



An appeal

- by -

Greenwood Product Distribution (Canada) Ltd.
("Greenwood Canada")

- 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 Ann Hart

FILE No.: 2005A/135

DATE OF DECISION: October 12, 2005

DECISION

SUBMISSIONS

Eric Chuang and Allen Wu on behalf of Greenwood Product Distribution (Canada) Ltd.
Ian Mac Neill on behalf of the Director

OVERVIEW

1. This is an appeal filed by Greenwood Product Distribution (Canada) Ltd. (“Greenwood Canada”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on July 20, 2005 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. According to the Determination, Guang Sheng Wan had responded to an advertisement for work in the construction industry placed by Greenwood Product Distribution (Canada) Ltd. in a Chinese newspaper. Mr. Wan had been interviewed and hired by Mr. Allen Wu, and subsequently did construction work from July 26, 2004 to September 3, 2004.
3. In the Determination, the delegate for the Director found that Greenwood Canada had contravened the *Employment Standards Act* and ordered that Greenwood Canada pay to Guang Sheng Wan the sum of \$1115.00 for wages under section 18 of the *Act*, \$153.90 for annual vacation pay under section 58(3) of the *Act*, \$879.50 for overtime under section 40 of the *Act*, \$42.00 for a business cost passed on to the employee in the use of his vehicle for company business, and \$79.82 for accrued interest pursuant to section 88 of the *Act*. The delegate for the Director imposed penalties of \$500.00 for each of the four contraventions of the *Act* pursuant to section 29(1) of the *Employment Standards Regulation*.
4. The appellants request that the Determination be cancelled on the basis that evidence had become available which was not available at the time the Determination was made. Greenwood Canada seeks to provide evidence in support of its assertion that Guang Sheng Wan was not employed by Greenwood Product Distribution (Canada) Ltd.
5. The Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

6. The issue in this case is whether the appellants are entitled to introduce evidence in this appeal on the basis that it was not available at the time the Determination was made.

THE INVESTIGATION AND THE HEARING BEFORE THE DELEGATE

7. A hearing was conducted by the delegate for the Director on May 5, 2005. No one appeared for Greenwood Product Distribution (Canada) Ltd. The delegate recorded in the Determination that he had contacted the offices of Greenwood Product Distribution (Canada) Ltd. at the time appointed for the hearing, but Mr. Allen Wu was not available. The delegate for the Director indicated that the gentleman

who had answered the phone had stated that he would ensure that Mr. Wu received the message informing him of the hearing, and advising that the hearing would not begin until 10:00 a.m. to give Mr. Wu the opportunity to attend.

8. The delegate for the Director also noted in the Determination that a Demand for Employer Records was issued to Greenwood Canada requiring that it produce pay roll and time records in relation to Mr. Wan's employment by April 20, 2005. According to the Determination, Greenwood Canada did not provide the requested records.

SUBMISSIONS

Appellants' Submissions

9. On the Appeal Form, Greenwood Canada alleged that the complaint had been filed against the wrong employer. Mr. Wan worked for Allen Wu, and not Greenwood Product Distribution (Canada) Ltd.
10. In a letter written to the Tribunal dated July 17, 2005, Mr. Chuang maintained that Mr. Wan was employed by Allen Wu. Mr. Chuang then wrote in a letter to the Tribunal dated July 27, 2005 in part as follows:

Mr. WAN, Guang-Sheng (Steven) was not working for Greenwood Product. Mr. WAN was employed by Greenwood International (an individual and separate company without any connection to Greenwood Product) to work for a renovation project in West Vancouver.
11. In another letter dated August 25, 2005, Mr. Wu wrote to the Tribunal that Mr. Wan was a "subcontractor for and Greenwood International" and was "neither an employee of Greenwood International nor Greenwood Product".
12. The appellants noted that mediator Brenda Sillito had been advised of the concern regarding the name of the employer.
13. According to the Appeal form, the appellants sought to provide the following documents as new evidence: (a) a document entitled Construction Agreement dated July 2, 2004; (b) a letter dated June 29, 2005; and (c) a letter dated July 4, 2005 to a delegate for the Director.
14. With the final submissions the appellants submitted a document entitled Payment Agreement dated August 3, 2005. Mr. Wu indicated in his letter dated August 25, 2005 that he was a director of two separate companies: Greenwood Product Distribution (Canada) Ltd. and Greenwood International Ltd. ("Greenwood International"). That letter further indicated that Mr. Wan had not submitted his invoice for payment by Allen Wu before Mr. Wu had to leave for China for private business. The payment from Mr. Wu to Mr. Wan had therefore been delayed.

Director's Submissions

15. The Director's delegate submitted that the Construction Agreement was evidence which was available to Greenwood Canada at the time the Determination was made. It was simply not provided. The delegate

for the Director cited the decision of the Tribunal in *Merilus Technologies*, and submitted that the appellants had not satisfied the test for the admission of new evidence which was set out in that case.

16. The delegate for the Director pointed out that the matter of the name of the employer had never been raised in connection with the adjudication. Greenwood Canada had indicated that mediator Brenda Sillito had been told about the concern regarding the name of the employer. The delegate noted that information which is provided to a mediator is not available to the adjudicator.
17. Greenwood Canada had also written in the appeal that Mr. Wan was working only for Allen Wu. The delegate noted that Allen Wu was the person who had interviewed and hired Mr. Wan; and he was also a director of Greenwood Products and Greenwood International. The Delegate further wrote as follows:

It should be noted that this Construction Agreement relates only to the renovation of an address at 11591 Bridgeport Rd., Richmond B.C. Mr. Wan's evidence indicates that he worked 33 days for Greenwood Products. Only 3 of those days, August 5, 6, & 7 were worked at the site covered by this Agreement. The other 30 days were worked at the Isleview Rd site. I believe this raises questions about the credibility of an individual or company who would present this document in an attempt to claim there was a different employer and overturn the entire Determination.

In light of the times and dates covered by Mr. Wan's complaint, this Agreement, on its own, or together with the other evidence presented at the hearing, lacks sufficient credibility to materially effect the outcome of the Hearing.

ANALYSIS

18. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

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 being made.*

19. The burden of proof is on the appellants to establish that the Determination should be cancelled on the basis that there is new evidence which was not available at the time the Determination was made.

20. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BCEST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered on appeal. 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.

21. The appellants provided no explanation as to why the Construction Agreement dated July 2, 2004 was not presented to the delegate for the Director during the investigation process. The date on the document indicates that it was in existence well before the Determination was made. I am not satisfied that the Construction Agreement was not available at the time the Determination was issued.
22. The appellants have also provided evidence in connection with the appeal in the form of assertions from Allen Wu and Eric Chuang. This evidence could have been presented to the delegate for the Director if Mr. Wu and Mr. Chuang had attended at the hearing to testify.
23. Information which may be shared by the parties in the mediation session is not available to the delegate for the Director in making the Determination unless the parties provide it to the delegate. No evidence was submitted to the delegate for the Director by the appellants during the investigation, and no one appeared at the hearing to represent Greenwood Product Distribution (Canada) Ltd.. As noted by the delegate, the appellants also failed to comply with the Demand for Employer records.
24. New evidence is not new merely because a party failed to attend the complaint hearing (*Re Save Energy Walls Ltd.* [2004] BCEST #D203/04). The Tribunal will not permit the appeal procedure to be used to make the case that the employer should have put forward to the delegate during the investigation.
25. On appeal, a party is not permitted to rely on evidence which was available during the investigation stage of the process, but was not submitted to the delegate for the Director (*Re Senior Rana's Cantina Ltd.* [2005] BCEST #D017/05). The more evident it is to the Tribunal that there has been a refusal by a party to participate in an investigation, the more strictly this principle will be applied (*Tri-West Tractor Ltd.*, BC EST #D268/96; *Kaiser Stables Ltd.*, BC EST #D58/97; and *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98).
26. The Payment Agreement dated August 3, 2005 which was submitted by the appellants was signed after the Determination was issued. I cannot find that this post-Determination document constitutes “new evidence” as defined by the Tribunal.
27. Greenwood Canada has not established that any of the evidence it has submitted with its appeal was “not available” at the time the Determination was being made, or that the evidence has high potential probative value, and could have lead the Director to a different conclusion concerning the assertion of Greenwood Product Distribution (Canada) Ltd. that Mr. Wan was not employed by Greenwood Product Distribution (Canada) Ltd. The appeal must therefore be dismissed.

ORDER

28. Pursuant to Section 115 of the *Act*, the Determination dated July 20, 2005 is confirmed with interest pursuant to section 88.

Carol Ann Hart
Member
Employment Standards Tribunal