

An appeal

- by -

Daniel P.L. Tong and Sea Harbour Seafood Restaurant Ltd.
(“Tong” and “Sea Harbour”, respectively)

- 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: David B. Stevenson

FILE No.: 2005A/179 and 2005A/180

DATE OF DECISION: December 20, 2005

DECISION

SUBMISSIONS

Daniel P.L. Tong	on his own behalf
Alvin Hui	on behalf of Sea Harbour Seafood Restaurant Ltd.
Ted Mitchell	on behalf of the Director

OVERVIEW

1. This decision addresses two appeals filed under Section 112 of the *Employment Standards Act* (the “Act”) of a Determination made by a delegate of the Director of Employment Standards (the “delegate”) on September 2, 2005. The Determination considered a complaint filed by Daniel P.L. Tong (“Tong”) against Sea Harbour Seafood Restaurant Ltd. (“Sea Harbour”). The delegate found the *Act* had been contravened and that Tong was owed wages in the amount of \$5626.17. The delegate imposed administrative penalties on Sea Harbour in the amount of \$3500.00.
2. Tong has appealed the Determination on the ground that the delegate failed to observe principles of natural justice in making the Determination. He seeks to have the Tribunal change the findings of the delegate on his overtime claim for a period from August 16 to September 15, 2005. The delegate decided Tong had not proved his overtime claim for this period, preferring Sea Harbour’s hours of work records relating to this period.
3. Sea Harbour has appealed the Determination on the ground that the delegate erred in law in making several findings of fact in the Determination. More particularly, Sea Harbour says the delegate “made a serious error by failing to apply the ‘credibility test’ properly to the facts of the case”.
4. The Tribunal is satisfied these appeals can be decided on the written submissions of the parties.

ISSUE

5. The issue is whether either Tong or Sea Harbour have shown any valid ground for an appeal of the Determination.

THE FACTS

6. It is unnecessary to engage in a substantial recitation of the facts of this case.
7. Tong was employed by Sea Harbour as a dishwasher from July 21, 2003 to February 15, 2004. He initially filed a complaint with the Director claiming entitlement to length of service compensation. Later, he included a claim for overtime pay. When Tong raised this claim, he advised the delegate, among other things, that he was paid minimum hourly wage from July 21, 2003 to September 15th, 2003 and a monthly salary of \$1500.00 from September 16th until his employment terminated. During the period Tong worked at an hourly rate, he punched into work on a time card and the employer recorded the

time he finished work. The record of hours worked during this period was kept by Sea Harbour and Tong's wage statements for this period showed his total hours worked during each pay period. During the second period, Tong's wage statements did not show total hours worked.

8. Tong kept a personal calendar on which he contemporaneously recorded his hours worked.
9. The delegate accepted the accuracy of the record of hours worked kept by Sea Harbour during the first period and found no overtime entitlement had been established for that period.
10. The delegate accepted the accuracy of the record of hours worked kept by Tong over the second period and found entitlement overtime wages was established for that period.
11. The delegate found reasons to support both findings.
12. The complaint process was punctuated by each side accusing the other of fabricating and altering evidence and of being untruthful. Those allegations are perpetuated in this appeal.

ARGUMENT AND ANALYSIS

13. Subsection 112(1) of the *Act* says:

112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was made.*

14. As an opening comment to the analysis of this appeal, I point out that that the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). An error of law relating to the facts might be demonstrated where a delegate has made findings of fact without any evidence or where the evidence does not provide any rational basis for the finding made; it is perverse or irrational.
15. Issues about the weight to be given to certain evidence and about credibility are questions of fact, not law (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, (1998) 62 B.C..L.R. (3d) 354 (C.A.); [1998] B.C.J. No. 2275 (BCCA)).
16. The appeal by Tong is easily disposed of. His appeal is not at all about natural justice, but it is about having the Tribunal review the decision of the delegate to give greater weight to the evidence provided by Sea Harbour relating to the hours he worked in the period from August 16 to September 15, 2003. The Determination clearly shows the delegate considered the evidence relating to the question of his entitlement to overtime wages in that period, accepted the evidence provided by Sea Harbour and made a finding of fact based on the evidence. It was a finding of fact for which there was evidence and which

could reasonably have been made on that evidence. No breach of natural justice, or other error of law, has been shown. As indicated above, the Tribunal has no appellate authority over findings of fact.

17. Tong's appeal is dismissed.
18. The appeal by Sea Harbour requires some additional analysis, but the result is the same.
19. Counsel for Sea Harbour says the delegate committed an error of law by incorrectly applying the test for determining the issue of Tong's credibility. The test is set out in the following extract from *Faryna v. Chorney*, [1952] 2 D.L.R. 354:

The test must reasonably subject his [the witness] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the best test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

20. Counsel says Tong's evidence - that he worked unpaid hours for Sea Harbour from September 16, 2003 to February 15, 2004 - is "ludicrous and improbable in light of the questions, unanswered and documents withheld by the claimant". Counsel asserts that Tong has provided no corroborating evidence and refused to answer questions and produce documents that might have affected his credibility at the complaint hearing.
21. What follows from that assertion is a six page analysis of why the delegate should not have found Tong's evidence to be credible. Included in that analysis are two matters that warrant specific comment. The first is an assertion that the delegate was not fair and unbiased. There is absolutely no basis for that assertion and I give it no credence whatsoever. The second relates to counsel's continued references to the Labour Relations Board Rules. Those Rules do not, of course, apply to the complaint process under the *Act*. They apply to proceedings before the Labour Relations Board exercising its jurisdiction under the *Labour Relations Code* [RSBC 1996], Ch. 244. The obligation of the delegate in dealing with the complaint filed by Tong under the *Act* is found in Section 77 of the *Act* and in principles of natural justice.
22. The argument by counsel for Sea Harbour is structured under three general arguments:
 - I The delegate found in favour of Tong even though Tong provided no corroborating evidence;
 - II Tong refused to answer questions that would have helped the delegate gauge his credibility;
and
 - III Tong's story is highly improbable in light of the hourly wage calculated in this case.
23. The Determination records the reasons for the delegate accepting the Tong's evidence that he worked overtime hours in the September to February period. It records that Sea Harbour provided no evidence relating to hours Tong worked in that period. There is no legal requirement in the test described in *Faryna v. Chorney, supra*, that Tong's evidence had to be corroborated, but in any event the delegate found some corroboration for that evidence in the consistency between Tong's record of hours worked at another restaurant and his wage statements from that restaurant.

24. The second argument is presumptive and argumentative, and shows no error of law in the application of the test described in *Faryna v. Chorney, supra*.
25. The third argument does nothing more than ask the Tribunal to re-assess the “financial facts” of Tong’s case and reach a different conclusion.
26. The appeal by Sea Harbour is also dismissed.

ORDER

27. Pursuant to Section 115 of the *Act*, I order the Determination dated September 2, 2005 be confirmed in the amount of \$9,126.17, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal