

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 -

Ling Hao Yeh
("Yeh" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen
FILE NO.: 1999/163
HEARING DATE: May 27, 1999
DECISION DATE: July 7, 1999

DECISION

APPEARANCE

Mr. Ling Hao Yeh

on behalf of himself

FACTS AND ANALYSIS

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 10, 1999. The delegate found that Yeh was terminated for cause on February 6, 1997 and, in the result, was not entitled to compensation for length of service. Yeh had worked for the Employer from March 7, 1995 to February 6, 1997. As well, the delegate agreed with the Employer, D & T Taiwanese restaurant Ltd., that Yeh worked seven (7) hours per day, six days a week, and not the hours claimed by Yeh. In the result, the Determination awarded \$340.46 to Yeh.

Yeh disagrees with the Determination. A hearing was held on May 27, 1999. The Employee, who is the appellant in this matter, has the burden to prove the Determination wrong. Although duly notified, the Employer did not appear at the hearing. The Employer’s submission in response to the appeal simply indicates that it disputes the appeal and intend to respond.

The issues in dispute relate largely to factual allegations: did Yeh attack another employee, as appears to be the basis for the delegate’s conclusion that the Employer had cause to terminate his employment, and did he work the hours he claimed to have worked.

Turning to the first issue, the Determination states:

“The employer’s statement is that Yeh attacked the manager and another employee, Chiating Wong, at the restaurant. The letter from the Vancouver Police Department indicates that Wong had been the victim of a crime.”

At the hearing, Yeh explained the circumstances of the termination of his employment. He stated that he did not attack another employee. Rather he was fired when he intervened in the Employer’s assault on a former employee who attended the work place to pick up her final pay cheque and personal possessions. I do not disagree that a physical attack by an employee on his or her employer, or another employee, may constitute cause for termination. In this case, however, the only evidence before me was Yeh’s. He denied the attack. In the result, I grant Yeh’s appeal on this point and find that he is entitled to compensation for length of service.

Yeh, worked as a cook from March 7, 1995 until February 6, 1997, at a salary of \$1,100 per month. From the calculation sheet attached to the Determination, it appears that the award of wages is based on minimum wage. He was employed for a little under two years and would, therefore, be entitled to two weeks' wages on account of compensation for length of service. In the circumstances, I refer the calculation of the amount owed as a result of this decision back to the Director.

With respect to the hours worked, the Determination notes:

“The parties in this case have submitted various documents as evidence concerning the hours of restaurant operation. Neither party it is to be noted has provided any record of the hours worked each day. The employer is required to maintain such records however apparently did not. The complainants did not supply any personal records.”

The delegate preferred the employer's evidence and was “satisfied that the complainants' hours were 7 hours per day 6 days a week”. Yeh's evidence was that he worked the following hours each day: 11:00 a.m. to 2:30 p.m. and 5:30 pm. to 10:00 p.m., six days a week. In the circumstances, particularly where, as here, there are no proper payroll records as required by the *Act*, and there is no other evidence to the contrary before me, I am persuaded to grant the appeal on this point. I refer the calculation of the amount owed on this account back to the Director, based on the hours claimed by Yeh.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated March 10, 1999 be varied as follows:

1. Yeh is entitled to compensation for length of service based on his employment with the Employer. I refer the calculation of same back to the Director.
2. Yeh is entitled to compensation for hours worked based on the above. I refer the calculation of same back to the Director.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal