EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Ningfei Zhang
(“ Zhang ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/129

DATE OF HEARING: May 23, 2000

DATE OF DECISION: June 9, 2000

DECISION

APPEARANCES

Ningfei Zhang	on his own behalf
Barry Dong	Legal Counsel for Aurora Instruments Ltd.
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Ningfei Zhang ("Zhang") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 8th, 2000 under file number ER 052159 (the "Determination").

Zhang's appeal was heard at the Tribunal's offices in Vancouver on May 23rd, 2000. Zhang testified (through a Mandarin interpreter) on his own behalf and, in addition, called two other witnesses, namely, Jinfu Yang and Steven Yan. The respondent employer did not call any *viva voce* evidence. The Director was not represented at the appeal hearing.

THE DETERMINATION

The Director's delegate, rejecting the position advanced by Aurora Instruments Ltd. ("Aurora" or the "employer"), held that Zhang was an Aurora employee and not an independent contractor. Notwithstanding this latter finding, however, the delegate did not accept Zhang's assertion that his wage rate was $10 per hour and, accordingly, calculated his wage entitlement based on the minimum wage of $7.15 per hour. In the absence of any employer records showing Zhang's actual working hours, the delegate relied on certain records in the form of notations on a monthly calendar, provided to her by Zhang. In the end result, the delegate concluded that Aurora did not owe Zhang any monies on account of unpaid wages.

The bulk of the Determination addresses Zhang's status (employee or contractor?) – Aurora does not challenge the delegate's conclusion that Zhang was an employee. The relevant portions of the Determination dealing with Zhang's unpaid wage claim (found at pp. 6-7) read as follows:

> "There is no evidence to support that the hourly wage was $10.00 per hour. In the absence of an agreed wage rate, the minimum wage of $7.15 applies. With regards to the hours worked, the employer has provided no records and claims that none were kept. I have examined N. Zhang's personal calendar record, which he provided and it only shows hours worked weekends and holidays. It shows no hours worked Monday to Friday...The employer contends that N. Zhang worked less than 100 hours and that they had no control over the hours he worked. The only acceptable records submitted are N. Zhang's calendar records, which show start and finish times and appear to have been kept in a timely manner. However, these records only support that 72 hours were worked. The total wages and

> advance N. Zhang received is $600.00 gross, which covers the hours he has records for, therefore no wages appear to be owed...
>
> Due to a lack of adequate records and based on the information provided, there is not enough evidence to support that any wages are owing to N. Zhang.
>
> DETERMINATION
>
> I have determined that the Act has not been contravened. Investigation has ceased and we have closed the file. No further action will be taken."

Thus, the delegate rejected Zhang's position that he worked more or less regular hours (9:00 A.M. to 5:30 P.M.) from Monday to Friday during the period in question and calculated his wage entitlement based on his having worked only weekends and holidays.

ISSUES ON APPEAL

In a letter dated February 27th, 2000, addressed to the Tribunal and appended to Zhang's notice of appeal, Zhang sets out two primary grounds of appeal:

- first, he maintains that his hourly wage was $10; and
- second, he says that the delegate erred in refusing to award him any compensation for regular Monday to Friday work.

ANALYSIS

Based on the evidence before me, I am satisfied that the delegate's analysis set out in the Determination is flawed and that this matter ought to be referred back to the Director for further investigation.

The delegate appears to have confused the burden of proof in this case--it is the *employer's* burden to provide employees with regular wage statements (see section 27) and to maintain proper payroll records (see section 28) which records must include, *inter alia*, "the hours worked by the employee on each day". Under the *Act*, an *employee* is not obliged to maintain any payroll records (*Carline Holdings Ltd.,* BC EST #D441/98). Thus, I must express some surprise at the delegate's conclusion "that the Act has not been contravened"– at the very least, the employer appears to have contravened sections 27 and 28. Further, the evidence before the delegate (and before me) shows that the employer also contravened section 17 of the *Act* (paydays).

In *Hofer*, BC EST #D538/79 (reconsideration dismissed BC EST #D120/98), former Tribunal Chair Crampton observed:

> "In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's Delegate) to consider employees' records *or their oral evidence concerning hours of work.* These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment

> of wages. *Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable.*" (my *italics*)

As noted above, Aurora did not maintain a record of Zhang's working hours but nonetheless took the position before the delegate that Zhang worked no more than 100 hours. Zhang, for his part, maintained that he worked some 324 hours during the 1 1/2 months that he was employed by Aurora. The delegate held that Zhang worked 72 hours but in so doing, by necessary implication, rejected his oral evidence as to his hours worked.

Before me, both Jinfu Yang and Steven Yan (former Aurora employees) testified that Zhang worked on weekdays although Yang's evidence on this point is tempered by the fact that Yang was not working on several of the days during the 2-week period when his employment overlapped that of Zhang. Yan's evidence on this point, on the other hand, is much more compelling and is wholly uncontradicted.

Although the delegate was aware of the fact that Zhang intended to produce witness statements regarding his hours worked (including, I understand, a statement from Yan) these statements were not produced during the investigation. However, notwithstanding that omission, I do not conceive this to be a *Kaiser Stables* (BC EST #D058/97) scenario whereby Yan's and Yang's evidence is inadmissible on appeal (as was asserted by employer's counsel). I say that for at least two reasons. First, clearly Zhang was an active participant in the investigation of his own complaint–he certainly did not "lie in the weeds". Second, the delegate was specifically made aware of the availability of Yang but, apparently, did not interview him; I fail to see how the delegate's failure to interview a witness (whose identity was made known to her) ought to redound to Zhang's detriment. Although it might be said that Zhang ought to have ensured that the delegate was provided with Yan's telephone number or a statement from him, it should be noted that the delegate was aware that Zhang did have other witnesses (although they were not identified by name) who could corroborate his assertions regarding his working hours. I also note that Zhang was a recent immigrant when he filed his complaint (he arrived in Canada from China on May 29th, 1998). Zhang obviously has some difficulties with the English language, let alone the finer points of the investigative and adjudicative procedures established under the *Act.* In light of the foregoing, I am not satisfied that either Mr. Yang's or Mr. Yan's evidence is inadmissible.

In any event, and quite apart from the admissibility of the *viva voce* evidence of Messrs. Yang and Yan, I am of the view that the Determination cannot stand as issued. The delegate had before her a situation in which the employer had not maintained *any* proper payroll records relating to Zhang despite its legal obligation in that regard. Obviously, both Zhang and Aurora had markedly divergent views regarding the number of hours Zhang worked during the period in question (July 16th to September 1st, 1998). The delegate appears to have resolved the matter by simply stating that Zhang's records only recorded 72 working hours but this finding ignores Zhang's apparent position that he recorded *only* weekend and holiday hours on his calendar. Zhang says that he told the delegate that he only recorded his weekend and holiday hours and that evidence stands wholly uncontradicted before me.

Further, and more importantly, Zhang was not obliged to maintain *any* record of his hours worked. The delegate simply did not turn her mind to the credibility of Zhang's *oral evidence* regarding his total working hours; the delegate did not attempt to corroborate Zhang's oral evidence by interviewing his witness, Mr. Yang. While it was certainly open to the delegate to reject Zhang's oral evidence as to his total working hours, the delegate–at least in the Determination itself--has not set out any basis for so doing and, so far as I can gather based on the evidence before me, on the balance of probabilities, it would appear that Zhang worked far more than the 72 hours credited to him by the delegate.

As noted above, the delegate found that there was insufficient evidence to support Zhang's assertion that the agreed wage rate was $10 per hour. Indeed, at one point in his testimony Zhang stated "I *think* I was to get $10 per hour" (my *emphasis*). Neither Mr. Yang nor Mr. Yan (Zhang's two witnesses) were able to provide any evidence regarding Zhang's wage rate. Zhang also submitted a handwritten one-page document that apparently represents notes made by Aurora's principal, Mr. Dong Liang, during a meeting between two shortly after Zhang's employment commenced. This document (Exhibit 1 at the appeal hearing) contains many, seemingly unrelated, notations but nowhere clearly sets out an agreed $10 per hour wage rate. Overall, the document appears to be a rather confusing array of numbers and words, some of which are in English while others in Mandarin. In my opinion, it certainly does not corroborate Zhang's position that his base hourly rate was $10. Accordingly, I see no reason to interfere with the delegate's finding that Zhang's unpaid wages ought to be calculated based on the minimum wage of $7.15 per hour.

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that Zhang's complaint be referred back to the Director so that it may be reinvestigated, taking into account the findings set out herein, by a delegate other than the delegate who issued the Determination. Following the reinvestigation, the Director may vary the Determination pursuant to section 86 of the *Act.*

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal