

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 -

Yan Zhang

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/292

DATE OF HEARING: August 26, 1998

DATE OF DECISION: September 3, 1998

DECISION

APPEARANCES

Gordon Yu on behalf of D & T Taiwanese Restaurant Ltd.

Yan Zhang on her own behalf.

OVERVIEW

This is an appeal by Yan Zhang, under Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards on April 16, 1998. The Determination found that Mrs. Zhang was entitled to \$1,019.16 in unpaid wages and interest from her former employer, D & T Taiwanese Restaurant Ltd. (“D & T”).

Mrs. Zhang’s appeal is based primarily on her submission that the Director’s delegate erred in finding that she worked 7 hours per day rather than 8.5 per day throughout her period of employment. Her appeal also refers to several sections of the *Act*: Section 6 (Informing employees of their Rights); Section 31 (Hours-of-work Notices); Section 32 (Meal breaks); Section 36 (Hours free from Work); and Section 46 (Work on a Statutory Holiday).

A hearing was held at the Tribunal’s office on August 26, 1998 at which time evidence was given under oath or affirmation. Ms. Linda Yu, a certified interpreter, interpreted the proceedings.

At the beginning of the hearing I made an order for exclusion of witnesses at Mr. Yu’s request. I also asked Mrs. Zhang to confirm if she would be calling any witnesses. While she initially requested an adjournment to contact possible witnesses by telephone, she confirmed that she would not call any witnesses to testify on her behalf.

ISSUE TO BE DECIDED

Did the Director’s delegate err in finding that Mrs. Zhang worked 7 hours per day during her employment with D & T?

FACTS

The following findings of fact, which are set out in the Determination, are not in dispute:

- Mrs. Zhang was employed by D & T as a kitchen helper from August 25, 1995 to April 5, 1996.
- She worked Monday through Saturday (6 days) each week.
- Her employment was terminated without notice on April 5, 1996.
- Mrs. Zhang was paid \$1,200.00 per month during her employment and received wages totaling \$9,401.60 from D & T.

The Director's delegate found that D & T had contravened the following sections of the *Act* and ordered it to cease contravening these Sections:

- Section 16 - Minimum Wage
- 17 - Paydays
- 18 - Payment of wages on termination of employment
- 20 - How wages are paid
- 27 - Wage statements
- 28 - Payroll Records
- 35 - Maximum Hours of Work
- 40 - Overtime Wages
- 45 - Statutory Holiday Pay
- 46 - Statutory Holiday Pay

The Determination sets out the various grounds of Mrs. Zhang's complaint under the *Act* as well as D & T's responses. Two issues lie at the heart of Mrs. Zhang's complaint:

- that she was promised a monthly salary of \$1,600.00; and
- her daily hours of work were 11:00 a.m. to 2:30 p.m. and 5:00 p.m. to 10:00 p.m. for a total of 8.5 hours per day, six days per week.

D & T informed the Director's delegate that Mrs. Zhang's hours of work (and those of other employees) were from 11:30 a.m. to 2:30 p.m. and 5:30 p.m. to 9:30 p.m. for a total of 7 hours per day. It provided "further evidence" to the Director's delegate which he described in the Determination in the following manner:

The employer submitted three affidavits from employees to confirm their argument of the restaurant hours. The affidavits were from Tsao Chao, a cook, employed since November 1, 1995, Sally Chia-Yi Wong, a cashier, employed since January 1, 1994 these affidavits were dated October 24, 1997, and Tina Chai-Ting Wong, bookkeeper, employed since January 1, 1994 to February 11, 1997. This affidavit was dated October 30, 1997.

A summary of the affidavits indicates,

- The shifts of work were 11:30 a.m. to 2:30 p.m., and 5:30 p.m. to 9:30 p.m.
- The restaurant was closed (“Closure Rule”) during the break 2:30 to 5:30; and all personnel except management were to leave, and this was strictly enforced.
- The signatories had not seen the complainant work outside of the hours declared.
- The signatories had not worked hours outside the hours declared.

The complainant refutes this evidence in a letter dated March 9, 1998, indicating that she had to work at times until after 10:00 p.m., or after 11:00 p.m.

It is to be noted that this letter was signed by the complainant and four other signatures were attached, they were Meiyuan Wu, Sue Huang, Mr. Ye, and Mr. Wu. The letter states that these people had worked for the employer for some time.

Prior to making a finding about Mrs. Zhang’s hours of work, the Director’s delegate also considered various records.

The records provided by the employer do not indicate the hours worked each day by the complainant, as required by the *Act*. The records show that the rate of pay was \$1,200.00 per month...

The complainant has not submitted any records of hours worked each day. She maintains that she was required to work 8.5 hours each day. She claims that she had to start earlier or stay later than the restaurant hourly thereby working over 8 hours each day (i.e. 8.5 hours each day).

There was no evidence submitted by either party concerning whether or not there were lunch breaks or other breaks during the work day, other than the break between the split shift.

His determination about Mrs. Zhang’s hours of work is stated as follows:

In view of all of the above the officer finds on balance of probabilities that the hours of work per day were 7 hours. The employer’s records concerning each day are reflective of the amount of days worked. These were used in the Calculations which are attached.

Therefore I find that the wages owed to the complainant are those detailed in the calculation schedule attached to this Determination.

The Determination makes no mention of the restaurant's advertised hours of operation.

Mrs. Zhang testified that her daily hours of work were 11:00 a.m. - 2:30 p.m. and 5:00 p.m. to 10:00 p.m. for a total of 8.5 hours each day. In support of her testimony, she tendered several documents:

- D & T's advertisement in the *World Journal* on March 30, 1996.
- D & T's advertisement in the *World Journal* on April 22, 1998.
- Copies of her Earnings Statements for the period of her employment which do not show any hours of work.
- A copy of her personal desk calendar for the month of April, 1996 which contains an entry on April 5th: "Informed not to work at 10 p.m. last evening."
- A letter to the Director's delegate (dated March 9, 1998) which was written and signed by Mrs. Zhang and co-signed by three co-workers (Mei Yuan Wu; Sue Huang; and Mr. Ye (2nd cook)).
- Two undated letters in which two former employees, Cho M. Yeu and Sue Huang, state that the restaurant's "working hours" were 11:00 a.m. to 2:30 p.m. and 5:00 p.m. to 10:00 p.m.
- A letter dated August 11, 1998 from Mrs. Zhang's sister, Eton Zhang, states that she cared for Mrs. Zhang's son each day while she was at work and that Mrs. Zhang returned "at 11:00 p.m. everyday."
- A letter dated August 11, 1998 from Susan Yu, a tour guide who brought groups to eat at the restaurant, which states that Mrs. Zhang was at the restaurant after 10:00 p.m. on one occasion.

Both of D & T's advertisements in the *World Journal* show its hours of operation as 11:00 a.m. - 2:30 p.m. and 5:30 p.m. to 10:00 p.m.

Under cross-examination, Mrs. Zhang testified that there were two reasons why she had not provided a copy of her desk calendar to the Director's delegate during his investigation: initially she did not believe it was necessary; and, she could not locate it until she had found it in a case on the day before the hearing. She also testified that she had not given the Director's delegate a copy of Mr. Yeu's letter because she had been unable to find him initially and, subsequently, another cook told her where to find him.

Wai Yung Lee is a part-owner of D & T who manages the daily operation of the restaurant and works in the restaurant's main kitchen preparing food. He testified that the advertised hours of operation which appeared in the *World Journal* were in error. The actual hours of operation, he testified, were 11:30 a.m. - 2:30 p.m. and 5:30 p.m. - 9:30 p.m. and those hours had been in effect since the restaurant's grand opening on January 1, 1995. The only period when the restaurant's hours of operation were different was during the last week of December, 1994 immediately prior to the grand opening. The reason for this change, he testified, was that during the week prior to the grand opening, the number of patrons at the restaurant after 9:00 p.m. did not warrant remaining open until 10:00 p.m. Mr. Lee also

testified that Mr. Zhang was not required to perform work outside of business hours as he personally performed any kitchen duties prior to and after normal business hours.

Mr. Lee also testified that he did not notice that the various newspaper advertisements in the *World Journal* and *Sing Tao* stated the restaurant's hours of operation incorrectly. Recent newspaper advertisements placed by D & T have corrected this error which was brought to Mr. Lee's attention by Mrs. Zhang's appeal to this Tribunal. In support of Mr. Lee's testimony, D & T submitted: a letter dated May 27, 1998 from the office manager and receptionist at Broadway Centre Packaged Office Ltd. which is located in the same building as D & T's restaurant; and a letter dated May 29, 1998 from the principal of Hermaglo Psychic Ltd., also at the same location.

Under cross examination, Mr. Lee could not recall that in 1995 Mrs. Zhang had introduced him to a friend, Li Pe Lee, who wished to rent the space now occupied by Broadway Centre Packaged Office Ltd. He also denied that he was involved in renting the space: "...it is not possible. I have only energy to run one business. It was there before I opened my restaurant." He also denied knowing the owner of the building in which D & T's restaurant is located.

Sally Chia-Yi Wong has been employed by D & T as a cashier/accountant since January, 1995. Her hours of work, she testified, have been 11:30 to 2:30 and 5:30 to 9:30 each day, and these hours of work were the same for all other employees. She also testified that the kitchen normally closes at 9:00 p.m. ("...last call is at 9:00 p.m.") and if the restaurant is busy at that, which is seldom, only Mr. Lee works beyond 9:30 p.m. to tidy up.

ANALYSIS

The principal issue in dispute in this appeal is Mrs. Zhang's hours-of-work during her employment with D & T Taiwanese Restaurant Ltd. While Mrs. Zhang gave several grounds for her appeal (Section 6 - Informing employees of their rights; Section 31 - Hours-of-work notices; Section 36 Hours free from work and Section 46 - Employee required to work on a statutory holiday), I intend to deal primarily with the hours of work dispute. However, I will dispose of each of the other issues briefly.

I find that Section 6 of the *Act* is not relevant to the adjudication of this appeal. Section 31 may be relevant to the extent that if D & T had displayed notices of employees' hour-of-work it is possible that this dispute may not have arisen. However, I agree with the Director's delegate the D & T's failure to post hours-of-work notices is a matter about which the Director's delegate may exercise his discretion to impose a penalty and that the issue is not relevant to an employee's entitlements under Part 4 of the *Act* - Hours of Work and Overtime. Section 32 (Meal Breaks) is not relevant to this appeal because under the *Act* an employee is entitled to a meal break only if he or she works more than 5 hours:

- (1) An employer must ensure

- (a) that no employee works more than 5 consecutive hours without a meal break,
- and
- (b) that each meal break lasts at least a 1/2 hour.

Mrs. Zhang's entitlements under Section 46 of the *Act* were dealt with by the Director's delegate in the "Overtime Calculation Report."

While Mrs. Zhang's complaint alleged that she was entitled to a salary of \$1,600.00 per month, her appeal does not include that issue as a ground of appeal. Further, the remedy she seeks from the Tribunal and the calculations submitted by her in support of that remedy adopt the hourly wage rates (\$6.92/hour; \$7.00/hour) used by the Director's delegate to calculate her wage entitlements. Mrs. Zhang did not give any evidence about this issue at the hearing. I conclude, therefore, that I should not disturb the delegate's finding that there is no evidence to establish her entitlement to a salary of \$1,600.00 per month.

Where there is a conflict in the evidence and an adjudicator is required to make a finding of fact, as is the situation in this appeal, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna v. Chorny* (1952) 2 D.L.R. 354 (B.C.C.A.) have been widely accepted. He made the following comments, at page 357, about how the issue of credibility ought to be assessed by an adjudicator:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the best test of the truth of the story of a witness in such case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions.

....

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reason for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case.

When I apply the *Faryna v. Chorny* test to the evidence in this appeal, I am led to find that it is probable that Mrs. Zhang worked 8 1/2 hours each day during her employment with D

& T. I make that finding with the benefit of having heard evidence under oath and having that evidence subject to cross examination.

In making my finding about Mrs. Zhang's hour of work I have considered several factors. First, I note that three employees (Tsao Chao, Sally Chia-Yi Wong and Tina Chai-Ting Wong) stated in writing that they and Mrs. Zhang worked from 11:30 a.m. to 2:30 p.m. and 5:00 to 9:00 p.m. and four other employees (Mei Yuan Wu; Sue Huang; Cho M. Yeu and Mr. Ye) stated in writing that they and Mrs. Zhang worked from 11:00 a.m. to 2:30 p.m. and 5:00 p.m. to 10:00 p.m. In addition, I have considered the often contradictory oral evidence by Sally Chiau-Yu Wong, Wai Yung Lee and Yan Zhang.

Second I note Dr. Hao Shen's written statement that he assisted Mrs. Zhang in securing employment with D & T and, during the employment interview, Mr. Lee advised Mrs. Zhang that her hours of work would be 11:00 a.m. to 2:30 p.m. and 5:00 p.m. to 10:00 p.m. six days per week. Third, I note that while Mrs. Zhang testified that she provided a copy of the *World Journal* newspaper advertisement to the Director's delegate, the Determination does not refer to the restaurant's advertised hours of operation. That, in my view, is a significant omission.

From January, 1995 to April, 1998 D & T's hours of operation were advised in the *World Journal* and *Sing Tao*, two leading Chinese-language newspapers, as being 11:00 a.m. to 2:30 p.m. and 5:30 to 10:00 p.m. Mr. Lee testified that he "...realized the error and corrected it" only after Mrs. Zhang made her appeal to the Tribunal. He also testified that the restaurant only operated those hours for one week prior to its grand opening on January 1, 1995. I find that to be inconsistent with the "preponderance of probabilities that surround the currently existing conditions." It appears to me to be highly unlikely that any business (but in particular a business such as a restaurant which is in a highly competitive service industry) would advertise its hours of operation consistently over a period of almost 2 1/2 years and not actually be open for business during those advertised hours. It is also not consistent with the preponderance of probabilities that a newly opened restaurant would reduce its hours of operation based solely on the volume of business its experienced in the week prior to its advertised grand opening. Normal business acumen and, indeed, good sense would suggest that any change in the business' hours of operation would be made only after several weeks or, possibly, months so as to take into account normal seasonal or cyclical factors.

I found that Mr. Lee was often evasive under cross examination and he had difficulty remembering the date of significant events such as when he was assaulted and reported the incident to the police.

Counsel for D & T sought to rely on earlier decisions of the Tribunal: *Tri-West Tractor Ltd.* (BCEST #D268/96) and *Kaiser Stables Ltd.* (BCEST #D058/97) in support of his submission that Mrs. Zhang should not be permitted to bring new evidence to the Tribunal which was not provided to the Director's delegate prior to his issuing the Determination. While I agree with the principles set out in that line of authority, I have not found those decisions to be relevant in this appeal.

For all these reasons, I find that the Director's delegate erred when he determined that Mrs. Zhang worked 7 hours per day.

ORDER

I order, under Section 115 of the *Act*, that the matter be referred back to the Director to calculate the wages owing to Mrs. Zhang based on my finding that she worked 8 1/2 hours per day, 6 days per week during her employment with D & T.

Geoffrey Crampton
Chair
Employment Standards Tribunal