

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/200

DATE OF DECISION: September 5, 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 28, 2003. The delegate concluded that Tsang had contravened the Employment Standards Act (Act) in failing to pay Jian Jian Guo (Jan Guo) minimum daily pay, statutory holiday pay, annual vacation pay, and compensation for length of service. The delegate ordered that Tsang pay Ms. Guo a total of \$739.49 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., Jan Guo, and J. Paul Harvey on behalf of the Director of Employment Standards.

Tsang contends that the delegate erred in law in concluding that it had contravened the Act, and submitted that it did not owe Ms. Guo any further amounts. Tsang further contended that, in arriving at this conclusion, the delegate failed to observe the principles of natural justice. Finally, Tsang alleges that evidence has become available that was not available at the time the Determination was being made.

ISSUES TO BE DECIDED

Whether the delegate

1. erred in law in concluding that Tsang contravened the Act in failing to pay Ms. Guo 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.

FACTS

Ms. Guo worked as an entry level clerk for Tsang, an accounting office, on a part time basis from April 10, 2001 to March 14, 2002. On March 22, 2002, she 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 asking for the employer's daily time sheets and payroll records relating to Ms. Guo.

Tsang responded in writing on September 12, 2002. Tsang alleged that Ms. Guo's employment had been terminated March 14, 2002 for cause. The reasons for her termination were set out in that letter, and included allegations that she played games and music while working, gossiped and harassed its clients, took client's books and records home and losing them, and making payroll and data entry mistakes. Tsang stated that it did not want to hire Ms. Guo to begin with since she did not speak English fluently, and had no computer skills. Tsang also alleged that Ms. Guo calculated her own hours of work and computed the payroll deduction each month. Tsang submitted that they verified her payroll calculations before issuing her paycheque. Tsang enclosed Ms. Guo's Record of Employment (ROE), which it alleged

she had completed after the employer had signed it. It indicates that Ms. Guo stopped working because of a shortage of work. Tsang contends that the ROE should indicate that Ms. Guo was dismissed.

On September 18, 2002, the delegate again wrote to Tsang, indicating that, while he had the employer's submission on Ms. Guo's allegations, he did not have copies of her payroll records or daily time records. The delegate sought this information within 14 days of the letter, and noted the penalty provisions contained in the Act for an employer's failure to maintain records.

The delegate also sought information from Tsang about policies and warnings regarding the reasons for Ms. Guo's dismissal.

In a letter dated September 30, 2002, Tsang provided the delegate with documents, including payroll records and time records, and provided the delegate with further information on the issue of Ms. Guo playing music.

In a further submission dated March 7, 2003, Tsang contended that Ms. Guo's employment was terminated for cause because she was dishonest, stole money, breached company rules by playing her portable cassette radio and went to clients to ask for free meals. It also asserted that Ms. Guo's performance was unsatisfactory, and that she acted in a conflict of interest. Ms. Guo left Tsang's employment at the end of November 2001. Tsang hired her back in January 22, 2002.

The delegate sought responses from Ms. Guo on all of Tsang's statements regarding the reasons for her dismissal. Ms. Guo denied all of the allegations against her. Ms. Guo also denied that she calculated her own pay or the ROE. Her responses to each of Tsang's allegations were set out in some detail in the Determination.

Following a review of the records provided by both Tsang and Ms. Guo, and an analysis of their responses, the delegate determined that Tsang had failed to comply with the Act. He found that Ms. Guo'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. Guo had not been paid at least twice a month, as required.

Ms. Guo 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. Guo's in 5 of the 11 months worked. In light of the discrepancies, the fact that Tsang's records did not comply with the Act and the fact that Ms. Guo's records matched the amounts paid each pay period, he preferred Ms. Guo's records to those of Tsang. However, the delegate did not accept that Ms. Guo worked extra hours or periods that she alleged. He did not find her allegations on this issue credible, and concluded that she had failed to prove her claim.

The delegate analyzed Tsang's reasons for dismissing Ms. Guo from its employment, and found no evidence to substantiate them. The delegate found that Tsang made other allegations that were unsupported by any "qualitative evidence". He concluded that Tsang had not established that it had just cause to terminate her, and determined that it owed her one week's wages in this respect.

The delegate also determined that Ms. Guo was entitled to statutory holiday pay, minimum daily pay and vacation pay.

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. Guo, the complaint was frivolous, vexatious or trivial, or not made in good faith. Tsang also contends that there was no evidence supporting Ms. Guo'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. Guo's records, which it contends were fabricated.

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. Guo's minimum daily pay, rather than section 34(2), and that he erred in determining the amount of termination pay. He also claims that the delegate erred in calculating the statutory holiday pay under s. 44(a) and s 37(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. Guo's evidence to that of Tsang. He argues that the delegate accepted Ms. Guo'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. Guo's termination, and secondly, to the delegate's reference to the section 27 penalty provision and subsequent references to illegal practises under the 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 an employee and former employees regarding Ms. Guo's wage statements.

Although the delegate responded to Tsang's allegations in some detail, they will 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 explained why he rejected Tsang's evidence, including the lack of any documentation supporting its allegations.

The delegate argued that, rather than showing bias against Tsang, he relied on Ms. Guo'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.

Ms. Guo also submitted a detailed response that parallel in some respects those of the delegate, and repeats much of the evidence analyzed by the delegate in the first instance. Guo alleges that Mr. Tsang forged, or created documents after the fact, to support the ground of Tsang's appeal.

In a response to Ms. Guo's submissions, Tsang alleges that Ms. Guo was not the author of the documents, and that the comments are fabricated.

ANALYSIS

Errors of law

Ms. Guo's complaint was filed on April 25, 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. Guo'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. Guo'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. Guo 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 the delegate noted that in the determination, and relied on it, in part, in arriving at his determination, does not support Tsang's allegations that the delegate harassed and intimidated him.

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 a letter to Tsang dated August 23, 2002, the delegate set out the essence of Ms. Guo's allegations, and gave Tsang 21 days to provide him with a copy of her daily time work records and payroll records for the period May 3, 2001 to March 15, 2002. Those are 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 on September 12, 2002, and that there was no request for additional time to respond. The delegate sought further information in a letter dated September 18, 2002, and Tsang provided a further reply on September 30, 2002. The contention that the delegate received only one letter prior to receiving a demand for payment in February is not supported by the evidence.

The delegate's initial findings and a request for payment were sent to Tsang on February 18, 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. Guo's dismissal for cause, which was considered by the delegate in the Determination.

I find that Tsang was notified of the complaint, the details of that complaint, and given a number of opportunities to respond, both to the initial complaint as well as the delegate's initial findings. Natural justice does not include the right to an oral hearing, and the delegate's decision not to hold one does not constitute grounds for an appeal.

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 the position of each party.

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. Guo. Based on the documents and the parties' information about those documents, the delegate preferred Ms. Guo's evidence in most respects. 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. Guo's evidence is not proof of a "closed mind". I note that the delegate did reject Ms. Guo's claim for extra unpaid hours of work on the grounds that the evidence did not support the claim. 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. Guo'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 28, 2003, be confirmed in the amount of \$739.49, 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