

An appeal

- by -

Dongoh Educational Company Ltd.
(“Dongoh”)

- 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: David B. Stevenson

FILE No.: 2009A/033

DATE OF DECISION: May 15, 2009

DECISION

SUBMISSIONS

Allen Han	on behalf of Dongoh Educational Company Ltd.
Soon Suk Adam Hong	on his own behalf
Lynn Ranger	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Dongoh Educational Company Ltd. (“Dongoh”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 12, 2009.
2. The Determination was made on a complaint filed by Soon Suk Adam Hong (“Hong”), who alleged Dongoh had contravened several provisions of the *Act* by misrepresenting the availability of a position, failing to pay regular wages, annual vacation pay and length of service compensation. The Determination found that Dongoh had contravened Part 3, section 18, Part 7, section 58 and Part 8, section 63 of the *Act* and ordered Dongoh to pay Hong an amount of \$5,283.02, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Dongoh under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$6,783.02.
5. The Determination was issued following a complaint hearing which was conducted in September 2008.
6. In this appeal, Dongoh submits the Director failed to observe principles of natural justice in making the Determination. Dongoh has also submitted further evidence with the appeal that was not provided to the Director in the complaint process.
7. Dongoh seeks a suspension of the effect of the Determination and a variance, including a cancellation of one of the administrative penalties, reducing the total amount of their liability under the *Act* to \$2,459.20.
8. Dongoh has not requested an oral hearing on the appeal. The Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

9. The issue in this case is whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

10. It is not necessary to restate all of the facts and findings of fact made in the Determination in order to address this appeal and I will provide only a brief summary.
11. Hong was employed by Dongoh as an instructor at their Chinese medicine school. He worked two semesters part-time as an instructor. In November 2007, Dongoh offered Hong work as a “practitioner/instructor” for the year 2008, at a salary of \$4,400.00 a month and a one-time bonus payment of \$4,800.00. There was a written agreement setting out the terms of employment dated 2007.11.22. Hong claimed he was not paid what was required by the agreement. Hong said he complied with the requirement of the agreement to work eight hours a day. Dongoh said Hong was not entitled to all of the salary set out in the agreement because he only worked for half of the hours he was required to work under the agreement. The Director found Hong was entitled to regular wages.
12. The Determination sets out a summary of the evidence of each of the parties and an extensive evidentiary and factual analysis on the disagreement between Dongoh and Hong about how many hours Hong worked during the period of claim. There is little disagreement by either of the parties with the evidentiary summary in the Determination¹. Dongoh disagrees with the conclusion and has provided comments on the Determination which illustrate particular areas of disagreement.
13. Hong was terminated from this position in February 2008. Dongoh claimed there was cause; Hong said he was terminated without cause. The Director found Dongoh had not demonstrated there was cause for termination and awarded Hong length of service compensation.
14. The Determination sets out the essential facts relating to the position of Dongoh that Hong was dismissed for cause.
15. Hong claimed the practitioner/instructor position was misrepresented to him by Dongoh and claimed compensation for the misrepresentation. The Director denied this aspect of his claim.
16. Dongoh has included documents with the appeal that were not provided to the Director during the complaint process. These documents are:
 1. a notice of termination of clinic duty dated January 11, 2008;
 2. a warning notice dated February 5, 2008;
 3. a notice about remaining in the school after working hours dated February 8, 2008; and
 4. Hong’s resume.

¹ Dongoh does say in the appeal submission that the incident which occurred on January 14, 2008, and referred to on page R11 of the Determination, is not correctly stated. Dongoh agrees the incident did occur but adds that Allen Han later apologized for the incident after finding out the patient involved was an existing patient of Hong and not a new patient. Dongoh also says a date attributed to January 9, 2008 at page R4 of the Determination was actually January 12, 2008.

17. Dongoh has also provided additional documents with their final response. They comprise an employment contract between Dongoh and another individual and a written statement from that individual about two telephone discussions on March 25, 2009, one between that person and Hong and another between that person and a student at Dongoh.
18. Most recently, Dongoh has provided the Tribunal with a copy of a Small Claims Court Order which Mr. Han says is an order dismissing a small claims action brought by Hong against Dongoh.

ARGUMENT

19. Dongoh submits the Determination is “too focussed on the employee even though the employee provided inappropriate evidence”. Dongoh says the Director relied on personal notes as decisive evidence.
20. The submission of the Director asserts there was no failure to observe principles of natural justice in making the Determination. The Director says both parties were given the opportunity to provide verbal and documented evidence which was all taken into account in making the Determination.
21. The Determination notes there was conflict in the evidence provided by the parties and chose to accept Hong’s evidence as being more credible. The reasons for making that choice are set out in the Determination.
22. The Director says the Tribunal should not allow or consider evidence which predated the hearing date and should have been produced at the hearing.
23. Much of Hong’s submission is not particularly helpful on this appeal as it predominantly restates the position he took in the complaint process, along with all the factual assertions supporting that position, which is not the focus of an appeal. He has provided a submission on the additional documents submitted with the appeal. He alleges the first three documents listed above are fake; he says he has neither seen nor received any of them.
24. In their final reply, Dongoh says the first three documents listed above were provided to the mediation officer on June 18, 2008. Dongoh then says the employment contract was never “officially made”, notwithstanding the Determination states it was not a matter of dispute that “[o]n November 22, 2007 both parties signed a contract of employment”.

ANALYSIS

25. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

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 made.*

26. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
27. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03.
28. I will first address the new evidence that Dongoh has submitted with the appeal.
29. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. As well as considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05.
30. I am not inclined to accept any of this new evidence. Most of this evidence was, on its face, reasonably available to Dongoh at the time the Determination was being made. As well, all of the additional evidence, including the additional evidence which might not have been available when the Determination was made, fails to demonstrate relevance to the issue raised by Dongoh in this appeal, which is whether the Director failed to observe principles of natural justice in making the Determination. As well, the probative value of the additional evidence on that issue is absent. The additional evidence submitted does not advance the natural justice ground of appeal or even assist in showing some other reviewable error in the Determination. Rather, it is apparent this “new” evidence has been asserted to support Dongoh’s disagreement with findings and conclusions of fact made by the Director on Hong’s wage claims.
31. An appeal to the Tribunal under Section 112 is not intended as an opportunity to add new evidence to the file, hoping to have the Tribunal review and re-weigh the evidence and reach a different conclusion. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.
32. The Tribunal recognizes persons without legal training do not always appreciate what “natural justice” means, and the concept can be confusing and complex to a lay person. Generally, the notion of “natural justice” requires a decision maker to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director had to make some choices between the competing positions of the parties. The reasons for those choices are explained in the Determination. Dongoh may not like the choices made, but they were provided with an opportunity to present their position in evidence and argument and, in the circumstances, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the choices and the resulting Determination.

33. As I have not found any merit to the appeal, I am unable to vary or suspend the effect of the Determination or to cancel any of the administrative penalties imposed under section 29(1) of the *Regulation*.
34. The appeal is dismissed.

ORDER

35. Pursuant to Section 115, I order the Determination dated February 12, 2009 be confirmed in the amount of \$6,783.02, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal