

An appeal

- by -

Sun Wah Foods Ltd.
("Sun Wah")

- 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: Shafik Bhalloo

FILE No.: 2007A/99

DATE OF DECISION: November 20, 2007

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") brought by Sun Wah Foods Ltd. ("Sun Wah") of a Determination that was issued on July 27, 2007 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Sun Wah had contravened Part 7, Section 58 and Part 8, Section 63 of the Act in respect of the employment of Elsa Heung ("Heung") and ordered Sun Wah to pay Heung an amount of \$885.06, an amount which included compensation for length of service, vacation pay and interest.
2. The Director also imposed an administrative penalty on Sun Wah under Section 29(1) of the Employment Standards Regulation (the "Regulations") in the amount of \$500.00.
3. Sun Wah says that the Director failed to observe the principles of natural justice in making the Determination by accepting Heung's "words with zero supporting evidence".
4. Sun Wah has requested, as a remedy in its appeal, the outright cancellation of the Determination. Sun Wah has also requested an oral hearing of the Appeal but has not provided any explanation of why an oral hearing is necessary. Section 36 of the *Administrative Tribunals Act* and Rule 16 of the Tribunal Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. In my opinion, Sun Wah's Appeal can be properly adjudicated on the written submissions of the parties without resort to an oral hearing. Therefore, this Appeal will be decided based on the written submissions of the parties, the Section 112(5) "Record" and the Reasons for the Determination.

ISSUE

5. While on the Appeal form Sun Wah has indicated that the basis for its appeal was a denial of natural justice on the part of the Director in making the Determination, for the reasons indicated under the heading Analysis herein, I have also considered the error of law ground or issue in this appeal.

FACTS

6. Sun Wah operates a wholesale food business within British Columbia.
7. Heung was employed as a clerk with Sun Wah from January 14, 2004 to February 24, 2006.
8. Sun Wah terminated Heung's employment on February 24, 2006 allegedly for cause.
9. On March 16, 2006, Heung filed a complaint under Section 74 of the Act (the "Complaint") alleging that Sun Wah contravened the Act by failing to pay her compensation for length of service.
10. On June 28, 2006, a delegate of the Director held a hearing into the Complaint and issued a Determination on August 4, 2006 (the "First Determination") which was appealed by Sun Wah and subsequently cancelled by the Tribunal. The matter was referred back to the Director for a new hearing before a new delegate of the Director (the "Delegate").

11. On February 13, 2007, a second hearing of the Complaint was scheduled and subsequently adjourned by the Director at the request of Sun Wah for reasons unidentified in the Section 112(5) Record.
12. On March 6, 2007, the rescheduled hearing was finally held (the "Hearing").
13. Since the First Determination was cancelled, the Delegate holding the subsequent Hearing provided both parties with an opportunity to submit evidence afresh and instructed both parties that they needed to ensure that their respective positions, arguments and evidence were presented at the Hearing in their entirety.
14. Heung attended at the Hearing on her own behalf and Sun Wah was represented by Ms. Corine Suen ("Suen"), the Administrative and Operations Manager of Sun Wah.
15. Sun Wah also produced an employee by the name of Betty Ho ("Ho") as a witness on its behalf at the Hearing.
16. At the Hearing, Suen testified that on February 15, 2006, Heung requested to take February 17 to 24, 2006 off as vacation but Suen told Heung that she could not take February 22 and 24 as vacation as Heung's co-worker, Yvonne, was granted the said days off and Sun Wah could only allow one person off at a time given the very small labour contingent at Sun Wah. As a result, Suen stated that Heung changed her vacation request and opted to take, as vacation, February 20 and 21, which Suen approved.
17. Heung was expected to return to work at Sun Wah on February 22 but did not. Suen testified that at approximately 10:00 a.m. or 11:00 a.m. on February 22, an employee of Sun Wah by the name of Ivy Cai ("Cai") told her that Heung had telephoned her at home the previous evening and informed her that she was unable to come to work on February 22 or 23. Suen asked Cai if she knew why Heung had not telephoned Suen directly and Cai replied that she did not know but that Heung would telephone Suen later that day. Suen states that she then informed the staff at Sun Wah that if Heung telephoned the office they were to let her know immediately. However, Suen states that she did not receive a call from Heung on either February 22 or 23.
18. On February 24, at 5:40 p.m., Suen states that she received a call from Heung but she did not really afford Heung an opportunity to explain her absence although Suen asked Heung why she had not called earlier. Suen stated that during the telephone call she also reminded Heung that she had denied Heung permission to take the additional days off when Heung previously requested them and then terminated Heung's employment as she felt that it was too late for Heung to explain her absence at that point. In Suen's view, Heung was insubordinate as she failed to obey Sun Wah's rules and intentionally planned to be away on the days in question despite having been denied permission to take the said days off.
19. Sun Wah's witness Ho, in her testimony at the Hearing, stated that she received a telephone call from Heung at Sun Wah's office before noon on February 24, 2006 when Suen was busy on another telephone call. Ho states that Heung did not leave a message for Suen or a contact telephone number where she could be reached. Ho simply advised Heung to call back.
20. At the Hearing, Sun Wah submitted documentary evidence in the form of letters from Ho and two other employees, Bonnie Cheung ("Cheung") and Cai. The letter from Ho essentially reiterated her oral testimony at the Hearing and did not add anything further. The letter from Cheung stated that Cai had indicated to her that Heung had telephoned Cai on February 21 and advised her that she would be taking

February 22 off. Cheung further stated that Heung was scheduled to work at Sun Wah's office on February 23 and 24 but did not attend at work on the said days. The letter from Cai stated that she had received a call from Heung on February 21, 2006 wherein Heung had requested that she pass on the message (presumably to Suen) that she would be taking February 22 and 23 off. Cai also indicated in her letter that Heung had advised her that she was out of town.

21. With respect to Sun Wah's vacation practice and policy, Suen stated that if an employee wanted a "long vacation", Sun Wah required the employee to inform Suen four weeks in advance by filling out a Vacation Leave Request form. If Suen approved the Vacation Leave Request, then the form was passed on to Sun Wah's accounting department. If the vacation request was for one week only then Sun Wah required two weeks advance notice, according to Suen. If, however, an employee only required one day's vacation, then 24 hours advance notice was sufficient. Whatever the length of vacation requested by an employee, Suen indicated that only one staff member could be off work at any given time.
22. Suen testified at the Hearing that Heung had worked for Sun Wah for two years and was aware of Sun Wah's vacation leave practice and policy. Suen further stated that in 2005, when Heung took one week's vacation, she followed the practice and policy governing vacations at Sun Wah by giving three weeks advance notice. However, when questioned by the Delegate, Suen admitted that Sun Wah did have a practice of granting leave approvals with shorter notice from employees but was quick to add that in the case at hand, Heung only gave two days advance notice for her request and she was specifically denied two of the days she requested, namely, February 22 and 24.
23. With respect to the Delegate's questions regarding Suen's attempts to contact Heung when the latter was away, Suen stated that she telephoned Heung at home once on the morning of February 23 but no one answered the telephone and she hung up after a few rings before an answering machine was or could be activated.
24. With respect to Heung's past performance, Suen admitted that there were no past performance concerns or issues with Heung.
25. With respect to the impact of Heung's absence on Sun Wah, Suen indicated that if Heung was away from work, another employee named Yvonne would be responsible for covering Heung's duties and responsibilities which involved routine tasks such as answering the telephone and dealing with out of town shipments to customers. However, with both Heung and Yvonne off work, Sun Wah could either contact the customers on as needed basis to postpone delivery of shipments or seek assistance from the remaining office staff, namely, Cheung, Cai or Ivy, as they were all capable of covering for each other. However, in the case at hand, Suen indicated that on the days Heung was absent she telephoned Sun Wah's customers and explained to them that there was a labour shortage and therefore it may be necessary to postpone their shipments by one day.
26. When questioned by the Delegate whether Sun Wah suffered a financial loss or received any customer complaints as a result of Heung's absence, Suen indicated that there was no financial loss or customer complaints.
27. With respect to Sun Wah's policy or practice governing sick employees, Suen testified that any employee who needs to phone in sick to work was required to telephone her or Cheung. Upon their return to work, the sick employee was required to fill out a sick leave form. Sick leave was unpaid time off, according to Suen.

28. In support of her Complaint, Heung testified at the Hearing that on February 21 she telephoned Cai and told her that she needed two more days off for family reasons as she anticipated she would not be able to make it back to work on time.
29. On the morning of February 24, Heung stated that she telephoned Sun Wah's office and spoke to a new employee by the name of Daisy who no longer works for Sun Wah. Heung indicates that because Daisy was a new employee, she did not feel comfortable discussing why she was absent with her and therefore did not leave any message with Daisy. However, Heung says that she again telephoned Sun Wah at noon on the same day and this time she spoke with Ho who advised her that Suen was away from the telephone and requested that Heung call back later that day. Subsequently, at about 5:00 p.m. on the same day, Heung states that she again telephoned Sun Wah and this time she was able to get Suen on the phone but the latter did not allow her to explain her absence and simply told her that she need not come back to work anymore.
30. With respect to the Delegate's questioning of Heung regarding her understanding of Sun Wah's policy and practice governing vacations, Heung stated that she was never informed of Sun Wah's policy governing vacation and also did not know what her entitlement for vacation was. She indicated that previously when she planned a vacation of one week or more in length, she simply gave Sun Wah as much advance notice as she could.
31. Heung also testified that in her experience, when her co-workers at Sun Wah had telephoned the office without advance notice in order to request a day or two off, Sun Wah granted the requests. However, in her case, the circumstances were "urgent and personal" and therefore it was not possible for her to give a lot of advance notice.
32. With respect to the Delegate's questioning of Heung regarding her job responsibilities, Heung indicated that she worked as a clerk with Sun Wah and did not belong to any specialized department. She had five co-workers and one accounting co-worker. Her responsibilities at Sun Wah included answering the telephone, filing, data entry, accounting and scheduling and preparing shipments.
33. When asked by the Delegate what her reasons were for being unable to return to work on February 22, Heung indicated that her father-in-law had been hospitalized and as a result she was spending a considerable amount of time at the hospital with him. When she was not at the hospital, Heung indicated that she was involved with assisting the rest of the family members to cope with her father-in-law's hospitalization and it was something that was personal to her and she needed to deal with.
34. Heung also indicated that when previously she agreed with Suen to only take two days of vacation, she thought that her father-in-law's health would maybe improve or settle but in the evening on February 21, she first realized that she would not be able to return to work on February 22 as she was needed at the hospital. Prior to that point, Heung stated that she felt that she would be able to return to work on February 22. However, Heung states that her father-in-law's medical situation changed for the worse and therefore she was prevented from returning to work.
35. With respect to her telephone conference with Cai on February 21, Heung stated that she indicated to Cai that she would not be able to make it to work on February 22 and 23 "because of something in the family" and asked Cai to apprise Suen of this. According to Heung, she was not out of town on the days in question and she never told anyone that she was out of town. In Heung's view, Cai wrongly assumed that she was out of town and may have told Suen that.

36. Heung also testified that on February 24, when she telephoned work in the morning, Daisy, the new employee, informed her that Suen was unavailable. Heung indicates that she again telephoned work at noon on the same day but Suen was unavailable. Heung also indicates that at this point, she was not feeling very well because of the nights she had stayed up at the hospital. When Heung, later on the same day, finally spoke with Suen, Heung states that it was not much of a conversation as Suen did not give her a chance to explain her absence as she almost immediately told her that she was not needed back at work.
37. In the Reasons for the Determination, the Director noted that Sun Wah asked the Director to find Heung's actions to constitute a fundamental breach of the employment relationship and warranting her immediate termination for cause. The Director, before making the Determination, canvassed the law governing termination for absenteeism and noted that while the act of not reporting to work as scheduled by the employer may, under certain circumstances, result in a finding of just cause for termination as absenteeism is a breach of the employee's duty to attend work; before such a finding can be made the factors that mitigate against such a finding of just cause needed to be considered.
38. The Director subsequently reviewed all the evidence in light of the law governing employee absenteeism and concluded that:
- (a) Sun Wah did not have a clearly established policy or procedure governing reporting of absences by employees and therefore, Sun Wah had not shown that Heung was required to or that she knew she was expected to phone in to work by any specific time and speak directly with Suen (notwithstanding that Heung made several attempts to talk to Suen after the fact on February 24);
 - (b) Heung was an individual who valued keeping her personal family matters private and failed to recognize how her decision not to disclose to her employer, and particularly to Suen directly, the reason for her absence would jeopardize her employment;
 - (c) while there may have been an error of judgment on Heung's part with respect to how she chose to communicate with Sun Wah around her need for additional time off from work and while it may have been prudent for Heung to follow-up as soon as possible with Suen directly the reasons for her absence, Heung believed that as a result of her communications with Cai on February 21, she would not be expected at work until February 24;
 - (d) Heung's testimony as to the reasons for her absence was credible and reasonable;
 - (e) Heung's evidence was preferable over Sun Wah's witnesses in the case of any inconsistencies or conflicts between them; and
 - (f) mitigating Heung's case included her past blemish-free employment record and no evidence of any financial or other loss on the part of Sun Wah due to Heung's absence except for a general increase in the work load and a need to reschedule some deliveries to customers.
39. In the circumstances, the Director concluded that there was not a sufficient basis to conclude that Heung's actions constituted an intentional, wilful or deliberate breach of her duty to attend work. The Director further concluded that even if Heung's actions amounted to a disobedience or misconduct, there was not a sufficient evidentiary basis to conclude that the relationship was so damaged that it could not be carried on.

ARGUMENT

Sun Wah's Submissions

40. Sun Wah, through Suen, asserts that the determinative question in the Determination was whether or not Heung's reason for being away for three days was valid. Sun Wah argues that the Delegate failed to ask Heung any questions or request any supporting documents from her to confirm that she was indeed in an emergency situation with her father-in-law and therefore could not attend at work on February 22 to 24 inclusive. Sun Wah also challenges the manner in which Heung opted to advise Sun Wah of her absence, that is, by telephoning a colleague of hers at work and simply advising that she was unable to attend work because of a personal reason without more. It is Sun Wah's contention that Determination cannot be supported simply on the basis of Heung's "zero supporting evidence" that her father was in the hospital.
41. In response to Heung's assertion at the Hearing that she observed her coworkers in the past received approvals to take a day or two off without any advance notice, Sun Wah states that in those instances the employees provided "a decent reason". Sun Wah further adds that, in the past, when employees have had emergencies and wanted to absent themselves from work, they called the company "with a good and decent reason", and Sun Wah would consider the employees' requests. Sun Wah also points out that in 2004 and 2005, Heung requested to leave early once and on another occasion obtained a day off. In these instances, Sun Wah states that Heung volunteered the reasons for her request, namely, a family emergency or an emergency relating to her sister-in-law and she was granted her requests. Sun Wah argues that if Heung had similarly requested time off and volunteered the reason for her request in the most recent instance, Sun Wah would have also granted her request. However, Sun Wah argues that in the most recent instance Heung was out of town.
42. Finally, Sun Wah expresses its displeasure at the Director for preferring Heung's explanation to Sun Wah's.

The Director's Submissions

43. The Director submits that Sun Wah's submissions do not contain any supporting evidence that the Director breached the principles of natural justice.
44. The Director also, out of an abundance of caution, addresses the balance of the available grounds of appeal under Section 112 of the Act. In particular, the Director submits that there does not appear to be any new evidence in Sun Wah's appeal submissions nor anything that would satisfy the four-part test for admitting fresh evidence on appeal set out in *Bruce Davies and Others, Directors or Officers of Merilus Technologies Inc.*, B.C. E.S.T. #D171/03. The Director also asserts that Sun Wah has not demonstrated an error of law on the part of the Director. In the Director's view, Sun Wah is simply challenging the findings of fact contained in the Determination and attempting to have the Complaint re-examined on its merits. Accordingly, the Director argues that the Tribunal should reject Sun Wah's appeal.

ANALYSIS

45. In an appeal of a Determination under the Act, the burden of proof is on the appellant to persuade the Tribunal that the Director committed some reviewable error in making the Determination and that the Tribunal should intervene to rectify that error. In the case at hand, Sun Wah founds its appeal on Section 112(1)(b) of the Act, namely, that the Director failed to observe the principles of natural justice in making the Determination. However, in my view, Sun Wah has not established any basis to support the said ground of appeal. It is abundantly clear to me on the written submissions of the parties, the Section 112(5) “Record” and the Reasons for the Determination that the Delegate afforded Sun Wah a full and fair opportunity to respond to the allegations made in Heung’s Complaint and Sun Wah submitted its position fully to the Delegate at the Hearing. Moreover, it is also abundantly clear to me that the Delegate also meticulously assessed and weighed the evidence presented at the Hearing and Determined what evidence was not only relevant but also reliable in making the Determination. In the circumstances, if this appeal were exclusively limited to the natural justice ground of appeal advanced by Sun Wah, then the appeal would be dismissed at this point. Having said that, it is important to note that the Tribunal has, in numerous decisions, opined that the Tribunal must not mechanically adjudicate an appeal based solely on the particular “box” that an appellant has simply checked off. It is important for the Tribunal to attempt to discern the true basis for the appellant’s challenge to the Determination, particularly since most appellants, whether for financial or other reasons, are unrepresented by legal counsel and may not fully appreciate the full scope of the grounds of appeal delineated in Section 112 of the Act and therefore may not be able to properly identify or check-off the proper ground or grounds of appeal in their Appeal forms.
46. In the case at hand, Sun Wah is unrepresented by legal counsel and while Sun Wah has not grounded its appeal in Section 112(1)(a) of the Act, the appeal submissions of Sun Wah alleging failure on the part of the Director to ask Heung any questions or request from Heung any supporting documents to confirm or verify her explanation for her absence combined with the allegation of Sun Wah that the Determination cannot stand solely on the basis of Heung’s “words with zero supporting evidence” appears to me to suggest that Sun Wah may also be appealing on the ground of error of law on the part of the Director in making the Determination. An error of law may arise in circumstances where there is no evidence to support a finding of fact or where a determination is reached on a view of the facts that could not reasonably be entertained. In my view, however, Sun Wah has not discharged the onus placed on it to show either that there was no evidence to support the findings of fact made by the Director or that the Director took a view of the facts that could not reasonably be entertained based on the evidence that was before the Director. To the contrary, I find that the Director carefully canvassed the evidence of Heung and the witnesses of Sun Wah and preferred the former’s evidence over the latter’s where there was a conflict. The fact that there was not any documentary information adduced by Heung to explain her absence from work on the dates in question does not equate to “no evidence”. In my view, the Director carefully reviewed Heung’s explanation for her absence and found Heung credible and her explanation believable. It is not for this Tribunal on appeal to second guess the Director’s finding of credibility of Heung when the Director’s Delegate had the benefit of hearing *viva voce* evidence of Heung and Sun Wah’s witnesses at the Hearing and assess credibility.
47. Finally, I do not find Sun Wah’s appeal submissions to contain any new evidence or any new evidence that would be acceptable under the test for admitting new evidence in appeals as delineated in *Triple S Transmission Inc. (c.o.b.) Superior Transimissions*, [2003] B.C.E.S.T.D. No. 141 (QL). In my view Sun Wah is, to a large extent, reiterating the arguments it advanced before the Delegate at the Hearing and

attempting to re-argue its case with a view to persuading the Tribunal to make a different finding of fact and reach a different conclusion on the question of Heung's dismissal for cause than the one reached by the Director. The Tribunal has stated on numerous occasions that an appeal to the Tribunal is not a reinvestigation of the complaint, nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process.

ORDER

48. Pursuant to Section 115 of the Act, I order that the Determination be confirmed as issued, together with whatever additional interest that may have accrued, pursuant to Section 88 of the Act since the issuance of the Determination.

Shafik Bhalloo
Member
Employment Standards Tribunal