

An appeal

- by -

Ota-Ya Japanese Restaurant  
("the restaurant")

- 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:** Lorne D. Collingwood

**FILE No.:** 2001/666

**DATE OF HEARING:** November 30, 2001

**DATE OF DECISION:** December 17, 2001

## DECISION

### OVERVIEW

Ota-Ya Japanese Restaurant Ltd. (which I will refer to as “the restaurant”) appeals, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), a Determination issued on August 31, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination orders that the restaurant pay Tsz-Kau Fong \$5,209.97 in compensation for length of service, statutory holiday pay, vacation pay and interest.

The restaurant does not appeal the order to pay length of service compensation but only the order to pay statutory holiday pay and the order to pay vacation pay. Its claim is that it has paid the full amount of vacation pay earned by the employee and that the employee is not owed statutory holiday pay because he was given days off. I have confirmed the Determination because it is neither shown that vacation pay was paid as claimed, nor shown that the employee was paid statutory holiday pay as the *Act* requires.

An oral hearing was held in this case.

### APPEARANCES:

Hirofumi & Ryoko Ota	The owners of the restaurant
Dr. Misao Batts	Interpreter
Eddy Teranishi	The restaurant’s accountant
Tsz-Kau (Andy) Fong	On his own behalf
David Yan	Interpreter

### ISSUES TO BE DECIDED

At issue is the matter of whether the restaurant did or did not pay statutory holiday pay as the *Act* requires.

The matter of whether the restaurant did or did not pay vacation pay as required by the *Act* is also at issue. Underlying this issue is the matter of whether there is or is not evidence to show that vacation pay was paid out with each and every pay period.

What I must ultimately decide is whether the restaurant has or has not shown that the Determination ought to be varied, or a matter referred back to the Director, for reason of an error

or errors in fact or law. There is in this case no possibility of the Determination being cancelled because the restaurant does not appeal the order to pay length of service compensation.

## FACTS

It is clear that the employee was employed by the restaurant from at least April 30, 1994 to September 18, 2000. Mr. and Mrs. Ota believe, however, that it was in 1993, not 1994, that Mr. Fong was hired.

I am shown that an “Andy Chen” was employed by the restaurant in 1993. According to Mr. and Mrs. Ota, Andy Chen and Mr. Fong are the same person. That, however, is denied by Mr. Fong.

The restaurant notes that Fong, like Chen, goes by the English name “Andy”. Both Chen and Fong resided at 7540 Frobisher Drive in Richmond. I am also shown that the restaurant made out a cheque to Fong on April 15, 1994, that it then cancelled the cheque and issued a new cheque to Chen in same amount. That circumstantial evidence is not conclusive proof that Fong and Chen are the same person, however. For example, the fact that Chen and Fong have the same address may be just as Fong claims, namely, they were roommates.

The employee had Tuesdays and Thursdays off. In the Determination, he is awarded pay for 16 statutory holidays. In explaining the decision, the delegate had this to say:

“Regarding the claim for statutory pay, I accept the complainant’s position that throughout the period in question, with the exception of the last half of March 2000, he worked every day of the week except Tuesday and Thursday. I do not accept the employer’s position that the complainant was provided with a day off whenever there was a statutory holiday. When examined on two occasions during the course of this investigation, Ota-Ya was open during statutory holidays. Mr. Fong was clearly an employee on which the employer relied, based on the length of service as the amount of hours worked. In the absence of clear evidence that he was provided days off, I conclude that his regular schedule was to have only Tuesdays and Thursdays off. For any statutory holidays falling on other days, the evidence indicates Mr. Fong worked but was paid only his regular salary.”

The restaurant on appeal again claims that the employee was given a day off. And, once again, it does not produce evidence to show that. There is in fact no evidence to show days worked and days off, nor are there payroll records which show the payment of statutory holiday pay.

The employer makes much of the fact that two of its current employees, through form letters dated September 17, 2001, appear to say that they are paid 1.5 times their normal pay when they worked a statutory holiday. I will not attach much of any weight to the letters because current employees are open to pressure from their employers. The letters are not, in any event, reason to believe that Fong was given the day off when a statutory holiday fell on a scheduled work day.

It is to suggest that Fong was not given a day off but worked statutory holidays for pay which is 1.5 times his normal rate of pay.

In the last two years of the employment, Fong was paid \$725 each pay period. The amount never varies.

I asked the employer how it could be that Fong was always paid the same amount cheque after cheque if it is that he was paid 1.5 times his normal rate for working statutory holidays. The restaurant's answer is that there was an offsetting reduction in hours worked. I find that to be just too unlikely to be believed. The restaurant has no reason to cut back the employee's work hours by half a day because he is only entitled to regular wages for those work hours and it would entail bringing in a relief worker for just half a day.

The employer produces a log of the cheques issued by the restaurant. The log contains entries which appear to be note of when a statutory holiday fell in a pay period. The log is not for the period of interest, however, the last two years of the employment. And it is not conclusive proof that the employee was in fact given a day off in any year or that, if he worked statutory holidays, that he was paid for the day as the Act requires. The log is proof only of the fact that someone made note of the fact that certain pay periods contain statutory holidays.

The Determination is that Fong is entitled to 4 percent vacation pay for work prior to May 1, 1999 and 6 percent thereafter. The delegate found the following in regard to vacation pay:

“Regarding the claim for vacation pay, I find that the complainant's salary did not include vacation pay. The employer's payroll records do not show that the salary was intended to include vacation pay. In addition, the wage statements do not include a notation that each cheque included vacation pay, despite the employer's position that all the slips say so.”

On appeal, the restaurant claims that it has paid Fong his vacation pay. It is said that the vacation pay was paid out with each pay cheque. But as matters are presented to me, the employer fails to provide evidence to show that vacation pay has been paid in full.

The restaurant's payroll records do not show any vacation pay payments.

The employer claims that Fong was, at the point of hire, told that his pay included vacation pay. There is not evidence to confirm that.

Attached to the first of the restaurant's two appeal submissions is what appeared to be a copy of Fong's pay slip for the pay period ending January 31, 1999. At the bottom of the pay slip is statement that pay “included vacation pay”. The employee, in responding to the restaurant's appeal submission, claimed that the pay slip was false. The employer now agrees that this particular pay slip is not an actual pay slip. According to the employer it is a representative example of Fong's pay slips.

Fong kept a large number of his pay slips. I have examined Fong's pay slips and find that the vast majority make no mention of vacation pay at all. Only the very last two of his pay slips, that for the pay period ending September 15, 2000 and that for work on September 16, 17, and 18, 2000, contain the note "include vacation pay".

The employer produces four of Hironobu Uchiyama's pay slips. On all four is the statement "included vacation pay".

If Fong was in fact hired in 1993, the fifth anniversary of the employment would then be in 1998. If, as Fong claims, the employment began in 1994, the fifth anniversary of the employment is in 1999. Whatever the case, there is not clear evidence of any increase in vacation pay in the fifth year. Fong's pay did not go up in 1998. It was reduced from \$925 each pay period to \$825, then cut again to \$725 each pay period and it thereafter remained the same.

## **ARGUMENT & ANALYSIS**

There is not evidence to show that Andy Chen and Tsz-Kau Fong are the same person but nothing really turns on it. It merely moves the date of the employee's fifth anniversary.

The payment of statutory holiday and vacation pay is governed by sections 44, 46 and 58 of the *Act*. Those sections are as follows:

- 44** After 30 calendar days of employment, an employer must either
- (a) give an employee a day off with pay on each statutory holiday, or
  - (b) comply with section 46.
- 46** (1) An employee who works on a statutory holiday must be paid for that day
- (a) 1 1/2 times the employee's regular wage for the time worked up to 11 hours, and
  - (b) double the employee's regular wage for any time worked over 11 hours.
- (2) In addition, the employer must give the employee a working day off with pay according to section 45.
- (3) The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.
- (4) The employer must schedule the day off with pay
- (a) before the employee's annual vacation,
  - (b) before the date the employment terminates, or
  - (c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday,
- whichever is earliest.

- 58** (1) An employer must pay an employee the following amount of vacation pay:
- (a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;
  - (b) after 5 consecutive years of employment, at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay.
- (2) Vacation pay must be paid to an employee
- (a) at least 7 days before the beginning of the employee's annual vacation, or
  - (b) on the employee's scheduled pay days, if agreed by the employer and the employee or by collective agreement.
- (3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

The employer in this case has failed to produce evidence to show that statutory holiday pay was paid as the Act requires, that it began paying 6 percent vacation pay after five years, whenever that is, and/or that it has paid any vacation pay at all. The appeal lacks substance.

There are two pay slips which appear to indicate the payment of vacation pay but, coming at the end of the employment as they do, I am inclined to believe that they are nothing but an attempt to avoid the payment of vacation pay not proof of its payment.

The appellant has failed to show that the Determination is in any way in error. The Determination is therefore confirmed.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated August 31, 2001 be confirmed in the amount of \$5,209.97 and, to that amount, I add whatever further interest has accrued pursuant to section 88 of the *Act*.

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