

An appeal

- by -

Mr. Samio Sin Chai Yeo, Golden World Enterprises Ltd.
operating as Mom's Fish and Chips
("Golden World" or the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/350

DATE OF HEARING: July 31, 2001

DATE OF DECISION: August 8, 2001

DECISION

APPEARANCES:

Francis C. Chen, Agent	for Golden World Enterprises Ltd.
Bing Leung	on his own behalf
Anna Wong	Interpreter

OVERVIEW

This is an appeal filed by Golden World Enterprises Ltd. (“Golden World” or the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Golden World appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on April 10th, 2001 (the “Determination”). The Director’s delegate determined that Golden World and Samio Sin Chai Yeo owed Bing Leung (“Leung”), a former Golden World employee, the sum of \$1,558.78 on account of unpaid wages (principally, overtime pay) and interest. Mr. Yeo (who is the principal director and officer of Golden World) has not appealed the Determination.

Further, by way of the Determination, the Director also, it would appear, assessed a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*. The matter of the penalty is confusing since, at page 6 of the Determination, the second paragraph indicates that a penalty is *not* being issued whereas in the fourth paragraph a \$0 penalty is assessed. The matter of the penalty should be clarified; the Director may wish to vary this aspect of the Determination pursuant to section 86 of the *Act*.

This appeal was heard at the Tribunal’s offices in Vancouver on July 31st, 2001 at which time I heard the testimony of Mr. Yeo and Mr. Martin Lee, on behalf of the Employer and Mr. Leung, on his own behalf. All three witnesses testified through a cantonese interpreter.

ISSUES ON APPEAL

Golden World advanced two grounds of appeal. First, it says that Mr. Leung’s unpaid wage claim was the subject of a binding settlement agreement entered into on March 23rd, 2000. Second, and alternatively, Golden World says that Mr. Leung did not actually work all of the hours set out in the calculation schedule appended to the Determination.

I shall deal with each issue in turn.

BACKGROUND FACTS

Golden World operates a fish and chip restaurant in Surrey, B.C. under the trade name “Mom’s Fish and Chips”. The restaurant offers both “dine in” and “take out” service. Mr. Yeo, Golden World’s principal, immigrated to Canada in 1997 under the federal immigration department’s “entrepreneur” admission program. Mr. Yeo’s status as a relatively recent immigrant is, of course, not relevant insofar as Mr. Leung’s claim for unpaid wages is concerned. However, it does appear (and, indeed, Mr. Yeo frankly admits) that Mr. Yeo, being a recent immigrant, was (and to a large degree remains) uninformed with respect British Columbia’s employment laws. This lack of knowledge resulted in Golden World, perhaps to some degree unwittingly, contravening the *Act*.

Mr. Yeo, through Golden World, opened the restaurant in July 1998. In the fall of 1999, Mr. Yeo advertised in a local Chinese language newspaper for a cook and Mr. Leung responded to the advertisement. Leung (who was not an experienced cook) was hired as Mr. Yeo’s helper at a monthly salary of \$1,200. Leung’s regularly scheduled shift was from 11 A.M. to 8 P.M. (*i.e.*, a scheduled 9-hour workday) Monday to Saturday (*i.e.*, a scheduled 54-hour workweek). Based on this work schedule, Mr. Leung’s monthly salary reflected a regular hourly wage that was well below the provincial minimum wage. Accordingly, the delegate’s calculations were based on the minimum wage.

Throughout his tenure with Golden World (which ended on or about March 20th, 2000) Leung and Yeo were the only two workers in the restaurant except for the few occasions when Mr. Yeo’s wife also helped out in the shop. Mr. Leung worked every statutory holiday during his tenure with the exception of Christmas 1999 but, according to both Leung and the Employer’s payroll records (which are incomplete and not in compliance with the *Act*), Leung was not paid any statutory holiday pay except for Christmas 1999. Even though Leung’s work schedule required him to work both daily and weekly overtime, Golden World did not pay Leung any overtime pay.

The restaurant’s business, as is common with most restaurants, ebbed and flowed throughout the day with a busy lunch and dinner trade and comparatively little business being transacted during the lulls in between. However, except for the those occasions when Leung was sent off by Mr. Yeo on some errand, he remained in the restaurant throughout his shift.

ANALYSIS

The Release and Settlement Agreement

At some point in time Leung learned that he was not being paid in accordance with the *Act* but his several requests to be lawfully compensated were rebuffed by Mr. Yeo. Matters came to a head on or about March 11th, 2000 when Leung either quit (according to Yeo) or was fired (according to Leung). I need not make a finding on this controverted point since Leung was not

awarded any compensation for length of service and Leung has not appealed the Determination. Mr. Leung did return to work after March 11th and worked a few more days for which he was paid, as agreed, at the minimum hourly wage rate. Mr. Leung's last working day was March 20th, 2000.

In any event, after March 11th, Mr. Yeo contacted the company's accountant, Mr. Chen (Mr. Chen appeared as the Employer's agent, but did not testify, before me). Mr. Chen apparently advised Mr. Yeo that Leung had not been paid properly. Mr. Chen prepared two Golden World cheques, in the respective amounts of \$691.81 and \$2,283.22 (net amounts after the requisite statutory deductions and remittances), each payable to Leung. The first cheque appears to have been tendered and accepted without any problem; the second cheque, however, was appended to a wage statement (also prepared by Mr. Chen) upon which appeared the following handwritten note (in Mr. Chen's handwriting):

FINAL RELEASE & AGREED FOR SETTLEMENT [sic]

SIGNATURE:

DATE:

Mr. Leung refused to sign the acknowledgement because he did not believe that the amount of the cheque represented all of his unpaid backpay and thus the cheque was not given to him. Mr. Yeo testified that "I would not give [Leung] the cheque if he did not sign the letter [wage statement]". Mr. Leung subsequently met with a counsellor at the Strathcona Employment Assistance Services' East Pender street office and was apparently told that if he accepted the cheque and signed the acknowledgement, his claim for additional backpay would not be prejudiced. On March 23rd, he accepted the cheque and signed and dated the "release".

In my view, this so-called release does not have any legal force or effect. As noted in *Robert Tower* (B.C.E.S.T. Decision No. D343/01) and in the other Tribunal decisions referred to therein, the Tribunal will uphold *bona fide* uncoerced settlement agreements negotiated in good faith. However, in my view, one could hardly characterize the "settlement" agreement at issue here in such terms. First, given the vague and nonspecific language, it can certainly be argued that this "settlement" agreement is void for vagueness and lack of certainty. Second, as Mr. Yeo clearly indicated, the "settlement" acknowledgement was signed as a precondition to Mr. Leung being given the very back wages that *the Employer itself acknowledged it owed to him*--where is the legal consideration? I note that the "agreement" is not under seal. Third, and in light of the foregoing, is this "agreement" tainted by economic duress? I certainly think so. Finally, it must be remembered that this was not an agreement negotiated in good faith between the parties; rather it represented a unilateral attempt on the part of the Employer to, in essence, "contract out" of its existing further liability under the *Act* and as such the agreement is void by reason of section 4 of the *Act*.

Hours of work

Although the delegate issued a demand for production of the Employer's records of Leung's daily working hours [see section 28(1)(2)], those records were never produced; it would appear such records were never kept by the Employer. The delegate relied on Leung's records of hours worked (kept on two 1999 and 2000 calendars). These latter records show that Leung's working hours varied but that he normally worked somewhere between 8.5 and slightly over 9 hours each day. Leung's records are entirely consistent with the work schedule that the Employer established for Leung (Monday to Saturday, 11 A.M. to 8 P.M.).

The Employer, while acknowledging that Leung was on-site throughout his entire shift, nonetheless claims that Leung was not "working" the entire time. Although Leung testified that he was carrying out his duties throughout the entire shift, I do not doubt that there were times when he was not actively engaged in some work task. However, Mr. Yeo testified that even during those times when Leung was not doing some work-related task but, rather, was taking a "break", if a customer came into the restaurant, it was Yeo's expectation that Leung would immediately have to attend to that customer's needs--and Leung would do so.

Leung was scheduled, by the Employer, to be at work from 11:00 A.M. to 8:00 P.M. each working day so that he would be available--at *all* times during his shift--to attend to customers who might come into the restaurant. Recall that for the most part, only Mr. Leung and Mr. Yeo were on-site. In general terms, Mr. Yeo did the cooking and otherwise managed the restaurant; Mr. Leung helped with meal preparation, served customers their meals and had other cleaning duties. The nature of the restaurant operation dictated that two employees be available while it was open for business. There is no credible evidence before me indicating that Leung was given any unfettered "free time" during his shift when his time was purely his own and when he was not obliged to make himself available to serve any customer who might wander into the restaurant.

I liken the situation here to a retail clerk who, when there are no customers around, might busy themselves with some task (say, restocking shelves or straightening up a display) or simply chat with another employee. In the latter case, some might say that the clerk is not "working", however, the clerk is still "on-duty" and subject to the employer's direction and control (unlike, say, during the meal break contemplated by section 32) and thus is entitled to be paid for that time (see *Relco Investment Corp.*, B.C.E.S.T. Decision No. D008/96; *Broadway Entertainment Corp.*, B.C.E.S.T. Decision No. D210/96).

ORDER

The Employer's appeal is dismissed.

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$1,558.78** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal