Employment Standards TRIBUNAL

An appeal

- by -

Mu-Jin Restaurant and Pub Ltd. and Shi-Jin Investments Ltd. operating as Yoro Japanese Restaurant and Lulu Island Bar and Grill

(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2002/409

DATE OF DECISION: October 8, 2002

DECISION

OVERVIEW

This is an appeal based on written submissions by Mu-Jin Restaurant and Pub Ltd. and Shi-Jin Investments Ltd. operating as Yoro Japanese Restaurant and Lulu Island Bar and Grill (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on July 4, 2002 wherein the Director's Delegate (the "Delegate") ruled that the Appellant had contravened Section 18 of the *Act* regarding wages due after termination of employment and Section 63 of the *Act* regarding compensation due for length of service and ruling that the two Appellant companies are under common control or direction such that they are jointly and severably liable to the various employees involved for the sum of $28,106.12 including interest.

ISSUES

1. The use of new evidence not raised prior to the Determination being issued.

2. Was the Delegate correct in finding that the Respondent, Gordon H.C. Sin (the "Respondent") is owed wages, vacation pay and interest totaling $13,658.72?

ARGUMENT

The Appellant's Position

In a written appeal form dated June 29, 2002 and filed with the Tribunal on the same date with an undated letter attached, the appellant asserts that the Delegate made an error in the finding of facts and asserts that a different explanation of the facts ought be found. The Appellant seeks to change or vary the appeal.

In its written letter attached to the appeal, the Appellant (by its receiver) appeals only the claim of the Respondent, Mr. Gordon H.C. Sin. The Appellant says that "the other complainants appear to have valid wage claims". Nor does the Appellant take issue with the Delegate's ruling that the Appellant companies are or were under common control or direction such that they are jointly and severably liable.

In its written submission, the Appellant notes that the one Appellant company, Mu-Jin Restaurant and Pub Ltd., was placed into receivership on February 14, 2002. The Appellant further asserts that the Respondent was not an employee and the amount owed to him was not wages. The Appellant notes that four post-dated cheques payable to the Respondent had stamped on each of those cheques in Chinese characters a statement that the cheque was for "payback of borrowed money" or "payback of loan". The Appellant notes that, for all of the other employees which were involved, the description on their cheques reads "payroll for the period". The Appellant submits that the claim of the Respondent should be rejected in its entirety and the Determination varied accordingly.

The Respondent's Position

In a written submission received by the Tribunal on August 21, 2002 the Respondent says that at an earlier time he was the boyfriend of the daughter of the individual who owned or controlled the Appellant companies and that he came to work for these companies at the request of that owner (Mr. Ho) leaving his employment as an engineer to do so. After a time the Respondent left the Appellant's employ but returned again a few months later at the request of Mr. Ho with an agreement that he would work as a consultant for a one-year term with a monthly salary of $3,000.00. After four months of employment the Respondent asserts that he had still not been paid his wages and Mr. Ho provided him 12 post-dated cheques for his monthly wages, with each cheque payable in the sum of $2,500.00 after deduction of Canada Pension Plan and employment insurance benefits. In support of his assertions the Respondent provides copies of a letter from a printing company confirming that the Respondent attended that business regarding a menu design for the Appellant, a letter from an energy consulting firm confirming that the Respondent attended their office with respect to utilities for the Appellant, and a Canada Customs and Revenue Agency "Declaration of Conditions of Employment" form regarding the Respondent apparently signed by the Director of the Appellant company, all during the relevant time. The Respondent maintains that he was an employee and is due wages and holiday pay accordingly. He further disputes the Appellant's assertion that the stamp of Chinese characters on the cheques payable to him were for "payback of borrowed money" or "payback of loan". He says that these characters translate as "returning owing" or "payback owing".

The Director's Position

In a written submission dated August 13, 2002 and filed with the Tribunal on the same date the Delegate says that the receiver for the Appellant received a letter from the Delegate dated June 11, 2002 with regards to the wage complaint for the Respondent and the receiver did not respond by the deadline indicated in that letter to raise any concerns with regard to the claim of the Respondent or to request an extension of time to respond to that claim. The Director says that the Appellant could have introduced this evidence during the investigation, or requested an extension to do so if they needed one. Inferentially, the Delegate appears to submit that the submissions and evidence raised by the Appellant should, therefore, not be considered and the Determination upheld.

THE FACTS

Mu-Jin Restaurant and Pub Ltd. and Shi-Jin Investments Ltd. operating as Yoro Japanese Restaurant and Lulu Island Bar and Grill ("Mu-Jin" and "Shi-Jin") operated two restaurants which ceased to carry on business on February 15, 2002. Mu-Jin went into receivership on February 14, 2002. Shi-Jin is not in receivership. The Appellant companies declined to participate in the investigation. Their businesses were closed and telephones disconnected. The Delegate's correspondence, including preliminary findings and calculations were sent to the Appellant's businesses and to the home addresses of the directors/officers of the Appellant companies, but no response was ever received. The Receiver, Price Waterhouse Coopers, was also unable to reach the Appellant companies.

The Delegate received payroll records from the Receiver. The Respondent quit his employment in January 2002 and received post-dated cheques from the Employer. The Delegate found that these post-dated cheques were for outstanding wages. A number of the employees involved were owed wages for pay periods previous to the final pay period prior to the restaurants closing their doors. Also, a number of employees were owed wages for earlier cheques issued which were returned NSF.

The Delegate sent a letter to the Appellant dated June 11, 2002 with a copy to the Receiver indicating her preliminary findings that the Appellants were in contravention of the *Act* and owed wages, vacation pay and interest for the various employees attaching a calculation sheet for the Respondent, Gordon H.C. Sin. In that letter, the Delegate went on to say "should you dispute that the wages calculated are owed to any of the employees under the *Act*, you must forward your written reasons and any records or evidence which you have not submitted to date, no later than June 25, 2002, and a Determination may be issued". Neither the Appellant nor the Receiver for the Appellant filed any response within that time frame.

A Determination was issued accordingly on July 4, 2002.

ANALYSIS

1. *Use of New Evidence*

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98 there is reference to the "Tri-West/Kaiser Stables Rule". This issue was decided in *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97. In *Tri-West (supra),* the adjudicator there held evidence inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it…The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors* (supra) held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria."

In the present case it appears that this evidence (of the stamp with Chinese characters that translates "payback of borrowed money" or "payback of loan" as the Appellant asserts or "returning owing" or "payback owing" as the Respondent asserts) could be important in that it is capable of being some evidence regarding the issue of whether or not the cheque was issued for wages owing. No reason is provided for this information or submission by the Appellant not having been made during the investigation prior to the Determination. However, I note that the Appellant or its directors and officers had apparently left the jurisdiction by that time. It is reasonable to assume that the Receiver did not have sufficient familiarity with the affairs of the Appellant by that time to realize that there may have been evidence to support any position being taken. I do not find that there is any prejudice to the parties resulting from the late disclosure of this evidence or position being taken in that the Respondent has had

an opportunity to reply to the Appellant's position in any event. Weighing all these factors I am allowing the evidence and considering the position being taken by the Appellant.

2. *Was the Delegate correct in finding that the Respondent was owed wages, vacation pay and interest totaling $13,658.72?*

The question regarding the meaning of the stamp of Chinese characters on the cheques issued to the Respondent and whether they translate to English as "payback of borrowed money" or "payback of loan" as the Appellant asserts or "returning owing" or "payback owing" as the Respondent submits, is a troubling one. Indeed, the translation provided for this group of characters in the Chinese-English Dictionary of Economics & International Trade is "loan repayment". However, even if that stamp means repayment for a loan or money which had been borrowed as the Appellant asserts, rather than for past wages due as the Respondent asserts, there is no evidence from the Appellant why it placed this stamp on the cheques. Furthermore, there are no payroll records which would tend to show the Respondent was paid for money due as wages. Balanced against the absence of such evidence there is evidence from the Respondent that he was an employee and that, notwithstanding the presence of that stamp, these funds were owed for wages due. Further, his position is supported by the documents he filed. From a printing office there is a letter which confirms that he attended that office representing the Appellant during the relevant time. In addition, there is a letter from an energy consultant that the Respondent similarly attended that office as a representative of the Appellant. Also, there is a declaration of conditions of employment apparently signed by a director of the Appellant confirming that the Respondent was an employee of the Appellant at the time.

The onus is on Appellant to establish on a balance of probabilities an error in the findings of the Delegate. I find that the Appellant has failed to meet that onus.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated July 4, 2002 be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal