



An appeal

- by -

Tony Lau Insurance Agencies Ltd.

- 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 MEMBER: Robert Groves

FILE No.: 2006A/5

DATE OF DECISION: March 20, 2006

DECISION

OVERVIEW

1. This is an appeal by Tony Lau Insurance Agencies Ltd. (“Lau Insurance”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on December 21, 2005, in respect of a complaint filed by Anita Gomes (“*Ms. Gomes*”). In that *Determination* the *Delegate* found that Lau Insurance had contravened sections 21 and 63 of the *Act*, the relevant portions of which require that an employer refrain from requiring an employee to pay any of an employer's business costs, and that an employer pay compensation for length of service, respectively.
2. Pursuant to section 79 of the *Act*, the *Delegate* ordered Lau Insurance to cease contravening the *Act* and the *Employment Standards Regulation* (the “*Regulation*”). She also ordered Lau Insurance to pay wages, compensation for length of service, concomitant annual vacation pay, and accrued interest to *Ms. Gomes* in the amount of \$3,700.97. Finally, the *Delegate* imposed two administrative penalties of \$500.00 each. The amount found to be payable therefore totalled \$4,700.97.
3. Lau Insurance filed its appeal with the Tribunal on January 6, 2006. On January 9, 2006 the Tribunal wrote to the parties, requesting the record from the *Delegate*, and inviting submissions. The *Delegate* forwarded the record, and a submission, dated January 20, 2006. *Ms. Gomes* delivered a submission dated January 30, 2006.
4. On January 31, 2006, the Tribunal wrote to the parties, enclosing copies of the material received, and requesting final reply submissions. Lau delivered further submissions dated February 9, 13, and 14, 2006.
5. On February 16, 2006, the Tribunal advised the parties that the appeal would be determined on the basis of the written submissions received from the parties.

FACTS

6. Lau Insurance is an insurance brokerage, operating out of several branch offices located throughout the Lower Mainland. The principal of the company is one Tony T. K. Lau (“*Mr. Lau*”).
7. On January 25, 2000, *Ms. Gomes* commenced employment in the head office of the company as a senior customer service representative, reporting directly to *Mr. Lau*. She had been employed in the insurance industry for many years previously. At Lau Insurance *Ms. Gomes* had the responsibility for the supervision and training of other customer service representatives but she had no authority to sign off on insurance policies.
8. There is nothing in the record to suggest that *Ms. Gomes*' employment was anything other than satisfactory until October 24, 2003. On that day one Te Cuong Tu (“*Mr. Tu*”) attended at the Lau Insurance office to obtain a one-year insurance policy for a house he was in the process of purchasing, so that he could provide proof to his mortgage lender that the property was insured. The policy was to cover the period from October 24, 2003 to October 23, 2004.

9. According to the evidence the Delegate heard from Ms. Gomes at the hearing, Mr. Tu told her that he had previous insurance claims, which she recorded on the application. She told Mr. Tu that she would be submitting his application to Economical Insurance (“Economical”), but that since that firm preferred a “clean record” from applicants, his application might be denied. Ms. Gomes testified that Mr. Tu then requested that she hold his cash payment for the insurance premium totalling \$820.00 at her desk pending receipt of advice from Economical concerning the application, as he intended to return and get his money back if his application was denied. She decided to accommodate this request. She then provided Mr. Tu with a receipt for the cash, and an interim binder for insurance on his home for the period October 24, 2003 to November 19, 2003, within which time Economical was expected to determine whether the policy would be issued.
10. Ms. Gomes acknowledged at the hearing that her conduct in receiving and holding Mr. Tu's cash in her desk was in breach of the established policy at Lau Insurance. Rather than simply leaving the cash in her desk, Ms. Gomes should have recorded the transaction in the cash receipt record and then passed the money to the company's accountant. However, she testified that since the application might be denied, and Mr. Tu had asked her to keep the money at her desk to permit its being returned to him, she decided to make an exception.
11. A few days later, Ms. Gomes said, Economical advised her that Mr. Tu's application had been denied. She then made contact with Mr. Tu who subsequently returned to the Lau Insurance office to collect his money. Ms. Gomes said she gave it to him, but that she forgot to ask Mr. Tu to sign a receipt.
12. Mr. Tu also gave evidence at the hearing before the Delegate. He denied that he asked Ms. Gomes to keep his money at her desk, or that he told her he would retrieve it from her if his application for insurance was rejected. Instead, he said he told Ms. Gomes that she should call him if there was any problem with his application. He stated that he received no communication from Ms. Gomes at any time thereafter.
13. Some eleven months later, in September 2004, Mr. Tu sold his home. He then attended at the office of Lau Insurance, purportedly to cancel his house insurance and receive a refund of the unused portion of the premium. When Ms. Gomes told him that she had already returned his payment to him nearly a year earlier after Economical rejected his application, Mr. Tu protested. He said he believed that his house had been insured for the better part of the previous year, and he denied that he had received a refund of the money he had paid by way of premium. Mr. Tu took his concern directly to Mr. Lau, who decided to pay Mr. Tu \$820.00 in order to resolve the complaint.
14. Mr. Lau testified that he first became aware of the transaction involving Ms. Gomes and Mr. Tu when the latter registered his complaint late in 2004. He at once realized that Ms. Gomes had committed a serious breach of policy with respect to the handling of cash, but he did not believe she had stolen Mr. Tu's money. Ms. Gomes was co-operative. She authorized the company to recover the \$820.00 from her wages, and she received a modest increase in salary in February 2005. Acting prudently, however, Mr. Lau commenced an investigation, which he continued to conduct over the succeeding months, during those times when his busy schedule permitted him to give the matter his attention. That investigation was complicated by the fact that the Lau Insurance file for Mr. Tu disappeared.
15. On July 8, 2005, Mr. Lau received confirmation from Economical that it had advised Ms. Gomes by phone and fax on November 17, 2003 that Mr. Tu's application had been rejected. As Ms. Gomes had told Mr. Lau that Economical had informed her but a few days after Mr. Tu had initially attended the

office on October 23, 2003 that his application had been denied, this discrepancy convinced Mr. Lau that Ms. Gomes was untruthful, and that she must therefore have stolen Mr. Tu's money. Mr. Lau's conviction in this regard was strengthened in his mind by the fact that Ms. Gomes had borrowed money from the company on occasion, and also from other employees. Mr. Lau terminated Ms. Gomes' employment on July 13, 2005.

16. Ms. Gomes filed a complaint under section 74 of the *Act*. Following a hearing at which Ms. Gomes, Mr. Lau, Mr. Tu, and the accountant for Lau Insurance all gave evidence, the Delegate determined that Lau Insurance had contravened the *Act* in respect of its treatment of Ms. Gomes. In particular, the Delegate determined that Lau Insurance:
- a) failed to meet the onus on it to demonstrate that Ms. Gomes had been discharged for just cause, with the result that Lau Insurance was required to pay Ms. Gomes compensation for length of service, and concomitant annual vacation pay;
 - b) wrongly deducted from Ms. Gomes' wages, during the six month period prior to Ms. Gomes filing her complaint, a portion of the \$820.00 repaid to Mr. Tu by Lau Insurance.
17. Lau insurance seeks cancellation of the Determination, and argues that:
- a) the Delegate erred in law,
 - b) the Delegate failed to observe the principles of natural justice in making the Determination, and
 - c) evidence has become available that was not available at the time the Determination was being made.

ISSUES

18. Can it be said the Determination should be cancelled on any of the grounds alleged by Lau Insurance?

ANALYSIS

Error of law

19. It became apparent to me in reviewing the detailed, and lengthy, submissions filed on this appeal by Lau Insurance that Mr. Lau is firmly of the view that Ms. Gomes stole Mr. Tu's money. After conducting a careful review of the evidence tendered, however, the Delegate decided that Lau Insurance had not proven that it was more probable than not that Ms. Gomes had misappropriated those funds. In making this finding, it is important to remember that the Delegate did not find that Ms. Gomes had not taken the money. Indeed, the Delegate expressly stated that it was possible that she had. However, the Tribunal has made it clear on many occasions in the past that the onus of proving that the conduct of an employee justifies dismissal is on the employer (see *Re British Columbia (Director of Employment Standards)* BCEST #RD122/03). What the Delegate decided is that Lau Insurance had not satisfied the onus resting on it to show that Ms. Gomes had stolen the money, on a balance of probabilities.

20. It is important to remember that the appeal jurisdiction of the Tribunal is now limited to those grounds specifically enumerated in section 112 of the *Act*. That section requires that in order for a determination to be challenged successfully, an appellant must show an error in law, a failure to observe the principles of natural justice, or new evidence that was unavailable at the time the determination was being made.
21. Having regard to the statutory framework as it now exists, the task of finding the facts generally belongs to the Delegate. Here, indeed, the Delegate conducted a hearing for precisely that purpose. In order for Lau Insurance to be successful in convincing this Tribunal that errors the Delegate may have made in her findings of fact constitute errors of law, Lau Insurance must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of the Delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354).
22. In a case such as the one before me, where the Delegate has had the opportunity to see the relevant persons give testimony, which the Tribunal has not, and the issue of just cause engages a question of credibility, as the allegation of theft clearly does, the Tribunal will be particularly reluctant to second-guess a Delegate's findings of fact. This is so despite the fact that a reviewing body might have been inclined to come to a different conclusion on the evidence than the one the Delegate reached. On the questions of fact that it was important the Delegate should determine, Lau Insurance does not argue that the Delegate's findings were entirely unsupported by evidence. Rather, Lau Insurance asserts that the Delegate erred in law by failing to assess the evidence in the manner Lau Insurance wanted. This type of complaint, in my view, does not amount to a complaint about an error of law.
23. Nor do I discern from the Determination an error of law in the application by the Delegate of the principles applicable in situations where just cause is alleged. Once the Delegate determined that Lau Insurance had not proven that Ms. Gomes had stolen Mr. Tu's money, the only basis on which the discharge for just cause could be justified was Ms. Gomes' failure to follow company protocol in the handling of Mr. Tu's transaction. On this point, one cannot take issue with the Delegate's observation in her submission on this appeal that while Mr. Lau became aware of the breach in late 2004, it was not until July 2005 that Ms. Gomes was discharged, a course of events which would lead a reasonable person to conclude that Lau Insurance was not prepared to terminate her employment for that reason alone. Furthermore, when Lau Insurance finally did terminate Ms. Gomes' employment, the reason conveyed to her was not that she had committed breaches of company policy, but that Mr. Lau had concluded that Ms. Gomes was a thief.

Failure to observe the principles of natural justice

24. The concern expressed by Lau Insurance under this heading is that the Delegate failed to list as documents forming part of the record submitted to the Tribunal four documents which formed part of the material submitted at the original hearing.
25. While I am troubled that these documents were not included with the material that was provided by the Delegate to the Tribunal, my reading of Mr. Lau's submissions assures me that the documents were brought to the attention of the Delegate and considered by her at the hearing. In these circumstances, I cannot find that Lau Insurance was deprived of an opportunity to present an important aspect of its case, or that the Delegate failed to consider the materials on which Lau Insurance sought to rely. Rather, the problem for Lau Insurance appears to be that the Delegate did not give those materials the weight sought. That, however, does not amount to a failure to observe the principles of natural justice.

New evidence

26. This ground of appeal engages section 112(1)(c) of the *Act*. That section requires that the evidence sought to be adduced must not have been available at the time the Determination was made.
27. Previous decisions of the Tribunal have held that section 112(1)(c) is not intended to permit a party such as Lau Insurance, which is unhappy with the result in the Determination, to seek out new evidence to bolster a case that failed to persuade the Delegate at first instance. The Tribunal has also stated that an appeal does not amount to a re-hearing, or a re-investigation of a complaint (see *Re Bruce Davies et al.* BCEST #D171/03, *J.P. Metal Masters 2000 Inc.* BCEST #D057/05). These statements are consistent with a principle underlying the *Act* expressed in section 2(d), which is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the legislation. A party is therefore expected to take the complaint process seriously, to co-operate with the Delegate, and to present all arguments which the party may reasonably expect should be made to the Delegate before the Determination is made.
28. Having said that, the Tribunal retains a discretion to allow an appeal based on fresh evidence, but it must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask itself whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the investigation or adjudication of the complaint and prior to the Determination being made. In other words, was the evidence really unavailable to the party seeking to tender it. In my opinion, Lau Insurance has failed to meet this test.
29. As early as late 2004, Lau Insurance became aware that Ms. Gomes might have misappropriated Mr. Tu's money. As Mr. Lau himself said in his submissions in support of his company's appeal: "The worst misconduct in general insurance is for a licensee to steal the cash from a client who is led to believe by the licensee that he is insured." The allegation was a serious one, particularly for Ms. Gomes. It demanded that Lau Insurance investigate the matter carefully and thoroughly. In my view, the ensuing period of months leading to Ms. Gomes' discharge in July 2005 provided Lau Insurance with ample opportunity to marshal the evidence it felt would be necessary to substantiate such a charge. Lau Insurance had its opportunity to present that evidence at the hearing conducted by the Delegate. It relied primarily on the evidence of Mr. Tu. The Delegate found Mr. Tu to be an honest witness, but had doubts about the quality of his memory. Once the Delegate came to that conclusion, she decided that Lau Insurance had not satisfied the onus on it to demonstrate that Ms. Gomes had stolen Mr. Tu's money.
30. In my opinion, Lau Insurance has not shown that the other evidence which it now seeks to tender was unavailable to it at the time the Determination was made. The evidence consists of statements from employees of Lau Insurance, copies of corporate records, or documents from third parties in respect of which no explanation is given as to why they might not have been obtained earlier.

ORDER

31. Pursuant to Section 115 of the *Act*, I order that the Determination dated December 21, 2005 be confirmed.

Robert Groves
Member
Employment Standards Tribunal