

An appeal

- by -

M.L. Garment Factory Ltd.
("M.L.G.F.")

- 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: Carol L. Roberts

FILE No.: 2007A/80

DATE OF DECISION: September 18, 2007

DECISION

SUBMISSIONS

Ming Lui	on behalf of M.L. Garment Factory
Ivy Hallam	on behalf of the Director of Employment Standards
Fu Yu Liu	on her own behalf

OVERVIEW

1. This is an appeal by M. L. Garment Factory Ltd., (“M.L.G.F.”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued June 21, 2007.
2. Fu Yu Liu worked as a sewer for M.L.G.F., a garment factory, from December 14, 2003. On October 14, 2005, she became unable to work due to an illness. On July 25, 2006, after discovering that M.L.G.F. had closed, she filed a complaint alleging that she was owed compensation for length of service.
3. After investigating Ms. Liu’s complaint, the delegate determined that M.L.G.F. had contravened Sections 58 and 63 of the *Employment Standards Act* in failing to pay Ms. Liu compensation for length of service and vacation pay. She concluded that Ms. Liu was entitled to compensation, vacation pay and interest in the total amount of \$952.29. The delegate also imposed a \$500 penalty on M.L.G.F. for the contraventions, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. M.L.G.F. contends that evidence has become available that was not available at the time the Determination was being made.
5. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I conclude that this appeal can be adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination

ISSUE

6. Whether new and relevant evidence is available that was not available at the time the Determination was being made, and that evidence, if believable, would have led the Director to arrive at a different conclusion on the material issue.

FACTS AND ARGUMENT

7. The facts as found by the delegate are as follows. After notifying her employer about her illness on October 14, 2005, Ms. Liu filed for Employment Insurance medical benefits and compensation from WorkSafe BC. In May or June Ms. Liu telephoned her employer several times attempting to advise him that she had applied for WorkSafe compensation and was told by the employer's wife that the employer was not available. She also said that the employer's wife hung up the telephone when she said that she continued to be unable to work. She filed her claim after she discovered M.L.G.F. had closed, stating that she had not quit her employment.
8. On December 22, 2006, the Director wrote a letter to M.L.G.F. outlining Ms. Liu's allegations. The letter was sent to M.L.G.F.'s operating address and the director/officer's residence. When those letters went unanswered, the Director sent a second letter to the same addresses by certified mail on May 9, 2007. Those letters were returned "unclaimed" and "moved". The delegate determined that M.L.G.F. had reasonable opportunity to participate in the complaint resolution process.
9. The delegate determined that Ms. Liu's evidence was credible and that her documentary evidence supported her allegations. She found that M.L.G.F. had terminated Ms. Liu's employment on July 25, 2006 when she found the company was no longer in operation. She determined that M.L.G.F. had not discharged its liability for length of service, and concluded that Ms. Liu was entitled to compensation for length of service in the amount of \$868.55, and vacation pay and interest.
10. Mr. Lui says that Ms. Liu provided the employer with a doctor's note on October 14, 2005 indicating that she would be unable to work until January 1, 2006. He says that she did not tell M.L.G.F. that she had applied for medical benefits.
11. Mr. Lui says that M.L.G.F. contacted Ms. Liu several times before her expected return date to determine whether she would return to work if her recovery was sooner than expected. He says that on November 29, 2006, Ms. Liu's husband informed M.L.G.F. that she had returned to China for personal reasons and would not return until the end of December.
12. Mr. Lui says that shortly before Ms. Liu's expected return to work date, the employer sent her a letter reminding her of the date and indicating that if she did not return on January 2, 2006, she would be considered to have voluntarily terminated her employment. Ms. Liu then provided the employer with a second doctor's note extending her sick leave until March 1, 2006. Mr. Lui says that the employer had no communication from Ms. Liu before or after March 1, 2007. He says that according to company policy, any employee who fails to show for work without valid reason "was evidence the employee is declaring self-termination". Enclosed with the submission were an ROE, two doctors notes, a letter dated December 27, 2005 to Ms. Liu regarding her sick leave and correspondence from WorkSafe BC regarding Ms. Liu's claim.
13. Ms. Liu denied receiving any letter about her January 2, 2006 return to work date and denied any knowledge of company policy regarding sick leave. She says that she received a telephone call in January from Mr. Lui's wife instructing her to pick up her personal belongings because the factory was being relocated. Ms. Liu says that, although she asked how she could remain in contact with the employer, Ms. Lui said that she would be in contact with her. Ms. Liu also says that in June 2006, WorkSafe BC advised her that her employer would be required to complete some forms. When she attempted to contact

her employer, she was told to call back. Each time she did so, she was met with a variety of responses, including Mrs. Lui hanging up the telephone.

14. The delegate submits that M.L.G.F. was afforded an opportunity to respond to the complaint and failed to do so. She contends that the evidence now being presented ought to have been submitted before the Determination was made.
15. The delegate further submits that, even with the additional evidence, her Determination would not change. She says that the new evidence contains two doctors' notes confirming that Ms. Liu was unable to work from October 14, 2005 until March 1, 2006. Ms. Liu had also provided the delegate with a form completed by her doctor for Human Resources and Skills Development Canada showing an expected date of recovery of April 30, 2006. The delegate says that the evidence supports Ms. Liu's assertions that she was medically unable to work until the end of April, 2006.
16. The delegate argues that in order for M.L.G.F to establish that Ms. Liu quit or abandoned her position, it has the burden of establishing that Ms. Liu was contacted after her medical leave expired and that she voluntarily quit her employment. In the absence of such evidence, the delegate submits that the appeal should be dismissed and the Determination confirmed.
17. In a reply submission, M.L.G.F says that it did not respond to the delegate's letters because it did not receive them. It says that the factory closed before the first letter was sent, and the director moved and sold his home in March, 2006. It says it first heard of the Determination when it was sent to the legal business address. M.L.G.F further says that it is up to an employee to submit and respond to their sick leave extension dates, and company policy is that employees are expected to return to work upon the expiry of their sick leave. M.L.G.F. denies that it contacted Ms. Liu to collect her personal belongings or give her any information regarding the future of the company. It also denies that it received any communication from Ms. Liu in June.

THE FACTS AND ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
19. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 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.

20. I am unable to find that M.L.G.F. has satisfied the test set out in *Bruce Davies*.

21. M.L.G. F. says that it did not respond to the delegate’s December 22, 2006 and May 9, 2007 letters because it did not know about them. The letters were sent to the factory location, which had moved, and the address of the director officer as indicated in the corporate registry. Although Mr. Lui says that this address also changed, the corporate registry records were presumably updated only after the letters were sent. It also appears that M.L.G.F. did not provide the post office with any mail forwarding address instructions. I find that the delegate did all she could to inform M.L.F.G. of the complaint. While I can not conclude that M.L.G.F. intentionally refused to participate in the investigation which would preclude it from now presenting evidence on appeal, I nevertheless deny the appeal.

22. I am not persuaded that the “new” evidence would have led the Director to a different conclusion on the material issue. The documents provided by M.L.G.F. do not establish that Ms. Liu quit her employment such that M.L.G.F. is relieved of its liability for compensation for length of service.

23. As the Tribunal determined in *Zoltan Kiss* (B.C. E.S.T #D 091/96):

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved.

24. M.L.G.F. provided no evidence, either during the investigation or on appeal, that Ms. Liu quit her employment. M.L.G.F. also provided no evidence that it attempted to contact Ms. Liu after her sick leave to determine whether she was returning to work.

25. The appeal is dismissed.

ORDER

26. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated June 21, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal