

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 -

Foursea Chinese Restaurant Ltd.
("Foursea")

and

Su Zhen Luo
("Luo")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

HEARING DATE: July 18, 1996

FILE NO.: 95/038

DATE OF DECISION: July 18, 1996

DECISION

APPEARANCES

William H. L. Chan
and Zachary Fong

for Foursea Chinese Restaurant Ltd.

Li Min

for Su Zhen Luo

Paul Harvey

for Director of Employment Standards

OVERVIEW

This is an appeal by Foursea Chinese Restaurant Ltd. (“Foursea”), under Section 112 of the *Employment Standards Act* (the “Act”), against Determination #CDET 000179 which was issued by a delegate of the Director of Employment Standards on November 28, 1995.

The Determination requires Foursea to pay \$1,664.02 to Su Zhen Luo (“Luo”) for unpaid wages and vacation pay.

Foursea’s appeal states that it is willing to pay vacation pay to Luo, but denies that any wages are owed to her.

A hearing was held on July 18, 1996 at which time evidence was given under oath.

Robert La, an accredited court interpreter, was sworn to interpret the evidence from Cantonese to English.

ISSUE TO BE DECIDED

Does Foursea owe wages to Luo as set out in the Determination?

FACTS

Luo was employed by Foursea as a dishwasher/kitchen helper from December 1, 1994 to May 31, 1995. She was paid a salary of \$1,000.00 per month.

In the Reason Schedule attached to the Determination, the Director’s delegate notes that ... “The employer has acknowledged that it continues to pay wages to some or all of its employees on a monthly basis in contravention of Section 17 of the *Employment Standards Act*.”

Foursea's appeal acknowledges that ... "There isn't sufficient information to establish that vacation pay was paid out ... the employer is willing to pay any vacation pay ... without further argument." However, Foursea denies that it owes any wages to Luo.

The Director's delegate based the Determination on his finding that Luo worked from 1:00 p.m. to 10:00 p.m. Wednesday through Saturday and 12:00 p.m. (noon) to 10:00 p.m. on Sundays with one half hour deducted per day for meal breaks. The Director's delegate calculated the wages owing to Luo based on the minimum wage rate (\$6.00 per hour) which was required to be paid under Section 16 of the *Act* and Section 15 of the *Regulation*.

Foursea's daily hours of operation were 11:00 a.m. - 3:00 p.m. and 5:00 p.m. - 10:00 p.m. The central issue in dispute in this appeal is that Foursea asserts that Luo was not required to work between 3:00 p.m. and 5:00 p.m. each day. Three witnesses gave evidence on this point on behalf of Foursea.

Man Chau Choi ("Man"), a waiter at Foursea, gave evidence about the restaurant's hours of operation and that employees were provided a meal, free of charge, at 2:30 p.m., 4:30 p.m. and 10:00 p.m. each day. In cross examination, he gave evidence that he did not know who washed the dishes after 3:00 p.m. because he worked in the dining room. He also stated that he did not know who washed the vegetables for the cooks. Man also gave evidence that while each employee had a different start and stop time, most remained at the restaurant between 3:00 p.m. and 5:00 p.m. each day. He stated that he did not know Luo's work schedule but saw her reading the newspaper on occasion between 3:00 and 5:00 p.m.

Situ Ling ("Situ") gave evidence that he has worked for one year in the kitchen at Foursea from 2:00 p.m. to 10:00 p.m. as a cook's helper. He stated that he became familiar with Luo in late March, 1995 and that her duties were to wash dishes and to help other kitchen staff. Under cross examination he stated that only two employees work between 3:00 p.m. and 5:00 p.m. - Chang Xiu Yu and himself. Also under cross examination, Situ was unable to say with certainty how many customers the restaurant could accommodate.

Chang Xiu Yu ("Chang") gave evidence that she has worked at Foursea for five years, first as a dishwasher and then as a cook. Her hours of work are from 1:00 p.m. to 10:00 p.m. six days per week. She stated that there is "... not much work between 3:00 p.m. and 5:00 p.m. most of the time" and "... sometimes I don't work, sometimes I do work. Under cross examination, Chang was asked how many customers the restaurant could accommodate. Her answers were: "I don't know"; "It's none of my business"; "I can't remember"; "and I don't know how many tables are in the restaurant." Also under cross examination she gave evidence that there has never been a written schedule to show when employees start work, take meal breaks and finish work.

Luo gave evidence about her typical work day. She stated that she began work at 1:00 p.m., except on Sunday when she started at 12:00 p.m. (noon). Her evidence about her daily duties can be summarized as follows:

- 1:00 - 3:30: wash dirty dishes, chopsticks and kitchen utensils; clean cooking area; and clean stock pots.
- 3:30 - 4:00 wash and clean kitchen floor; clean garbage cans.
- 4:00 - 5:00 take food deliveries from the delivery area to the upstairs storage room and stock them there.
- 5:00 - 10:00 clean dirty dishes from employees' meals; wash clean and cut vegetables and seafood; cook rice; clean kitchen, employee washroom and customer washroom; bring food from stockroom to kitchen as needed.

Luo's evidence was that she asked her employer for an increase in her salary in early May, 1995. Her employment was terminated, without notice, on May 31, 1995.

Under cross examination, Luo testified that she was never told to stop working between 3:00 p.m. and 5:00 p.m. and was specifically given work to do during this period of time. For example, she stated, she had to cook rice promptly at 4:00 p.m. for the employees' meals. She also testified that she was given instructions to take the food to the warehouse and to tidy the warehouse. According to Luo, food deliveries were normally made between 3:00 and 5:00 when the restaurant was not open to the public.

ANALYSIS

Foursea argues that because the restaurant was closed between 3:00 p.m. and 5:00 p.m., Luo was off duty for those hours and, therefore, no wages are owed to her. In effect, Foursea argues that if Luo did any work between 3:00 p.m. and 5:00 p.m. she was not required to do so by her employer.

I have considered all of the evidence given to the Tribunal by Man, Situ, Chang and Luo. Wherever there is a conflict in the evidence I find that I prefer the evidence given by Luo. She gave her evidence in a forthright manner and her responses to vigorous cross examination were consistent with her evidence in chief. I find it remarkable that neither Chang nor Situ could give evidence about the number of customers that the restaurant could accommodate. Their evasiveness on this point puts into doubt the reliability of other parts of their evidence.

Luo's evidence included a detailed account of her typical daily duties between 1:00 p.m. and 10:00 p.m., none of which was challenged in cross examination nor by the evidence given by Man, Situ and Chang. I find Luo's explanation of her duties and her hours of work to be reasonable in all of the circumstances. For that reason, I can find no reason to cancel or vary the Determination.

Section 1 of the *Act* defines an employee, in part, as "... a person an employer allows, directly or indirectly, to perform work performed by an employee. Foursea's appeal makes it clear that it "... would not discourage the complainant's volunteering to help other

co-workers.” This statement, taken together with the evidence of Luo’s hours of work and her duties, convinces me that there is no reason to vary or cancel the Determination.

ORDER

I order, under Section 115 of the *Act.*, that Determination # CDET 000179 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:nc