

An appeal

- by -

Wellington College Corporation

- 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

TRIBUNAL MEMBER: Carol Ann Hart

FILE No.: 2005A/21

DATE OF DECISION: April 26, 2005

ISSUE

The issue in this case is whether the Determination should be cancelled or referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was being made.

THE FACTS

Wellington College Corporation operated a private training institution. Shixu Gu was employed by Wellington College Corporation as a janitor. During the month of November 2003, Wellington College Corporation ceased its operations. Mr. Gu filed a complaint under section 74 of the *Act* alleging that the Wellington College Corporation had failed to pay regular wages, vacation pay, and compensation for length of service.

The Delegate for the Director conducted an investigation, and concluded in the Determination that Mr. Gu did not receive all outstanding wages owing to him within forty-eight hours of the termination of his employment.

ARGUMENT

Wellington College Corporation submitted that the Delegate's conclusion concerning Mr. Gu's last day of work was incorrect. The Delegate had found that the last day of employment for Mr. Gu was November 26, 2003. However, the Wellington College Corporation was closed on November 21, 2003.

The Delegate submitted that the Determination should be confirmed. The Record of Employment showed that Mr. Gu was employed by Wellington College Corporation from May 22, 2003 to November 26, 2003.

ANALYSIS

Subsection 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

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.*

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

In a letter dated August 30, 2004 the Delegate wrote to Wellington College Corporation to outline the preliminary findings in the investigation. The Delegate indicated that she had previously written a letter dated June 3, 2004 to Wellington College Corporation to provide details about Mr. Gu's complaint and to request the input of the employer. As there was no reply, a Demand for Employer Records was subsequently issued on July 21, 2004. Again, no response was received from the Wellington College Corporation. Preliminary findings were made by the Delegate, and the Wellington College Corporation was advised that if it did not comply, or submit documents and evidence concerning the preliminary findings made by the Delegate, a Determination would be issued, which would include a \$500.00 penalty.

In the Determination, the Delegate outlined that two of the Directors of Wellington College (Mr. Mike Chen and Mr. Jian Liang) had subsequently offered to pay amounts to Mr. Gu, but the payments promised were never received by the Employment Standards Branch.

Mr. Liang now purports to submit new information in the context of this appeal. Mr. Liang indicated in his written submissions that he had advised the Delegate when he first met with her that Mr. Gu's last day of work was incorrect. He had not been able to reach other shareholders and Mr. Gu's supervisor as they were not in Canada, and he therefore could not provide "*the detailed information*". Mr. Liang did not outline any efforts which had been made to obtain the evidence in question during the investigation. There was no indication that a representative for Wellington College Corporation had contacted the Delegate to request additional time to locate any information which was required.

A letter from the Receiver-Manager dated November 21, 2003 was submitted with the appeal. Mr. Liang did not give a reason why that letter could not have been provided to the Delegate prior to the Determination being made.

Although Mr. Liang appeared to be asserting that Mr. Gu had completed the Record of Employment himself, the information provided with the appeal in this regard was hearsay evidence only. The accountant identified only as "David" did not provide a statement or other evidence, and neither did Thomas Tom. Evidence concerning the Record of Employment and the last day of Mr. Gu's employment could have been provided to the Delegate, but Wellington College Corporation did not do so prior to the Determination being made.

On appeal, the Tribunal does not conduct a re-investigation. The Tribunal is being asked by Wellington College Corporation, in effect, to consider the employer's evidence and arguments and reach different

conclusions than those reached by the Delegate, when that evidence and those arguments were not presented to the Delegate prior to the Determination being made. This is not the role of the Tribunal. The appeal must be confined to those grounds listed in subsection 112(1) of the *Act*, as set out above.

It was not shown that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the investigation of the complaint and prior to the Determination being made. Consequently, I cannot find that Wellington College Corporation has satisfied the test set out above in the *Bruce Davies* case for new evidence to be considered. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated January 28, 2005 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal