

**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 -

Aurora Instruments Ltd.  
("Aurora")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2000/132

**DATE OF HEARING:** May 23, 2000

**DATE OF DECISION:** June 9, 2000

## DECISION

### APPEARANCES

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

### OVERVIEW

This is an appeal brought by Aurora Instruments Ltd. (“Aurora” or the “employer”) 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”).

Aurora’s appeal was heard at the Tribunal’s offices in Vancouver on May 23rd, 2000 at which time I heard the testimony of Aurora’s president and director, Dong Liang, and his daughter, Ms. Fay Liang (who acted as Aurora’s bookkeeper and payroll clerk). The respondent employee, Mr. Jinfu Yang (“Yang”), appeared and testified as the sole witness on his own behalf. Yang’s evidence was given partly in English and partly through a certified Mandarin interpreter. The Director was not represented at the appeal hearing.

### THE DETERMINATION

The Director’s delegate awarded Yang the sum of \$15,394.06 on account of unpaid wages (overtime pay and concomitant vacation pay) and interest.

The delegate rejected Aurora’s position that Yang was “manager” as defined in section 1 of the *Employment Standards Regulation* and, therefore, not entitled to overtime pay. The delegate also rejected Yang’s claim for compensation for length of service on the basis that Aurora did give Yang the appropriate amount of written notice (2 weeks) called for in section 63 of the *Act*. Yang has not appealed this latter aspect of the Determination and Aurora does not challenge the delegate’s finding that Yang was not “manager”.

### ISSUES ON APPEAL

In its appeal documents, Aurora says that the Director’s delegate erred in several respects. These alleged errors may be summarized as follows:

- the delegate awarded Yang overtime pay in the absence of reliable evidence regarding Yang having worked a specific number of (or, indeed, any) overtime hours;
- the delegate wrongly rejected the employer’s position that Yang’s monthly salary included an allowance for 10.5 overtime hours each week; and

- the delegate conducted a procedurally flawed and, as it related to the employer, a misleading, investigation.

## BACKGROUND FACTS AND EVIDENCE

Aurora manufactures chemical analysis instruments. The company, which is supported, in part, by both federal and provincial funding, was founded in April 1990 and currently has some 15 employees. I understand that the employer is commercializing applied research that was originally undertaken at the University of British Columbia (UBC is an Aurora “a” shareholder). Dong Liang, a Ph.D. chemist, is Aurora’s president and holds 51% of Aurora’s issued shares.

### *Dong Liang’s Evidence*

Mr. Yang first contacted Mr. Liang (by telephone) while Yang was working on an exchange visa at a university in the United States. Yang was seeking a position in Canada and had either applied for, or had already obtained, landed immigrant status. Liang offered Yang a position (over the telephone) and clearly indicated to Yang that the \$2,000 monthly salary was based on a 50.5-hour work week—8.5 hours Monday to Friday plus an 8-hour Sunday shift. Mr. Yang joined Aurora in mid-December 1996.

On December 12th, 1996, after Yang accepted the position, Liang prepared a note (marked as Exhibit 1) to his daughter, Fay Liang (who handled payroll) indicating that Yang was to be paid a monthly salary of \$2,000 and that this salary was based on a 50.5-hour work week which included 10.5 overtime hours each week; Yang’s “base” rate, for purposes of paying overtime pay, was indicated to be \$8.10 per hour.

Mr. Liang says that during Yang’s tenure (some 1 1/2 years) Yang never raised any question regarding payment for overtime hours. Liang says that Yang often, but not always, worked 50.5-hour work weeks. If Yang worked less than a 50.5 hour week, his salary was not proportionately reduced and any overtime beyond 10.5 hours required Liang’s express approval.

In late February 1997, Yang’s monthly salary was increased by \$300 and another handwritten note (marked as Exhibit 2), dated February 28th, 1997, was given by Mr. Liang to his daughter--this note states, in part, that Yang’s \$2,300 monthly salary is “base [sic] on 50.5 hr/wk and about \$9.31/hr base rate”. Yang’s salary was increased yet again in early January 1998 to \$2,450 and another note was prepared by Mr. Liang and given to his daughter--this note (Exhibit 3) refers to a new base hourly rate of \$9.92 and that the monthly salary assumes a 50.5-hour work week. Liang says that Yang was present when both Exhibits 2 and 3 (but not Exhibit 1) were written out and given to Ms. Liang and that Yang never questioned either his pay or Aurora’s expectations regarding his work week and never asked for any additional overtime pay. Yang first raised the matter of overtime pay only after his employment with Aurora ended.

During the course of the delegate’s investigation, Mr. Liang says that the delegate assured him, on more than one occasion, that Yang’s overtime entitlement would not exceed “several hundred dollars”. Accordingly, Aurora did not go to the expense of obtaining records from Aurora’s security firm, Celcom Security, which it says would have shown that Yang’s claim regarding Sunday overtime hours was inflated (the records would apparently show Yang’s entry and exit from Aurora’s premises as recorded by the use of his security “pass key”). However, given the

costs associated with obtaining the records, relative to the value of Yang's claim as indicated by the delegate, Aurora did not obtain the records. I understand that Celcom has now gone out of business; there is no evidence before me regarding the present location of its security records and obviously, the contents of these records is a matter about which I can only speculate.

*Fay Liang's Evidence*

Ms. Liang confirmed that her father gave her Exhibits 1, 2 and 3. She also testified that her father wrote out Exhibits 2 and 3 in her and Yang's presence. Yang never approached her requesting additional payment for working overtime hours. Ms. Liang also testified that the delegate misinterpreted Yang's first pay stub (for the period ending December 24th, 1996) and that the calculation shown there was simply an attempt to create a daily rate so that Yang could be properly paid for the 8 days that he worked during the first pay period. The calculation shown on the pay stub (Exhibit 4) is " $2000 \times 12 \times 52 \div 5 \times 8$ " which Ms. Liang says means "the monthly wage (\$2,000) times 12 months x 52 weeks divided by 5 days per week x 8 days worked". All other pay stubs issued to Yang thereafter (Exhibit 8) simply show total wages earned as being one-half Yang's monthly salary. None of Yang's pay stubs show any separately itemized overtime pay in the box where overtime pay is to be recorded—Ms. Liang's explanation for this omission [and contravention of section 27(1)(d) and (e) of the *Act*] is that she was unaware that overtime pay was required to be separately itemized on an employee's pay stub.

*Jinfu Yang's Evidence*

Yang testified that Mr. Liang offered him a position as a chemist in October or November 1996. Yang's salary was \$2,000 per month based on a 5-day (8 hours each day) work week; overtime pay was not discussed. Yang says that he was required to work overtime hours on a regular basis and his specific requests for overtime pay were rebuffed by Mr. Liang (Liang, for his part, denied that Yang was ever told that his pay was based on a 40 hour, 5-day work week). Yang says that his first request for overtime pay was made in early January 1997 and that upon refusal he began to record his overtime hours in a diary, and later on, on a calendar. Yang's position is that the employer's time records are accurate insofar as his recorded working hours are concerned but he says that he may have worked on certain days that are not recorded in the employer's time records (Exhibit 7).

As for Exhibits 2 and 3—Mr. Liang's notes to his daughter regarding Yang's pay increases—Yang says that these documents were not prepared in his presence and were not provided to him during his employment; he does not believe them to be *bona fide* documents.

In cross-examination Yang stated that he did not file a complaint regarding unpaid overtime pay during his tenure with Aurora because he feared retaliation and, in any event, knew (from reviewing information contained in the Employment Standards Branch web-site) that he could file a complaint after his employment ended.

## ANALYSIS AND FINDINGS

### *The Contract of Engagement*

I am not satisfied, based on the evidence before me, that Yang was engaged by Aurora on the specific understanding, as alleged by the employer, that his salary would be based on a 50.5 hour work week (and thus included an allowance for overtime pay) nor do I accept Yang's assertion that he and Mr. Liang specifically agreed that his salary would be based on a 5-day, 40-hour work week. Accordingly, in my view, the delegate erred in concluding that Yang's monthly salary "only applied to a 40 hour workweek (8 hours per day, Monday through Friday)" (Determination, p. 6).

If Yang's monthly salary was predicated on a 6-day work week, why did Ms. Liang—in her calculation set out on Exhibit 4—divide by "5 days" rather than by "6 days" in her attempt to distill a daily wage rate from Yang's monthly salary? Further, if Yang's salary was based on an 8.5 hour workday (on weekdays) why do all of the employer's time records (Exhibit 7) relating to Yang state that the "total working hours per day is 8 hours"?

With respect to Yang's position, if Yang indeed understood that his monthly salary was based on an 8-hour day, why did he not record in his own records—and advance a claim for—an extra .5 hour of overtime each working day (Yang's original complaint was restricted to weekend overtime pay)?

The most credible explanation, in my view, is that *nothing* was specifically agreed as between the parties with respect to Yang's compensable working hours; the parties only agreed on a \$2,000 monthly salary. Therefore, and in accordance with the provisions of the *Act*, Yang's was entitled to overtime pay in addition to his monthly salary but, as will be seen, I am of the opinion that the delegate did not apply the appropriate "regular wage" rate in calculating Yang's overtime entitlement.

### *The Claim for Overtime Pay*

The delegate, in her calculations, relied on the employer's time records which Yang accepts as accurate (at least with respect to the hours recorded therein). Inasmuch as Yang has not appealed the Determination, I hereby confirm the *number of overtime hours* awarded to Yang by way of the Determination. However, in my view, the delegate did err in calculating Yang's "regular wage" for purposes of fixing Yang's actual *overtime pay entitlement*. Yang's overtime pay entitlement appears to be overstated in the Determination.

Section 35 states that an employer must pay overtime wages for those hours worked in excess of 8 per day or 40 per week. Section 40 sets out the appropriate overtime "premium" based on the number of overtime hours worked in either a day or a week. The premium is calculated based on the employee's "regular wage". As recorded at page 6 of the Determination, the delegate used a \$13.06 hourly rate when calculating Yang's entitlement to overtime pay for May 1997. However, in my opinion, given that Yang was paid a monthly salary, subparagraph (d) of the section 1 definition of "regular wage" applies. In other words, Yang's "regular wage" must be calculated based on the fact that his "normal or average weekly hours of work" was 50.5. Thus, Yang's "regular wage" for May 1997 was not \$13.06 per hour but rather \$10.51 per hour— $[\$2,300 \times 12] \div [52 \times 50.5] = \$10.51$ .

Inasmuch as the delegate calculated Yang's overtime entitlement *based on the employer's own time records*, I fail to see how it can be said that the delegate overstated, as was alleged by Aurora in its appeal documents, the number of overtime hours actually worked by Yang. I cannot accept the employer's assertion that the so-called "Celcom" records would show that the delegate overstated, even though she relied on the employer's own records, Yang's working hours given that the Celcom records are not before me.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied in accordance with these reasons. This matter is remitted to delegate solely for the purpose of recalculating Yang's unpaid wage entitlement, including interest payable pursuant to section 88 of the *Act*.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**