

**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 -

511773 BC Ltd. operating as Great China Kitchen Restaurant  
("Great China")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 97/701

**DATE OF HEARING:** November 17, 1997

**DATE OF DECISION:** November 20, 1997

**DECISION**

**APPEARANCES**

David Tso	on behalf of 511773 BC Ltd. op. Great China Kitchen Restaurant
Charlie Leung	on behalf of 511773 BC Ltd. op. Great China Kitchen Restaurant
Lawrence Chan	on behalf of 511773 BC Ltd. op. Great China Kitchen Restaurant
Pak Man (Joe) Mah	on his own behalf
Richard Lee	Interpreter

**OVERVIEW**

This is an appeal by 511773 BC Ltd. operating as Great China Kitchen Restaurant (“Great China”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated August 26, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Great China alleges that the delegate of the Director erred in the Determination by concluding that Pak Man (Joe) Mah (“Mah”) was owed wages in the amount of \$495.75 plus interest for a total of \$506.14.

**ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether Mah is owed wages ?

**FACTS**

The following facts are not in dispute:

- Mah was employed by Great China from February 16, 1997 to March 15, 1997;
- Mah was employed on a part-time basis from February 16 to 28 and then on a full-time basis from March 1 - 15, 1997;
- Mah was paid \$7.50 per hour while part-time and then paid \$1500.00 per month to be paid semi-monthly when he became full-time;
- Great China did not keep daily records of Mah’s work from March 1 - 15, 1997;

David Tso (“Tso”) and Charlie Leung (“Leung”) testified on behalf of Great Wall and stated that:

- all full time employees were instructed to take a 1 hour meal break between 3:00 p.m. and 4:00 p.m. and this was confirmed by a notice posted on the bulletin board in the kitchen;
- Mah was instructed to take the 1 hour meal break upon being hired;
- the restaurant was normally open from 11:30 a.m. to 2:30 p.m. and then again from 4:30 p.m. to 10:00 p.m.;
- Mah did not work on Mondays or Thursdays as he was taking English as a Second Language (“ESL”) courses on those evenings;
- Mah was free to quit if he did not like the working conditions at Great Wall;
- it was a board of directors decision to terminate Mah’s employment;
- Mah only filed a complaint in order to get revenge on Great Wall for terminating his employment;
- Mah stated in one submission that he would get 30 minutes for a lunch break and in another submission he stated that he was supposed to get 1 hour for a lunch break;
- the time card provided for Mah was made up by Leung;
- a number of other former employees provided written statements with regard to the lunch break issue and these support Great Wall’s position.

Lawrence Chan (“Chan”) testified and stated that:

- he had been employed by Great China for more than 1 year;
- he worked in the kitchen and would normally take 1 hour for lunch between 3:00 p.m. and 4:00 p.m.;
- he recalls Mah telling him about taking the ESL courses;
- he normally worked 5 days each week with Monday and another day off;
- if the restaurant was busy or if he had been slow, he might take less than 1 hour for lunch;
- he worked 9 hours per day with 1 hour off for lunch;
- the shift schedules would sometimes be posted on the bulletin board, but he was not sure if they were always posted as he did not always check to see what was on the bulletin board;
- he recalls being shown the notice about taking lunch breaks between 3:00 and 4:00 p.m.;

Mah testified and stated that:

- the time card provided by Great Wall is not in his handwriting and was fabricated by Great Wall;
- employees would fill out the time card and then submit it to a member of management for approval;

- he objected to the manner in which Great Wall operated and raised those concerns with them;
- he wrote his hours down on the calendar each day after he came home from work;
- he was offered \$1,500.00 per month by cheque and a further \$100.00 per month cash by Leung;
- he was paid \$257.69 by cheque and a further \$270.00 in cash for the period of February 16 to 28, 1997;
- Great Wall took 10% from his cash payment in February;
- he normally worked 9 hours each day and started working on February 16 and was fired on March 15, 1997;
- he was not given 1 full hour of break for lunch, rather, the workers were given 30 minutes to eat and then had to return to work.

## **ANALYSIS**

The burden of establishing that the delegate of the Director erred in the Determination rests with Great Wall.

Section 28 of the *Act* contains the requirements for an employer to keep certain records and states:

### *Section 28, Payroll records*

*28.(1) For each employee, an employer must keep records of the following information:*

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*

(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must

(a) be in English,

(b) be kept at the employer's principal place of business in British Columbia, and

(c) be retained by the employer for 7 years after the employment terminates.

In the absence of records being kept by Great Wall, it is appropriate to consider the records kept and submitted by Mah. I reviewed the original calendar on which Mah kept his records and I am satisfied that those records were made on a daily basis at the time Mah performed the work.

With respect to the time cards presented by Great Wall, I am not satisfied that they accurately reflect the actual hours worked by Mah. Those time cards do not contain any indication that Mah had any connection with the hours noted on the time card.

The time cards provided for other part time employees clearly indicate that each employee was deducted for a 1/2 hour meal break.

With respect to the statements of other employees provided, those statements are hearsay and do not provide much assistance in this matter.

Based on the evidence provided and on the balance of probabilities, I conclude that Mah received a 1/2 hour meal break on each day he worked. Mah did therefore work more than 8 hours per day. I further conclude that, in the absence of credible records from Great Wall, that Mah did work on the days noted on his calendar.

The wages earned by Mah are to be recalculated to include the additional 1/2 hour previously deducted for meal break and to include wages for the days not previously paid. I am further satisfied that the wage rate for Mah for the month of March 1997 was to be \$1500.00 per month. Those wages owing are calculated as follows:

Feb. 16 - 28, 1997	10 days @ 1/2 hour x (\$7.50 x 1.5=\$11.25)	= \$ 56.25
	92 hours worked x \$7.50	=\$690.00
	less cash paid	=\$270.00
	less cheque paid	<u>=\$258.75</u>
	balance wages owing	=\$161.25
Mar. 1 - 15, 1997	12 days @ 1/2 hour x (\$1500. X 12 ÷ 52 ÷ 40	
	x 1.5= \$12.975)	= \$ <u>77.85</u>
sub-total		=\$295.35
4% Vacation Pay		<u>= \$ 11.81</u>

Total Wages owing **=\$307.16**

For all of the above reasons, the appeal by Great Wall is granted to the extent as set forth above.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 26, 1997 be varied to be in the amount of **\$307.16** together with interest calculated pursuant to Section 88 of the *Act*.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**