

**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 -

Howard Development Co. Ltd. operating as Noodle Kino House  
("Noodle House")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 97/490

**DATE OF HEARING:** October 7, 1997

**DATE OF DECISION:** October 23, 1997

**DECISION**

**OVERVIEW**

The appeal is by Howard Development Co. Ltd. operating as Noodle Kino House (“Noodle House”) under section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) dated June 17, 1997. The Determination awards Jia Zheng Shen compensation for length of service and overtime wages.

**APPEARANCES**

Jia Zheng Shen

On his own behalf

Linda Yu

Interpreter

**PRELIMINARY ISSUE**

The appellant did not attend the hearing set in its appeal. Is further consideration of the appeal in order?

Through Notice of Hearing dated August 13, 1997, Noodle House was advised that a hearing had been set in its appeal for October 7, 1997.

In a letter dated August 13, 1997, Lap Man King of Noodle House advised the Tribunal that he had left Vancouver and would not return until December. He had earlier advised the Tribunal of the close of his restaurant. It is King that ran the small restaurant that was Noodle Kino House.

A second letter dated simply October 1997 makes it clear that King received notice of the hearing and that he understood that the hearing would go ahead in his absence. He asks in the letter that consideration be given to his written submissions. The Tribunal made further attempts to contact King but nothing more has been heard from him.

Normally, where the appellant fails to appear at a hearing and there is no reasonable explanation for that, the Tribunal proceeds no further. In this case the appellant asks that the Tribunal proceed on the basis of written submissions. The Tribunal may do so. Section 109 of the *Act* makes that clear. But should it do so? In my view, the circumstances of this particular appeal require an answer in the affirmative. That is because I am satisfied that no one other than King is in a position to represent Noodle House and because I am inclined to believe that King, for all practical purposes, was truly unable to attend the hearing set for the 7<sup>th</sup>. Any doubt that I may have in the latter regard is overshadowed by a concern that the appellant have adequate opportunity to be heard.

In deciding to proceed on the basis of written submissions, I have considered and rejected the option of waiting until King's return to Vancouver. He expects that to be in two months but it could well turn out to be longer. King is not certain of the date. A delay of that length is in my view contrary to the provision of fair, efficient procedures, a purpose of the *Act*, section 2 (d). It is I think also quite unnecessary. The appeal can be decided on the basis of the written submissions.

**OTHER ISSUES TO BE DECIDED**

Did Shen quit or was he terminated without notice or just cause?

Has Noodle House paid Shen all moneys owed for his work?

**FACTS**

Jia Zheng Shen began work as a cook for Noodle Kino House in March of 1996. The matter of what day he actually began work is open to question. His first full day of work was the 5<sup>th</sup> but records show that he was paid for two hours on the 3<sup>rd</sup>. As matters are presented to me, I conclude that it was a test for employment that was conducted on the 3<sup>rd</sup> and that Shen did not begin his employment until the 5<sup>th</sup>.

Shen's last day of work was October 5, 1996. To the Director's delegate at the time of his investigation, Noodle House claimed that Shen quit after quarrelling with a waitress on or about September 21, 1996. The restaurant said that Shen, on saying he was quitting, gave October 4, 1996 as his last day. Noodle House also said that Shen had further problems with the waitress on October 5, 1996 and that there were problems with his work performance as well. The delegate's Determination is that it was Noodle House that terminated Shen's employment and that it was without notice or compensation for length of service.

In appealing the Determination, Lap Man King of Noodle House argues once again that Shen quit. He denies having fired or laid off Shen. He says that he needed a chef and that Shen's quitting forced him to advertise for another cook. Payroll records show that a Ming Zhao was employed soon after Shen's departure.

Shen denies arguing with a waitress and denies ever having said that he was going to quit. The employer's records show that Shen worked only 15 minutes on the 5<sup>th</sup>. Shen stopped work at that point and his employment came to an end.

The Determination finds that \$1,026 of overtime pay is owed Shen. King says nothing like that is owed Shen, that all wages have been paid. King produces payroll records as a basis of his claim. Shen accepts those records as being an accurate record of hours worked.

On the matter of how much Shen has been paid for his work there is agreement on the amount of moneys paid up to and including a cheque for \$784.38 in October.

The parties disagree on whether a further \$408.20 was paid to Shen. King says that he paid Shen the money. Shen says that, at King's request, they met on June 22, 1997 and that King was offered him \$408.20 as a way of settling matters between them but did not give him the money because he would not drop his claim for compensation for length of service. There is nothing to show that the money was actually paid Shen, a cancelled cheque or other compelling evidence. The absence of such proof leads me to conclude that the money was never actually paid to Shen.

### **ANALYSIS**

The Director's delegate found that the employer's own evidence did not support a conclusion that Shen quit his job. I agree.

The employer appears to operate under the mistaken belief that an employee may be considered to have quit when, or simply because, he or she has uttered the words "I quit", or words to that effect. But more is required. The evidence must show formation of an intent to quit and conduct or an action by the employee which either, confirms that he or she has quit, or is consistent with an intention to resign. The evidence must, moreover, be clear and unequivocal. That is because the right to quit is personal to the employee.

I am presented with nothing which confirms that Shen ever said that he was going to quit. But even if I were to accept the employer on that, the employer's own evidence is that he did so in an argument with a waitress. Where a person says that he or she is going to quit in such circumstances, he or she may not be indicating an intent to quit so much as merely voicing anger or frustration. And beyond that, Is there clear, unequivocal evidence that Shen acted or conducted himself in a way which confirms that he quit or which is consistent with an intention to resign on his part? There is not, nothing of the sort. The undisputed evidence is to the contrary, namely, that Shen kept on reporting for work up to and including the 5<sup>th</sup>. I conclude that, if Shen ever had a plan to quit, he decided not to carry out that plan. I conclude that it was King that ended Shen's employment on the 5<sup>th</sup> and that, had he not done so, Shen would have continued working for Noodle House for quite some time.

Where it is found that the employee has not quit, and there is neither notice of termination as required by the *Act*, or just cause, section 63 of the *Act* requires the payment of compensation for length of service. As Shen was employed continuously for a period which is greater than three months but less than 12 months, he is entitled to one week's compensation for length of service.

The Director's delegate has found that 205.25 hours of overtime were worked and \$1,026.25 of overtime pay is owed Shen. Those calculations were not made on the basis of a daily record of hours worked but on the basis of weekly totals. A detailed calculation of the wages earned by Shen shows that he earned a total of \$13,918.75 in what can broadly be considered wages; overtime, minimum daily pay and statutory holiday pay all included. On that he is entitled to vacation pay at 4 percent which is \$556.75. I have found that Shen was not paid another \$408.20 as King claims but only \$13,829.38 in total, just as Noodle House's records show. The result of subtracting the total amount paid (\$13,829.38) from the total amount owed (\$13,918.75 plus \$556.75) is \$646.12. It is that which is owed Shen for the work that he performed.

Shen has been found to be owed one week of compensation for length of service. That is \$400. Vacation pay on that amount is \$16. Using the same rate as used by the Director's delegate, interest is reduced to \$37.81. The total amount which Noodle House owes Shen is not \$1,536.10 but \$1,099.93.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated June 17, 1997 be varied. It is \$1,099.93 that Howard Development Co. Ltd. operating as Noodle Kino House must now pay Jia Zheng Shen in wages, compensation for length of service, vacation pay and interest.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

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