Employment Standards TRIBUNAL

An appeal

\- by -

537192 B.C. Ltd.
("537192")

\- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2002/608

DATE OF DECISION: February 18, 2003

DECISION

OVERVIEW

537192 B.C. Ltd. (the "employer" or the "Appellant") appeals, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 14, 2002. The Determination is that Jim Tang is entitled to compensation for length of service and other wages, $903.40 including interest.

The Appellant is asking that the Determination be varied. The Appellant is prepared to accept that it must pay Tang statutory holiday pay but it disagrees with the Determination in all other respects. It claims that it has been treated unfairly by the delegate. It claims that Tang has been paid all of his vacation pay. It claims the employee should not have been awarded regular or overtime wages because he had breaks from work and he was found to be falsely recording his start and finish times. Finally, the employer argues that the employee is not entitled to compensation for length of service because he was terminated for cause, the employee took a one month leave of absence, and it is not in any event known when the employment began.

I have decided to confirm the Determination. There is in fact no evidence of any unfairness. I am not shown that the Determination is contrary to the *Act*. The Determination is reasonable given the evidence that was before the delegate. The employer is seeking to introduce new evidence but I will not accept that evidence because it could have been submitted at the investigative stage.

This case has been decided on the basis of written submissions.

ISSUES

The employer disagrees with the decision to award 2.5 hours of regular wages and, beyond that, overtime wages.

The employer disagrees with the decision that it must pay compensation for length of service. The employer again claims that the employee's record of work is false and it is now also claiming that he was not "doing his work well" and that he was warned to improve and fired when he did not improve. The employer appears also to suggest that the employee was insubordinate and that it should not be forced to pay length of service compensation because the employment was interrupted when the employee went to China for a month and the employer is uncertain as to when the employment began.

The employer disagrees with the decision to award an additional amount of vacation pay.

FACTS

537192 operates a restaurant/pub. The current owner of 537192 is Barbara Chan.

Jim Tang worked for two previous owner/operators of the restaurant. The first owner ceased operations and filed for bankruptcy protection in May of 2000. The next owner of the restaurant was Paul Chang. He rehired Tang on July 3, 2000.

Barbara Chan had invested in the restaurant. She was successful in gaining control of the restaurant from Chang on June 7, 2001. There was no interruption in the employment at this point. That led the delegate to decide that Tang's employment began on July 3, 2000. The employer does not submit evidence to show that the delegate is wrong on this conclusion.

Tang's last day of work was the 9th of December, 2001. The employer, at the investigative stage, claimed just cause on the basis that Tang's daily record of work was found to include a number of false entries which did not reflect the fact that the employee was late on occasion and left early on occasion. It was not suggested that the employer had just cause for any other reason.

The delegate, in investigating Tang's complaint, found that while Tang was accused of misrepresenting his actual or true hours of work, the employer only provided an incomplete set of payroll records and that it did not provide clear support for the allegation that the employee was cheating on his start and finish times. The delegate found, moreover, that there was not evidence to show that Mr. Tang was ever confronted about the alleged time theft (misrepresenting his actual or true hours of work) or that any corrective action was taken by the employer. She reports, moreover, that such records as were produced by the employer indicate that the employee did work overtime on November 24, 2001 and that, with the exception of the very last pay period, the employee had accepted the employee's record of work and paid him on the basis of that record.

The delegate reports that she was led to believe, there being no clear evidence to the contrary, that Tang worked another 2.5 hours in the period December 1, 2001 to December 9, 2001 and a certain amount of overtime as well. She prepared a set of draft calculations which were based on records produced by the employer and, where they were incomplete, records kept by the employee, and that set of calculations was then sent to the employer for a response. While an accountant for the employer contacted the delegate and asked for more information which was then supplied, that was the extent of the employer's response to the calculations. It did not take issue with her hours worked information or her wage calculations.

The employer on appeal claims, once again, that the employee falsely recorded start and finish times but it is now claiming, in addition to that, that Tang was not "doing his work well", that he was warned to improve, and fired when he did not improve (letter dated December 8, 2002). Barbara Chan, the owner of 537192, then goes on to say (in a letter dated January 19, 2003) that Tang, "on the last (day or week) of work … did not listen to me so I told him to leave and he is fired." As matters are presented to me, however, there is not clear evidence of insubordination. I am also not shown that the employee was adequately warned to improve prior to being terminated.

The employer on appeal is seeking to raise new issues and submit new evidence, letters from current employees in the main. The current employees write to say that Tang was not a good worker and/or that he falsified work records when late for work and when leaving work early.

The Appellant claims that it has been treated unfairly by the delegate. I find that there is in fact absolutely no evidence of any unfairness on the part of the delegate.

ANALYSIS

This employer does not have a proper set of payroll records or, at least, has failed to produce the records. As matters were presented to the delegate, there was no evidence that the employer had a problem with the employee's daily record of work until the dying days of the employment. All of a sudden the

employee is said to have falsified records and not shown that he was late or left early. The employee was then terminated.

As matters were presented to the delegate, the employer claimed just cause for the reason that Tang cheated on his start and finish times. The Determination reflects a failure to provide evidence which shows that the employee did in fact submit false work records. The decision is that the employer failed to show just cause and that the employee worked overtime and another 2.5 hours in the last pay period. I am satisfied both that the Determination is reasonable given the evidence that was before the delegate and that the Determination is fully consistent with the *Act*. The employer had failed to show just cause. The employer had failed to produce a record of all hours worked. Even the employer had submitted evidence of overtime. The Determination does not double count vacation pay but merely reflects the fact that the Determination means that the employee now has an additional amount of earnings.

The employer was provided with information on hours worked and a set of preliminary calculations at the investigative stage and it was asked for a response. There was no response. But now that the employer has been ordered to pay Tang as it has, the employer wants to appeal the Determination. It has new excuses for not paying the employee. And it is seeking to introduce new evidence.

The Tribunal has consistently said, through decisions like *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97), that it will not normally allow an employer to present new evidence, evidence which could have been raised or presented at the investigative stage. The delegate in this case objects to my accepting the new evidence on that basis.

In *Tri-West*, the Tribunal had this to say:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. … The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Adjudicator in that decision states, "the Tribunal will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions".

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the *Act*'s decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

The Tribunal has not set an absolute bar to the production of new evidence on appeal. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer. But there are not any in this case. I see only a plain and simple failure to cooperate with the delegate. I will not accept the new evidence which pertains to the employment, hours worked or reasons for the employee's termination.

The employer on appeal claims in one breath that Tang was terminated for reason of insubordination and, in another, that he was terminated because of an inability to do the job. The Appellant has not submitted evidence to show insubordination or that the employer had just cause for reason of an inability to work to some acceptable standard of performance. The latter would require that the employer show the following:

> "1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 4. The employee continued to be unwilling to meet the standard.

The employer does not do that. And where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee. I am not shown that the employer made any effort to train or instruct the employee and whether its only option was to terminate the employee..

The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 14, 2002 be confirmed in the amount of $903.40 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal