

An appeal

- by -

Fu Wen Guo  
("Guo")

- 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:** Carol L. Roberts

**FILE No.:** 2001/616

**DATE OF HEARING:** November 14, 2001

**DATE OF DECISION:** November 26, 2001

## DECISION

### APPEARANCES:

Fu Wen Guo:	On his own behalf
For Tamoda Apparel Inc.:	C. Cheung, R. Sankey
For the Director of Employment Standards:	No one appeared

### OVERVIEW

This is an appeal by Fu Wen Guo ("Guo"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 14, 2000. The Director found that Tamoda Apparel Inc. ("Tamoda") contravened Sections 40(1) and (2), 46(1) and (2), and 58(3) of the Act in failing to pay Guo overtime pay, statutory holiday pay and vacation pay, and Ordered that Tamoda pay \$2,082.45 in wages and interest to the Director on Guo's behalf.

### ISSUE TO BE DECIDED

Whether the Director erred in determining Guo's entitlement to compensation for overtime pay, vacation pay and MSP payments. At the hearing, Guo withdrew his appeal with respect to the length of service compensation. Guo also contended that the delegate was biased, since she preferred the employer's evidence over his.

### FACTS

Guo worked as a garment worker for Tamoda from March 16, 1998 to December 20, 2001, at a rate of \$8.25 per hour. Tamoda advised the delegate during the investigation that it paid overtime wages on a straight time basis plus an amount for piece work if an employee's production exceeded his hourly rate. At the hearing, Tamoda indicated that it changed its method of payment in June, 2000 from a piece rate wage to a regular wage and bonus system. Ms. Cheung indicated that the bonuses were optional, if work was finished within, or ahead of schedule, but that the bonus payment was always in excess of what overtime wages would otherwise be.

I accept, based on Guo's withdrawal of his appeal in respect of length of service compensation, as well as his complaint information form indicating that he quit, that he did so.

Following an investigation of the Guo's complaint, the delegate calculated the overtime wages, statutory holiday pay and vacation pay owed to Guo based on Tamoda's records. However, she does not say how she arrived at the rate of pay. She stated that "a calculation was done based on

the employer's records." The calculation indicated that the complainant is owed \$1992.16, and that this included overtime pay, statutory holiday pay and vacation pay. The delegate stated that in calculating wages, she used both an hourly rate and a piece rate, and when Guo was paid an amount for piece work the piece rate was used. She also determined that the money paid for piece work should be considered as part of the wages. However, in response to Guo's appeal, the delegate indicated that because Tamoda did not provide her with piece work rates, she calculated wages based on the definition of regular wages under the Act.

The delegate further concluded that Guo was owed \$198.00 in statutory holiday pay, although it is not clear what days she finds wages owing. Finally, she found that Guo made a request to cancel his MSP as of September, 1999, and that, in any event, no money was ever deducted from his wages for a medical premium. Ms. Cheung provided me with evidence respecting the MSP payments that was not provided to the delegate. She indicated that Tamoda did not provide this information because it did not consider it worthwhile to do so. The information provided shows that the MSP charged Tamoda for Guo's contributions commencing October, 2000, but Tamoda was not billed for those contributions until April 2001, and that those charges were never deducted from his pay.

## **ARGUMENT**

Guo argues that the delegate erred in several findings of fact. He contends that Tamoda changed the piece work system to calculate his wages in 2000, and after June 1, 2000, it combined overtime and piece work together as a bonus. He says his pay stubs after June 1, 2000 do not reflect piece work done, and that the calculations are therefore in error. He contends that he should be paid both overtime and piece work, and that the basis of the compensation determined by the delegate was unfair.

Guo also contends that Tamoda provided medical benefits for all single employees, and that he did not agree to cancel his medical benefit. He says that he did agree to suspend payment of it during a holiday period in 1999.

Guo also contended that the delegate failed to properly consider his claim for statutory holiday pay.

Finally, Guo argued that the delegate investigating his complaint was biased.

Gregory N. Harney, Barrister, of Shields Harney made written submissions on behalf of Tamoda, but did not appear at the hearing. Ms. Cheung indicated that she would represent Tamoda in Mr. Harney's absence. She argued that the determination should be confirmed.

Tamoda contended that it did not deduct any monthly MSP contributions from Guo's income. Further, Tamoda says that it paid Guo's life insurance on his behalf until January, 2001.

Tamoda also argued that its bonus payments always exceeded what an employee would otherwise receive in overtime wages.

## **ANALYSIS**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met. I find that the delegate made a number of factual errors, which may result in an error in determining Guo's entitlement.

There is no dispute that Guo earned \$7.75 per hour to August 1999, and \$8.25 per hour until his employment ended. Given that there was no dispute this was his hourly wage, it is unclear to me why the delegate would attempt to determine his regular wage on any other basis. In any event, Guo's complaint dealt with overtime wages, which does not appear to be fairly addressed by the delegate. At the hearing, Tamoda indicated that it paid employees a bonus, which consisted of overtime and piece rates, but which was calculated as a percentage of its profits. It appears that the delegate did not consider the hours Guo worked, nor does it appear that she applied the Act in determining what overtime wages he was entitled to. Although I find that Guo accepted a change in his method of compensation since his employment continued for an additional six months after the change, he is still entitled to overtime wages, if they are found to be owing. Given the apparent inconsistency in the calculations, I find it appropriate to refer this matter back to the Branch for further investigation.

The Act does not require an employer to provide medical benefits to an employee. Further, Tamoda did not deduct contributions made on Guo's behalf from his wages. I find no grounds for this aspect of the appeal.

The delegate correctly determined that Guo was not entitled to statutory holiday pay for December 25, 1998 and November 11, 1998, as those dates fell outside the statutory deadline for making a complaint. However, while she denied his claim for statutory holiday pay for November 11, 1999, the wage calculation summary she prepared shows that Guo was in fact paid for that date.

In addition, although the delegate awarded Guo holiday pay in the amount of \$198.00, she does not indicate what statutory holiday that pay is in respect of. The wage calculation summary sheet indicates the statutory holiday pay is for Canada Day, BC Day and Labour Day, but there is no evidence in the employer's documentation that Guo was paid for any statutory holidays. I find the delegate's calculations unreliable, as they are not supported by any documentation from the employer, and her wage calculation summaries are inconsistent.

While I am unable to conclude, on the evidence, that the delegate is biased against Guo, I find, in the circumstances, that it may be prudent for another delegate reconsider the issues of overtime pay and vacation pay.

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination dated August 14, 2001 be allowed in part. I refer the matter of overtime wages and vacation pay back to a delegate for further investigation on an expedited basis.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**