

An appeal

- by -

Xiao Ming Lu
("Lu" or "Employee")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/122

DATE OF DECISION: July 23, 2003

DECISION

OVERVIEW

This is an appeal by an employee, Xiao Ming Lu (“Lu ” or “Employee”), from a Determination dated March 31, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). The Delegate found that Ms. Lu was not entitled to wages as claimed. The Employee filed a complaint on December 7, 2001, which included an allegation that the Employer failed to pay minimum wages. The Delegate met with the Employer on December 4, 2002, and issued a Determination on March 31, 2003 finding no entitlement to wages.

At all material times, Ms. Lu was an employee. It was apparent in this case that the Employer did not keep records of hours worked by Ms. Lu during the training period, in violation of section 28(5) of the *Act*. Further it is apparent, that the Delegate did not accord a reasonable opportunity to the Employee to participate in the investigation of the complaint, given the failure of the Delegate to notify the Employee of the December 4 meeting, extend to the Employee an opportunity to participate in that meeting, or an opportunity to respond to information obtained from the Employer during the course of that meeting. On appeal, Ms. Lu filed written statements from former employees confirming hours worked during the training period. The result could well have been different had the Delegate accorded to Ms. Lu an opportunity to respond to the Employer’s information. I therefore referred the matter to the Delegate for further investigation or oral hearing.

ISSUE:

Did the Employee establish the Delegate erred in the Determination?

FACTS

I decided this case, on the basis of written submissions, after considering the notice of appeal filed by the Employee, the written submissions of the Employer and Employee, and reading the Determination and the record supplied by the Delegate. Ms. Xiao Ming Lu worked as a warehouse clerk, with the Employer, Howard C. Chui operating as Label Express. She worked in a training capacity between June 5 and July 31, 2000 at a monthly wage of \$500.00 per month. She worked thereafter at minimum wage, until July 3, 2001. Ms. Lu appears to have quit her job.

The particulars surrounding the termination of the employment relationship are not germane to the resolution of this appeal. I note that both parties have referred to rulings made in appeals of Ms. Lu’s employment insurance entitlement. The appeal of the Employee relates to wage claims during the employment relationship, and does not raise any issue relating to compensation for length of service. The findings in the insurance appeal do not appear to have formed any part of the findings and analysis of the Delegate, and therefore, it is unnecessary for me to consider any submissions based on attendance or non-attendance by Ms. Lu in the employment insurance appeal process. I note further that the issue in the employment insurance appeal is not the issue which is properly before the Delegate or the Tribunal.

The Employee claims that she was not paid complete wages during her training period from June 5, 2000 to July 31, 2000. The Employee claims that she was not paid one hour of wages in the pay period ending October 31, 2000. She also claims statutory holiday pay for August 7, 2000 and vacation pay. She filed an employment standards complaint seeking the sum of \$1067.08, plus interest for the following claims:

Regular wages from June 5, 2000 to July 31, 2001 \$958.60

Extra hour worked from October 5 to October 16, 2000 \$7.15

Vacation pay from June 5, 2000 to July 31, 2001 \$75.11

Statutory holiday pay for August 7, 2001 \$26.22

After conducting an investigation, the Delegate issued a Determination finding that no wages were owing and that the Employer had not contravened the *Act*.

The Delegate found that the Employee had not kept records on a contemporaneous basis, whereas the Employer had kept records on a contemporaneous basis. The Delegate preferred the records kept by the Employer, in preference to those kept by the Employee. The records of the Employer indicated that Ms. Lu earned the sum of \$9,743.16 which included \$9,296.67 for wages, \$73.75 for statutory holiday pay, and \$374.74 for vacation pay. The Delegate found that Ms. Lu was paid \$9,099.38 by the Employer. The Delegate found that there was an overpayment of wages by the Employer.

In this appeal, the Employee submitted statements from co-workers, employed by the Employer at the same time as Ms. Lu. These statements were as follows Helen Yip (June 2, 2003), Helen Yip (May 8, 2003), Carman Chan (May 8, 2003). These statements indicated that Ms. Lu had worked at least 5 hours per day, Monday to Friday for the period of June and July 2000. The Delegate had before him evidence that Ms. Lu did not work five hours per day, five days per week, but rather trained two to three days per week.

Employee's Submission:

The Employee submits that the Delegate failed to observe the principles of natural justice, and erred in law. The Employee says that the Delegate "proceeded ex parte", and that the appellant was not notified of the hearing. The Employee submits that this matter should be referred back to the Director.

Employer's Submission:

On June 10, 2003, the Employer submitted information relating to an employment insurance appeal. The Employer has not responded to the allegations made by the Employee in this appeal.

Delegate's Argument:

The Delegate provided the record, but did not provide a submission.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employee, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

- (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.

The Delegate determined correctly that Ms. Lu was an employee during the training period, applying the definition of employee set out in section 1 of the *Act*. The Delegate also found that the Employer did not keep records of the hours worked by Ms. Lu during the training period. Pursuant to section 28(1)(d) of the *Act*, an Employer is obliged to keep records of the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis. The Delegate found, however, that there was no entitlement to wages.

In this case, the Delegate investigated the complaint made by the Employee, rather than conducting an evidentiary hearing. The Employee's allegations of proceeding *ex parte* and failing to notify the Employee of a hearing, can be re-cast as an argument that the Delegate failed to provide to the Employee an adequate opportunity to participate in the investigation, pursuant to s. 77 of the *Act*.

I note that the complaint in this matter was made by Ms. Lu, in writing, on December 7, 2001. It appears that the Delegate met with the Employer's representative, almost one year later, on December 4, 2002, prior to issuing the Determination on March 31, 2003. Upon the filing of an appeal, the Delegate is required to transmit the record to the Tribunal: see section 112(5). There is nothing in the record provided to me which suggests that the Delegate notified Ms. Lu that a meeting was to take place, provide Ms. Lu an opportunity to attend at meeting of December 4, 2002, or an opportunity to review and respond to information provided by the Employer at the meeting. In my view, given the lengthy delay in investigating this matter, and the failure of the Delegate to invite Ms. Lu to the meeting of December 4, 2002, and the failure to provide an opportunity to Ms. Lu to consider or respond to information provided by the Employer, there was a failure by the Delegate to provide Ms. Lu with a reasonable opportunity to participate in the investigation. I recognize that considerable latitude is given to the Delegate to conduct an investigation, however, it is apparent that the Delegate did not extend to the Employee an opportunity to hear or respond to information presented by the Employer. This amounts to a failure by the Delegate to accord a reasonable opportunity to Ms. Lu to participate in a meaningful way in the investigation.

Wages during the Training Period:

The breach of section 77 appears to have resulted in an error with regard to the Delegate's conclusion that Ms. Lu was not entitled to wages during the training period. The Employer did not keep records of the hours worked by the Employee during the training period. The Employer is, however, obliged to keep records of hours worked, by an Employee, and it is clear that Ms. Lu was an employee during the training period. In my view, the failure to keep records is a breach of section 28(1)(d) of the *Act*.

Further, it appears that the Employee worked pursuant to an oral training agreement to accept \$500.00 per month in return for training. I note that this type of an agreement is contrary to section 4 of the *Act*, where the employee in fact works hours which would yield wages in excess of \$500 per month, calculated on a minimum wage basis. Such an agreement is not enforceable, and Ms. Lu is entitled to be paid for the hours that she actually worked during the training period.

There was other evidence, submitted by Ms. Lu in this appeal, in the form of written statements from Ms. Yip and Ms. Chan, which would tend to confirm Ms. Lu's written complaint. The allegation of Ms. Lu, supported by the new evidence, is that she worked at less than the minimum wage, given the hours worked. If Ms. Lu had an opportunity to present this information, the Delegate would have had an opportunity to make a full and reasoned decision regarding wage entitlement during the training period. I am satisfied that the issue of wage entitlement during the training period, must be reconsidered by the Delegate, in light of the failure of the Delegate to accord a reasonable opportunity to Ms. Lu to participate in the investigation.

Other wage entitlements:

Ms. Lu claims that a number of other errors were made by the Delegate in interpreting the records provided to him by the Employer. Given my findings, that Ms. Lu was not provided with an adequate opportunity to participate in the investigation, it is my view that the entire Determination is flawed, and ought to be re-investigated, or set for an oral hearing to provide both the Employer and the Employee an opportunity to participate in providing information and evidence to the Delegate

ORDER

Pursuant to s. 115 of the *Act* the Determination dated March 31, 2003, I refer this matter back to the Director to re-investigate or re-hear this matter and in particular; (a) present to Xiao Ming Lu the information obtained by the Delegate from the Employer during the meeting on December 4, 2002, and (b) to obtain from Ms. Lu her further evidence and submissions, prior to rendering a decision on the wage claims made in her complaint dated December 7, 2001.

Paul E. Love
Adjudicator
Employment Standards Tribunal