

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-

Wei Yip Moving Co. Ltd.

(“Wei Yip”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: 97/330

DATE OF HEARING: July 30th, 1997

DATE OF DECISION: July 31st, 1997

ISSUE TO BE DECIDED

The employer says that it has paid all wages earned by Feng and Liang and that the Director erred in not taking into account certain cash payments that were allegedly made to the Respondent employees.

ANALYSIS

The employer does not dispute that Feng and Liang were hired as employees at a rate of \$10 per hour. Nor does the employer dispute the hours that these two former employee claimed to have worked. Indeed, the employer's own records (marked as Exhibits 1 and 3 at the appeal hearing) show that Feng worked, as set out in the Determination, a total of 185.5 hours during October to December 1996, and that Liang worked, also as set out in the Determination, a total of 49 hours during November and December 1996. The employer also concedes that it did not comply with section 34 of the *Act*--the minimum daily pay provision.

However, the employer alleges that each of the two former employees were paid for all of their hours worked (leaving aside the additional wages that should have been paid under section 34) by way of additional cash payments over and above the two cheques that were issued to the complainant employees (one cheque issued to each of Feng and Liang).

The employer does not have any records (such as receipts) to corroborate the alleged cash payments. The employer says that Feng and Liang refused to sign any acknowledgement of payment but I cannot accept this evidence as being credible--if the employees refused to sign an acknowledgement, then why make the cash payment? Alternatively, if the employees refused to sign a receipt for a cash payment, then the wages could have been paid by way of cheque (as was the case on one occasion for each employee) so that there would have been a documentary record of payment.

I might add that the employer does not appear to have maintained any payroll records, other than a handwritten note that purports to set out the hours worked, on a daily basis, by Feng and Liang (*i.e.*, Exhibits 1 and 3), and has apparently never provided either Feng or Liang with a proper wage statement as directed by section 27 of the *Act*. The "payroll records" maintained by the employer clearly do not meet the statutory requirements set out in section 28 of the *Act*.

The employees say that the only wages they received were paid by way of a company cheque--a cheque in the amount of \$447.03 for Feng and a cheque in the amount of \$124.65 for Liang. The employer concedes that these two cheques represent the only wages paid by way of a cheque.

The employer's case on appeal is exactly the same case that was put before the Director prior to the issuance of the Determination--no new evidence has been presented. I am satisfied, as was the Director, that on a balance of probabilities one cannot conclude that the alleged cash payments were made.

On an appeal of a Determination, the employer bears the burden of proving that the Determination ought to be set aside. In my view, the employer has simply failed to meet its burden of proof.

ORDER

As noted at the outset of these reasons, the Determination appears to contain a minor arithmetic error. Accordingly, while the employer has not satisfied me that the Determination ought to be cancelled, it would appear that a small variance is in order.

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 9th, 1997 and filed under number 74770, be varied to reflect a total employer liability of \$2,295.42 (together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance)--the individual amounts due to each complainant employee, as set out in the Determination, are confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal