

An appeal

- by -

B.C.C.E. Communications Inc. operating as Genius Communications Centre
(“B.C.C.E.”)

- 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.: 2006A/43

DATE OF DECISION: May 23, 2006

DECISION

SUBMISSIONS

Stanley Mak	on behalf of B.C.C.E. Communications Inc.
Ning Lan	on his own behalf
Lynne Egan	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by B.C.C.E. Communications Inc. (“B.C.C.E.”) of a Determination that was issued on February 16, 2006 by a delegate of the Director of Employment Standards (the “delegate”). The Determination found that B.C.C.E. had contravened Part 8, Section 63 of the *Act* in respect of the employment of Ning Lan (“Lan”) and ordered B.C.C.E. to pay Lan an amount of \$1,152.31, an amount which included wages and interest.
2. An administrative penalty was imposed on B.C.C.E. under Section 29(1) of the *Employment Standards Regulation* (the “Regulations”) in the amount of \$500.00.
3. The total amount of the Determination is \$1,652.31.
4. B.C.C.E. says the delegate failed to observe principles of natural justice in making the Determination. The reasons for appeal set out several “wrong assumptions” made by the delegate in reaching a conclusion that Lan was entitled to length of service compensation under the *Act*. B.C.C.E. asks that the Tribunal reach a different conclusion and cancel the Determination.
5. B.C.C.E. has requested an oral hearing on the appeal. The Tribunal, however, has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue in this appeal is whether B.C.C.E. has shown there is any basis for the Tribunal finding the delegate committed a reviewable error in making the Determination.

THE FACTS

7. B.C.C.E. is a wireless communications retailer. Lan worked for B.C.C.E. as a repair technician from April 20, 2001 to March 3, 2005, when he was terminated without notice or compensation in lieu of notice. He filed a complaint under the *Act* claiming he was entitled to length of service compensation.
8. In response to the claim, B.C.C.E. took the position that Lan was terminated for cause and therefore not entitled to length of service compensation.

9. The delegate conducted a complaint hearing and received written submissions. The only matter at issue was whether B.C.C.E. should be discharged from its liability to pay length of service compensation because Lan had given B.C.C.E. cause to terminate his employment.
10. The delegate found that Lan's conduct did not constitute just cause for dismissal. As a result, the delegate decided Lan was entitled to, and B.C.C.E. was liable for, length of service compensation.

ARGUMENT AND ANALYSIS

11. B.C.C.E. has the burden, as the appellant, of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are 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.*

12. An appeal is an error correction process with the burden of showing the error being on the appellant. It is not simply an opportunity to re-argue one's case, hoping the Tribunal will reach a different conclusion. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law.
13. B.C.C.E. has grounded its appeal in paragraph 112(1)(b), but has not established any basis for the Tribunal finding the delegate failed to observe principles of natural justice in making the Determination. It is apparent that B.C.C.E. was aware of the complaint and had an opportunity to fully respond to the allegations made in the claim and to submit its position on the claim to the delegate.
14. If this appeal were confined to the ground chosen on the Appeal Form, it would be dismissed at this point. The Tribunal has accepted, however, that the "substance", not the form, of an appeal should be addressed (see *J.C. Creations Ltd. c.o.b. Heavenly Bodies Sports*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03)).
15. Although B.C.C.E. has not grounded its appeal in paragraph 112(1)(c), the appeal submission includes several documents that are not found in the Record provided to the Tribunal under subsection 112(5) of the *Act* and appear to be additions to the evidence considered by the delegate during the complaint process. The Tribunal has a discretion to allow additional evidence but has taken a relatively strict approach to accepting such evidence in an appeal, particularly where such evidence was reasonably available and could have been provided during the complaint process. The Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it be reasonably capable of belief.
16. I am not going to accept or consider any of the additional evidence. I have three main reasons for this decision. First, the evidence is being provided for the purpose of challenging findings of fact. None of

this additional evidence is determinative of a factual error having been made by the delegate or has the effect of raising questions of law about the factual findings made by the delegate. As indicated above, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such errors constitute errors of law. Second, the relevance of this evidence to the issue of just cause has not been demonstrated. Third, the credibility of the additional evidence is questionable. This evidence, and the submissions relating to it, has been prepared by Mr. Stanley Mak, the owner and representative of B.C.C.E., who also presented the case for B.C.C.E. during the complaint process. In the Determination, the delegate noted Mr. Mak possessed a “propensity” for “creating evidence” and questioned the credibility of certain documents he had presented. As well, the Determination notes that B.C.C.E. had failed to provide documents on a central factual assertion that the delegate had requested from B.C.C.E. The delegate drew inferences against B.C.C.E. and rejected the same assertions that are being advanced in this appeal, and being supported by the additional documents.

17. Turning to the validity of the appeal, while a decision about whether there is just cause for dismissal does include questions of law, it is predominantly fact driven. As a matter of law, the Tribunal has identified and consistently applied several principles to questions of just cause for dismissal (see *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97) and, as it applies to one aspect of the argument made by B.C.C.E., has affirmed an analysis of the law regarding just cause for dismissal for “wilful disobedience” (see *James Stephens*, BC EST #D131/00). I do not find the delegate erred in the legal analysis applied to the question of just cause, or “wilful disobedience” to facts as found.
18. In reality, and even though B.C.C.E. has grounded its appeal in a failure to observe principles of natural justice, the substance of this appeal is a disagreement by B.C.C.E. with findings of fact made by the delegate. The appeal submission points to several “wrong assumptions” made by the delegate. B.C.C.E. has done nothing more in this appeal than seek to have the Tribunal make different findings of fact and reach a different conclusion on the question of just cause. B.C.C.E. has not met the burden of showing there is any error in the Determination that is reviewable under Section 112 of the *Act*.
19. The appeal is dismissed.

ORDER

20. Pursuant to Section 115 of the *Act*, I order the Determination dated February 16, 2006 be confirmed in the amount of \$1,652.31, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal