

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 -

Shiming S. Yuan
("Yuan")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/517

DATE OF HEARING: September 27, 2000

DATE OF DECISION: October 12, 2000

APPEARANCES

On his own behalf	Shiming S. Yuan
For the Director	Heidi Hughes, Counsel Ivy Hallam, delegate
On behalf of North Vancouver Export and Import Trade of Canada & Super Chestnuts	Gou Qiang Hong (By telephone)

DECISION

OVERVIEW

This is an appeal by Shiming S. Yuan (“Yuan”), pursuant to Section 112 of the Employment Standards Act (“the Act”), against a Determination issued by the Director of Employment Standards (“the Director”) June 30, 2000. The Director’s delegate found that the Act had not been contravened and that the matter at issue between the parties had been resolved. The investigation process was concluded and the file closed.

Mr. Hong participated in the hearing by telephone, with the assistance of an interpreter. His participation was not continuous throughout the hearing however. Mr. Hong hung up, and reconnected himself, twice during the 3.5 hour hearing. On each occasion, he was not present for approximately 10 to 15 minutes. No explanation was provided for his absences. I do not consider that he was prejudiced by this absence, nor do I consider that his absence affected the outcome of this decision. The appeal was against the Determination of the Director, and there was no onus on Mr. Hong to prove or disprove any matter in dispute.

Yuan had two witnesses at the hearing. After some discussion, Yuan agreed that it would not be necessary to hear from those witnesses, since the evidence Yuan sought to have adduced from them went to the substantive issues raised in his complaint, rather than the issues on appeal.

ISSUES TO BE DECIDED

There were several issues raised on appeal. They are as follows:

1. Whether the investigators knew the employer and were therefore biased in favor of the employer;
2. Whether Yuan was coerced or intimidated into signing the settlement agreement;
3. Whether the Act was misinterpreted or misrepresented to Yuan by the investigator; and
4. Whether the agreement is based on an incorrect interpretation of the Act and the requirements of the Act were waived for the employer.

After the appeal was filed, Yuan withdrew his allegation of bias against the delegate.

Yuan sought, as a remedy, that I “finalize a previous case officer’s preliminary decision to order the employer to pay \$8544.67 of wages owing” to him. I advised that, following the arguments of the parties, I would either uphold the Determination or set it aside. If set aside, the matter would be remitted back to the delegate for a Determination. In any event, I do not consider the letter of November 10 to which Yuan refers as a “preliminary decision” as a decision or a Determination.

FACTS

As found by the delegate, the facts are as follows.

Yuan worked for North Vancouver Export-Import Trade of Canada Limited & Super Chestnuts Inc. (“Super Chestnuts”), a chestnut roasting business, as a technician making the chestnut roaster and helping to establish the business.

Yuan worked and resided with Guo Qiang Hong (“Hong”) and his family in Hong’s house from May 1998 to November 1998. During that time he invested \$12,000 in Super Chestnuts, and became one of the directors. He alleged that he also worked for Super Chestnuts in February, March and April 1998.

On February 8, 2000, during an investigation into Yuan’s complaint that he was owed overtime and regular wages, a fact finding and settlement meeting was held. Hong and his wife, Yuan and the delegate attended the meeting. Another officer, Michael Fu, also attended the meeting as an interpreter. During the meeting, Hong and Yuan agreed to settle the dispute, and a settlement agreement was entered into. The delegate noted that Yuan was not happy with the offer made by Hong, but after some consideration, signed the settlement agreement. A cheque in the amount of \$1200.00 was picked up by Yuan on February 16, 2000.

The delegate considered whether Yuan was coerced into accepting the settlement or voluntarily accepted it.

Hong produced two receipts showing that Yuan signed for wages received for July, August, September and October 1998, and argued that no further wages were owed. However, Hong wanted to settle the matter, and offered to pay Yuan \$1200.00.

Yuan claimed that he was not paid wages from March to June 1998, and only partial wages from July to November 1998, but had no daily records of his work hours from March to June 1998, and no witnesses to corroborate his hours.

The delegate notes that although Yuan was not happy about the offer, he was advised that if he rejected it, the delegate would make a Determination that could be appealed. Yuan accepted the offer. The following day, a representative from Joan Sawicki’s office (Yuan’s MLA) called, and stated that Yuan felt he was coerced into accepting the settlement. The delegate stated that, since Hong’s cheque had not yet arrived, she would contact Hong and let him know that Yuan had changed his mind and issue a Determination. Over the course of the week, Ms. Sawicki’s representative contacted the delegate several more times on Yuan’s behalf. She was advised that

Yuan could tell the delegate by the end of the week whether he had accepted the agreement, or if the cheque was not picked up, the delegate would consider the agreement void and issue a Determination. Yuan in fact picked up the cheque and signed a “Receipt of Payment and Termination of Complaint” form.

ARGUMENT

Yuan argued that the delegate misrepresented the employee/employer relationship to him. He alleges that he was misinformed as to whether he was an employee or not, and claimed that the delegate told him that “because he lived in Hong’s basement, she could not do anything for him”.

Yuan also claimed that the delegate misinformed him on the issue of his rights to unpaid wages as a director. Yuan contends that he could be an employee as well as a director, and still be entitled to wages.

Yuan also contends that he signed the settlement agreement because he was intimidated by the delegate into doing so. He argued that, although the delegate told him he had a right of appeal, she advised him that he would not likely succeed on appeal.

Yuan further argues that the delegate gave the same misinformation to the staff in his MLA’s office.

Yuan contends that he only found out the correct information a few months ago as a result of Internet searches.

Yuan seeks to have the agreement declared void and set aside. He contends that had he been given the correct information, he would not have entered into the agreement.

EVIDENCE

I heard evidence from Ms. Hallam, the delegate who conducted the fact finding and settlement conference with Yuan and Hong, with Mr. Fu’s assistance. Ms. Hallam’s recollection of the events of that meeting were refreshed upon a review of her notes, which were made during the conference.

The settlement conference lasted between one and two hours. Both Yuan and Hong were advised of the purpose of the meeting at the time they were notified of the date. Yuan raised no concerns with the possibility the meeting would result in a settlement at the time.

Yuan set out his position first, followed by Hong. Yuan claimed wages were owed for the months March to June 1998, and partial wages for July to November 1998. Hong provided receipts signed by Yuan acknowledging payment of wages for July through October, and claimed that no further wages were owed. During the discussion, Yuan stated that he had made a financial contribution to Super Chestnuts. The contributions were made in installments, with the second installment of \$7000 to \$8000 made in September 1998.

Hallam testified that after both parties spoke, she separated them, and discussed the possibility of settlement with Yuan. It was her evidence that she told him that he did not have a strong case because he had no record of his daily hours of work, just a blanket number of hours per month. Additionally, that summary was not prepared on a daily basis, but a significant amount of time after the work was done. Yuan also provided a large amount of correspondence between him and Hong as evidence of the hours worked, but Hallam testified that these documents did not support his claim. Yuan also contended that he had once had witnesses to corroborate his claims, but that Hong had intimidated those witnesses into not giving evidence.

Hallam questioned Yuan about the receipts acknowledging payment for wages from July to October. Yuan told her that he signed those receipts under duress, and that they did not represent total payment for wages owed. Hallam asked Yuan why, if he felt he was coerced into signing the receipts, and was still owed wages for March to June, he was still receiving room and board from Hong and his wife, and he nevertheless invested a further \$7000-\$8000 in the company in September. Hallam testified that she told Yuan his evidence was not strong, that these issues undermined the strength and credibility of his evidence, and that if she were to issue a Determination, it would not be in his favor.

Hallam's evidence was that Hong did not want to settle because he was of the opinion that he did not owe any further wages, but that he wanted the matter dealt with. She also testified that Hong told her that Yuan had a practice of coming back after documents were signed and asking for more money. She testified that she expressed the opinion that Yuan might not come back after settling through the Employment Standards Branch and persuaded Hong to offer Yuan \$1200.00.

Hallam testified that she told Yuan that there was an offer of \$1200, and that he was not happy about it. She told Yuan that was a final offer, and that if he did not want to accept it, she would write a Determination and that he had a right to appeal it. She acknowledged that she advised him that she was of the opinion that he would not likely succeed on appeal. She acknowledged that Yuan asked about the appeal process and wanted a few days to check with a lawyer. She told him that not many lawyers were familiar with the Act. She left Yuan to think about the offer for five minutes. When she returned, he was still thinking about it. She told Yuan if he did not want the agreement, he should not sign it. Yuan then quickly signed the agreement and left the meeting room.

Between the date of the settlement meeting (February 8), and the date Yuan picked up Hong's cheque (February 16), Hallam received several telephone calls from Jean Lawrence, a staff member in Joan Sawicki's office. Ms. Lawrence stated that Yuan had complained that he was under pressure to sign the agreement and wanted to know why he was not entitled to more wages. Hallam also received a telephone call from the Employment Standards Branch in Victoria advising her that they had received a call from Yuan complaining that he was unhappy with the settlement agreement and that he thought he should be entitled to more wages. Hallam called Yuan and told him that Hong's cheque was in the office, and that he had one week to pick it up. She told him that if he did not pick it up, she would consider that the agreement had been rejected, and would issue a Determination. Hallam also gave Jean Lawrence the same information.

As noted above, Yuan picked up the cheque on February 16.

Hallam denied that she told Yuan that he could not collect wages because he lived in Hong's basement. She denied that she gave him any advice about being a director, although she did give him a copy of s. 96 of the Act. She also denied shouting at him at any time during the settlement conference.

Yuan denied discussing the receipts with Hallam, and denied telling her that she could not call his witnesses.

Hong corroborated Hallam's evidence with respect to her discussions with him. He stated that Hallam never misled him. He also disputed Yuan's allegations that he signed the wage receipts under duress.

The Director argued that the settlement agreement is a contract, the fairness of which is not reviewable. She contended that the test was whether there was misrepresentation going to the root of the contract, and that an objective test ought to be applied to determine whether there was misrepresentation.

ANALYSIS AND DECISION

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has not been met.

Section 78 (1) provides that the director may

- (a) *assist in settling a complaint or a matter investigated under section 76;*
- (b) *arrange that a person pay directly to an employee or other person any amount to be paid as a result of a settlement;*
- (c) *receive on behalf of an employee or other person any amount to be paid as a result of a settlement.*

In *Alnor Services (Re)* BC EST #D199/99, the Tribunal referred to *Small* (BC EST #D032/98) in which an employee who was represented by legal counsel entered into a settlement agreement with his employer but subsequently refused to be bound by the settlement agreement:

As was noted by the Tribunal in enforcing the settlement reached in that case, both parties to a settlement agreement negotiated in good faith are entitled to assume the other party will abide by the terms and conditions of the agreement. Unless specifically noted otherwise, the intent of all settlement agreements is to effect a final resolution of the matters in dispute between the parties.

Under the law of contract, settlement agreements may be set aside if the agreement was entered into through misrepresentation, undue influence, duress or fraud. Yuan is alleging both misrepresentation and duress.

Yuan disputed little of Hallam's evidence regarding her conversations during the settlement agreement. I accept that Yuan may have felt "pressured" to sign the agreement given Hallam's assessment of the case. Settlement negotiations often involve compromises. Typically, both parties settle for something other than what they feel entitled to, in the interest of obtaining a speedy and final resolution of the dispute. In that respect, it may be said that all settlement agreements are made with some degree of duress. Nevertheless, the parties acknowledge that an agreement is preferable to other options they have. I find this case to be no different, and I do not accept that the agreement was unfair in this respect. The fact is that Yuan was aware, at all times, of his right to refuse the offer and to appeal Hallam's determination. He also had a "cooling off" period in which to reject the offer. He had the opportunity to seek legal advice, and in fact sought the assistance of his MLA. He was told at all times that he could reject the offer. If Yuan felt intimidated during the conference, he had further time to consider the offer, and to reject it. I find no merit to this ground of appeal.

I am also unable to find, on a balance of probabilities, that the delegate misinterpreted the Act or that the agreement was based on an incorrect interpretation of the Act. I accept that Hallam reviewed and considered all of the evidence presented by the parties, gave Yuan her impressions of the strength of his case, and recommended settlement. Whatever Yuan's interpretation of the Act, I accept that, in Hallam's view, the evidence necessary to support the claim for wages, whether those were due as an employee or not, or whether Yuan lived in Hong's basement or not, did not exist. She found that his evidence was either lacking or not credible, and her settlement recommendation was based on that assessment. Her interpretation of the Act was only marginally relevant to this recommendation, which Yuan was fully aware he had the right to reject.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated June 30, 2000, be confirmed.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal