

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 -

492695 BC Ltd. operating as Paloma Polynesian Bar & Restaurant
("Paloma")
Louis Kong, Director/Officer of 492695 BC Ltd.
("Kong")
David Yu, Director/Officer of 492695 BC Ltd.
("Yu")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE Nos.: 97/641, 97/642, 97/643

DATE OF HEARING: October 9, 1997

DATE OF DECISION: October 30, 1997

DECISION

APPEARANCES

Louis Kong	on his own behalf and on behalf of Paloma
Lizza Kong	on behalf of David Yu
Dave Ages	on behalf of the Director
Jason Kenny	on his own behalf
Michael Chalut	on his own behalf
Vincent Joseph	on his own behalf

PRELIMINARY ISSUE

Kong raised the issue of the lack of an interpreter as he stated that a letter had been sent to the Tribunal requesting one. There was no request for an interpreter received by the Tribunal prior to the hearing. The Tribunal did receive such a request after the conclusion of the hearing. I was satisfied that Kong, with the assistance of Lizza Kong (“L. Kong”) was able to understand and participate in the hearing and that it was not necessary or appropriate to adjourn the hearing.

OVERVIEW

This is an appeal by 492695 BC Ltd. operating as Paloma Polynesian Bar & Restaurant (“Paloma”), by Louis Kong (“Kong”) Director/Officer of 492695 BC Ltd. and by David Yu, (“Yu”) Director/Officer of 492695 BC Ltd., under Section 112 of the *Employment Standards Act* (the “Act”), against 3 Determinations dated July 29, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Paloma alleges that the delegate of the Director erred in the Determination by concluding that certain employees were owed wages and compensation for length of service in the total amount of \$11,877.58. Kong alleges that the delegate of the Director erred in the Determination by concluding that certain employees were owed wages and compensation for length of service in the total amount of \$11,877.58. Yu alleges that the Director erred in the Determination by concluding that Yu was a Director/Officer of 492695 BC Ltd.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Are those certain employees owed wages and compensation for length of service by Paloma ?
2. Is Kong as a Director/Officer liable for wages and compensation for length of service for certain employees ?
3. Is Yu as a Director/Officer liable for wages and compensation for length of service for certain employees ?

FACTS

Paloma was closed on or about March 25, 1997 as a result of an action by Revenue Canada.

M. Chalut (“Chalut”), V. Joseph (“Joseph”), J. Kenny (“Kenny”), Y. Kidane (“Kidane”), T. Landey (“Landey”), W. Mah (“Mah”), I. Michtchenko (“Michtchenko”), D. Peake (“Peake”) and J. Simpson (“Simpson”) were all employees of Paloma at the time of closing.

The above noted employees filed complaints alleging that wages were owing by Paloma.

The delegate of the Director investigate the allegations and concluded that wages, based on payroll information provided by Paloma, and compensation for length of service were owed to the above noted employees.

Paloma stated that the calculation of wages owing with respect to Chalut, Joseph, and Mah were incorrect and should be adjusted accordingly. Paloma further stated that compensation for length of service should not be owed as the business was closed down by Revenue Canada and not Paloma.

Kong stated that the calculations of wages owing with respect Chalut, Joseph, and Mah were incorrect and should be adjusted accordingly. Kong further stated that compensation for length of service should not be owed as the business was closed down by Revenue Canada and not Paloma.

Lizza Kong (“L. Kong”) stated that Yu was not a Director/Officer of 492695 BC Ltd., he was merely assisting his brother-in-law Kong by doing the books as required. L. Kong stated that while Yu did have “power of attorney” at one time, this was only during the initial start up of the restaurant while Kong was absent.

Joseph testified and stated that:

- for a period of time he was considered as an “independent contractor” and received a total of \$800.00 per month;
- he was advised in January 1997 that a Revenue Canada audit had determined that he was an employee therefore statutory deductions would be taken from his pay;
- he told Paloma that he had already budgeted for the full amount of \$800.00 and wanted to receive this amount;
- he received \$800.00 with no statutory deductions for January 1997.

Kenny testified and stated that:

- he maybe saw Yu 3 times per month in the office doing the books;
- he was not aware of any directions issued by Yu;
- he felt that “Yu didn’t have a hand in this at all”.

In response to cross examination by the delegate of the Director, Kenny stated that:

- he was the sous chef;
- he was under the direction of the chef, Landey;
- the chef may have gotten direction from Mah (the manager) and Kong.

Chalut testified and stated that:

- he maybe saw Yu 3 times per month in the office doing the books;

In response to cross examination by the delegate of the Director, Chalut stated that:

- he was the dishwasher;
- he was under the direction of Kenny (sous chef) and Landey (Chef)

The delegate of the Director stated that information from the Registrar of Companies revealed that Kong was the sole Director/Office of 492695 BC Ltd.

The delegate of the Director confirmed that 1 days wages should be deleted from the calculations with respect to Chalut.

The delegate of the Director stated that with respect to Yu, on the basis of information provided by Landey and Mah, he considered that even though the Registrar of Companies did not list Yu as a Director/Officer of 492695 BC Ltd., Yu functioned in the capacity of a Director/Officer.

ANALYSIS

There is no dispute that the certain employees are owed wages, although there is some disagreement with the amounts owed to Chalut, Joseph, and Mah.

I conclude, based on the evidence provided that wages were owed to the certain employees and except as noted below, the calculations performed by the delegate of the Director and set forth on the Determinations are correct.

I further conclude that the amount owing to Chalut should be adjusted by deleting 1 days pay for March 16 which has the effect of eliminating 1 day at overtime rates of pay. Chalut's wages are calculated as follows:

Chalut	wages owing	= \$1,160.25	
	less 1 day at 1 1/2	= \$ 84.00	
	balance owing	= \$1,076.25	
	+ wages already paid Mar.		<u>= \$ 690.00</u>
	subtotal earnings		= \$1,766.25
	+ 4% vac pay(\$1,766.25)	<u>= \$ 70.65</u>	
	TOTAL OWING	= \$1,146.90	

I further conclude that the amount owing to Joseph should be adjusted to reflect that Paloma paid Joseph the gross amount of his pay for January and also submitted statutory deductions on behalf of Joseph for January. This overpayment is adjusted and the wages owing to Joseph are calculated as follows:

Joseph	wages owing	= \$1,945.63
	less statutory deductions	
	paid twice	<u>= \$ 340.76</u>
	TOTAL OWING	= \$1,604.87

I further conclude that the amount owing to Mah should be adjusted to reflect that his wage rate effective March 1, 1997 was \$900.00 per month as he had obtained other employment and only worked part time for Paloma from that point. The amount calculated for compensation for length of service remains unchanged.

Mah	wages owing March..	
	900.00 /mo x 12 ÷ 52 ÷ 6 (days) x 6 days wages	= \$ 207.72
	TOTAL OWING	= \$1,397.69

Section 63 of the *Act* sets forth the requirement for an employer to pay compensation for length of service.

Section 65 of the *Act*, contains exceptions to the requirement to pay compensation for length of service. Section 65 (1) states:

- (1) *Sections 63 and 64 do not apply to an employee*
 - (a) *employed under an arrangement by which*
 - (i) *the employer may request the employee to come to work at any time for a temporary period, and*
 - (ii) *the employee has the option of accepting or rejecting one or more of the temporary periods,*
 - (b) *employed for a definite term,*
 - (c) *employed for specific work to be completed in a period of up to 12 months,*
 - (d) *employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,*
 - (e) *employed at a construction site by an employer whose principal business is construction, or*
 - (f) *who has been offered and has refused reasonable alternative employment by the employer.*

Based on the evidence provided I conclude that the certain employees named in the Determination are entitled to compensation for length of service pursuant to Section 63 of the *Act*.

There is no dispute that Kong was a Director/Officer of 492695 BC Ltd. at all times material to this appeal.

Based on the evidence provided I conclude that pursuant to Section 96 of the *Act*, Kong, as a Director/Officer of 492695 BC Ltd. is liable for wages totaling **\$10,867.10** plus interest calculated pursuant to Section 88 of the *Act*.

Based on the evidence provided and on the balance of probabilities, I conclude that Yu was not a Director/Officer of 492695 BC Ltd.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 29, 1997 against 492695 BC Ltd. be varied to be in the amount of **\$10,067.10** together with interest calculated pursuant to Section 88 of the *Act*.

I further order that the Determination dated July 29, 1997 against Kong, Director/Officer of 492695 BC Ltd. be varied to be in the amount of **\$10,067.10** together with interest calculated pursuant to Section 88 of the *Act*.

I further order that the Determination dated July 29, 1997 against Yu, Director/Officer of 492695 BC Ltd. be canceled.

Hans Suhr
Adjudicator
Employment Standards Tribunal