

**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 -

Mei Yuan Wu  
("Wu")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE No:** 1999/528 & 1999/529

**DATE OF HEARING:** December 10, 1999

**DATE OF DECISION:** December 24, 1999

**DECISION**

**OVERVIEW**

Mei Yuan Wu (“Wu” or “the Appellant”) appeals two related Determinations by a delegate of the Director of Employment Standards (the “Director”). The appeals are both pursuant to section 112 of the *Employment Standards Act* (the “Act”).

Each of the Determinations is dated March 10, 1999. One, the “Corporate Determination”, is against D & T Taiwanese Restaurant Ltd. (“D&T” or “the employer”). It orders D&T to pay Wu \$499.58 in wages with 4 percent vacation pay and interest over and above that. Wu also claimed compensation for length of service but the delegate has decided that the employer had just cause to dismiss Wu.

The second of the Determinations (the “Section 96 Determination”) is against Wei Yung Lee, a Director or Officer of D&T. That Determination establishes that Lee is liable for up to two months wages. It orders that he pay \$582.65 to Wu, which is the amount of the Corporate Determination, vacation pay and interest included.

Both appeals were received after the time limit for filing the appeals had passed. An extension was granted in the case of each of the appeals. In the case of the Corporate Determination, that is done through the decision *Mei Yuan Wu*, (1999) BCEST No. D380/99. In the case of the Section 96 Determination, that is done through the decision *Mei Yuan Wu*, (1999) BCEST No. D381/99.

The Tribunal invited written submissions and on the basis of those submissions I identified an issue which went to credibility. The parties were for that reason summoned to a hearing. Wu attended and brought along a witness. The employer did not attend.

In appealing each of the above Determinations, Wu, in written submissions, claims that the delegate is wrong on the facts. According to Wu, she worked the same hours as two other employees, a Mr. Yeh and a Yan Zhang, and yet is awarded less in wages than they were on appeal. She claims that she fired for no reason other than her refusal to serve leftovers to customers. She asks that the Tribunal award physical and mental damages as well as wages.

**APPEARANCES:**

|              |                   |
|--------------|-------------------|
| Mei Yuan Wu  | On her own behalf |
| Ling Hao Yeh | Witness           |
| Anthony Mak  | Interpreter       |

**ISSUES TO BE DECIDED**

What is Wu owed in the way of wages?

Is Wu entitled to compensation for length of service?

Is Wu entitled to any other moneys under the *Act*?

## **FACTS**

Wu was employed by D&T from March 7, 1995 to February 6, 1997. She worked a 'runner' and prep cook.

Yeh was also employed by D&T. He was one of the chefs that D&T employed at the time of Wu's employment.

Wu, at the investigative stage of the Complaint, claimed to have worked a split shift from 11 a.m. to 2:30 p.m. and 5:30 p.m. to 10:00 p.m. (8 hours in total) and a 6 day week. The delegate found that while some employees said that they worked an 8 hour day, others said that only 7 hours a day were worked. Wu on appeal sticks by her claim that she worked an 8 hour day. She produces evidence in support of that. I find that, in view of what Wu and the delegate have presented me, D&T makes no submission, that she in fact worked an 8 hour day. The restaurant's hours of operation point to an 8 hour day and I find it likely that Wu would have worked at least that, it being necessary for cooks to start work so that they are ready for the first customer at lunch and the first customer that arrives in the evening. Moreover, it is Yeh's testimony that everyone who worked in the kitchen, Wu included, worked an 8 hour day. Yeh appears credible, as does Wu. I am given no reason to disbelieve what they have to say in respect to the employment.

The Corporate Determination is that Wu is not entitled to compensation for length of service for reason of just cause. According to the Corporate Determination, Wu was fired for being late on February 2, 1997 and that she had been warned by her supervisor about being late and was put on notice for being repeatedly late. According to Wu, she was fired when she refused to serve customers leftovers. Yeh tells me that on the day that Wu was fired, he and the others overheard Lee angrily telling Wu that it was his business, not her business, whether he wanted her to serve leftovers and that Lee then shouted at Wu, in Mandarin, "don't come back".

There is no evidence showing that Wu was at any point warned that her job was in jeopardy for being late. Indeed, as matters are presented to me, there is no evidence showing that Wu was ever late for work.

## **ANALYSIS**

What I must decide in this case, the appellant being the Complainant, is whether she has or has not met the burden for persuading the Tribunal that the Corporate Determination ought to be varied, or referred back to the Director, for reason of an error in fact or in law.

I have found that the delegate is wrong on the facts. Wu worked an 8 hour day, not a 7 hour day. There is a need to vary the Corporate Determination for that reason alone.

The payment of compensation for length of service is governed by section 63 of the *Act*. Sub-section 3 is of particular importance. It is as follows:

**(63) (3) The liability is deemed to be discharged if the employee**

- (a) is given written notice of termination as follows:
  - (i) one week's notice after 3 consecutive months of employment;
  - (ii) weeks' notice after 12 consecutive months of employment;
  - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
- (c) terminates the employment, retires from employment, or **is dismissed for just cause.**

(my emphasis)

A single act may be so serious as to justify the termination of employment, as may misconduct of a minor sort, when it is repeated, or the chronic inability of an employee to meet the requirements of a job, even though it is not the fault of the employee. In all cases the onus for showing just cause lies with the employer.

As the facts are presented to me, I am satisfied that Wu was fired because she refused to scrape food off of plates and serve it to other customers. That is not insubordination. Wu is for ethical and health reasons entitled to refuse to follow instructions to serve leftovers.

And it has not been shown to me that D&T had just cause to terminate Wu for reason of being late.

It is the well established view of the Tribunal [*Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that just cause for reason of minor misconduct, like being repeatedly late for work, requires the following:

- a) That reasonable standards of performance were established and communicated to the employee;
- b) the employee was clearly and unequivocally warned that his or her employment was in jeopardy unless such standards were met;
- c) the employee was given sufficient time to improve; and
- d) the employee did not meet those standards.

The evidence before me does not show that Wu was ever late for work, never mind repeatedly tardy. And it is not shown that Wu received plain, clear warning that her job was in jeopardy for reason of being late.

Wu has asked that she be awarded damages for physical and mental abuse by her employer, particularly, the manager. The *Act* does not allow for such an award.

In summary, I have found that Wu did not work 7 hours a day but 8 hours a day. And I find that the employer has not shown that it was justified in terminating the employee Wu and that, as such, the liability to pay her compensation for length of service has not been discharged. It follows that the Corporate Determination is in need of revision. It must award Wu length of service compensation and wages, including any overtime pay, statutory holiday pay, and vacation pay, which reflect an 8 hour day and a 6 day work week.

I leave the matter of the calculations to the Director.

### **ISSUE TO BE DECIDED**

What is the amount that Wei Yung Lee may be required to pay Wu?

### **FACTS**

D&T is no longer in business. According to the employees, Lee (Li in the Corporate Determination) is the manager. They believe that Lee may have been a part owner of the restaurant but it is his sister that was the majority owner, and made the important decisions.

Records of the Registrar of Companies show that Lee is a director/officer of the D&T.

### **ANALYSIS**

- 96** (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
- (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
- (a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
  - (b) vacation pay that becomes payable after the director or officer ceases to hold office, or
  - (c) money that remains in an employee's time bank after the director or officer ceases to hold office.
- (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

By virtue of section 96, Lee is personally liable for up to 2 months' wages. He is not personally liable for what Wu is owed in the way of compensation for length of service.

Other directors or officers are also liable for up to 2 months wages.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Corporate Determination dated March 10, 1999 be varied so that it reflects Wu's entitlement to compensation for length of service and, also, her entitlement to wages for working the hours that she did, an 8 hour day and a 6 day work week. To that is added whatever interest is owed pursuant to section 88 of the *Act*.

I order, pursuant to section 115 of the *Act*, that the Section 96 Determination which is against Wei Yung Lee, and dated March 10, 1999, be varied so that Lee is liable for wages as set out in the Corporate Determination as it has been varied, to a maximum of two month's wages.

I, pursuant to section 114 of the *Act*, refer the matter of making the necessary calculations back to the Director.

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