

An appeal

- by -

Qian Wei (Grace) 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 (as amended)

TRIBUNAL PANEL: Carol L. Roberts, Panel Chair
David B. Stevenson, Member
Kenneth Wm. Thornicroft, Member

FILE No.: 2012A/5

DATE OF DECISION: March 20, 2012

DECISION

SUBMISSIONS

Kenneth J. Tyler

counsel for Qian Wei (Grace) Zhang

Andres Barker

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Qian Wei (Grace) Zhang (“Ms. Zhang”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued December 7, 2011.
2. Ms. Zhang filed a complaint alleging that Keson Consulting Limited (“Keson”) contravened the *Act* by failing to pay all wages owing and in charging her a fee in exchange for employing her. The Director’s delegate determined that Ms. Zhang’s complaint was not made within the time limits prescribed in section 74 of the *Act* and decided not to proceed further with the investigation, pursuant to subsection 76(3)(a) of the *Act*.
3. Ms. Zhang contends that the delegate both erred in law in and failed to observe the principles of natural justice in making the Determination.
4. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

5. Whether or not the Director erred in law and/or failed to observe the principles of natural justice in deciding not to continue to investigate Ms. Zhang’s complaint.

FACTS

6. In February 2010, Ms. Zhang applied for an advertised position as Executive Secretary for Keson, a consulting firm. She was interviewed for the position by Sonya Cui, the principal of CS International Consultants Ltd. (“CSI”). CSI is one of four member corporations that comprise Keson, the others being an accounting firm, two law firms and an immigration consulting business. Although each company operates independently, they refer clients and business to each other. We note that the Director did not issue a formal section 95 order declaring all four firms to be a single employer for the purposes of the *Act* and in the Determination identified only Keson as the respondent employer.
7. On February 25, 2010, Ms. Zhang signed an “immigration services” contract with CSI in which she agreed to pay CSI a “service fee” of \$5,000 plus GST of \$250. Of that amount, Ms. Zhang was to pay CSI \$2,000 before the second interview for the position of secretary and the second payment at the time of signing the employment contract. The contract also provided that if Ms. Zhang was unsuccessful in the interview, CSI would refund the first payment, and if Ms. Zhang was laid off within the first three months, CSI would

refund \$3,000. Ms. Zhang paid the money and was the successful applicant for the position. Ms. Cui assisted Ms. Zhang both by recommending Ms. Zhang as an employee to Keson's principal as well as processing the necessary paperwork to obtain the documents Ms. Zhang required to work in Canada.

8. Although Ms. Zhang's contract with CSI also promised other immigration-related services, she did not receive those services.
9. Ms. Zhang signed her employment contract on April 7, 2010, and commenced work on April 16, 2010. She performed work for all four companies. Ms. Zhang's employment was terminated on December 15, 2010. The reason for her termination, as identified on the Record of Employment, was "shortage of work".
10. On December 20, 2010, Ms. Zhang sent Keson an Employment Standards Branch "Self-Help Kit" seeking recovery of, among other things, the \$5,000 payment she made to CSI. After receiving no response from Keson, Ms. Zhang filed her complaint with the Branch on January 7, 2010. The complaint included a claim for wages in the amount of \$5,250.00 owed to her under sections 18(1) and 10(3). Ms. Zhang noted that she had forgotten to include the \$250 GST payment on \$5,000 in her "Self-Help Kit". In her complaint, Ms. Zhang contended that CSI was associated with Keson in such a way that they could be considered one employer for purposes of the *Act*.
11. Counsel submits that the money Ms. Zhang paid to CSI was paid contrary to section 10(3) of the *Act* and as such was "deemed wages [that] became payable upon her termination" (Reasons for Appeal para. 58). Counsel submits that the amount in question was recoverable as wages under section 18(1) after her employment was ended and since Ms. Zhang's complaint was filed in time as it was filed within six months after her last day of employment, the complaint was timely within subsection 74(3) of the *Act*.
12. The delegate decided that he need not consider the substantive issues as he decided that the complaint had been made beyond the time limits provided for in the *Act*.
13. The delegate determined that section 10(3) of the *Act* did not apply to Ms. Zhang until she became an employee, at which time she gained the benefit of that prohibition: "Although [Ms. Zhang] was entitled in April 2010 to have her payments to [CSI] treated as wages, nothing in her contract of employment or the *Act* made those wages payable on a particular date."
14. The delegate held that although wages paid in contravention of section 10 are deemed wages owing and the *Act* applied to the recovery of those wages:

...these wages cannot be recovered without there first being a finding that the payments are deemed wages. This requires an investigation into the merits of the complaint. And this requires the Director to both accept and investigate a complaint which alleges a contravention of section 10. Without the finding that section 10 has been contravened there can be no finding that monies were paid in contravention of the *Act* and are therefore recoverable. [reproduced as written]
15. The delegate decided to exercise his discretion not to continue investigating Ms. Zhang's complaint because the complaint was filed on January 7, 2011, almost one year after she made the payments to CSI and approximately 20 weeks after the statutory time period for filing the complaint had expired.

ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
17. The burden of establishing the grounds for an appeal rests with an Appellant.

Error of Law

18. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the *Act*;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
19. Counsel for Ms. Zhang contends that the Director erred in concluding that the complaint was filed out of time and in finding that sections 74(4) and 76(3)(a) of the *Act* applied to the complaint. Counsel argues that the Director erred in law by failing to give proper consideration to the legal effect of subsection 18(1) under which the complaint was made. Counsel asserts that Ms. Zhang's employment was terminated on December 15, 2010, and that the time limit for filing her complaint did not expire until June 14, 2011. Counsel submits that the payment made to CSI became deemed wages at the time she commenced her employment and became payable upon her termination.
20. Counsel further submits that the Director erred in assuming he had a discretion not to further investigate the complaint under section 76(3)(a). He contends that as the complaint was made under section 18(1), the Director was required to accept and review the complaint.
21. Counsel also argues that the Director erred in adopting an interpretation of the *Act* which was inconsistent with its objects and by issuing inadequate reasons that failed to respond to the actual complaint made and misrepresented the position of Ms. Zhang.
22. In the alternative, counsel submits that the Director failed to observe the principles of natural justice by issuing inadequate reasons and, in mischaracterizing the evidence, created an apprehension of bias.
23. The relevant provisions of the *Act* are as follows:
- Section 10 (1) provides that a person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
- (a) employing or obtaining employment for the person seeking employment, or
 - (b) providing information about employers seeking employees.

24. Section 10(3) provides that a payment received by a person in contravention of this section is deemed to be wages owing and this *Act* applies to the recovery of the payment.
25. Section 18(1) provides that an employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
26. Section 74 provides as follows:
- (1) An employee, former employee or other person may complain to the director that a person has contravened
 - (a) a requirement of Parts 2 to 8 of this Act, ...
 - (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.
27. Section 76(3)(a) gives the Director the discretion to stop or postpone reviewing, mediating, investigating or adjudicating a complaint if the complaint is not made within the time limit specified in section 74(4) of the *Act*. Section 74(4) provides that a complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.
28. The Tribunal has previously addressed the interpretation of sections 74(4) in *Serion* (BC EST # D378/01). In *Serion*, the complainant filed a complaint almost two years after paying an employer an amount in contravention of section 10. The Tribunal held:
- The Serions contravened section 10(1) and the payment received by them, therefore, would have constituted “wages” recoverable under the Act. The problem, in my view, is that the complaint was filed outside the time limit provided for in section 74(4), namely within 6 months of the contravention. In short, in my view, the delegate erred in her interpretation of the limitation period and I set aside the order for payment [of the fee charged in contravention of section 10].
29. I find no basis to depart from this decision.
30. Although it is not entirely clear from the Determination, it appears that the delegate assumed a number of facts, which, while in my view, have no effect on the outcome of the Determination, are incorrect. It seems that the delegate concluded that the entire \$5,000 paid by Ms. Zhang was for the purpose of assisting her in seeking employment. I note that at least part of the \$5,000 paid by Ms. Zhang was for *bona fide* immigration services rather than employment related services and therefore not all of that amount would be recoverable under section 10(3) even had the complaint been filed within six months of the payment. However, taking the most favourable view of the facts, that is, that all of the \$5,000 was paid for employment related purposes, there must still be a Determination by the Director that such payment is indeed a contravention of section 10(3). Once so determined, the amount is, by operation of legislation, considered to be wages and recoverable under section 18. However, there must nevertheless first be a determination by the Director that the amount paid has been paid in contravention of section 10. That was not done in Ms. Zhang’s case until the Determination was issued, some 11 months after the funds were paid and well beyond the statutory time period in which a complaint was to be filed.
31. To accept counsel’s argument that an employee has until six months after their employment ends to allege a contravention of this section would be tantamount to giving an employee the power to decide that there has been a contravention of that provision. While I agree with counsel’s argument that desperate employees will rarely, if ever, risk their employment by filing complaints against their employer before their employment is

ended, as this Tribunal stated in *Douglas Mattson* (BC EST # RD647/01) I am unable to ignore the plain meaning of the words of a statute and substitute my view of the legislative intent based solely on its judgement about what is “fair” or “logical”.

32. In this case, accepting that there was a contravention of section 10, it occurred when Ms. Zhang provided money to CSI and/or Keson in order to secure employment. By reason of section 10(3), the amount so paid was “deemed to be wages owing” as and from the date of payment and, accordingly, Ms. Zhang was entitled to access the wage recovery provisions of the *Act* (this is the effect of section 10(3)). Since Ms. Zhang was alleging that there had been a contravention of section 10, her complaint was required to “be delivered ... within 6 months after the date of the contravention” (section 74(4)). Ms. Zhang’s complaint was filed well outside the applicable 6-month complaint period.
33. We are unable to conclude that the Director erred in his interpretation of the *Act*.

ORDER

34. We Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 7, 2011, be confirmed.

Carol L. Roberts
Panel Chair
Employment Standards Tribunal

David B. Stevenson
Member
Employment Standards Tribunal

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal