

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 -

Fook Cheung (William)Tang
("Tang")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/386

DATE OF HEARING: August 25, 1999

DATE OF DECISION: September 22, 1999

DECISION

OVERVIEW

This is an appeal by Fook Cheung (William) Tang (“Tang”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 7, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Tang alleges that the delegate of the Director erred in the Determination by concluding that he was not entitled to regular wages, overtime wages and statutory holiday pay.

APPEARANCES

William Tang	on his own behalf
Anna Wong	interpreter provided by the Tribunal
Chung Mah Chan	on behalf of Moutai Mandarin Restaurant (1993) Ltd.
Acme Chan	on behalf of Moutai Mandarin Restaurant (1993) Ltd.
Leanne Walsh	articling student with Walsh & Company counsel for Moutai Mandarin Restaurant (1993) Ltd.

ISSUE

The issue to be decided in this appeal is whether Tang is owed for regular wages, overtime wages and statutory holiday pay ?

FACTS

Tang was employed by Moutai Mandarin Restaurant (1993) Ltd. (the “Restaurant”) commencing July 4, 1998 to November 1998. The Restaurant opened on July 4, 1998 and Tang alleges that during the month of July 1998 he worked from 11 a.m. to 10 p.m. each day without a day off and was only paid a total of \$900.00. Tang alleges that a review of the daily cash register tapes which are stapled onto the customer’s bill would show not only his handwriting but also the date and time of the receipt. Tang further alleges that other employees at the time would be able to verify his hours.

The Restaurant concedes that no payroll records were kept for Tang in the month of July but insists that he only worked 4 hours per day.

ANALYSIS

The Determination issued by the delegate of the Director in this matter with respect to the matter of regular and overtime wages owing does not meet the requirements of Section 81 of the *Act* which provides:

Section 81, Notifying others of determination

(1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:

(a) the reasons for the determination;

(b) if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;

(c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;

(d) the time limit and process for appealing the determination to the tribunal.

(2) On being served with a determination requiring the employer to limit the hours of work of employees, an employer must display a copy of the determination in each workplace in locations where the determination can be read by any affected employees.

(emphasis added)

The delegate of the Director states “*There is no other independent evidence available.*” There is no indication that during the investigation the delegate of the Director either interviewed independent witnesses as requested by Tang in his letter of March 15, 1999 nor is there any indication that the delegate of the Director reviewed the cash register tapes and customer bills.

The only reason given by the delegate of the Director for determining that Tang was not owed overtime wages was “*...the payroll records presented by the employer are inadequate but it did not show any unpaid overtime as alleged by Mr. Tang. Thus, the only conclusion that I could arrive at is that there were no incurred overtime hours as alleged by Mr. Tang.*”

The logic used by the delegate of the Director in arriving at his conclusion, if allowed to stand, would only serve to encourage unscrupulous employers to fail to keep records thereby escaping their obligations under the *Act*. Such a result would be, in my view, contrary to the principles expressed in the *Act*.

With respect to the issue of statutory holiday pay, the documentary evidence is clear, Tang was not employed for 30 days prior to the August 3, 1998 statutory holiday. The requirement for an employer to pay and employee a statutory holiday is found in Section 44 of the *Act* which provides:

Section 44, Entitlement to statutory holiday

After 30 calendar days of employment, an employer must either

- (a) give an employee a day off with pay on each statutory holiday, or*
- (b) comply with section 46.*

For all of the above reasons, I conclude that Tang is not entitled to statutory holiday pay for the August 3, 1998 statutory holiday.

I further direct that the issue of regular and overtime wages owing be referred back to the delegate of the Director for further investigation.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 7, 1999 be confirmed with respect to the issue of statutory holiday pay. I further order that the issue of regular and overtime wages be referred back to the Director for further investigation.

Hans Suhr
Adjudicator
Employment Standards Tribunal