

An appeal

- by -

Yimin Huang
("Mr. Huang")

- 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: Carol L. Roberts

FILE No.: 2015A/14

DATE OF DECISION: April 30, 2015

DECISION

SUBMISSIONS

Yimin Huang	on his own behalf
Michael Thompson	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Yimin Huang (“Mr. Huang”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on December 23, 2014. In that Determination, a delegate of the Director found that Burtection Systems Incorporated (“BSI”) had contravened the *Act* in failing to pay Mr. Huang, its former employee, \$441.44 in wages, annual vacation and interest. The Director also imposed four administrative penalties in the total amount of \$2,000 for BSI’s contravention of sections 17, 27 and 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”), for a total amount payable of \$2,441.44
2. Mr. Huang appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination. Mr. Huang disagreed with the delegate’s calculation of his wage entitlement as well as his conclusion that he was not entitled to compensation for length of service.
3. These reasons are based on the written submissions of Mr. Huang and the Director, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination. BSI made no submissions despite being invited to do so.

FACTS AND ARGUMENT

4. Mr. Huang filed a complaint with the Employment Standards Branch alleging that BSI had contravened the *Act* by failing to pay him wages, annual vacation pay and compensation for length of service. A delegate of the Director held a hearing into Mr. Huang’s complaint on October 22, 2014.
5. The relevant evidence before the delegate may be summarized as follows.
 - Mr. Huang worked for BSI as a fire prevention technician from October 15, 2006, until November 27, 2013. As a condition of his employment, Mr. Huang was required to use a company vehicle to travel between client locations. As he travelled directly to the first client location each morning, Mr. Huang normally took the vehicle home each night. Mr. Huang agreed to fuel the vehicle himself and seek reimbursement for fuel expenses from BSI at a later date.
 - In 2013, Mr. Huang’s wages and expense reimbursement payments were occasionally late, and on at least one occasion Mr. Huang’s paycheque did not clear the bank due to insufficient funds in BSI’s account.
 - On November 26, 2013, Mr. Huang attended BSI’s offices and demanded his wages for the pay period ending October 24 as well as prepayment of his expected fuel expenses for the next two weeks. There was a verbal altercation between BSI’s administrator, Maria Robledano, and Mr. Huang, with each calling the Employment Standards Branch regarding BSI’s policy of

having Mr. Huang pay the employer's fuel costs in advance. According to Ms. Robledano, Mr. Huang told Ms. Robledano that he was not obliged to pay for the employer's expenses and refused to leave the office until he received pre-payment of his fuel expenses. Ms. Robledano then called the Branch herself and was advised that the Employer could change its policy and require Mr. Huang to drop off his vehicle at the end of each shift. When Mr. Huang told Ms. Robledano that he would not follow this policy, Ms. Robledano called the Branch again and was told that BSI could end Mr. Huang's employment for failure to comply with company policies.

- Ms. Robledano testified that she asked Mr. Huang to outline his concerns in writing, which he did. Ms. Robledano then drafted a letter on BSI's behalf outlining the policy change. Mr. Huang returned to BSI's office the following day. He returned BSI's letter with a notation that he would not follow the new policy. Ms. Robledano then terminated Mr. Huang's employment.
- On November 27, 2013, Mr. Huang acknowledged receipt of the letter setting out the new policy and advised BSI that he could not accept it because it changed the way he had worked for 7 years. Upon receipt of Mr. Huang's letter, BSI terminated Mr. Huang's employment citing his "non conformity to and non compliance of our company policy".
- BSI did not deny that it had cash flow difficulties and that Mr. Huang's wage payments were occasionally late. BSI also acknowledged that its vehicle policy changed and that, following the termination of Mr. Huang's employment, it reverted to its previous policy.
- Mr. Huang provided the delegate with documents for five pay periods that he relied upon to support his assertion he was not paid all wages and annual vacation pay owed. According to Mr. Huang's calculations, a total of 12 hours remained unpaid. BSI's representative, Mr. Wong, took the position that Mr. Huang's claim for unpaid hours resulted from Mr. Huang's claim for 7.5 hours per day. Mr. Wong said that BSI never guaranteed Mr. Huang 7.5 hours of work per day.
- Mr. Wong contended that Mr. Huang initiated the policy change which led to his dismissal. His evidence was that when Mr. Huang demanded that BSI pay his fuel expenses in advance, BSI's administrator contacted the Employment Standards Branch and received information that it could change its policy and require Mr. Huang to commute to work in his own vehicle. Mr. Wong argued that Mr. Huang's refusal to comply with the new policy constituted serious and willful misconduct and justified BSI's termination of his employment.
- Mr. Wong denied that BSI manipulated the circumstances to end Mr. Huang's employment without having to pay compensation for length of service stating that Mr. Huang was BSI's only technician at the time and BSI could not afford to lose his services.
- BSI's administrator, Maria Robledano, testified that Mr. Huang was not owed wages. Although she acknowledged that Mr. Huang was not paid for some hours for certain pay periods, he had not worked the hours he claimed for other periods. She also contended that Mr. Huang had used more hours of sick time than he was entitled to. She argued that Mr. Huang was short paid 2.5 hours and that the overpayment of 3.5 hours sick time offset this underpayment.

6. The delegate determined that Mr. Huang was owed an additional 2.5 hours of wages and \$362.60 in annual vacation pay. He noted that Mr. Huang did not challenge Ms. Robledano's evidence that he did not work the hours he claimed for some pay periods. The delegate also noted that Ms. Robledano's evidence was consistent with Mr. Huang's testimony that he occasionally worked less than 7.5 hours each day and either

claimed 7.5 hours or used sick time to top up his hours. The delegate found that Mr. Huang did not work the hours claimed in the pay periods at issue.

7. The delegate noted that BSI's bookkeeper testified that she had been told to pay Mr. Huang 7.5 hours per day, which was consistent with Mr. Huang's evidence. Noting Mr. Wong and Ms. Robledano's contrary evidence, the delegate found as follows:

Wages are defined in section 1 of the Act to include "money, paid or payable by an employer to an employee for work", and to specifically exclude "money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency". Burtection had the obligation to pay Mr. Huang for any hours that he actually worked. If it agreed to pay him for hours that he did not work, which Mr. Wong and Ms. Robledano dispute, these payments would be at Burtection's discretion, and clearly not related to hours of work, production or efficiency. As such, I find that these payments would not be wages under the Act. I find that Mr. Huang is not entitled to the wages that he has claimed for the pay periods ending August 4, September 15 and October 13, 2013.

8. The delegate found that Mr. Huang was not entitled to an additional half hour of wages for the pay period ending October 27.
9. The delegate concluded that BSI's new vehicle policy did not constitute a substantial change to a condition of Mr. Huang's employment under section 66 of the Act. The delegate noted that Mr. Huang's wages or hours of work were not affected by the policy change. He noted that Mr. Huang's sole objection to the policy was that he did not want to park his vehicle at the employer's premises.
10. The delegate concluded as follows:

[BSI] did not unilaterally change their vehicle policy and require that Mr. Huang accept the change; Mr. Huang himself demanded that the policy be changed. [BSI] was under no obligation to provide advance payment of expenses to Mr. Huang, and I find that the evidence supports an inability to do so. [BSI] furthermore had valid concerns regarding issuing a gas card to Mr. Huang. The vehicle policy of November 26 met Mr. Huang's concerns, and did not introduce any significant problems for Mr. Huang. In the circumstances, I find that the vehicle policy was a reasonable and lawful direction. Mr. Huang, on November 26, refused to follow that reasonable and lawful direction with essentially no reason. His written rationale for refusing to follow the new policy was that it was a change to the way that he had worked for seven years, even though he simultaneously refused to follow the prior policy. Fundamental to any contract of employment is the expectation that an employee follow the direction of their employer, and that the employee perform the work for which they are hired. By refusing to follow the lawful and reasonable direction of his employer, and in fact refusing to perform any work, Mr. Huang indicated that he would not be bound by his contract of employment. While Mr. Huang insisted that he would not quit, I find that he in fact repudiated his employment contract, and provided [BSI] with just cause to terminate his employment. As such, Mr. Huang is not entitled to compensation for length of service.

