

An appeal

- by -

Raymond Hung operating as Down by the Bay Garden Center  
("Hung")

- 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:** Carol L. Roberts

**FILE No.:** 2002/404

**DATE OF HEARING:** October 22, 2002

**DATE OF DECISION:** October 23, 2002

## DECISION

### APPEARANCES:

R. Hung, Down by the Bay Garden Center

### OVERVIEW

This is an appeal by Raymond Hung operating as Down by the Bay Garden Center ("Hung"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 3, 2002. The Director found that Hung contravened Sections 17(1), 18(2), 34(1) and 58(3) of the Act in failing to pay Brenda Hagen, Kerri Peacock and Graham Walsh (the "complainants") minimum daily pay, regular wages, annual vacation, an Ordered Mr. Hung to pay \$523.48 to the Director on the complainants' behalf.

### ISSUE TO BE DECIDED

At issue is whether the Director erred in finding that the complainants were entitled to regular wages and minimum daily pay. Mr. Hung did not dispute the award for training time. Although Mr. Hung also did not dispute the vacation pay award, because that amount is calculated on the wages, it is also, indirectly, under appeal.

### FACTS

The three complainants worked at Mr. Hung's garden center between March and June 2001. They complained to the delegate that they submitted their hours of work to Mr. Hung, who altered the hours based on what hours he believed they had worked. They contended that Mr. Hung was rarely at the work site, and that, because they had difficulties with the cash register, they could not always log in or out appropriately. They alleged that Mr. Hung insisted they attend 4 hours of cashier training with the Bay, and did not pay them for that training time.

Mr. Walsh alleged that he worked from May 17 to June 13, 2002, and did not receive any wages until August 15. When he complained that he had not been paid properly, he received another cheque in November, 2001.

The delegate made several attempts to contact Mr. Hung to respond to the complaints. After several telephone calls were not returned, the delegate sent Mr. Hung a letter outlining the complainants' position on February 15. On February 28, Mr. Hung left a telephone message for the delegate indicating that he would forward records demonstrating that all wages had been paid. When the delegate did not receive those records, she issued a Demand for Records on March 20. Mr. Hung then provided the delegate with a "master schedule" consisting of the computer records showing when the complainants logged into the terminal. Mr. Hung stated that the employees were all instructed to log their employee numbers into the terminal when they came to work, and log out when they left. This was Mr. Hung's only record of the complainants' hours of work. Mr. Hung advised the delegate that the complainants did not work the hours they submitted to him, or the hours they claimed to have worked. He submitted that they

would log into the computer system, leave the site, and return later in the day to log off. He took the position with the delegate that the complainants frequently did not show up for designated shifts, and on those days the garden center would remain closed. He stated that he was aware of this when he telephoned the center, and would get no answer, or got a complaint from a customer. Mr. Hung contended that the complainants had been paid all wages owing.

In a letter to Mr. Hung dated May 22, the delegate wrote that she had reviewed his records, and indicated that they did not constitute payroll records as required by s. 28 of the Act. She noted that he failed to provide her with their fax copies of their hours of work. She noted that the daily record was merely a print out of the computer system log on and off, which would not necessarily reflect the actual hours of work. Furthermore she noted that the staff were not supervised. She further noted discrepancies in the records provided to her, and sought Mr. Hung's response to several matters. Mr. Hung did reply on June 7.

The delegate preferred the evidence of the complainants as being the best evidence of the hours they worked, since Mr. Hung was not at the site on a regular basis, and relied on telephone calls and customer reports to monitor the activities of the complainants. Although the delegate found that the master schedule provided by Mr. Hung contained the sign in and sign out times, thereby reflecting the complainants' hours of work, his only explanation of the differences between the record and the complainants' was that they were not at work because he was not able to contact them by telephone.

The delegate compared Mr. Hung's schedule with that of Mr. Walsh, and found that, with the exception of 3 days in which Mr. Hung's records contained no relevant information, they matched each other. She also found that, on two different occasions when Mr. Hung stated that an employee was not at work, the employee had logged in but not off. The delegate rejected Mr. Hung's allegation that the employee did not work on that day.

The delegate also concluded that Mr. Hung failed to pay Mr. Walsh in a timely manner, in contravention of s. 17 and 18 of the Act. She also found that both Mr. Walsh and Mr. Hung's records demonstrated there were shifts of less than 4 hours for which he was not paid a minimum of 4 hours, in contravention of s. 34. Finally, the delegate found no evidence of payment of annual vacation, in contravention of s. 58(3).

## **ARGUMENT**

Mr. Hung argues that he was "not given any related documentation or relevant material on the complainants' position, and was thus unable to refute or object to them." He further contends that the delegate conducted an "inappropriate investigation" filled with "unsubstantiated fact and heresay".

He says that he advised the delegate that he confronted at least one of the employees, and that she admitted not showing up on certain days, and leaving early. He says the delegate did not address this in the determination.

Mr. Hung also says that the delegate failed to inquire with Bay staff, who also monitored the employees, to corroborate his allegations that the employees often failed to appear for work.

Mr. Hung further alleges that the complainants' time sheets were not provided to him in a timely manner, and thus he could not pay them on time. He argues that their records were submitted to him at the same time the complaints were filed, and thus should not be considered reliable.

The delegate outlined the several attempts she made to contact Mr. Hung from August to February prior to issuing a Demand for Records. She states that Mr. Hung only contacted her after The Bay was copied with the Demand for Records, on request.

The delegate notes that, in Mr. Hung's appeal documents, he states that the only evidence Mr. Hung could provide regarding the employee's hours of work was the "master schedule". The delegate notes that, upon receipt of that document, she asked Mr. Hung for clarification on several points, and he simply stated that the employees were not at work on the dates in question. The delegate says that the employees were equally adamant they were at work on the dates indicated. One advised the delegate that she worked on her son's birthday, a day on which Mr. Hung states she did not show up.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. Having heard from Mr. Hung, I am not persuaded that the Director erred.

Mr. Hung disputes the delegate's attempts to contact him, saying he received no telephone calls, and that, when he was contacted by the delegate, he attempted to deliver the records as soon as he was able. Mr. Hung acknowledged that he received a telephone call from the delegate, but when he attempted to call her back, reached only her voice message. He did not explain why he did not leave messages for the delegate, or make several attempts until he was successful in reaching her.

However, as I explained to Mr. Hung, the determination does not turn on his failure to respond to the delegate in a timely fashion, even though the delegate assessed a \$0 penalty against him.

Mr. Hung disputes the credibility of the employees' records. He alleges that he told the delegate that he confronted one employee, and that she acknowledged improperly logging her hours. He contends that the delegate did not address this matter in the determination.

It is not clear from the determination whether the delegate did ask the employee whether she admitted falsifying her hours. However, Mr. Hung provided me with no credible explanation as to why, if indeed he had an acknowledgement of fraud by an employee, the employee was not disciplined or terminated. Mr. Hung replied that he had, and that he had reduced the employee's hours. Mr. Hung provided no evidence any of the employees were given warning letters, or were terminated for cause. Indeed, the ROE's indicated that the employees were laid off because of a reduction of hours. Mr. Hung agreed that was not entirely accurate, since he said that, rather than fire the employees, he reduced their hours while he trained other staff to replace them. Mr. Hung provided no evidence of any of the employees' schedules, or other forms of communication of the hours they were to work.

Mr. Hung stated that the till computer was the only record of hours. The employees contended they had difficulty operating it, and did not always log in or out appropriately.

Mr. Hung also asserted at the hearing that he went to the site approximately twice a week, although he had no contemporaneous records to show that he did. Mr. Hung relied solely on the till records, which he said were generated 45 days after they were made, to support his argument that he was on site when he said he was. There is nothing in the till records that establish his presence on site.

Furthermore, Mr. Hung's till records are confusing, and incomplete. For example, on May 7, the records suggest that "kerri" opened the till at 10:01. The document then contains the notation "no close". Mr. Hung has indicated 0 hours for Ms. Peacock on that day. From his explanation, I understood that he would have himself closed the till that day. He contends that Ms. Peacock was not at work that day even though the record shows that Ms. Peacock opened the till.

Mr. Hung's records are clearly deficient. In the face of incomplete and inadequate records, the delegate must weigh the evidence of the parties, and determine which is more credible. The delegate found the employees' records more credible, given that Mr. Hung was not on site daily, and did not appear to have any system of record keeping other than the till computer records. The delegate found the till records to be unreliable, a conclusion I am not persuaded was incorrect.

I find no basis to interfere with the determination.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated August 17, 2000 be confirmed, together with whatever interest has accrued since that date.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**