

An appeal

- by -

Pui King Cheng

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/163

DATE OF DECISION: November 3, 2004

DECISION

SUBMISSIONS

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| P. Cheng | on her own behalf |
| T. Robertson | on behalf of the Director of Employment Standards |

OVERVIEW

This is an appeal by Pui King Cheng, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 4, 2004.

On April 19, 2004, Ms. Cheng filed a complaint with the Director alleging that Wei Ying Luo ("Luo") and Yang Dong Sheng ("Sheng") failed to pay her wages and compensation for length of service. Following an investigation, the Director's delegate determined that Luo and Sheng had not contravened the Act, and that Ms. Cheng was not owed any additional wages.

Ms. Cheng alleges that the delegate failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made.

Although the appellant sought an oral hearing, I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUES

1. Did the delegate fail to observe the principles of natural justice?
2. Has new and relevant evidence become available that would have led the Director to a different conclusion on the material issue?

FACTS AND ARGUMENT

Luo and Sheng employed Ms. Cheng as a domestic in October, 2003. Ms. Cheng's original complaint stated that she had not received any pay for the period October 2 to 31, 2003. Ms. Cheng also raised a number of other issues that did not fall under the jurisdiction of the Act.

In a subsequent in-person conversation with a Cantonese speaking delegate, Ms. Cheng indicated that she worked from October 10 to October 31, 2004, and that she was to be paid \$1,400 per month. She also acknowledged that she had received \$1,400 cash, and made additional allegations about personal matters between herself and the employer.

Luo acknowledged that Ms. Cheng worked for her in October, but did not recall the exact dates. Luo said that she paid Ms. Cheng two \$700 cash payments, and that because the relationship had not worked out, Ms. Cheng wanted more money.

The delegate found that Ms. Cheng worked from October 10 to 31, and that she had been paid wages of \$1,400 in cash. She determined that, since Ms. Cheng had not worked the entire month, her pay exceeded the amount she earned and that Ms. Cheng was more than compensated for any accrued vacation pay.

The delegate found that because Ms. Cheng had not completed three months employment, she was not entitled to compensation for length of service under section 63 of the Act.

Although Ms. Cheng does not clearly set out the basis for her appeal, it appears that she disputes the delegate's findings that she worked from October 10 to October 31. On her appeal form she says that she worked from October 3 to October 31, 2004.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

Failure to observe principles of natural justice

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent and impartial decision maker. In this case, Ms. Cheng does not say that she was not given an opportunity to be heard. She writes on her appeal form that she wants "her file sent back to Vancouver where I can get someone to help for my English barriers".

I find no evidence that Ms. Cheng was not given a fair hearing. In her initial complaint, Ms. Cheng claimed that she worked from October 2 to October 31, and that her employer did not pay her salary. That form was completed in English. I note that, in the "Problem Description Form" portion of the complaint, Ms. Cheng overwrote the days she worked, and appears to have initially indicated that she worked from October 8, 2003 to October 31. In the documents supporting the complaint, Ms. Cheng indicated that she worked anywhere from 26 days to 29 days. She also claimed that she was owed wages of \$2,300. In a second, in-person interview with a Cantonese delegate, Ms. Cheng indicated that she worked from October 10 to October 31, and that she was paid all wages due. I am unable to conclude that the delegate denied Ms. Cheng the opportunity to present her case, or to respond to Luo and Sheng's response. The fact is that the delegate had conflicting evidence as to the days Ms. Cheng worked and relied on the dates provided to the Cantonese speaking delegate. However, even if she had not, the fact is that Ms. Cheng did not work the entire month of

October, and the wages paid for the entire month would have compensated Ms. Cheng for vacation pay in any event.

New Evidence

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. 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.

Ms. Cheng does not say what the new evidence is or why it could not have been provided during the investigation. While she appears to disagree with the delegate's determination of the dates she worked, there is no evidence that there is either new or additional information to put forward.

Given that Ms. Cheng provides no information on what the new evidence is, or how it might have led the delegate to a different conclusion, I find no basis for this ground of appeal.

Therefore, the appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated August 4, 2004 be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal