

An appeal

- by -

Fortune Dragon Restaurant Ltd.
(the "Employer")

- 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.: 2001/655

DATE OF HEARING: November 28, 2001

DATE OF DECISION: December 6, 2001

DECISION

APPEARANCES

Mr. Wayne Lee	on behalf of the employer
Mr. Rui Qiang Wen	on behalf of himself
Mr. David Tan	interpreter

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director issued on August 21, 2001. The Determination concluded that Wen was owed \$1,1208.18 by the Employer on account of vacation pay and compensation for length of service.

FACTS AND ANALYSIS

The Employer appeals the determination and, as the appellant, has the burden to persuade me that the Determination is wrong.

The Employer operates a restaurant. Wen worked there as a dim sum worker from December 16, 1998 to August 31, 2000 at the rate of \$1,200 per month.

Before the Delegate, the Employer took the position that Wen had taken vacation with pay. Wen denied that but acknowledged that he had been paid \$288 on account of vacation pay for the period December 1999 to August 2000. The Employer did not provide the dates for the vacation taken in 2000 and the Delegate resolved this issue in favour of Wen.

The Employer also took the position that Wen quit his employment. Wen denied this. He told the Delegate that he was informed by his supervisor that the staff was being cut and he did not need to come to work after August 31, 2000. Given the evidence before the Delegate--including the lack of detailed information provided by the Employer to support the argument that Wen quit--she resolved the issue in favour of the Employee, Wen. She awarded two weeks pay.

At the hearing, the Employer largely reiterates its position, namely that Wen was given time off with pay and that he quit.

With respect to the first issue, Lee was not able to point to any vacation time taken by Wen. He says that he would have to refer to the supervisor, who did not testify, for that information. He acknowledged that the pay statements, put to him by Wen in cross-examination, did not indicate when vacation was taken. In the circumstances, I am not persuaded that the Delegate erred.

With respect to compensation for length of service, Lee explains that business was slow and the employer decided to cut staff, including Wen. He says that when the “dim sum workers” were given notice in August, the whole group quit. While the rest of the group quit in mid September, Wen resigned at the end of August. Wen explains that when he approached the Employer for vacation time on August 28, 2000, his supervisor told him that the restaurant “wanted to fire [him] and that [he would] not have to take holidays.” He says he worked until August 31, 2000. The Employer’s evidence lacks particulars and detail and, in the circumstances, I prefer Wen’s evidence. If, as the Employer now contends--that Wen told his supervisor that he decided to end his employment at the end of August--that evidence could have been provided under oath or affirmation by the supervisor. It was not. I note that, in regard to such evidence, there is a real issue of whether the employer ought to be able to rely on it since it was not made available to the Delegate. In the circumstances, I am not convinced that the evidence supports that Wen resigned from his employment and, in the result, I am not convinced that the Delegate erred in her conclusions.

Briefly put, I am of the view that the Employer has failed to show that the Delegate erred and the appeal is, therefore, dismissed.

ORDER

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

Ib S. Petersen
Adjudicator
Employment Standards Tribunal