Employment Standards TRIBUNAL

An appeal

- by -

Canada Swan International Travel Ltd.
(the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2003A/6

DATE OF DECISION: March 18, 2003

DECISION

INTRODUCTION

This is an appeal filed by Canada Swan International Travel Ltd. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director's delegate") on December 5th, 2002 (the "Determination").

The Director's delegate rejected the Employer's position that its former employee, Ms. Chi Yun Hsu ("Hsu"), voluntarily quit her employment and, accordingly, awarded her 2 weeks' wages as compensation for length of service payable under section 63 of the *Act*. The total award in favour of Ms. Hsu, including vacation pay and section 88 interest, was $807.56. I should add that the Employer does not challenge the amount of compensation awarded to Ms. Hsu under section 63, only its legal obligation to pay such compensation.

THE APPEAL

The Employer seeks an order from the Tribunal under section 115(1)(a) of the *Act* cancelling the Determination on the grounds that:

- the Director's delegate erred in law [section 112(1)(a)]; and
- the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)].

By way of a letter dated February 25th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

FINDINGS AND ANALYSIS

The only material filed in support of the appeal by the Employer is a 2-page letter from its legal counsel dated January 8th, 2003 and a supporting 1 1/2 page affidavit from the Employer's manager, Ms. Sharon Webber.

Although I do not have any submission from Ms. Hsu, her position is set out in the Director's delegate's submission to the Tribunal dated January 29th, 2003 and in the record (submitted on January 30th) that was before the delegate when she issued the Determination [see section 112(5)].

I shall address each of the two issues raised by the Employer in turn commencing with the "natural justice" issue.

Breach of the rules of natural justice

One of the central issues in this case was whether or not Ms. Hsu was on medical leave during the period from April 5th to August 1st, 2001 (although during this period Ms. Hsu did return to work for a 10-day period in July). The Employer's legal counsel's entire submission on this issue is reproduced below:

> "Procedurally Unfair
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> This evidence regarding Hsu's alleged illness requiring medical leave was never put to Canada Swan. Despite repeated attempts to obtain some evidence that medical leave was granted to Hsu for good reason, the only evidence adduced was a requisition for treatment from a physician in Taiwan. Canada Swan had no opportunity to assess whether Hsu's medical leave, if granted by an employee with requisite authority to do so, was justified in the circumstances."

I have reviewed the record that was before the delegate and it is unequivocally apparent that the delegate clearly identified Ms. Hsu's position for the Employer's benefit, namely, that she was on medical leave during the months of April, May, June and July, 2001. Further, in concluding that Ms. Hsu was on medical leave the delegate relied, in large measure, on the evidence of her supervisor, Ms. Catherine Li. The delegate made this evidence known to the Employer and, surely, the Employer would have been in a position to interview its own employee during the relevant time frame and obtain the same information that was subsequently gleaned by the delegate during her investigation.

Counsel for the Employer asserts, in his submission, "that Hsu voluntarily left its employment on April 5, 2001 and later worked as an independent contractor for Canada Swan clients from July 5, 2001 to July 14, 2001". However, this latter assertion is wholly undermined by its own document, namely, the record of employment that was issued to Ms. Hsu (and signed by Ms. Webber) on October 30th, 2001 in which Ms. Hsu's employment was said to have commenced on March 1st, 1999 and ended on September 30th, 2001. Further, and even more damaging to the Employer's case, the record of employment (and it must be reiterated that this is the Employer's own document) was issued because Ms. Hsu was "dismissed" (code M on the form) rather than because she "quit" (code E).

I might add that an earlier record of employment, issued by the Employer to Ms. Hsu in April 2001 and signed by Ms. Li, indicates that it was issued because Ms. Hsu was unable to work due to "illness or injury" (code D on the form). I consider this document to be further evidence corroborating Ms. Hsu's position that in April 2001 she did not quit her employment but rather was away from work after April 5th, 2001 due to an authorized medical leave.

In sum, I am not persuaded that this ground of appeal is meritorious.

Error in law

Counsel for the Employer submits that the delegate erred by making a "patently unreasonable" finding of fact:

> "Patently Unreasonable Finding of Fact
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> The evidence of Sharon Webber overwhelmingly supports a finding that Hsu was never granted medical leave for her alleged illness. In the alternative, Ms. Webber's evidence shows that any leave granted was approved by Catherine Li, a Canada Swan employee who did not have the authority required to do so. Furthermore, no evidence was adduced to support the finding of [the

> delegate] that Hsu returned to Canada Swan's employment between July 4, 2001 and July 14, 2001 and that she re-commenced her medical leave immediately thereafter."

It should first be noted that a finding of fact can only be characterized as "patently unreasonable" if such a finding is entirely devoid of any factual foundation. Ms. Webber's affidavit does *not* unequivocally suggest that Ms. Hsu was never granted medical leave. Indeed, Ms. Webber says that she was not involved in the leave discussions (either by way of approval or denial). She also concedes that Ms. Li was Ms. Hsu's supervisor. Whether or not Ms. Li had the *actual* authority to authorize a medical leave is not particularly relevant; the key question is whether Ms. Li had the *ostensible* (sometimes termed implied or apparent) authority to authorize Ms. Hsu's medical leave. In my view, Ms. Hsu was entitled to rely on the authority of her supervisor to grant a medical leave. Further, and in any event, Ms. Li's evidence was that, in fact, Ms. Webber's approval was sought and obtained with respect to Ms. Hsu's leave.

Clearly, there was more than sufficient evidence before the delegate upon which she could reasonably conclude that Ms. Hsu was away from work after April 2001 due to an authorized medical leave.

Finally, as noted above, the Employer's own evidence, in the form of the record of employment signed by Ms. Webber and the earlier record of employment signed by Ms. Li, corroborate Ms. Hsu's evidence as to: i) her length of service, ii) that she never formally resigned and then returned to work (with respect to her medical leave), or iii) voluntarily resigned her employment in September 2001.

In light of the foregoing, I am similarly of the view that this ground of appeal is not meritorious.

There is one final issue to be addressed. In his submission, counsel for the Employer submits that a zero dollar penalty ought not to have been assessed. In point of fact, no such penalty was issued. It is not clear to me how or why counsel concluded that a penalty was issued (since the Determination makes no mention of a penalty) but, nevertheless, no such penalty was levied in this case.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I am of the view that neither ground of appeal has been met and, accordingly, I order that the Determination be confirmed as issued in the amount of **$807.56** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal