

An appeal

- by -

Everlasting Enterprises Ltd. carrying on business as Garage Sale Inc.
("Everlasting")

- 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.: 2007A/77

DATE OF DECISION: September 18, 2007

DECISION

SUBMISSIONS

Eric Yang and Calina Hung	on behalf of Everlasting Enterprises Ltd.
Ying Jie Ge	on his own behalf
Amanda Welch	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Everlasting Enterprises Ltd. (“Everlasting”) of a Determination that was issued on June 15, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Everlasting had contravened Part 3, Section 18, Part 4, Sections 35 and 40, Part 5, Section 46 and Part 8, Section 63 of the *Act* in respect of the employment of Ying Jie Ge (Ge”) and ordered Everlasting to pay Ge an amount of \$3,886.37, an amount which included wages and interest.
2. The Director also imposed an administrative penalty on Everlasting under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$1000.00.
3. The total amount of the Determination is \$4,886.37.
4. In this appeal, Everlasting says the Director erred in law and failed to observe principles of natural justice in making the Determination.
5. Everlasting also says that evidence has come available that was not available at the time the Determination was being made. In reality, this ground is being used to respond to findings by the Director concerning some of the evidence presented by Everlasting during the complaint process.
6. Everlasting has asked the Tribunal for a hearing on the appeal. The reason given relates to being able to establish a greater credibility to their arguments by presenting more evidence and argument. 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). 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

7. The issue is whether Everlasting has shown an error in the Determination requiring the intervention of the Tribunal under Section 115 of the *Act*.

THE FACTS

8. Everlasting operates a furniture consignment store. Ge was employed by Everlasting from November 1, 2004 to December 19, 2005. He was paid a monthly salary.
9. Following the termination of his employment, Ge filed a complaint with the Director, alleging Everlasting had contravened the *Act* by failing to pay overtime, statutory holiday pay and his full entitlement to length of service compensation. In response to the claims for overtime and statutory holiday pay, Everlasting took the position that Ge was a manager under the *Act* and not entitled to overtime and statutory holiday pay.
10. There was a factual issue concerning the hours worked by Ge. In response to a Demand for Employer Records, Everlasting produced an incomplete set of time cards, with no explanation why they were incomplete, and a record of hours for Ge's last six months of employment that were also not complete.
11. The Director found the evidence submitted by Everlasting during the complaint investigation to be "problematic", consisting mostly of memos, inventories and contracts written in Chinese. The Director noted that while that was not illegal and while the parties agreed on the general content of the documents, it was difficult to assess their relevance to the issues, particularly to the issue relating to Ge's status under the *Act*.
12. The Director found the timecards submitted by Ge to be more credible than those submitted by Everlasting. The reasons for that finding are stated in the Determination, and relate to the time cards not being complete for the last six months of Ge's employment, their inconsistency with other evidence provided by Everlasting, their inconsistency with copies of his time cards provided by Ge, the apparent alteration of documents submitted to the Director and everlasting submitting time cards for other employees.
13. On the issue of Ge's status under the *Act*, the Director accepted his evidence of what his job duties were over the evidence of Everlasting. The Director's decision in this regard was, to some extent, driven by a view of the evidence provided by Everlasting generally and by specific reference to deficiencies and inexplicable flaws in some of the evidence provided by Everlasting relating to his job duties.

ARGUMENT AND ANALYSIS

14. 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.*

15. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. In particular, and in the context of this appeal, the burden of showing the Director failed to comply with principles of natural justice in making the Determination is on Everlasting (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).
16. 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). The Tribunal has adopted the definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).
17. I shall first to consider whether everlasting has sought to submit any the new, and additional, evidence in the appeal and, if so, whether it should be accepted and considered by the Tribunal.
18. 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. In addition to 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).
19. No additional evidence was submitted at all when the appeal was filed. There were assertions in the appeal submission that Everlasting had much more evidence to present. Following the reply submissions by Ge and the Director and the delivery of the Section 112(5) record, Everlasting filed a final reply, attaching 5 pages of material. The material comprises what is purported to be a page from the employee handbook, written in Chinese characters with hand-written commentary in English, and four pages containing selections from time cards for periods in late 2004 and early 2005. The first document was undoubtedly available at the time the Determination was made and could have been provided to the Director. Its relevance and probity are not apparent. The four pages of copies from time cards were also available when the Determination was being made. As well, they are documents which were required to be produced under the Demand for Employer Documents issued to Everlasting by the Director on June 12, 2006.
20. No good reason for allowing these documents in this appeal has been established. On the other hand, there is good reason for disallowing these documents. Accordingly, none of the documents submitted are allowed. The appeal will be decided without reference to them.

21. It remains to be decided whether the other grounds of appeal – alleged error of law and failure to comply with principles of natural justice – have been established by Everlasting.

22. The Director characterizes the appeal as an attempt by Everlasting to reargue their case. That is a fair characterization. The appeal does not identify any error of law. The central position advanced for the appeal is natural justice and the basis for that position stated in the first paragraph of the appeal submission:

After we presented our documents and evidence to Amanda Welch more than a year ago, we never heard from Amanda or anyone else from the Employment Standards. A year later, we received the Determination ordering us to pay \$4886.37. In the Determination, it states that there are discrepancies between our documents and the documents presented by Gary Ge, and that Amanda Welch chose to believe Gary Ge's version. She never contacted us or even asked why there are such discrepancies or what exactly happened. We were judged guilty without having the chance to represent ourselves, and that is one of the main reasons for us to file the appeal.

23. The Section 112(5) record provided by the Director does not support the allegation that the Determination was made without providing Everlasting a chance to respond to the complaint. The record indicates Everlasting was aware of the claim being made by Ge and was provided with sufficient particulars of the claim to allow them to file a comprehensive response to it. Everlasting initially had notice of the claim through the "Self-Help Kit" from Ge and the complaint in March and April, 2004. A mediation session was scheduled on the complaint for June 12, 2006. Everlasting declined to participate in mediation, indicating in a communication to the Branch that "we have sufficient proof that we do not owe Mr. Ge a penny". At the end of June 2006, Everlasting submitted its position and evidence to the Director. The evidence comprised approximately 120 pages of material. In the cover letter to that material, Mr. Yang stated, in part:

. . . our company has sufficient evidence to prove that Gary has been lying all along. We have sufficient evidence to prove that Gary is a true General Manager, and his primary responsibilities are in fact managerial.

24. The evidence shows that in this case, the Director met the obligation found in Section 77, which states:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

25. As indicated above, the burden is on Everlasting to show a failure by the Director to comply with principles of natural justice in making the Determination. The only assertion made in that regard is found above and it is not supported on the material. No failure by the Director to comply with principles of natural justice has been shown.

26. As Everlasting has not shown any error in the Determination on the grounds of appeal set out in Section 112, the appeal must be dismissed.

ORDER

27. Pursuant to Section 115 of the *Act*, I order the Determination dated June 15, 2007 be confirmed in the total amount of \$4,886.37, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal