

An appeal

- by -

Hercules Precast Products Ltd.
(the "Employer" or "Hercules")

- 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: Ib S. Petersen

FILE No.: 2002/427

DATE OF HEARING: October 31, 2002

DATE OF DECISION: November 13, 2002

DECISION

APPEARANCES:

Mr. Wenbin Chen (“Chen”)	on behalf of the Employer
Mr. Albert Lau	on behalf of himself
Mr. Zhuo L. Wu	on behalf of himself
Mr. Wan Xuan Wu	on behalf of himself
Ms. Joanne Kembel	on behalf of the Director

OVERVIEW

This is an appeal by the Employer, the Appellant, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination of the Director’s Delegate issued on July 17, 2002 (the “Determination”). In the Determination, the Delegate concluded that Mr. Albert Au (“Au”), Mr. Jian Hua Luo (“Luo”), Mr. Wan Xuan Wu (“Wu”), Mr. Z.L. Wu and Mr. Bao Heng Zhu (“Zhu”)(collectively, the “Complainants”) were owed \$22,043.00 generally, but not in all cases, on account of regular wages, vacation pay, statutory holiday pay and compensation for length of service.

In my view, the background facts may be gleaned from the Determination. I hasten to add that much of this is in dispute. In any event, these background facts sets the stage for the appeal.

Hercules operated a manufacturing plant, producing concrete products. The business apparently closed around February 15, 2002 with some follow-up work being done until March 15, 2002. Au worked from November 1, 2000 to March 15, 2002. According to the Determination, he was employed as the general manager. He was paid \$1,000 biweekly. Luo worked from February 14 to March 4, 2002 as a “concreter” at the hourly rate of \$11.50. Wu worked from May 28, 2001 to February 15, 2002, also as a “concreter.” He was also compensated hourly, at \$11.50 per hour. Z.L.Wu worked from November 1, 2000 to February 15, 2002 as a foreman at the rate of \$15.00 per hour. Zhu worked as a “concreter” from October 6, 2001 to February 15, 2002 at the hourly rate of \$10.00.

As noted in the Determination, Au was the previous owner of the business and he sold it to Chen in October 2000. He stayed on as an employee. The Delegate accepted that Au was a manager for the purposes of the *Act*.

The Employer’s position is stated as follows in the Determination:

“The Employer submitted payroll records showing that wages were paid up to and including February 15, 2002. A Fact Finding Conference was conducted on July 9, 2002. The Employer, represented by Wenbin Chen did not dispute that the payroll records were incomplete and agreed (in English) that some cheques had not been cashable as there is only \$1.00 in the Company bank account. A notice of the Fact Finding Conference had been sent both to the Employer and his legal counsel. The Employer elected to attend ... on his own and asked that one of the Complainants, Albert Au, translate from Cantonese to English for him. Mr. Chen is an absent owner of the company. Mr. Chen further stated that since Mr. Au had been the manager that he would have to rely upon Mr. Au to provide details of what wages were owing to the employees.

Despite Mr. Chen agreeing that Mr. Au should present the details as to what wages are owed to each Complainant, it seemed appropriate that counsel for Mr. Chen be involved in the process. Again Mr. Chen had taken the unusual step of having his legal counsel absent from the Fact Finding Conference. In light of the circumstances, the Employment Standards Branch asked Mr. Chen for permission to write to Mr. Chen's legal counsel to present the wage calculations discussed at the Fact Finding Conference. A letter was sent the afternoon of the Fact Finding Conference with a request that the Employer's counsel contact us with any discrepancies in any of the material presented therein. The Employer's counsel replied, stating that Mr. Chen has no "independent means of verifying the wage claims submitted by various employees and, accordingly, disputes the amounts claimed."

The Delegate accepted the Complainant's records of dates and hours worked. The Complainants submitted records of wages owed and cheques returned by the bank, marked "insufficient funds."

The Delegate relied on the information provided by the parties and concluded that wages were owed as presented at the Fact Finding Conference. According to the Determination, the Employer did not provide details of the amounts it wished to dispute at the conference. It is evident that much of Chen's efforts were directed at his contractual dispute with Au. The Delegate did not accept Chen's position that the responsibility (and liability) for the record keeping ultimately rested with Au. In her view, that responsibility rested with the Employer. With respect to the cheques, marked "insufficient funds," the Delegate noted that:

"[Chen] has it within his means and ability to verify or refute the claims that these cheques did not clear the account. He has chosen not present this information. I accept the Complainant's information that these cheques were not cleared."

The Delegate relied upon the payroll records to ascertain whether vacation pay and statutory holiday pay was, indeed, paid. As well, the Delegate found that the evidence was clear that the business was shut down without written notice to the employees and, therefore, compensation would be owed to those who otherwise qualified. The Delegate noted:

"...The Employer's representative claims that he has no independent means to verify this information. Yet he has these payroll records in his possession and, in fact, brought them with him to the Fact Finding Conference."

The Delegate found, with some adjustments, that the employees' calculations were reliable and that amounts were owing on account of vacation pay, statutory holiday pay and compensation for length of service.

ISSUE

The Employer argues that it was denied a "fair hearing" before the Delegate. This argument turns in large measure on Chen's assertion that "[m]aybe [he] did not know English nor had an interpreter...." Hercules also questions the wage calculations. In my opinion, the basic issues to be resolved are:

- (a) whether the Employer was denied a fair hearing;
- (b) whether the Employer failed to participate in the investigation on some or all of the matters before the Delegate such that I ought to summarily dismiss the appeal, in whole or in part; and

(c), if the Employer did not fail to participate, whether the Delegate erred in her conclusion that the Complainants are owed wages as determined.

FACTS AND ANALYSIS

The Appellant has the burden to persuade me that the Determinations are wrong. For the reasons that follow, I am of the view that it has not met that burden.

In large measure the resolution of the issues before me turn on the credibility of the witnesses. At the hearing, Chen testified for the Employer and Au, Z.L. Wu and Wan Xuan Wu testified on behalf of themselves. As will become evident, there were substantial and material conflicts in the evidence of these witnesses.

Prior to the Determination being issued, Chen commenced legal action in the British Columbia Supreme Court against Au based on their contractual relationship. It is clear that the relationship between Chen and Au was acrimonious. A great deal of Chen's efforts were expended on this contractual dispute, outside my jurisdiction. The focus on this dispute was counterproductive. Chen would, in my opinion, have been better off focussing on the Determination.

I now turn to the issues of denial of a fair hearing and the Employer's participation in the Delegate's investigation. I do not think that there is any merit to the argument that Hercules was denied a fair hearing. I think, as well, that there is much to suggest that Chen was, as it were, "lying in the weeds" in the manner in which he dealt with the investigation, particularly in respect of some of the documents Chen seeks to rely on here, on appeal.

Au testified that all of the Complainants, and the Delegate, expected Chen's lawyer to be present for the Fact Finding Conference. The correspondence confirms that Chen's lawyer was quite active in the process leading up to the conference. Chen explained that his lawyer was not present because he "couldn't afford it".

Chen testified that he "didn't have an opportunity to speak at all" at the Fact Finding Conference. In light of the evidence and the material on file, I have, as indicated at the hearing, considerable difficulty with that statement. Au testified that the Delegate went over each of the wage claims at the conference. While he could not recall if Chen actually expressed agreement with the calculations presented, and Chen's evidence is that he did not agree, I do not accept that Chen did not have an opportunity to speak. Bluntly put, I do not accept Mr. Chen's testimony on this point.

Au explained that the Delegate asked Mr. Chen if he understood English. Chen stated in response that he understood "a little English." Au explained that the conference proceeded after that. Au also testified, however, that Chen required only minor interpretation (from him) and appeared to understand. Interestingly, the letter from Chen's counsel immediately after the conference did not suggest that Chen had been unable to understand English, challenged the Delegate's statement that Au had been authorized to interpret, or otherwise suggested that Chen's participation had been limited. In my view, this speaks volumes. From my observations of Chen during the hearing, he appeared to understand what was said, independently of the interpreter. While I do not seek to diminish the importance of language difficulties in circumstances such as the ones at hand, I am of the view that Chen, in fact, understood far more than he claimed to understand. In my view, Chen is a fairly sophisticated businessman who, on his own evidence, has conducted business here and in the United States.

The Delegate's submission to the Tribunal states unequivocally that Chen was asked if he required an interpreter. Chen said, according to the Delegate, that he wanted Au to translate for him. At the hearing, Chen denied authorizing Au to interpret for him. I asked Chen if, and, if not, why, he had not asked for an interpreter to be present at the Fact Finding Conference. He explained that his "mother was sick at the time" and he was travelling in the United States. There was no evidence, other than Mr. Chen's statement to support these assertions. I do not understand the nexus between his failure to request interpretation, the illness of his mother and travelling, and I do not accept these assertions. I accept that he was, in fact, offered the assistance of an interpreter and that he turned the offer down, preferring Au's assistance.

One of the critical points in this appeal, in my view, is whether or not (and, if not, why) Mr. Chen did not address his concerns about the wage claims, except, perhaps in the most general manner, with the Delegate before, or at, the Fact Finding Conference, or, indeed, immediately afterwards. Another critical point is, as well, why the documents--cheques and bank statements--he sought to rely on at the appeal hearing were not provided at the Fact Finding Conference.

There is no dispute that the Delegate allowed his counsel to comment on the calculations after the Fact Finding Conference. According to the Determination, as mentioned, the Delegate wrote to Hercules' counsel (on July 9, 2002). The letter states, *inter alia*:

"We met today as scheduled for a Fact Finding Conference. Your client, Mr. Chen, was in attendance on his own. He authorized Mr. Albert Au to translate for him and he provided some evidence in English.

Attached is a spreadsheet representing the wages claimed by each of the employees present ...

On July 16, 2002, counsel responded:

"We refer to your letter dated July 9, 2002, and advise that Mr. Wenbin Chen has no independent means of verifying the wage claims submitted by the various employees and, accordingly, disputes the amounts claimed."

This was the response in its entirety. Such a response is not, in my view, particularly helpful.

It is clear from his own testimony that Chen, in fact, had received the company documents from Au on April 27, 2002, including those he sought to rely upon at the hearing. Chen stated that Au returned company documents, including payroll records, to him on April 27, 2002. On the evidence, the payroll records had been prepared by Au's daughter, at least after June 1, 2001. The Fact Finding Conference was held on July 9, 2002. It is a reasonable inference, therefore, that Chen could have made the detailed objections to the wage claims at the conference or earlier. As Chen had the payroll records (incomplete, as they were), cheques and bank statements in his control or possession. Counsel, or Chen, were, at least, in a position to comment on the documentation presented by the Complainants, and considered by the Delegate, in a submission after the conference. Rather than detailing the concerns with the wage claims, Hercules response amounts to very little and is, as noted, not very helpful. A general "dispute" with the claims is not helpful. All the same, I accept that Chen took issue with the calculations.

The Tribunal has often stated that it will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination (*Kaiser Stables*, BCEST #D058/97). There is nothing to suggest that up until the Fact Finding Conference, the Employer refused to participate in the investigation. In the circumstances, I am reluctant to conclude that Chen, and the Employer, generally failed to participate in the Delegate's investigation. It is clear to me, though, that his

participation was limited to the bare minimum. At least he appeared at the conference and, perhaps, generally took issue with the wage claims. There were also communications from his counsel prior to the conference. In all of the circumstances, I am nevertheless of the view that the Employer failed to cooperate with the Delegate's investigation, at least to the extent that I will not allow him to rely on bank statements and cheques that were not provided to the Delegate. It is clear to me that the Delegate made real efforts to obtain information and documents from the Employer.

At the hearing, Chen sought, as mentioned, to rely on cheques and bank statements. As mentioned, these were not presented to the Delegate in a timely manner. They were provided after the Determination had been issued. There is, however, no reasonable or credible explanation of why these documents were not presented at the conference by Chen or, by counsel, afterwards. These documents had been in Chen's possession for a considerable time prior to the conference.

The Delegate had, in fact, highlighted the importance of providing documents. The notice of the Fact Finding Conference stated, in bold:

“Please ensure that you bring to the meeting any documents you want considered ... before any conclusions are drawn.”

If these documents had been provided, the Delegate would have had the opportunity to properly consider them in her analysis. As well, it would have allowed the Complainants a proper opportunity to review and comment on Chen's assertions. In my view, it would not be appropriate for me to consider the cheques and bank statements at this stage. These documents could, and should, have been presented during the Delegate's investigation.

In his appeal, Chen also took the position that the Complainants were not entitled to compensation for length of service because they were employed in “construction.” In his testimony under oath at the hearing, he did not elaborate on this point. It was clear, however, that this issue had not been raised with the Delegate. He explained that he had not brought this up with the Director's Delegate because “they didn't bring it up and [he] didn't go looking for evidence.” I reject the bald assertion that the Employer's business was construction. This matter was not raised by the Employer until the appeal. That, in my opinion, is too late. I reject his explanation that he “didn't go looking for evidence.”

In this case a Fact Finding Conference was held before the Determination was issued. It was attended by Chen on behalf of the Employer. He had an opportunity to speak to the wage claims and present documents and other evidence to contradict those claims. He was offered interpretation and turned it down, preferring to rely on Au for translation. In my view, the evidence does not bear out that he was unable to understand what happened at the Fact Finding Conference. In any event, he had, through his counsel, a further opportunity to present evidence and dispute the claims and calculations.

In my view, far from being denied a fair hearing, the circumstances here presents a classic case of “lying in the weeds.”

This does not end the matter. Even if I were to consider this appeal on its merits, I would still dismiss it. On the basis of the evidence, even taking into account the excluded documents, I am not persuaded that the Delegate erred in her findings and conclusions.

The B.C. Court of Appeal noted in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

“... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions.”

Regrettably, those comments are apposite in the instant case. I found Chen’s testimony replete with inconsistencies, internally and externally. Some statements--and some of those statements have been set out above--were greatly exaggerated. In the result, I place little weight on his testimony, and prefer the evidence of the Complainants where any conflict occur.

Moreover, and in any event, Chen’s testimony was fairly general--and in many respects confusing--and did not specifically, and with any degree of detail, relate to the case he had to meet on the merits of the appeal, wages owing, and how the records he brought with him to the hearing supported his case. Chen agreed that certain employees were owed certain amounts. He did not, in any meaningful sense, relate that evidence to, for example, the payroll records. His evidence, taken at face value, did not explain why I ought to accept his numbers over those in the Determination. From this standpoint, Chen’s evidence did little to assist the Employer on the appeal.

As well, in my opinion, Chen did not in any meaningful way address the documentation provided by the Complainants to the Delegate, and considered by her. Chen took issue with these records in a general way. He referred to the fact that, at least for a period, the payroll records had been prepared by Au’s daughter and, therefore, ought to be treated with suspicion. He also suggested that Au had “manufactured” the Complainants’ records. He levelled accusations of dishonesty against Au. I accept that Au provided at least some of the (other) Complainants’ records. All the same, in my view, allegations of dishonesty ought to be strictly proven. They were not. I do not understand why Chen did not provide me with a detailed response to the records. He would have known of their form and content from the Fact Finding Conference. In those circumstances, it is difficult for me to conclude that the Delegate erred.

As I explained to him at the outset of the hearing, the onus is on the Appellant to persuade me that the Delegate erred in her findings and conclusions. I expressly told the parties that my role was not to conduct an investigation, and that I remained neutral in the dispute between them. This is an adversarial process, and the responsibility for the presentation of each party’s case rests with that party.

Chen’s testimony was that Au started working for the Employer only after June 1, 2001 when he “started to contract” for Hercules. As I indicated to Chen several times during the hearing, the meaning of this phrase--“started to contract”--was not entirely clear to me. Chen submitted two “contracts” (in Chinese with English translations attached) with his appeal, one signed October 19 and 18, 2000, another signed July 3 and 4, 2001. It appears, therefore, that the phrase has to do with the mutual obligations of Chen and Au under these “contracts” and, in particular, from Chen’s standpoint, Au’s responsibility for the malaise the company found itself in. Chen accused Au of all manner of dishonesty in his dealings with the company.

Chen was adamant that the Delegate’s findings regarding Au’s time worked for the company and amounts owed were “not true.” Au testified that the Delegate’s findings were correct and that her calculations of wages owing were correct. He was an employee from November 1, 2000. Au explained that he worked as a supervisor for Hercules until June 1, 2001, when he replaced Z.L.Wu as “general manager.” That testimony was confirmed by Z.L.Wu. In fact, the contract between Au and Chen appears to contemplate that the former would continue to work for Hercules for a period of time after the sale. In all of the

circumstances, I find it difficult to accept Chen's testimony that Au only started to work for Hercules after June 1, 2001.

Chen explained that Au was the "general manager" for the company and had signed an agreement that he was "responsible" for it. The Employer's problems were deliberately caused by Au. He stated that Au had tried to persuade him to leave the country, that he had withdrawn his complaint (but subsequently had it re-instated) and told him that other employees would not pursue their complaints due to language difficulties.

Chen's position was that Au had been paid what was owed to him. He was of the view that Au owed him money under the contractual relationship between them. Chen testified that Au issued a cheque to himself, on a blank cheque signed by Chen, in the amount of \$2,234.65, covering the period February 1-28, 2002. In cross examination, Chen agreed with this--that he had received the money. It is not clear what this (and other) amounts represent and Chen did not pursue this. According to Chen, this cheque (and other cheques, which were not submitted as part of the appeal) was provided to the Delegate on July 17 or 18, 2002. From the Delegate's submission to the Tribunal in response to the appeal, it appears that this (and other cheques) were provided to the Delegate immediately after the Determination had been issued, July 17, 2002, and after Hercules' counsel had advised the Delegate that he had no independent means of verifying the wage claims. All the same, it appears that the Delegate considered the cheques and obtained a response from Au in that regard. According to the submission from the Delegate, the payments were on account of company expenses, "petty cash or supplies." In the result, the Delegate did not find it necessary to amend the Determination. Based on my review of the evidence, and my earlier assessment of the Employer's case presentation, I agree.

At the hearing, as mentioned, Chen also sought to rely on bank statements to support his contention that Au had paid money to himself with company cheques. Again, this evidence, was not submitted prior to the Determination being issued. Au, it would appear, agreed that cheques had been issued to him. Chen did not address the circumstances of these payments in any substantial manner in his cross examination Au: were they on account of company expenses as the Delegate's view seems to have been. Usually, a determination is accompanied by detailed wage calculations. In this case, however, it is unfortunately not clear from the Determination for what period wages were owing. Au explained that the period for which wages were claimed was from January to March 2002. I'm not satisfied, on the evidence that the Delegate erred in awarding wages to Au.

Chen agreed "in principle" that wages were owed to certain employees, but not with the amounts awarded by the Delegate. Chen stated first that [based on the payroll records] Wan Xuan Wu's start and termination dates with the company in the Determination, May 28, 2001 and February 15, 2002, respectively, were incorrect and that there was (generally) a lack of evidence for the Delegate's findings. When I asked him why he had not mentioned this at the Fact Finding Conference, he explained that "at that time, no-one had interpreted for him." I do not accept this explanation. I also asked him to clarify why, in his view, the start date was wrong when, in fact, the payroll records, he was relying upon at the hearing, stated that the start date was, indeed, May 28, 2001. He then agreed with May 28 but, nevertheless, insisted that the termination date, February 15, was wrong.

Chen also stated that Z.L. Wu had "some breaks" in his employment with Hercules. He said that Wu had been away in China between November 21, 2001 and January 18, 2002. Wu agreed and said that he went to China with Chen's permission. He does not consider this to be a break in employment. He also explained that Mr. Wu was the general manager up until June 1, 2001, paid \$2000.00 per month. After

that he was employed at the hourly rate of \$15.00. Chen took issue with the award of close to \$8,000 to Wu. In Chen's view, the amount owed was only a little more than \$4,100.

Chen disputed only the payment of \$364.00 to Heng (on account of compensation for length of service). He stated that Heng was employed by Au, and that "he didn't know anything." According to Chen, Luo was only entitled to \$681.62. Based on Chen's evidence, I am not sure of the reason for this.

As I understand from the Determination, the evidence at the hearing and the material on file, the Delegate's findings were based on her review of all of the records provided, including those of the Complainants. I am not persuaded that she erred with respect to these Complainants.

In my view, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated July 17, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal