

An appeal

- by -

Medistar Biotech Inc.
("Medistar")

- 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: Ian Lawson

FILE No.: 2005A/91

DATE OF DECISION: August 11, 2005

DECISION

SUBMISSIONS

James R. Elliott

on behalf of Medistar Biotech Inc.

Glen Smale

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Medistar Biotech Inc. (“Medistar”) pursuant to section 112 of the *Act*. The appeal is from Determination ER#125-730 issued by Glen Smale, a delegate of the Director of Employment Standards on April 13, 2005. The Determination required Medistar to pay regular wages, overtime wages, annual vacation pay, compensation for length of service and interest to five of its former employees in the total amount of \$30,776.82. Administrative penalties of \$1,000.00 were also imposed on the company. Medistar filed its appeal on May 24, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

2. Medistar is a research and development company focusing on the development and production of immunological and biochemical diagnostic tests, with offices in Vancouver. Medistar employed Bo Lei as a Senior Scientist/Manager on August 26, 2003, Fang Peng as a Production Team Member on August 6, 2003, Qing Sun as a Production Team Leader on April 17, 2003, Bing Yan as a Laboratory Technician on September 16, 2003, and Ximao Zhang as a Laboratory Technician on May 9, 2003.
3. All five employees were given layoff notices on December 18, 2003 on account of Medistar experiencing a significant drop in sales. The layoff became effective on December 19, 2003, although some employees received a record of employment indicating the layoff took effect on December 31, 2003. All employees were recalled to work in January and February, 2004. They were told by company director (and technical director) Dr. Ying Liang Tian (“Tian”) that they were returning to the same positions they held prior to the layoff. It appears, however, the employees were not paid after working approximately a month. At a meeting with Tian and two other officers of the company, the employees were told they would be compensated for unpaid wages by being given stock based on their positions and salaries. It seems the employees were satisfied that their wages for January, 2004 were paid by way of a transfer of company shares to them.
4. Payment of wages was sporadic over the next two months and on March 31, 2004, all employees were given layoff notices, to be effective the next day. They were told Medistar hoped the layoff would be temporary and were given four separate payments of \$200.00 each. The employees filed complaints with the Director on April 20, 2004, alleging they were owed regular and overtime wages arising in February and March, 2004, and vacation pay.
5. In the course of the delegate’s investigation of these complaints, Medistar argued the complainants were independent contractors and not employees, and were “vendors” of the specialized products they made. On May 28, 2004, the Canada Customs and Revenue Agency issued a decision finding one of the

complainants to have been an employee under a contract of service from February 1, 2003 (but this likely should have been "2004") to March 31, 2004. The delegate reached the same conclusion respecting all complainants, finding that Medistar directed them in their work, called them "employees", provided the facilities and equipment which they used exclusively, and gave them no chance of profit or risk of loss in the endeavour. The delegate further found the complainants were not aware of any special project they were hired to do, and had no involvement in selling anything – they performed the same work they had performed prior to the layoff. The delegate therefore found each of the complainants was owed wages and annual vacation pay by Medistar.

6. On August 23, 2004, the delegate sent a Demand for Employer Records to Medistar. Shortly thereafter, Medistar provided copies of the Record of Employment for each complainant and a copy of its layoff notices, but no other records apart from proof that each complainant had been paid \$800.00 after the final layoff. Medistar advised it had no other records relating to the complainants. As the company's offices had relocated and new directors and officers had been appointed, the delegate sent a copy of the Demand to the company again on January 10, 2005. Medistar again replied it had no further records. The delegate accordingly found Medistar failed to comply with the Demand by failing to produce its employees' wage rates, daily hours of work, dates of statutory holidays taken and amounts paid for annual vacation pay.

SUBMISSIONS

7. Medistar's only submission in support of its appeal consists of a two-page letter filed with its notice of appeal. A recurring theme in its submission is that Medistar accepts the complainants were employees up to the December, 2003 layoff, but says it had nothing to do with recalling the employees in January 2004 or employing them in any way thereafter. Medistar appears to submit that technical director Tian was responsible for bringing the complainants back on its premises, and that Medistar itself did not employ them. The submission is not consistent on this, however, and I reproduce the following paragraph *verbatim*:

Dr. Tian was given approval by Medistar to contract work for his project. Dr. Tian was to secure funds through sales of the product and was to secure the services of contract workers to share in the risk. Additionally the contractors would be given the opportunity of direct selling of finished product in order to secure payment. Medistar would be compensated for use of their facilities, equipment, materials and overhead and would bare no other risk or expense. The revenues generated from sales would be 1) pro-rated amongst the contracted workers 2) used to pay Medistar for incurred expenses. The formulations and processes that the contract workers used were not the property of Medistar and were developed by Tian and the contractors collectively. Dr. Tian negotiated the terms of the contracted agreement with the complainants and again no terms were evidenced to Medistar. The work that Dr. Tian directed and the project that the complainants worked on were sub-contracted to this group. The products, processes and formulations were and never have been represented or included in the Medistar Product portfolio.

8. With regard to the \$800.00 paid to each complainant, Medistar's submission states:

The Notice dated April 1, 2004 was issued as an announcement and general posting only to all workers. Since Dr. Tian was not present this notice was issued to contracted workers as well as notification of termination of contracted work. Payments issued as of March 31, 2004 are in accordance with Employment Standards Act in regards to "a temporary layoff becomes a termination when a layoff exceeds 13 weeks". Payments were issued in lieu of severance from

Layoff Notifications issued in December and No Recall being issued up to and including March 31, 2004.

9. The following submission was made in a section headed “Summary of Findings by Glen Smale”:

Mr. Smale has used “giving the Act a broad and general interpretation” and “the balance of probabilities therefore support the employees” in his findings and analysis. Medistar as the Employer of record has supplied the Ministry and Mr. Smale with facts and written records as evidence, we have not been given the same accord as the complainants who have not presented any other factual information. All of the information presented by the complainants has been evidenced as “quotations” and can not be substantiated or corroborated by any independent body. The Employment Standards Tribunal is requested to evidence the factual information that was presented to Mr. Smale and represent an unbiased opinion that is not subject to broad interpretations and the analysis of probabilities for both parties.

10. Medistar’s notice of appeal states only one ground of appeal, that the Director failed to observe the principles of natural justice in making the Determination, which is elucidated with the statement: “The Director has shown a bias support towards the claimants and poor judgement.” The notice also contains the statement that Medistar “was not afforded the opportunity to present oral arguments, justifications or support.”

ISSUE

11. Whether the appellant has established any *prima facie* error or failure to observe the principles of natural justice in the making of the Determination.

ANALYSIS

12. As in any appeal, the appellant bears the burden of demonstrating error or unfairness in the Determination – appeals before this Tribunal are not re-hearings of the matters before the Director (*Re World Project Management Inc.*, BCEST #D134/97). To re-hear every complaint would be contrary to section 2(d) of the *Act*, which states one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions. As a result, appellants before this Tribunal bear the “risk of non-persuasion” and must first demonstrate there was some error or unfairness in the Determination on at least a *prima facie* or threshold basis in order to move the Tribunal to decide whether to exercise its authority under section 115 of the *Act* to vary or cancel the Determination. If an appellant fails to persuade the Tribunal at the threshold level that an error or unfairness has occurred, the Tribunal will not proceed to review the Determination under section 115.
13. I find Medistar has failed to demonstrate any *prima facie* error or unfairness in this Determination. It claims the delegate was biased and it was not afforded an opportunity to present oral “arguments, justifications or support”, but it has not identified anything in the proceedings before the delegate, or in the Determination itself, that might support that contention. Medistar claims the delegate used “poor judgment,” yet its submission acknowledges the complainants performed work on its premises under the direction of its employee and technical director Tian, and Medistar has not presented any evidence or argument that might call into question the delegate’s conclusion these complainants were its employees and not independent contractors under Tian.

14. Medistar's contention that Tian somehow brought the complainants onto its premises without its knowledge or involvement is refuted by its own submission, in which it approved Tian's enterprise, provided its facilities and equipment, and knew all of these former employees were then performing the same work they had done previously. I note as well that Dr. Tian and two other Medistar directors apologized to the complainants for the December layoff, assured them they would be compensated, and arranged for a transfer of shares to them.
15. It is my impression Medistar washed its hands of whatever scientific experiment Tian had wished to pursue in its laboratory, and now seeks to avoid any responsibility for the failed endeavour. As part of this effort, Medistar attempts to re-write history and suggests the complainants returned to work under a completely new relationship with Medistar. The delegate accepted the complainants' uniform evidence that they were not aware of any special project, that they were then to be independent contractors engaged in the sale of their product, and that they returned to exactly the same positions and duties they had in 2003. I see no indication that in accepting this evidence, the delegate was biased or failed to allow Medistar an opportunity to be heard (whether orally or otherwise). Medistar has certainly failed to satisfy me on even a *prima facie* basis that the delegate made any error in finding it was the employer of the complainants and that wages are now owing to them.

ORDER

16. Pursuant to section 115 of the *Act*, I dismiss the appeal and confirm the Determination, together with interest pursuant to section 88.

Ian Lawson
Member
Employment Standards Tribunal