

An appeal

- by -

Patrick Ngan  
("Ngan")

- 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:** David B. Stevenson

**FILE No.:** 2003A/229

**DATE OF DECISION:** October 29, 2003

## DECISION

### SUBMISSIONS

Patrick Ngan	on behalf of himself
Denny Seto	on behalf of D. Seto Enterprises Ltd. operating as Airport Inn Restaurant
Myron Wallace	on behalf of the Director of Employment Standards

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Patrick Ngan (“Ngan”) of a Determination of the Director of Employment Standards (the “Director”) dated July 18, 2003.

Ngan had filed a complaint with the Director alleging his employer, D. Seto Enterprises Ltd. operating as Airport Inn Restaurant (“Airport Inn”) had contravened the *Act* by failing to pay wages bi-weekly, failing to pay minimum wage, failing to allow proper meal breaks and failing to pay overtime, statutory holiday pay, length of service compensation and the resulting annual vacation pay. The Determination found Airport Inn had contravened Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* and ordered Airport Inn to cease contravening and to comply with the *Act* and to Pay Ngan an amount of \$2,804.87.

In this appeal, Ngan contends the Director failed to observe principles of natural justice in making the Determination. Specifically, Ngan contends the Director erred in calculating his hourly rate, erred in deciding his daily work schedule, erred in concluding there was just cause for his termination, erred in the wage calculation summary and erred in accepting the evidence of certain witnesses, resulting in errors in findings of fact.

The Tribunal has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue is whether Ngan has raised any matters that would justify the intervention of the Tribunal to vary or cancel the Determination or refer the matter back to the Director.

### THE FACTS

Ngan was hired to work at the Airport Inn on, or about, June 1, 2002 as a chef at a rate of \$1800.00 a month. He was terminated on March 15, 2003. Ngan had received 2 warning letters prior to his dismissal. Both letters identified concerns with Ngan’s performance and attitude, clearly put him on notice of the need to improve and identified termination as a consequence of a failure to improve.

The Determination followed an investigation hearing during which the Director received evidence from Ngan, Mr. Seto, the owner of Airport Inn, and several witnesses called by Airport Inn. The Determination notes:

All evidence given by the Employer's witnesses went uncontested, as Mr. Ngan wished to leave the hearing prior to the evidence being presented by the witnesses. Mr. Ngan wanted to leave and catch a ferry back to Vancouver.

One of the areas of dispute between Ngan and Airport Inn that was considered and decided in the Determination was the days and hours worked by Ngan. Much evidence was provided by both parties in that area. The Determination indicates the evidence of Airport Inn was preferred and accepted.

## ARGUMENT AND ANALYSIS

The burden is on Ngan, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (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.*

Much of this appeal does no more than restate the positions taken by Ngan during the investigation, challenging findings and conclusions of fact made by the Director in the Determination. The conclusions of the Director on the wage rate, hours worked and the issue of just cause are adequately supported by the record and the reasons set out in the Determination. Ngan obviously disagrees with the Director's findings but has provided no analysis identifying any particular errors or relating those errors to the grounds of appeal set out above.

There is an attempt by Ngan to introduce evidence that was not presented during the investigation. Ngan was given more than a reasonable opportunity to put his position, and any evidence supporting that position, to the Director. Even if I thought any of this evidence was relevant and probative, none of the information he is attempting to introduce in this appeal is new evidence; it is evidence that was available and could have been provided to the Director during the investigation process if Ngan thought it supported his claim demonstrated flaws in the information and evidence provided by Airport Inn. No additional evidence beyond what was provided to the Director will be considered.

As well, Ngan challenges the evidence, and in some cases the truthfulness and motivation, of witnesses called by Airport Inn at the investigation hearing. If Ngan wished to challenge that evidence or suggest the witnesses were lying or coerced by Airport Inn, he should have remained at the investigation hearing and done so. It is well settled that the Tribunal will not allow a party to fail or refuse to participate in the

investigation process and then later seek to challenge findings made by the Director (see *Tri-West Tractors Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97).

Ngan has not met the burden on him to show an error on the findings made by the Director in the Determination on the hourly rate, hours worked or entitlement to length of service compensation. The appeal on those matters is dismissed.

The Director acknowledges an error in the overtime wage calculation for the period September 15, 2002 to November 30, 2002 was made. The Director says correcting the error would result in Ngan being owed an additional \$1000.00 by Airport Inn. On the basis of that acknowledgement, the appeal on this matter succeeds.

It is not clear, however, whether the additional amount the Director acknowledges is owed is inclusive of annual vacation pay and interest. Accordingly, rather than attempt to guess if the additional \$1000.00 is inclusive of amounts payable under Section 58 and 88 of the *Act*, I will refer the matter back to the Director to correct the error and re-calculate the amount owing.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated July 18, 2003 be varied to show an additional \$1000.00 owing to Ngan and the matter be referred back to the Director to re-calculate the amount of the Determination.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**