

An appeal

- by -

Happy Video & Electronics Ltd.
("Happy Video")

- 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: Norma Edelman

FILE No.: 2001/404

DATE OF DECISION: July 16, 2001

DECISION

FACTS AND ANALYSIS

This matter arises out of a referral back to the Director of Employment Standards (the "Director") in an earlier decision of the Tribunal (*Happy Video & Electronics Ltd.* BCEST #D215/01). That decision arose out of an appeal by Happy Video & Electronics Ltd. ("Happy Video") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination of the Director issued on November 29, 2000. The Determination concluded that Happy Video owed Daniel Tong ("Tong") \$17, 923.11 (including interest) on account of compensation for length of service, overtime wages, statutory holiday pay and vacation pay. In the earlier decision, I confirmed that Tong was owed compensation for length of service in the amount calculated by the delegate, but I referred the amount of Tong's entitlement to overtime wages, statutory holiday pay and vacation pay back to the Director's Delegate to redo the calculations based on Tong's records for the period April 1998 to April 2000.

On May 23, 2001, the Tribunal received a report from the Delegate, including his calculations, which he said were based on Tong's records for the period April 1998 to April 2000. The Delegate said he sent a letter and his calculations to Happy Video and Tong on May 8, 2001 with a request that they review the calculations and respond to him within two weeks. Only Tong responded to his letter. The Delegate said that Tong was of the view his calculations were incorrect. The Delegate concluded his report by stating he believed his calculations were correct. With his report, the Delegate submitted three letters from Tong dated May 13, 2001, May 17, 2001, and May 21, 2001, a copy of Tong's calculations, and a copy of a letter dated May 17, 2001 that he sent to Tong advising him that he was unable to understand Tong's calculations.

On the same day the above report was received from the Delegate, the Tribunal received a copy of a letter from Happy Video to the Delegate dated May 22, 2001. In the letter, Victor Que ("Que") on behalf of Happy Video, said "In reply to your letter of May 8, 2001, please be informed we have no reason to take part in agreeing to your calculation". Que then goes on to dispute the conclusions in my earlier decision.

Que's letter of May 22, 2001 and the Delegate's report of May 23, 2001 were sent to the parties for their reply on May 25, 2001. The parties were advised that the only issue being decided was *quantum* (did they agree or not with the Delegate's calculations) and that the Tribunal would consider a request for a reconsideration of the earlier decision after the calculation issue was finalized. In reply, the Tribunal received submissions dated June 14, 2001, June 15, 2001, and July 2, 2001 from Tong and submissions dated June 15, 2001 and July 2, 2001 from Que.

In his submissions, Que does not dispute the Delegate's calculations. Rather, he takes issue with my earlier decision. As indicated above, however, the only matter before me at this time is the correctness of the Delegate's calculations. Once this matter is finalized, Que may apply for a reconsideration of my earlier decision.

As for Tong's submissions, it appears he is saying he is not sure if the Delegate's calculations are correct and he wants confirmation that his method of calculation (which consists, for the most part, of applying \$7.50 to the first 40 hours in a week, \$11.25 for the next 8 hours and \$15.00 for hours in excess of 48 hours in a week) is correct. I believe this is what Tong was getting at in his May 13 and May 17 letters to the Delegate, which the Delegate said he did not understand.

As stated above, the only matter before me is whether the Delegate's calculations are correct or not. I have reviewed the Delegate's calculations and I am unable to accept them for the following reasons.

First, certain hours used by the Delegate in his calculations do not reflect Tong's record of hours. Some (non-exhaustive) examples are:

- Tong's records for April 1998 show he worked 11 hours on 25 days, 9 hours on 4 days and 10 hours on 1 day. The Delegate's calculations show he worked 10.5 hours on 26 days and 9 hours on 4 days. Similar errors occur in May, June and July of 1998.
- Tong's records show he worked 8 hours on August 2, 1998, but the Delegate shows he worked 9 hours.
- Tong's records show he worked 7.5 hours on February 13, 2000 but the Delegate shows he worked 6.5 hours.
- In my earlier decision, I found Tong did not work on July 10, 1999 and January 1, 2000, yet the Delegate shows he worked 9 hours on both days.
- Tong's records show he worked zero hours on April 10, 2000, but the Delegate shows he worked 7.5 hours.

Second, in his report to the Tribunal, the Delegate offered no explanation or reason why his calculations were correct. In an earlier letter to Tong, he advised Tong he could not understand his calculations. However, I find Tong's calculations to be perfectly clear. Tong's method of calculation only takes into account weekly overtime. The Delegate's calculations appear to take into account both weekly and daily overtime. The Delegate needs to explain why he reached the conclusion that his method is correct and in accordance with the *Act* and Tong's method is not. To ensure that the principles of natural justice are met, the parties are entitled to know the basis of the Delegate's decision. Without reasons, the parties cannot assess the decision, which includes knowing the case made against them and determining whether there are grounds to dispute the matter.

Third, the *Act* defines a week, for the purpose of calculating overtime, as 7 days beginning on a Sunday, yet the Delegate, without explanation, commences his calculations for daily/weekly overtime on Mondays and attributes double time to every Sunday.

Fourth, the Delegate's calculations run from April 1, 1998 to April 23, 2000, whereas the amount of wages that Happy Video is liable for, is limited to the amount that was payable in the period beginning 24 months before April 17, 2000, the date of Tong's complaint (see Section 80 of the *Act*).

Given the above, I have no choice but to again refer this matter back to the Delegate. I trust the Delegate will re-issue his calculations and provide the parties with an opportunity to respond to them in an expeditious manner. In the event the matter is not voluntarily resolved then the Delegate will submit a report to the Tribunal. Again, I trust this will be done in an expeditious manner. The Delegate's report will include calculations based on Tong's records and an explanation of the methodology used to make the calculations and how it accords with the *Act*. Further, in the event one or both of the parties provides a methodology that is not accepted by the Delegate, he will provide reasons why he finds the methodology to be wrong.

ORDER

Pursuant to 115 of the *Act*, the amount of Tong's wage entitlement for overtime, statutory holiday pay and vacation pay is referred back to the Delegate for calculations in accordance with the above directions. My order concerning Tong's entitlement to compensation for length of service remains as set out my earlier decision.

Norma Edelman
Vice-Chair
Employment Standards Tribunal