

An appeal

- by -

H.M. Tsang Co., Ltd. operating as Tsang & Company
("Tsang")

- 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: Carol L. Roberts

FILE No.: 2003A/160

DATE OF DECISION: July 29, 2003

DECISION

OVERVIEW

This is an appeal by H. M. Tsang Co., Ltd. operating as Tsang & Company (Tsang) of a Determination of a delegate of the Director of Employment Standards issued May 2, 2003. The delegate concluded that Tsang had contravened the Employment Standards Act (Act) in failing to pay Jaime Lui minimum daily pay, statutory holiday pay, annual vacation pay, and compensation for length of service. The delegate ordered that Tsang pay Ms. Lui a total of \$649.73 as a result of the contraventions.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions by Tom Tsang on behalf of H.M. Tsang Co., Ltd., Jamie Lui, and J. Paul Harvey on behalf of the Director of Employment Standards.

ISSUES TO BE DECIDED

Whether the delegate

1. erred in law in concluding that Tsang contravened the Act in failing to pay Ms. Lui minimum daily pay, statutory holiday pay, annual vacation pay and compensation for length of service; and
2. failed to observe principles of natural justice in making the Determination.

Tsang further contends that evidence has become available that was not available at the time the Determination was being made.

FACTS

Ms. Lui worked as a clerk for Tsang, an accounting office on a part time basis from May 1, 2001 to March 14, 2002.

On April 25, 2002, Ms. Lui filed a complaint with the Employment Standards Branch (Branch) alleging that Tsang had contravened the Act. On August 23, 2002, the delegate wrote to Tsang setting out the nature of the complaint and sought a response as well as the employer's records.

Tsang alleged that Ms. Lui's employment had been terminated March 14 for cause. The cause was indicated to be playing CD's while working, and making payroll and data entry mistakes. Tsang's position was that Ms. Lui calculated her own hours and pay, which were then verified by the employer, and therefore there could not be any basis for her claim for unpaid vacation, statutory holiday pay and minimum daily pay. Tsang also enclosed Ms. Lui's Record of Employment (ROE), which it alleged she had completed erroneously, as well as her "work record" (which it stated Ms. Lui had prepared).

In a further submission dated February 28, 2003, Tsang contended that Ms. Lui's employment was terminated for cause because she was dishonest, stole money, breached company rules by playing her CD's and talking to relatives and friends while on the job, and making mistakes.

Ms. Lui denied all of the allegations against her. She contended that she always advised Tsang of the days she could not work, and that Tsang's allegations of her being late or absent were false. She also denied the allegations of theft. Ms. Lui stated that there were no company rules about playing music, and in any event, that she did not play any music at work or talk to family and friends. She advised the delegate that her work was not checked regularly by the employer, and that her training was incomplete.

Following an investigation and a review of the records provided by both Tsang and Ms. Lui, the delegate determined that Tsang had failed to comply with the Act. He found that Ms. Lui's payslips did not record the hourly rate or indicate statutory holidays, and did not indicate that vacation pay was paid. The delegate also determined that Ms. Lui had not been paid at least twice a month, as required.

Ms. Lui provided the delegate with original pay notices. Tsang also provided copies of those notices that the delegate determined had been altered. The delegate also determined that Tsang's daily hours record did not match that of Ms. Lui's in 6 of the 11 months worked. The delegate expressed some concern about these discrepancies in light of the fact that Tsang was an accountant. In light of the discrepancies, the fact that Tsang's records did not comply with the Act and the fact that Ms. Lui's records matched the amounts paid each pay period, he preferred Ms. Lui's records to those of Tsang.

The delegate also rejected Tsang's claim that statutory holidays had been paid. He noted that there was no evidence statutory holiday pay was paid in either Tsang's payroll records or pay slips.

Finally, the delegate noted that, contrary to Tsang's assertion that Ms. Lui had been fired, the ROE indicated that the reason Ms. Lui was no longer working was 'shortage of work'. Tsang alleged that Ms. Lui had forged Mr. Tsang's signature on the ROE. The delegate analyzed the reasons Tsang provided for his contention that she was dismissed for cause and found insufficient or inadequate evidence to support those reasons.

The delegate concluded that Ms. Lui was entitled to compensation as noted above.

ARGUMENT

Tsang contends that the delegate erred in law in accepting the complaint, and in failing to dismiss the complaint for lack of evidence. Tsang contends that, because it did not receive a written complaint from Ms. Lui, the complaint was frivolous, vexatious or trivial, or not made in good faith. Tsang also contends that there was no evidence supporting Ms. Lui's allegations, and the delegate ought to have dismissed it for lack of proof. Tsang further argues that the delegate erred in calculating wages owed on Ms. Lui's records, which it contends were fabricated. Further, Tsang contends that "The complainant was a payroll clerk. She knew how to print out the wage statement anytime if she wants one... A Canadian company called Easy Pay Payroll program develops our payroll software..."

Tsang further argues that he was not given a full opportunity to respond to the complaint. Mr. Tsang says that, when the complaint was received, he was on summer vacation, and his assistant manager had to respond. He says that the next communication from the Director was a demand for payment approximately six months later. Tsang responded that he had inadequate opportunity to respond.

Tsang further contends that the delegate failed to provide him with the date the complaint was delivered to the Branch, and because that date determined, in part, the amount of wages to be paid under s. 80(1) and (1.1), his rights were violated.

Tsang argues that the delegate erred in law in applying section 34(1) to Ms. Lui's minimum daily pay, rather than section 34(2).

Tsang argues that the delegate failed to observe the principles of natural justice in making the Determination. Specifically, he asserts that the delegate was biased against him by preferring Ms. Lui's evidence to that of Tsang. He argues that the delegate accepted Ms. Lui's side of the story "without any proof and evidence and he did not consider the employer's evidence, facts and witness...". Tsang further alleges that the process leading to the Determination was flawed, in that he made his decision without an oral hearing.

Tsang further alleges that "the Director lacks common sense" and that the "Director harassed us (the employer) with intimidation". Neither of these constitute grounds of appeal. In essence, the statements made under these headings relate, firstly, to the delegate's analysis of the grounds for Ms. Lui's termination, and secondly, to the delegate's reference to the section 27 penalty provision and subsequent references to the "UI Act". I find no merit to the second allegation and will not refer to it further. However, since the first allegation may go to the issue of natural justice, I will address it within the context of that ground of appeal.

Finally, Tsang contends that evidence has become available that was not available at the time the Determination was made. Specifically, he says that he has witness statements from current and former employees regarding Ms. Lui's wage statements.

Although the delegate responded to Tsang's allegations in some detail, they need not be repeated or summarized here. In essence, the delegate contended that there was no error in law in that he provided Tsang with a copy of the complaint, analyzed the evidence and information provided to him by the parties, and arrived at his conclusion in a fair manner. He also submits that the provisions of the Act relied upon by Tsang did not come into effect until after Ms. Lui's employment ceased.

The delegate argued that, rather than showing bias against Tsang, he relied on Ms. Lui's records in light of the discrepancy between them and what appeared to be altered records provided by Tsang. He submits that this does not show bias or prejudice against Tsang.

The delegate further contends that the process leading to the Determination was no different than what was followed in all investigations. He submits that Tsang was not intimidated, that, in fact, Tsang's response was prepared by someone other than Mr. Tsang himself.

Ms. Lui alleges that Mr. Tsang forged her signature on documents it now relies on in support of the appeal. She also notes that the documents suggest that she entered into agreements with Tsang that are unenforceable under the Act.

ANALYSIS

Errors of law

Ms. Lui's complaint was filed in April 2002. On July 1, 2003, the Branch instituted a process in which employees were to attempt to resolve complaints with employers prior to filing complaints. The delegate did not err in investigating Ms. Lui's complaint simply because she had not attempted to resolve it with Tsang prior to doing so.

Furthermore, I am unable to find that the delegate erred in not dismissing Ms. Lui's complaint on the grounds that it was frivolous or vexatious. I find that the complaint disclosed sufficient grounds for the delegate to investigate. The evidence is that Ms. Lui provided pay records that, on their face, did not comply with the Act. Upon further examination, the delegate determined that Tsang had contravened section 27.

Section 27(1) of the *Employment Standards Act* provides that on every payday, an employer must give each employee a written wage statement for the pay period stating

- ...
- (b) the hours worked by the employee
- (c) the employee's wage rate, whether paid hourly, or on a salary basis or on a flat rate....
- (d) the employee's overtime wage rate,
- (e) the hours worked by the employee at the overtime wage rate,
-
- (i) the employee's gross and net wages
- ...

The evidence is that Tsang did not comply with the Act. The fact that payroll was completed using a software program does not establish that the delegate erred in arriving at this conclusion.

Tsang's arguments regarding the delegate's application of the provisions of the Act relating to minimum daily pay (s. 34) and wages owed (s. 80) are without merit. The relevant provisions of the Act relating to the complaint are those that existed prior to May 30, 2002.

Failure to observe principles of natural justice

I am also unable to find any merit in Tsang's argument that the delegate failed to observe the 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 decision maker.

The evidence discloses no breach of natural justice.

In August, 2002, the delegate provided Tsang with a letter setting out the essence of Ms. Lui's allegations, and gave Tsang 21 days to reply to the complaints and to provide documents an employer is obliged to maintain. Although Tsang claims that the time for that response was insufficient (which it says was approximately 2 weeks upon receiving the letter), I note that a response was received within the time frame requested, and that there was no request for additional time to respond. I find that Tsang was notified of the complaint, the details of that complaint, and given a reasonable opportunity to respond. Tsang had no right to an oral hearing before the delegate.

The delegate's initial findings and a request for payment were sent to Tsang on February 12, 2003, approximately 6 months later. The letter requested Tsang to respond to the findings and the request for payment within 16 days. Tsang did respond with additional information regarding Ms. Lui's dismissal for cause, which was considered by the delegate in the Determination.

I am unable to find that the delegate failed to offer Tsang full opportunity to respond to the complaint, or that he arrived at a conclusion without considering the merits of each parties position.

There is also no evidence the delegate was “closed minded” about Tsang’s evidence. The delegate noted, among other things, that Tsang’s documents failed to comply with the requirements of the Act (i.e, payroll records), and that some of the documents provided by Tsang differed from those provided by Ms. Lui. Based on the documents and the parties’ information about those documents, the delegate preferred Ms. Lui’s evidence. Where the evidence of the parties differs, a decision maker must make a reasoned decision about which evidence is to be preferred. The Determination sets out the delegate’s reasons for arriving at his decision. Simply by preferring Ms. Lui’s evidence is not proof of a “closed mind”. I am unable to find that the allegations of bias have been made out.

New and relevant information

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:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. 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.

I am not persuaded that the first condition has been met. The witness statements could have been provided during the delegate’s investigation of the complaint. However, having examined the unsworn statement of one of those witnesses, I note that the statement does not contain any information relevant to the matters relevant to Ms. Lui’s complaint, nor does the witness appear to have any personal knowledge of those matters in any event.

In conclusion, I am unable to conclude that the grounds for the appeal have been substantiated. The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the determination, dated May 2, 2003, be confirmed in the amount of \$649.73, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal