Employment Standards TRIBUNAL

An appeal

- by -

Golden Day Cake House Ltd.
("Golden Day" or the "employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/81

DATE OF DECISION: May 3, 2001

DATE OF DECISION: May 30, 2001

DECISION

APPEARANCES

Ronald Eichler, Barrister & Solicitor	for Golden Day Cake House Ltd.
George Lee, Articled Student	for Shui Man Ma
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Golden Day Cake House Ltd. ("Golden Day" 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 January 5th, 2001 under file number ER#099-301 (the "Determination").

The Director's delegate determined that Golden Day owed it former employee, Mr. Shiu Man Ma ("Ma"), the sum of $9,356.27 [*sic*, the amount ordered to be paid, based on the appended calculation schedule, should have been $9,356.28] on account of unpaid overtime pay payable pursuant to section 40 of the *Act* ($5,051.18), seven weeks' wages as compensation for length of service ($3,183.92; see section 63), concomitant vacation pay ($494.11; section 58) and section 88 interest ($627.07).

This appeal was heard at the Tribunal's offices in Vancouver on May 3rd, 2001 at which time I heard the testimony of Lilly Wong, on behalf of the employer, and Mr. Ma on his own behalf. Mr. Ma testified with the assistance of a certified Cantonese interpreter. No one appeared at the appeal hearing on behalf of the Director.

ISSUES ON APPEAL

There are essentially two issues before me.

First, and foremost, the employer says that the delegate should not have issued the Determination since the dispute between the parties was settled; indeed, settled with the Director's delegate's assistance.

Second, the employer says, in any event, the delegate incorrectly determined Ma's unpaid overtime pay entitlement. The employer does not dispute the Determination insofar as the $3,183.92 award for compensation for length of service is concerned.

With the agreement of counsel, I first heard the evidence and submissions relating to the "settlement" issue and advised the parties that I would render a decision with respect to that

matter and, depending on my decision, would then hear the evidence relating to Ma's overtime claim. After hearing the evidence and submissions on the settlement issue, I reserved decision. Having now considered the matter more fully, I am of the view that this matter was properly settled and the delegate erred in proceeding to issue a Determination other than for the settlement amount. Accordingly, I do not find it necessary to hear evidence and submissions relating to Mr. Ma's unpaid overtime claim.

THE PARTIES' TESTIMONY

At page 3 of the Determination, the delegate refers to "a fact-finding conference" [that] was held with all parties present" but does not mention any settlement discussions that took place at that meeting. Golden Day's principal, Ms. Wong, and Mr. Ma have quite different recollections of the events that occurred during that conference.

The employer's evidence

Ms. Lily Wong, a Golden Day principal, testified that both she and her husband, Joseph Wong (also a Golden Day principal), were present at this latter meeting which was held at the Employment Standards Branch office in Burnaby during the afternoon of July 19th, 2000. A second delegate acted as the interpreter for Mr. Ma. Ms. Wong testified that the parties were initially (for about 20 to 30 minutes) in the same conference room and then broke into separate caucus rooms. After the parties caucused, the Wongs acknowledged to the delegate their liability for compensation for length of service but hotly contested Mr. Ma's entitlement to any overtime pay. Accordingly, the Wongs made an offer, to be communicated by the delegate to Ma, that the entire matter be settled upon payment of $3,400 (this latter figure approximated Mr. Ma's compensation for length of service claim).

The delegate left the room and returned about 15 minutes later at which time she indicated that Ma had rejected their $3,400 settlement proposal but was prepared to accept $5,800 in full and final settlement of the matter. After discussing the proposal between themselves, the Wongs advised the delegate that they would accept Ma's counterproposal and pay him $5,800 in full settlement of the matter. The delegate stated words to the effect that she "would draw up the papers" and the Wongs expected that they would be paying the settlement monies that same day after the necessary documents were signed.

The delegate left the caucus room and returned about 20 minutes later. The delegate stated that Ma had left the premises and had "changed his mind" about the settlement. The Wongs told the delegate that "we believe we have an agreement" and the delegate replied that she had never been faced with such a situation before and would have to check with her supervisor. The Wongs left the premises and subsequently forwarded a letter dated July 27th, 2000 to the delegate in which they reiterated their position that Ma's claim was settled and, in addition, they sought "payment instructions from your office". The delegate did not reply to the Wongs' July

27th letter. Shortly after July 27th, Ms. Wong telephoned the delegate only to be told that the delegate "had not yet worked on the file because she had more pressing matters" to attend to.

As noted above, the Determination was issued on January 5th, 2001. Upon receipt of the Determination, Ms. Wong telephoned the delegate and was told that the settlement was void because the employer had not complied with the terms of settlement by paying the settlement funds to Ma. When Ms. Wong protested that Ma refused to honour the settlement, Ms. Wong says that the delegate told her that Ma was entitled to change his mind and that they could not pay the settlement funds and discharge their liability "even if they wanted to".

Ma's evidence

Mr. Ma confirmed that there were settlement discussions at the "factfinding" conference. He testified that Ms. Jennifer Ip, whom he understood was also a delegate, acted as his interpreter and that she appeared to be fully conversant in Cantonese. Ma denies having received an initial $3,400 offer and further denies making a $5,800 counteroffer.

Ma testified that the delegate came to him with a $5,800 proposal from the Wongs; the offer consisted of $3,400 for severance pay and the balance for his overtime claim. Ma says that he told the delegate that "If the figure is OK to the Employment Standards Branch, then I will take it". The delegate replied that he might receive a lower amount if a determination was issued and that the employer "was prepared to write a cheque" that same day. The delegate then left the room and during her absence, he asked Ms. Ip if his overtime pay had been properly calculated and he received a noncommittal response from Ms. Ip. Mr. Ma then decided that he would not accept the employer's offer. He told the delegate when she returned to the room that he was not prepared to accept the employer's offer.

FINDINGS AND ANALYSIS

Obviously, although the parties both acknowledge that settlement discussions occurred at the delegate's office, there is a dispute about who made what offer to whom and whether those discussions resulted in a final agreement. The delegate, at page 3 of the Determination, suggested that Ma was not a credible witness. I, too, must conclude that his evidence lacks veracity.

At the outset of the appeal hearing, I was advised--through the interpreter--in response to my question that Mr. Ma did not have any understanding of english. And yet, on several occasions in response to a question from me, he immediately launched into a reply (albeit in cantonese) without the question first being translated. His translated answers were always responsive to my questions. I find that Ma mislead me about his facility in english, perhaps as a ruse to cast doubt with respect to his understanding of the settlement discussions.

As for those settlement discussions, the delegate corroborated the employer's version of events in a letter to Ma dated July 27th, 2000 which states, in part, as follows:

> *At that meeting, you made an offer to the employer to settle the complaint for $5800.00. The employer accepted that offer.* Please inform me in writing if you wish to honour the settlement agreement that was made that day.
>
> (my *italics*)

It should be noted that this letter does not appear to have been disclosed to either the Tribunal or to the employer prior to the appeal hearing. The delegate's July 27th letter was disclosed at the appeal hearing in response to my inquiry about whether the delegate had ever written Ma concerning the settlement discussions held on July 19th. I am inclined to the view that Ma purposely withheld disclosing the delegate's July 27th letter as he believed (quite rightly) that its disclosure would prejudice the position that he intended to advance before the Tribunal, namely, that he never made, nor accepted, any settlement proposal.

Ma himself corroborated the employer's version of events in a letter dated August 3rd, 2000 addressed to the delegate: "...I cannot agree to the settlement amount of $5800.00...I can no longer agree to that amount." Certainly, in my view, a statement that one *can no longer agree* necessarily implies that at some prior point in time the person had, in fact, *agreed* to some proposal. Ma's letter suggests that he acknowledges having made an agreement but, with hindsight, is of the view that he made an imprudent bargain.

The August 3rd letter further compromises Ma's credibility in that he refers to the delegate raising some concerns in his mind about the employer's calculations when, in his evidence before me, Ma testified that it was not the delegate, but rather Ms. Ip, who led him to believe that the employer's calculations might not be correct. I might add that Ma's August 3rd letter is written in English and was prepared by a U.B.C. law student, fluent in Cantonese, who took Ma's instructions, prepared the letter and then orally translated the letter into Cantonese for Ma prior to Ma signing it.

In a submission to the Tribunal dated February 22nd, 2001, the Director submits that, although there was a settlement between the parties, Ma was free to withdraw from the settlement by reason of section 78(3) of the *Act:*

> The second issue submitted by the employer is that the Delegate lacked jurisdiction to make a determination in this matter because of the existence of a settlement. Section 78 provides guidelines for the settlement of a complaint under the Act and the consequences of *failure by a party to honour a settlement agreement.* Section 78(3) clearly outlines that if *a person fails to comply with the terms of a settlement,* the director is not bound by its terms. A subsequent investigation may result in a determination that a different amount is owing.

> In this instance, *the employee changed his mind about the settlement amount. As he no longer wished to comply with the terms of the settlement,* the Delegate was within her authority under Section 78 to conduct an investigation and render a decision.
>
> (my *italics*)

Two points are to be noted with respect to the above italicized excerpts from the Director's submission. First, as the Director's delegate clearly states, this settlement agreement was derailed not by reason of the *employer's* failure to comply--the employer is now, and has always been, willing to fully comply with the settlement agreement. Rather, it was Ma himself who, to paraphrase the delegate, no longer wished to be bound by the settlement. Thus, and this is my second point, why should the employee benefit (in the sense that the Determination calls for a higher payment) from his own wrongful conduct?

There is no evidence before me that this settlement was tainted by fraud or any sort of coercion. Ma now says that his "acceptance" was conditional upon the amount allocated to overtime being calculated correctly. I do not accept that, in the language of contract law, Ma was the offeree; rather I am of the view that he was the offeror. As stated by both Ms. Wong and the delegate, it was Ma who made the $5,800 proposal and it was unconditionally accepted by the Wongs on behalf of Golden Day. Thus, in light of those facts, it is simply not possible for Ma to have given a "conditional acceptance" (which, of course, in law is not acceptance at all).

I find that Ma rejected the Wongs offer, and in turn, made an counteroffer that was unconditionally accepted by the Wongs. Neither party lacked contractual capacity. In short, upon the Wongs' acceptance there was a valid and subsisting lawful settlement agreement supported by consideration and, in my view, Ma was not entitled to unilaterally withdraw from that agreement. As noted in *Small* (BC EST Decision No. D032/98), "when parties conclude a settlement in good faith, the terms and conditions of that settlement will be respected by the parties". In *Alnor Services Ltd.* (BC EST Decision No. D199/99) I referred to the purposes of the *Act* and that uncoerced settlements were entirely consistent with those purposes:

> Two of the stated purposes of the *Act* are the encouragement of open communication between employers and employees and the provision of fair and efficient dispute resolution procedures [see sections 2(c) and (d)]. The settlement of unpaid wage claims is an integral aspect of the *Act*, explicated by the provisions giving the Director specific statutory authority to negotiate settlement agreements and receive and disburse settlement funds. In my view, the entire scheme of the *Act* is undermined if *bona fide* settlements can be overridden simply because one party--with the benefit of hindsight--subsequently concludes that they made a bad (or at least not an optimal) bargain. If *bona fide* settlement agreements can be reopened even in the absence of misrepresentation, fraud, undue influence, duress or noncompliance with the agreement, then one has to

> wonder why any party would want to settle any dispute. In my view, a principle that discourages, rather than encourages, the timely settlement of unpaid wage disputes ought to be very closely scrutinized.

I do not accept the Director's delegate's assertion that since Ma unilaterally declared that he no longer wished to be bound by the settlement, that the delegate "was within her authority under Section 78 to conduct an investigation and render a decision". In my view, subsection 78(3) addresses the situation where the *employer* enters into a valid settlement agreement from which it later purports to withdraw. The "person" in the introductory wording of subsection 78(3) must be the same "person" referred to in subsections 78(3)(a) and (b); otherwise, the statutory language is rendered meaningless and, indeed, nonsensical. Read in this fashion, section 78(3) makes sense when the *employer* is the party purporting to withdraw; the subsection, in my view, makes no sense at all if it is interpreted such that the "person" failing to comply with the terms of settlement is the *employee.* This view of section 78(3) is consistent with my decision in *Dacre* (BCEST. Decision No. D306/98):

> In my view, the effect of section 78(3) is to preserve an option to claim the full amount of the wages owed if, as was the case here, the employer refuses to honour the compromise reached. Subsections 78(3)(a) and (b) only have meaning in the context of creating an incentive on the part of the employer to honour the settlement--if the settlement is breached, the employer may be held liable, via a determination, for the full amount of the employee's claim.

One of the statutory powers given to the Director and her delegates is the authority to "assist in settling a complaint" [see subsection 78(1)(a)] and to facilitate the payment of the settlement funds to the employee [subsections 78(1)(b) and (c)]. If a particular complaint is settled, the Director may refuse to continue to investigate the complaint. While this latter authority is a discretionary power, this discretion must be exercised appropriately. Clearly, a delegate would not be obliged to refuse to investigate a complaint that was settled in a manner contrary to the express terms of the *Act* (*e.g.*, overtime being paid on a "straight-time" basis)--see *Takarabe et al.*, BC EST Decision No. D160/98.

However, where a Director's delegate facilitates a settlement that is not obviously contrary to the *Act*, the employee, in my view, is not entitled to unilaterally withdraw from that settlement on the basis that, with hindsight, they might have negotiated a better bargain (see *Small, supra.*). Most settlements, by their very nature, involve some sort of compromise with neither party obtaining the maximum that they might otherwise hope to achieve in an adjudicated resolution of the dispute.

As I observed in *Dacre, supra.*:

> One must consider section 78(3) in light of the overall scheme of the *Act* and the "mischief" (a well-established concept of statutory interpretation) to which it is directed. Section 78(1) specifically authorizes the Director to assist in settling

> claims. By their very nature, settlements imply that one or the other party (often both) obtain something less than that which they were originally seeking. In the case of a settlement of a wage claim, inevitably, the employee is accepting less than the full amount of their claim; otherwise, why settle?--the employee would be better off with a determination in his or her favour for the full amount of their claim. Of course, employees often settle because a determination is not cash in hand and many a monetary judgment has proven to be just another piece of paper.
>
> In the ordinary course of events, parties honour their settlements. Once a settlement of the employee's claim has been reached, there is likely no reason to continue the investigation--indeed, the Director has been given the specific statutory authority let the settlement stand and "stop...investigating [the] complaint" [see section 76(2)(g)]...

I would only add that, in this case, when the settlement was concluded the employer maintained that it did not owe Ma any monies on account of unpaid overtime. That position, as this appeal demonstrates, is still asserted by the employer. While, undoubtedly, Ma settled for something *less* than his original claim, it should also be noted that the employer settled for something *more* than it believed it owed Ma.

THE APPROPRIATE REMEDY

I am satisfied that Ma's unpaid wage complaint was the subject of a valid and subsisting settlement agreement. Although Golden Day was--and remains--ready, willing and able to comply with the settlement agreement, Ma has steadfastly (and, in my view, improperly) refused to accept the settlement funds. If Ma had accepted the settlement funds, I am of the view that the delegate's best course of action would have been to simply dismiss the complaint pursuant to section 76(2)(g) of the *Act* as was done in the *Mise* case (BC EST Decision No. D374/98).

However, the facts of the present case are more like those in *Small, supra.,* where the parties entered into a settlement agreement after the issuance of a determination (the settlement was negotiated during the course of an appeal hearing relating to that determination). Subsequently, the employee refused to comply with the settlement agreement in that he refused a tender of the settlement funds and refused to sign the requisite settlement documents. In *Small*, the Tribunal ordered that the original determination "be varied to reflect the quantum of the 'Terms of Settlement' dated September 5, 1997". The Tribunal also ordered that "the parties comply with the 'Terms of Settlement" dated September 5, 1997".

In my opinion, and in the face of what I consider to be Ma's unlawful refusal to comply with the settlement agreement, the delegate ought to have issued a determination ordering Golden Cake to pay Ma the settlement amount, namely, $5,800. Once such a determination was issued, Golden Day would have been able to pay the settlement funds into the Director's trust account and

thereby discharge its liability under the determination. Accordingly, as in *Small*, I propose to make an order varying the Determination to reflect the parties' settlement.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate that Golden Day Cake House Ltd. is ordered to pay the sum of $5,800 to Shiu Man Ma together with interest to be calculated by the Director in accordance with section 88 of the *Act* as and from July 20th, 2000.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal