

An appeal

- by -

Xin Zhang
("Zhang")

- 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: David B. Stevenson

FILE No.: 2001/656

DATE OF DECISION: November 14, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Xin Zhang (“Zhang”) of a Determination that was issued on August 21, 2001 by a delegate of the Director of Employment Standards (the “Director”).

Zhang had filed a complaint with the Director under the *Act* alleging he was owed vacation pay and length of service compensation by his former employer, Preferred Restoration & Emergency Services Inc. (“Preferred”). The Determination concluded that Preferred had contravened Part 3, Section 28 and Part 8, Section 63(2) of the *Act*. Preferred had paid Zhang one week length of service compensation on termination and paid an additional week of compensation during the investigation. The Determination ordered Preferred to cease contravening and to comply with the *Act* and its requirements. The Determination also concluded, on a balance of probabilities, that Zhang was not owed vacation pay.

The appeal says that the Director failed to consider key evidence and failed to properly weigh all of the available evidence.

ISSUE

The issue in this case is whether the Director failed to properly investigate the vacation pay claim and failed to properly weigh the available evidence supporting Zhang’s claim for vacation pay.

FACTS

Preferred is in the business of building restoration. Zhang was employed by Preferred from April 16, 1999 to January 15, 2001 as an estimator at a rate of \$2800.00 a month. On termination of his employment, Zhang complained that he had not received full entitlement to length of service compensation and was owed vacation pay.

The complaint was investigated. Preferred acknowledged the Zhang had not received his full length of service compensation entitlement. Zhang had been paid one week length of service compensation and Preferred paid an additional one week. On the matter of vacation pay, Preferred said that Zhang was not owed any vacation pay, as he had not worked during the period December 26 to 29, 2000 and had been paid \$560.00 as vacation pay. The Determination indicated the pay statement issued to Zhang for that period clearly identified an amount of \$560.00 having been paid as vacation pay.

Zhang disagreed that he had taken that period off as a vacation. Zhang said he had worked during that period and provided the investigating delegate with names of several persons who

could corroborate that assertion. The delegate interviewed a number of witnesses, including those whose names had been provided by Zhang. Only one of those witnesses was able to support Zhang's presence in the office for a very short time during the period in question. Two persons giving information on behalf of Preferred said Zhang did not work during the period.

ARGUMENT AND ANALYSIS

Zhang has given several reasons for his appeal of the Determination. They are listed in 10 points in the appeal submission. I shall attempt to summarize them by general issue as a number of the points raise the same issue:

- one of the witnesses whose name was provided to the delegate is not mentioned in the Determination and was not, apparently, contacted by the delegate;
- people who told Zhang they would support his position changed their story when interviewed by the delegate;
- evidence within the control of the company that would support Zhang's position was not requested by the delegate;
- one of the persons who provided information to the delegate is unknown to Zhang; and
- the delegate would not allow Zhang to demonstrate how a computer's time system could be changed.

There are other points raised, which are not directly relevant to the issue on appeal, but which suggest the company and its representatives and agents did not provide correct or complete information to the delegate.

It appears the documents attached to the appeal were all provided or available to the delegate during the investigation.

In reply, the Director refutes most of the points raised in the appeal. The Director says that the witness alluded to by Zhang was contacted, but refused to provide any information on the record. The Director says the Determination accurately conveys the information given to the delegate by the witnesses during the investigation. The Director says that, in his appeal, Zhang has misunderstood or misstated some of what was set out in the Determination. The Director reiterates that on balance there was not sufficient evidence to support a conclusion that Zhang had worked during the period in question.

In this appeal, Zhang is seeking to have the Tribunal review and re-weigh the evidence and the information that was considered during the investigation. In some respects, he is asking the Tribunal to presume the existence of evidence, and to draw conclusions of fact from that

evidence, that was not presented during the investigation. An appeal, however, is not simply an opportunity for a dissatisfied party to ask the Tribunal to substitute its view of the evidence or the conclusions of fact for that of the Director. In *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96), the Tribunal noted that the scheme of the *Act* contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law and noted that it would be neither fair nor efficient to ignore the initial work of the Director. There is a burden on Zhang to persuade the Tribunal that the Determination is wrong. When challenging conclusions of fact, Zhang is required to show those conclusions of fact were either based on wrong information, that they were manifestly unfair or that there was no rational basis upon which the factual conclusions could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98). In this appeal, I find that Zhang has not met that burden.

None of the assertions made by Zhang demonstrate conclusively that he worked during the period in question. The reality is that neither Zhang, nor any of the witnesses, were able to substantiate his claim that he worked and he was unable to convince the delegate that any information and evidence provided by Preferred to the contrary was a tissue of fabrication and invention.

In this appeal, Zhang has fared no better. He has not shown there was any error in the findings of fact made by the delegate. He has not shown the conclusion reached by the delegate on the available facts was either unreasonable or without rational foundation. Specifically, Zhang said the only work he was doing around that period was for the Monte Carlo project and the information available to the delegate was that Zhang's work on that project was completed by December 22, 2000. The fact that a computer's time clock may be altered is not proof that someone did alter it. During the investigation Zhang was unable to explain how the employer might have altered the computer's time clock to show he had entered the data into the computer on December 22, rather than at some later date as he alleged. The fact that Zhang did not fill out a vacation form is not evidence he did not have the time off. There was no dispute that the company was operating on a "skeleton" staff during this period and many employees were taking time off. Most of the company's sites were closed down and there was no need to have Zhang, or any other estimator, working during the period. Two company representatives told the delegate that Zhang had not worked in the office between Christmas and New Year's Day. There was no apparent reason to disbelieve them. The fact that a potential witness refused to speak on the record is not evidence that witness would have confirmed Zhang's claim. Finally, because Zhang was not familiar with one of the company representatives interviewed by the delegate does not mean that person did not have relevant information to provide the delegate during the investigation concerning his observations during the period in question. The individual was, as well, the company's controller and would be expected to have the payroll information requested by the delegate.

In sum, Zhang has not provided any good reason for disturbing the Determination and the appeal must be dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 21, 2001 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal