An appeal

- by -

Vanform Canada Inc.
("Vanform")

- 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: John Savage

FILE No.: 2008A/22

DATE OF DECISION: May 5, 2008

DECISION

SUBMISSIONS

M.J. (Peggy) O'Brien	on behalf of Vanform Canada Inc.
Yan Lin Jiang	on behalf of himself
Andres Barker	Delegate for the Director of Employment Standards

INTRODUCTION

1. Vanform Canada Inc. ("Vanform") appeals a determination of the Director of Employment Standards dated January 23, 2008 (the "Determination") wherein the Director found he had jurisdiction to adjudicate a complaint by Yan Lin Jiang ("Jiang").

2. The Determination found Vanform owing wages, annual vacation pay, compensation for length of service and accrued interest plus administrative penalties. The amount owing, with penalties and interest, exceeds $15,000.

3. Vanform argues that the Director erred in law and breached the rules of natural justice when the Director determined that Jiang's complaint came within the jurisdiction of the *Employment Standards Act*, R.S.B.C. 1996, c.113 (the "Act").

4. Jiang was employed by Vanform. Vanform is a provincially registered company. Jiang had a family residence in British Columbia, Canada. He was hired by Vanform and commenced work in China, returning three times to B.C. There is a dispute about how much work Jiang did in B.C. and where the contract of employment was made.

5. The Delegate held that Jiang worked half time in B.C. although Jiang's submission would suggest that was closer to one third of his time. Vanform and Jiang disagree about how much work was performed here. Vanform says two and one half days, but Jiang says it was closer to three months. On this point the Delegate preferred the evidence of Jiang but seems to have misconstrued some of that evidence.

6. The issue of the Delegate's jurisdiction was not originally raised by the parties before the Delegate although the Delegate considered the matter. It is raised as an issue for the first time in this appeal. The Delegate dealt with the matter briefly in his reasons. As it is a question of jurisdiction Vanform says that the standard of review is correctness.

7. The Tribunal determined to hear the appeal by way of written submissions. Submissions were received from Vanform, Jiang and the Director.

ISSUE

8. Did the Director err in law or breach the rules of natural justice in determining that he had jurisdiction to deal with the complaint?

APPEAL PROVISION

9. On an appeal under the Act, the parties are limited to the grounds of appeal set out in section 112:

> 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.

10. The appeal provisions under the Act are statutory, and therefore constitute a code with respect to the grounds of appeal.

11. It is not open, for example, for this Tribunal to interfere with a finding of the Director in a determination merely because the Tribunal might be of another opinion, or take issue with some factual inference or with a finding which is a mixed finding of fact and law.

12. Appeals are limited to situations where an error of law has been committed, or there is a failure to observe the principles of natural justice, or where there is new evidence, that is, evidence that has become available, that was not available at the time the determination was being made.

ERROR OF LAW

13. When an appeal is based on an error of law (section 112(1)(a)) it is not open to an appellant to appeal findings of fact or mixed findings of fact and law.

14. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" enunciated by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

15. The *Gemex* case describes an error of law as occurring where the adjudicator:

> a) misinterprets or misapplies a section of a statute;
> b) misinterprets or misapplies an applicable principle of general law;
> c) acts without any evidence;
> d) acts on a view of the facts which could not reasonably be entertained; or
> e) adopts a methodology that is wrong in principle.

16. Errors of law are to be contrasted with findings of fact and findings of mixed fact and law. An error or law typically arises where a statutory provision is misinterpreted, or there is an error in legal principle. Mixed findings of fact and law, such as whether a thing falls within the definition of its term, are not reviewable.

17. The weight of evidence, on the other hand, is a matter for the Delegate and is a question of fact, not law: *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471.

18. It is only where a conclusion reached is one that could not reasonably be entertained that an error of law is shown: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

19. In considering an issue on appeal it is not necessary that the Tribunal necessarily agree with the conclusion of the Delegate.

20. It is only if no reasonable person, acting judicially and properly instructed as to the law, could have come to the determination that a successful appeal lies on the basis that there has been an error of law: *Delsom Estates Ltd. v. Assessor of Area 11 – Richmond / Delta* (2000), SC 431 (B.C.S.C.), approved in *Britco Structures Ltd.*, BC EST #D260/03.

BREACH OF NATURAL JUSTICE

21. The principles of natural justice are not referenced in the Act but must be based on the common law.

22. The Latin phrase *audi alteram partem*, which means hearing both sides fairly, describes the duty to act judicially. In essence, the parties to a dispute are entitled to know the case against them and to be heard by, and make submissions to, the decision-maker.

23. The several rights that can arise out of this duty are: the right to notice, the right to be heard (although not necessarily to have an oral hearing), the right to know the case to be met and to answer it, the right to cross-examine witnesses (in appropriate circumstances), the right to counsel, and the right to a decision on the evidence: *D. Jones & A. de Villars, Principles of Administrative Law*, (Toronto: Carswell, 1985) c. 8 at 197-241; *Hundal v. Superintendent of Motor Vehicles* (1985), 32 M.V.R. 197 (B.C.C.A.); *Murphy v. Dowhaniuk* (1986), 22 Admin. L.R. 81 (B.C.C.A.); *R. v. Canada Labour Relations Board* (1971), 18 D.L.R. (3d) 226 (Man. C.A.); *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [1994] 2 W.W.R. 422; *Re City of Vancouver and Assessment Appeal Board et al.* (1996), 135 D.L.R. (4th) 48. A decision maker cannot have bias.

24. Since an allegation that there has been a breach of natural justice would, if supported, impugn the whole of the Director's decision on this issue, I will deal with those submissions first.

THE BREACHES OF NATURAL JUSTICE ALLEGED

25. The breach of natural justice alleged, as I read Vanform's submission, is that the Director failed to consider relevant evidence.

26. The specific allegations concern the Directors findings that (1) Jiang's employment contract was created in BC, (2) the location of Jiang's residence and place of work, and (3) the conflict in the evidence regarding the duties Jiang was to perform and the location of the work in China.

27. These submissions question the findings and conclusions of the Delegate. The error alleged is perhaps more appropriately described as an error of law where it is alleged that the Delegate has acted on a view of the facts which could not reasonably be entertained.

28. While the decision of the Tribunal in *Jane Welch operating as Windy Willows Farms*, BC EST #D161/05 ("*Welch*") suggests that a breach of natural justice may arise where exceptionally probative evidence is ignored, in my view, with respect to these findings of the Delegate, this case fails to approach the standard established in *Universite du Quebec a Trois-Rivieres v. Larocque*, [1993] 1 S.C.R. 471.

29. There remains the question of whether the Delegate breached natural justice by determining an issue without giving the parties an opportunity to address the issue by producing evidence and making submissions.

THE ERRORS OF LAW ALLEGED

30. The Delegate prefaced his reasons on jurisdiction with the comment that "there was no evidence or argument during the hearing to suggest the lack of jurisdiction" (page 13).

31. That is unfortunate, because this Tribunal does not generally hear appeals de novo, but rather sits as an appellate body.

32. Before the Tribunal appeals are confined to errors of law, breaches of natural justice, or the consideration of new evidence.

33. Failure to raise an issue, even jurisdictional issues, severely restricts the ability of the Tribunal to review an issue.

34. In some contexts, failing to raise an issue has been held to be fatal to using this form of review, even on jurisdictional questions: *Assessment Commissioner v. Woodward Stores, et. al.*, [1982], 4 W.W.R. 686, (1982) 38 B.C.L.R. 152, (1982) 19 M.P.L.R. 179. In this case, however, the Delegate made a decision on jurisdiction, albeit, without the parties being alerted to that question and having an opportunity to address evidence and make submissions on the issue.

35. Proceedings before the Delegate are informal and hearings are not transcribed. This leads to difficulties where it is alleged, as it is here, that findings on facts which form the basis of a conclusion on jurisdiction cannot reasonably be entertained.

36. This difficulty is exacerbated when the submissions of both parties refer as facts to evidence which is not part of the record, such as it is, is not part of the Delegate's findings, and their submissions on the evidence is contradictory.

37. For example, Vanform in its submission to this Tribunal says that Jiang was paid "part of his salary" in Canadian dollars which was deposited in his Canadian bank account, but the "balance of his compensation" was paid in Chinese currency in China. The Delegate finds that "Jiang was paid in Canadian currency". Jiang in his submission says that "When I traveled to China I got travel compensation CAD 50 a day to cover my room and board" and received RMB 60000 travel compensation. He was also paid a semimonthly wage.

38. There is no evidence in the record that addresses whether Jiang received another part of his salary in Chinese currency in China and, if he received payment in Chinese currency, this is properly characterized as travel compensation or wages.

39. Again, Vanform in its submission to this Tribunal says that "In September, 2005, Jiang was residing in China where….Zhang offered Jiang employment….The employment contract was formed in China and Jiang performed his duties there". Jiang says that "…in August 2005, CNEEC and Vanform offered me to be a senior advisor for both companies when I was in Vancouver…" and "At end of August 2005, I bought round tickets to travel to China and met Zhang on Tuesday afternoon, September 06, 2005". The Delegate found that "…the employment contract between Vanform and Jiang was created in British Columbia…"

40. There is no evidence in the record that addresses where the contract was made.

41. Regarding his residence, Vanform in its submission to this Tribunal says that Jiang was residing in China at the time the contract was formed. Jiang says he was a BC resident since May 2001. He was in Vancouver when the job was offered and then travelled to China. The Delegate found only that "Throughout his period of employment, Jiang maintained a residence in Vancouver where his family lived".

42. The finding of the Delegate is not disputed but there is no evidence in the record before me that addresses whether Jiang was resident in BC at the time the job was offered or whether he was living in China.

43. Regarding the amount of work done in China and Canada, Vanform in its submission says that only two and a half days of work were performed in Canada. The Delegate says "Approximately half of Jiang's time was spent working in china while he worked the other half of his time in British Columbia". Vanform points out that other findings of the Delegate suggest that only one third of his time was spent working in Canada, a position that is supported by the submissions of Jiang.

44. There is no evidence in the record before me that addresses how much time was spent in each jurisdiction.

45. There are some facts found by the Delegate that are uncontroverted. For example, Jiang maintained a bank account in Canada where salary was deposited. The pay statements note that deductions are made for Canadian income tax, employment insurance, and Canada Pension Plan payments. Records of employment forms were issued by Vanform after termination. Vanform is a provincially registered company in British Columbia with offices in the Province.

CONCLUSION

46. Whether the matter is properly characterized as involving an error of law or a breach of natural justice, the central difficulty in the Determination is that the Delegate and the parties failed to appreciate there was a potential issue involving jurisdiction from the outset. In my view, the Delegate erred in law and/or breached natural justice when, after recognizing this was a potential issue, proceeded to determine the matter in the absence of notice to the parties.

47. Stemming from the failure to recognize this as an issue before the oral hearing concluded, the record as it relates to jurisdiction is clearly deficient. The Delegate's reasons are perfunctory, in contrast to the detailed and careful analysis regarding the amounts owed.

48. The parties have made contradictory submissions regarding the evidence, and there is no means of reconciling these submissions since there is no record relating to the contradictory submissions.

49. It is apparent that the parties should have an opportunity to fully address through evidence and submissions the question of jurisdiction, and a Delegate should have the opportunity of making an informed decision on the issue after holding a hearing limited to that issue.

50. The matter is referred back to the Director to reconsider only the question of jurisdiction pursuant to section 115(1)(b).

51. Vanform has not challenged the Delegate's findings on the amounts said to be owed under the Determination, nor could it now at this late stage. In my view, the appropriate course is to continue with the suspension of the Determination as set out in the Vice-Chair's Order of February 28, 2008, pending the outcome of the referral back process.

52. Nothing in these reasons should be construed as indicating any particular outcome on the jurisdictional issue. The question of jurisdiction is, in the first instance, a matter for the Delegate, after conducting a hearing and receiving evidence and submissions from the parties.

ORDER

53. The matter is referred back to the Director to reconsider only the question of jurisdiction pursuant to section 115(1)(b).

John Savage
Member
Employment Standards Tribunal