the Director of Employment Standards on June 10, 2004. The Determination required Silver Sky to pay wages, overtime, statutory holiday pay, vacation pay and interest to Lin Lin Chen ("Chen") in the total amount of \$9,646.16, together with an administrative penalty in the amount of \$500.00.

Silver Sky filed its appeal on July 19, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Silver Sky operates a garment manufacturing business in Vancouver. Chen worked for Silver Sky as a sewer between August 24, 2002 and April 27, 2003. She was paid on a piecework basis at rates set by Silver Sky. The Delegate found that although Silver Sky permitted its workers to do work at home, Chen performed all her work on Silver Sky's premises, using its equipment. Silver Sky argued before the Delegate that there was a written agreement with Chen whereby she agreed her piecework would be performed on a contract basis, without expectation of a minimum or hourly wage. Silver Sky could not produce the written agreement, and told the Delegate it would go bankrupt if it paid an hourly rate to its workers.

Before the Delegate, Silver Sky did not dispute the evidence given by Chen regarding the nature of her work, the materials provided to her, and the supervision of her work by Silver Sky. Silver Sky did dispute, however, the number of hours that Chen claimed to have worked. Chen supplied a logbook in which she says she recorded the hours she worked at the end of each day. She also prepared a list of piecework for Silver Sky every 15 days. Silver Sky argued Chen could not have worked the hours claimed for the piecework delivered, and there were discrepancies between the hours Chen claimed in April 2003 and the piecework generated that month. Silver Sky had no record of hours worked by any of its sewers.

The Delegate identified three issues in his Determination: whether Chen was an employee or a self-employed contract worker; if she was an employee, whether she was paid at least the minimum wage; and whether Chen is also owed overtime, statutory holiday pay and/or vacation pay. The Delegate concluded Chen was an employee, in the following terms:

The evidence presented by the parties clearly establishes that: Silver Sky provided the work to be done; directed and controlled how the work was to be performed; Silver Sky provided the equipment and materials used in the business; Silver Sky set the rate of remuneration; and, the complainant had no chance of profit, other than in producing work on a piece basis, and took no risk of loss. The complainant provided general services to Silver Sky on an indefinite on-going basis and was not hired to perform a time limited or project-based service.

Respecting the hours of work claimed, the Delegate stated:

Further, upon a review of the evidence presented in the investigation I am satisfied that, on a balance of probabilities, the complainant worked the hours claimed as shown on the Wage Calculation Report attached to this Determination. The complainant maintained a daily record of the hours worked by her. Silver Sky did not produce any record contrary to that provided by the complainant. The complainant's record and evidence was clear, concise, and reasonable. I accept the complainant's record in total.

The Delegate then found that Chen had been paid less than minimum wage for the hours she worked, and she was also owed overtime, statutory holiday pay and vacation pay, all of which amounted with interest to \$9,646.16.

Silver Sky alleges in its Notice of Appeal that the Director erred in law, that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. In its written argument in support of the appeal, Silver Sky makes five points:

1. The Delegate should not have decided the matter, as he "is also the conciliator for the settlement of the case outside the court, which is inconsistent with legal procedures."
2. "Ken Elchuk has failed to take the evidence produced by the two parties in a fair attitude during the proceedings of the meetings. Documentary evidence by several people that I produced proved that LinLin Chen's time record was false. But Ken Elchuk neither accepted nor took a look at it."
3. The Delegate failed to see the obvious, that "judging from the ink and location of the time record" Chen had created her time record after the fact. Silver Sky emphasized this to the Delegate, but the Delegate "refused to examine the originals" of the record.
4. The hours of work claimed by Chen were "ridiculous," and clearly were overblown. As an example, in one period she claimed to have worked 61 hours, but was paid only \$78.10, which amounts to \$1.28 per hour – Chen's work was routine and should have resulted in an hourly rate of "\$7 to \$8 per hour for this line of work."
5. "Every worker signs a agreement with Silver Sky. The agreement says that every worker borrow my machine and accept the works. They can sew the works at home. I have been telling LinLin Chen I hope you sew at home, but she has been refusing sewing at home for some reason. The report of Ken Elchuk says that LinLin Chen don't remember she sign an agreement. I don't believe her because she won't sew my works if she don't sign the agreement. By law, oral agreement is ok. I think LinLin Chen should take some responsibility in this case. So, I think the determination is unfair."

In a further submission dated August 30, 2004, Silver Sky states Chen could not have worked at all between April 18 and April 27 of 2003, and that "every worker can prove this." Silver Sky closed its business on April 30, 2003. Silver Sky also refers to "the mediation" at which Chen advised the Delegate she did not recall any agreement as to contract piecework.

ISSUES

For the reasons set out below, I am unable to adequately address the grounds of appeal raised by Silver Sky. Two preliminary issues arise as follows:

1. Whether the Delegate also acted as a mediator in this complaint (or whether a mediation was conducted at all).
2. Whether the written statements attached to Silver Sky's Notice of Appeal were put before the Delegate, and if so, whether they were considered by the Delegate.

ANALYSIS AND ORDER

The Director has not filed a written submission in response to this appeal. The record delivered by the Director does not contain any written statements delivered to the Delegate by Silver Sky, as seems to be alleged in Silver Sky's submissions. I know nothing about whether a mediation was conducted in this case, and if so, whether the Delegate conducted it. In my view, I cannot properly decide this appeal without that information. I therefore order the following matters to be referred back to the Director for further investigation, pursuant to s. 114(2)(a) of the *Act*:

1. Was a mediation conducted in this matter, and if so, who conducted it?
2. Were the written statements of Gui Fen Liu dated March 29, 2004, Banyan Guan dated April 1, 2004, Anissa Fung dated April 2, 2004, and Dai Hon Wen dated April 9, 2004 (all of which are attached to the Notice of Appeal) delivered to the Delegate? If so, conduct a further investigation as to the validity of the statements of fact alleged therein.

A third question arises from Silver Sky's submissions: whether a proper investigation was made into the hours of work claimed by Chen between April 18 and April 27, 2003. It seems to have been obvious to Silver Sky that no worker could claim hours of work during this period, but the issue is not addressed in the Determination. I therefore order a third matter to be referred back to the Director:

3. Investigate the allegation that Chen could not have performed work for Silver Sky between April 18 and April 27, 2003.

Ian Lawson
Member
Employment Standards Tribunal