Argument

11. Although Mr. Huang alleged that the delegate failed to comply with natural justice, in reality, his argument is that the delegate erred in law, as he states that the Determination was based on an "untrue story". I have considered his appeal on this basis.

12. Mr. Huang says the delegate erred in:
- determining the days for which he was paid. Mr. Huang says he was paid for November 25, 26 and 27, 2013;
 - failing to find that Mr. Huang was terminated because he told BSI he would not continue to pay its business expenses; and
 - not concluding that BSI's November 27, 2013 vehicle policy constituted a substantial change to the conditions of his employment.
13. Mr. Huang also contended that he was BSI's on-call technician and required to respond to emergency calls at all times, which included having a vehicle with tools and parts available to him on short notice.
14. The delegate submits that BSI did not make a unilateral change to Mr. Huang's terms of employment. He says that Mr. Huang was terminated because he refused to perform work until BSI either provided him with an advance on his expenses or a credit card for his use. He submits that BSI had just cause to terminate Mr. Huang's employment after Mr. Huang refused to work.
15. Finally, the delegate says that Mr. Huang's position that he required a vehicle at his home to respond to emergency calls at all hours was not part of the evidence at the hearing. He submits that Mr. Huang's only objection to the new vehicle policy expressed at the hearing was that he would have to park his personal vehicle at BSI's premises.
16. In his reply, Mr. Huang says that BSI had no policy regarding the use of vehicles and payment of vehicle expenses. He also says that it was impossible for him to work for BSI after November 27, 2013, because that was the day his employment was terminated.

ANALYSIS

17. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
18. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

Natural Justice

19. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
20. I am not persuaded that the Director failed to comply with principles of natural justice.

21. I am also not persuaded that the Director erred in his analysis of whether BSI had established just cause to terminate Mr. Huang's employment.

Error of Law

22. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. No. 2275 (B.C.C.A.) as reviewable errors of law:
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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. adopting a method of assessment which is wrong in principle
23. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
24. Section 21(2) of the *Act* prohibits an employer from requiring an employee to pay any of the employer's business costs except as permitted by the regulations. No regulation permits an employer to require an employee to pay vehicle expenses.
25. The Tribunal has determined that costs associated with a company vehicle are employer business costs (*Aluminex Extrusions Ltd.* (BC EST # D250/98)) as are gasoline costs (*Keep On Trucking Ltd.* (BC EST # D087/99)). Mr. Huang agreed to pay these expenses and was always reimbursed by BSI. Although Mr. Huang had a legitimate concern about whether BSI would continue to reimburse him in a timely manner or at all, there is no evidence that BSI contravened section 21(2) of the *Act*.
26. Section 66 provides the Director with discretion to determine that the employment of an employee has been terminated if a condition of employment is substantially altered. The delegate found that BSI had a policy whereby Mr. Huang would take the company vehicle home each night and go directly to the first job the following morning. The delegate further accepted that the policy was changed after Mr. Huang objected to the policy. When Mr. Huang refused to comply with the new policy, the delegate concluded that his refusal provided grounds to end his employment. I find no error in the delegate's conclusion. As the Tribunal has noted on many occasions, an employee's refusal to comply with an employer's legitimate and reasonable policy constitutes insubordination. Depending on the circumstances, one act of insubordination may constitute just cause. The delegate concluded that, in this case, Mr. Huang's refusal to work constituted a repudiation of the employment contract and constituted just cause to end his employment. I find no basis to interfere with the delegate's conclusion.
27. I deny the appeal.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination, dated December 23, 2014, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal