

An Application for Reconsideration

- by -

Momo's Kitchen Ltd.  
(the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2003A/251

**DATE OF DECISION:** December 2, 2003

## DECISION

### APPEARANCES:

|                 |   |
|-----------------|---|
| Vivian Chiang   | on behalf of Momo's Kitchen Ltd.                  |
| Cindy K. S. Lee | on behalf of herself                              |
| Ed Wall         | on behalf of the Director of Employment Standards |

### INTRODUCTION

This is an application filed by Momo's Kitchen Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on August 12th, 2003 (B.C.E.S.T. Decision No. D254/03).

### PREVIOUS PROCEEDINGS

On April 30th, 2003, and following an investigation of an unpaid wage complaint filed by Ms. Cindy Kwai Sum Lee ("Lee"), a delegate of the Director of Employment Standards issued a Determination ordering the Employer to pay Ms. Lee the sum of \$758.13 on account of unpaid wages (\$721.96) and section 88 interest (\$36.17)--the "Determination".

The Employer appealed the Determination to the Tribunal alleging that the delegate erred in law, breached the rules of natural justice and on the basis that it had new evidence. In other words, the Employer invoked all three of the statutory grounds of appeal set out in section 112(1) of the *Act*. In addition, the Employer sought various other remedies not available under the *Act*--for example, it asked that a monetary "penalty" be imposed on Ms. Lee for having filed a "fraudulent claim" and that the delegate be disciplined for "bias, abuse of power, and breach of public trust".

The Employer's appeal was adjudicated based on the parties' written submissions in accordance with the provisions of section 107 of the *Act*. The adjudicator concluded, as did the delegate, that the Employer breached certain provisions of the *Act* in that it did not pay Ms. Lee for her final pay period earnings until about one month after her last day of work and, at that time, unlawfully deducted certain items from her pay. As for the allegation that the delegate failed to observe the principles of natural justice, the record clearly indicated that the delegate informed the Employer about the nature of Ms. Lee's complaint and provided the Employer with a full and fair opportunity to present its case. It might be noted that the Employer was hampered in this latter regard by its own actions--for example, it failed to keep proper payroll records and, accordingly, could not justify many of its assertions (some of which were inconsistent with its own records) and otherwise failed to document alleged payments (in particular, an alleged \$300 cash payment to Ms. Lee). The adjudicator concluded that the Employer failed to submit any new evidence; rather, its position was more in the nature of an argument concerning the timeliness of the delegate's investigation.

As noted above, the Employer also sought several remedies that were beyond the statutory authority of the Tribunal--these claims were quite properly dismissed by the adjudicator.

## THE APPLICATION FOR RECONSIDERATION

The Employer's application for reconsideration of the adjudicator's decision was filed with the Tribunal on September 22nd, 2003. The Employer attached a 3-page memorandum, dated September 21st, 2003, to the Tribunal's standard reconsideration application form. In this latter memorandum, the Employer asserts that the adjudicator "failed to comply with the principles of natural justice", "made a mistake of law or fact" and failed "to deal with serious issues".

## FINDINGS

Although this application is timely, it is not meritorious. I shall briefly address the issues raised by the Employer in its application for reconsideration.

### *Failure to hold an oral hearing*

The Employer says that it was denied a fair hearing inasmuch as the appeal was adjudicated on the basis of written submissions even though it requested that the Tribunal hold an oral hearing. Although the Tribunal is not required to hold an oral appeal hearing (see section 107), in certain circumstances, a failure to hold an oral hearing could prejudice one or both parties. However, in this instance, the Employer was not prejudiced by the fact that the appeal was adjudicated based on written submissions.

The Employer apparently wanted an oral hearing in order to call one or more witnesses to testify that Ms. Lee was not a diligent and conscientious employee. It would appear that it also wished to cross-examine Ms. Lee on her evidence. Nevertheless, this is not the sort of case where that evidence would have been relevant. Even if Ms. Lee was not a conscientious employee (an allegation that I cannot unequivocally accept based on the record before me), the Employer nonetheless breached section 21 of the *Act* by withholding wages otherwise payable to Ms. Lee. If the Employer believes that it has some sort of breach of contract claim against Ms. Lee because she did not fully satisfy her employment obligations, then it should pursue that matter in the civil courts. The Employer was not, however, entitled to unilaterally determine the matter of its own entitlement, and then enforce its own view of its rights by withholding monies otherwise due to Ms. Lee on account of earned and payable wages.

The Employer's present position is that Ms. Lee was all too often tardy and that she frequently called in sick when that was not truly the case. That being the Employer's position, it follows that the Employer ought to have more diligently monitored and directed Ms. Lee during the course of her employment. If Ms. Lee was a poor performer--and that is far from clearly proven--that matter should have been addressed by way of appropriate direction and, if necessary, discipline by the Employer. It is curious that the Employer apparently never took any such action while Ms. Lee was in its employ.

I might also add that the Employer took the position that it was entitled to set-off wages otherwise due to Ms. Lee only after her employment ended. As noted above, the Employer withheld wages from Ms. Lee's last paycheque which, itself, was not issued to her in a timely manner (thereby contravening section 18 of the *Act*). The Employer's actions raise a concern in my mind with respect to section 83 of the *Act*--its actions appear to have been motivated by a desire to retaliate against Ms. Lee because she filed a complaint after she was unable to obtain a proper accounting from the Employer with respect to the deductions from her last paycheque.

***\$300 cash payment***

The Employer continues to assert that this alleged payment ought to have been credited against its liability to Ms. Lee. This matter has been fully and fairly (and, in my view, entirely correctly) addressed in the previous proceedings before the delegate and the adjudicator. I adopt their analysis.

***Other allegations***

Many of these allegations are rather extravagant and raise matters that fall outside the jurisdiction of the Tribunal. The Employer persists in demanding that Ms. Lee be penalized under section 98--this demand is frivolous and vexatious and has already been addressed by the adjudicator in her reasons.

The Employer also seems confused about the ambit of section 112(3) of the *Act* [formerly section 112(2)]. This latter subsection establishes time limits governing an appeal to the Tribunal. These time limits do not relate to any actions that might be taken by the delegate during the course of an investigation--for example, requiring the Employer to produce payroll records within some specified time frame.

There is absolutely no evidence before me that would raise even a *prima facie* case that the adjudicator failed to observe the principles of natural justice in making her decision.

Finally, the Employer says that the delegate used sections 18 and 21 to “expropriate wealth from employer to employee on the basis of discretion/bias rather than merit”. In fact, by withholding wages otherwise lawfully due to Ms. Lee, the Employer was the only party taking something to which it was not entitled.

This application is refused.

**ORDER**

The application to vary or cancel the decision of the adjudicator in this matter is refused.

---

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**