

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*

-by-

Sun Wah Supermarket Ltd.

(“Sun Wah”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/394

**DATE OF HEARING:** November 8th, 1996

**DATE OF DECISION:** November 14th, 1996

## DECISION

### APPEARANCES

T. Wing Wai                                for Sun Wah Supermarket Ltd.

Qing Mei Chen     )  
Sunny W.S. Cheng)  
Ronald H.C. Chin )  
Josanne Choww    )     on their own behalf (former Sun Wah employees)  
Rebecca Y.L. Chu )  
Sai Kwon Leong    )  
Lin Ging Wong     )

Victor Lee                                for the Director of Employment Standards

### OVERVIEW

This is an appeal brought by Sun Wah Supermarket Ltd. (“Sun Wah”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 002565 issued by the Director of Employment Standards (the “Director”) on June 12th, 1996. The Director determined that Sun Wah owed seven former employees (see above) the sum of \$16,085.87 on account of unpaid termination pay pursuant to section 63 of the Act (including concomitant vacation pay and interest).

Sun Wah advanced several grounds of appeal including bias on the part of the investigating employment standards officer and that the Determination was based on several erroneous findings of fact.

The appeal hearing was conducted in Vancouver on November 8th, 1996. Sun Wah was represented by its legal counsel, Mr. T. Wing Wai, and by Mr. Eric Tang (a shareholder, officer and director of Sun Wah). All of the employees named in the Determination appeared on their own behalf. Mr. Victor Lee attended the hearing on behalf of the Director. Several of the employees were not fluent in English and, accordingly, Ms. Nicole Lee, a certified translator accredited by the B.C. Ministry of the Attorney General, served as interpreter (Cantonese).

I received testimony, under oath, from Eric Tang, Annie Chan and Mai Yee Leung on behalf of Sun Wah and from Sunny W.S. Cheng (“Cheng”), Rebecca Y.L. Chu (“Chu”), Qing Mei Chen and Josanne Choww on behalf of the employees. The other employees declined the opportunity to testify saying that they adopted the evidence given by Cheng, Chu, Chen and Choww. Sunny Cheng and Rebecca Chu were formerly the managers of the Sun Wah Supermarket located at 268 Keefer Street in Vancouver. The other former employees named in the Determination were employed as cashiers or clerks at the supermarket.

The issue of bias was not pressed at the hearing and, in any event, I have no evidence before me that the investigating employment standards officer was biased in the way in which he conducted his investigation. Sun Wah also based its appeal on the somewhat related ground that it “was denied [an] opportunity to be heard or to cross-examine the complainants”, although, again, this point was not pressed during the appeal hearing. Section 77 of the Act imposes a statutory obligation on the Director to “make reasonable efforts to give a person under investigation an opportunity to respond”. It is clear on the face of the Reason Schedule to the Determination that the section 77 obligation was satisfied in this case. I do not conceive section 77 as creating a right on the part of the employer to cross-examine a complainant employee as part of the investigative process.

Accordingly, I need only concern myself with the factual disputes between the appellant and the employees.

## **FINDINGS OF FACT**

In early 1996, due to constrained financial circumstances, the directors of Sun Wah decided to close down the Sun Wah Supermarket. At a board meeting held on January 10th, 1996 at Richmond, B.C., Sun Wah’s directors--Eric Tang, King Shen Tang and Simon Tang--instructed both Cheng and Chu to close down the store and to give all Sun Wah employees notice of termination. It was agreed at this meeting that the last day of business for the supermarket would be February 15th, 1996.

On January 12th, 1996, the staff of the Sun Wah supermarket were told by Cheng and Chu that the supermarket would be closing down on February 15th, 1996. Several employees inquired as to whether or not February 15th would be their last day of work; Cheng replied that he did not know for sure as there might be inventory and cleanup work to be done after the 15th. The January 12th meeting with the staff commenced around 10 A.M. and lasted approximately 45 minutes.

On January 22nd, 1996, Chu faxed a proposed form of notice of termination that had been prepared by Cheng to Mr. Simon Tang, a Sun Wah director. Simon Tang advised Chu that the proposed notice was satisfactory and should be given to each employee. Chu, in turn, advised Cheng that the notice was satisfactory and should be issued. I should note that Chu's evidence on these points is uncontradicted, Simon Tang not having testified before me.

The notice, on Sun Wah letterhead and written in Cantonese, reads as follows (this English translation by Ms. Lee was accepted by Mr. Wai, who also speaks Cantonese, as accurate):

This is a formal written notice to all the employees that the 15th of February, 1996 will be the last day of business of Sun Wah Supermarket. The company will prepare all the separation formalities and documents including the separation slips for all the employees.

This notice was provided to each employee (except Cheng and Chu) when he or she "punched out" their time card on January 23rd, 1996. Each employee acknowledged receipt by signing a form prepared for that purpose (Exhibit 3A). Initially, Sun Wah took the position that this latter meeting occurred on January 19th, however at the hearing Mr. Wai (properly, in my view) conceded that the overwhelming weight of evidence was to the effect that the employees received written notice on January 23rd.

Although the notice does not specifically state that each employee is to be terminated effective February 15th (rather, it merely states that the supermarket will be closing down on that date), I accept that this notice was a valid written notice of termination within section 63(3) of the Act, particularly in light of the reference in the notice to "separation formalities and documents including separation slips". This is the basis upon which the Director proceeded and I note that none of the employees has appealed the Determination.

There is no evidence before me that either Cheng or Chu received written notice of termination [note that section 63(3) of the Act calls for *written* notice--verbal notice is not legally sufficient]. Mr. Wai submitted that the minutes of the January 12th, 1996 director's meeting in Richmond (Exhibit 2), signed by both Cheng and Chu, satisfied the requirements of section 63(3). The only reference to notice of termination contained in Exhibit 2 reads as follows:

2. Rebecca and Sunny suggested extending the closing date to Feb 15, 96 which happened to be Chinese New Year. Hopefully, they can have better sales and liquidate more merchandises during that period [sic].

3. King Shen Tang agreed to the extension. Then, they'll close down the Supermarket with renovation as an excuse for the shoppers. He also stressed that adequate notice must be given to the employees and according to their seniority.

At most, I would characterize the above reference as an *intention* to give notice, rather than the issuance of written notice. Further, even if the above-quoted reference could be taken as notice of termination, there is no termination date given. Nor is there any evidence before me that these minutes of the January 12th meeting were actually provided to Cheng and Chu. As for the issue regarding the effective date of the "notice", while it could be argued that the notice was effective February 15th, later on in the minutes reference is made to Rebecca and Sunny:

- providing "a list of Accounts Receivables (N.B. minutes should read "payables"?);
- arranging for the sale of a "beat-up truck";
- following up on a possible sale of the supermarket to Lam Tung Ming;
- returning excess stock to Wah Loong Ltd. after the Chinese New Year's sale; and
- providing "a list of the furniture and equipment in order to facilitate the calculation of the Supermarket's assets, also for evaluating the sale price of the Supermarket".

Thus, Cheng and Chu could reasonably assume that their own employment might continue on beyond February 15th in order to accomplish one or more of these particular tasks.

In order to bring itself within section 63(3) of the Act, an employer must give specific written notice of termination effective as at a particular date. In my view, Exhibit 2 falls far short of the statutory requirement.

Mr. Wai submitted that the reference in section 63(3)(b) of the Act to “a combination of notice and money” could be interpreted so to allow verbal notice, if such notice was given in combination with money (thus, in this case, notice of termination would have been given on January 12th, rather than on January 23rd, 1996). The short answer to this submission is that, first, the employer in this case *never gave* the employees a combination of pay and notice that satisfied the overall statutory obligation to each employee--the employer only gave notice. Thus, the employer, because of its own failure in this latter regard, cannot rely on section 63(3)(b). Second, in my view, the word “notice” in section 63(3)(b) can only refer to the statutory obligation to give *written* notice in the same way that the references to “notice” in subsections 63(3)(a)(i) to (iii) also mean written notice.

During the course of the appeal hearing the employer did not present any evidence contrary to the Determination with respect to employee wage rates or employment commencement dates. That being the case, I am satisfied that the calculations set forth in the Determination ought to be confirmed. I am further satisfied that all of the employees, save Cheng and Chu, received written notice of termination on January 23rd, to take effect on February 15th, 1996. There is no evidence before me that either Cheng or Chu received written notice of termination as required by section 63. I am also satisfied that the Determination correctly sets out the applicable statutory notice requirement for each employee, based on the “years of service” formula set out in section 63(3) of the Act, and therefore, I see no reason to set aside or otherwise vary the Determination.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 002565 be confirmed as issued together with whatever further interest that may have accrued, pursuant to section 88 of the Act, since the date of issuance.

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