Employment Standards TRIBUNAL

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: David B. Stevenson

FILE No.: 2003A/200

DATE OF DECISION: October 21, 2003

DECISION

SUBMISSIONS

Ada Lam	on behalf of H.M. Tsang Co., Ltd.
Jan Guo	on behalf of herself
Paul Harvey	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by H. M. Tsang Co., Ltd. ("Tsang") of a Determination that was issued on May 28, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Tsang had contravened Part 3, Section 34, Part 5, Section 45, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Jan Guo ("Guo") and ordered Tsang to cease contravening and to comply with the *Act* and *Regulations* and to pay Guo an amount of $739.49.

Tsang has raised the following matters in the appeal:

- The Director should have refused the complaint because it was "frivolous, vexatious or trivial or not made in good faith";
- The complainant falsified and exaggerated her time record and fabricated her own story to support her claims;
- Tsang had just cause to terminate the complainant because she was in a conflict of interest;
- There was not enough evidence to prove the complaint;
- The Director failed to give Tsang a reasonable opportunity to respond to the complaint;
- The Director failed to disclose to Tsang the date on which the complaint was filed;
- The Director erred in calculating the minimum daily pay;
- The Director erred in calculating "termination pay";
- The Director erred in calculating statutory holiday pay;
- The Director failed to observe principles of natural justice in making the Determination;
- The Director was biased;
- The Director failed to conduct an impartial investigation;
- The process leading to the Determination was flawed;
- The Director lacked common sense;
- The Director harassed and intimidated the employer; and
- Evidence has become available which was not available at the time the Determination was made.

Tsang has requested an oral hearing, indicating that through such a hearing they will be able to "present our evidence; . . . bring witnesses such as our former employees, current employees, clients whom were

being harassed and stolen by this troublemaker". Generally, the Tribunal will not hold an oral hearing unless it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.). After considering the Determination, the appeal and the material on file, the Tribunal has decided an oral hearing is not necessary in order to adjudicate the appeal.

ISSUE

The issue is whether Tsang has raised any matters that would justify the intervention of the Tribunal to vary or cancel the Determination or refer the matter back to the Director.

FACTS

The Determination found that Tsang operates an accounting office. Guo was employed in that office as an entry level clerk from April 10, 2001 to March 14, 2002. She took some time off in December 2001 and January 2002. From April 10, 2001 to October 31, 2001 she was paid at a rate of $7.75 an hour and from November 1, 2001 to March 14, 2002 at a rate of $8.00 an hour. The complaint was filed with the Director on April 25, 2002. Confirmation of the date on which the complaint was filed disposes of the concern raised by Tsang about the claim period.

Tsang was notified of the complaint in a letter dated August 23, 2002. In that letter, the Director asked that time work and payroll records for a period May 3, 2001 to March 14, 2002 be provided within 21 days of the date of the letter. On September 12, 2002, Ms. Lam submitted a letter, on Tsang's letterhead, setting out an initial response to the compliant. The demand for complete payroll records was restated in a letter from the Director dated September 18, 2002. The letter provided Tsang with an additional 14 days to meet the demand and notified Tsang of potential penalties for failing to comply. On September 30, 2002, Tsang responded to the demand, reiterating as well that Guo was fired for cause and raising the allegation that she had stolen clients from Tsang. The matter continued to be investigated by the Director. In a letter dated February 18, 2003, the Director provided a rough calculation of amounts owed to Guo, demanded payment and raised the possibility of settlement. On March 11, 2003, Tsang filed a letter dated March 7, 2003 with the Director. The letter responded to every aspect of the claims being made by Guo and contained an extensive submission on the issue of just cause for termination, alleging dishonesty, theft, serious breach of company rules, unsatisfactory performance and conflict of interest. The allegations relating to the issue of just cause were provided to Guo for her response. That response was provided to the Director in a letter dated April 10, 2003.

The Director reviewed the respective versions of the factual issues in dispute between Guo and Tsang. In specific areas related to the matters included in the complaint, the Director made the following findings:

- The regular daily work records provided by Tsang appeared to have been reconstructed;
- The regular daily work records provided by Guo matched the employer pay records and were accepted as correctly identifying what might be owed;
- The extra hours and other periods that were recorded and claimed by Guo were not sufficiently supported on the evidence;

- Guo did not quit in November, 2001, as alleged by Tsang, but was allowed by Tsang to go on approved vacation leave;
- There was no evidence that Guo damaged Tsang's computer playing CD's and insufficient evidence to find Guo was playing CD's and games at work and had been warned about it;
- There was no quality supporting evidence to find that Guo had attempted to steal, or had stolen, any clients from Tsang while she was employed;
- Tsang was unable to seek recovery of "training costs" under the *Act*, as such costs are "an employer cost of doing business" and their recovery is prohibited under Sections 21 and 22;
- There was no evidence that Guo sometimes took a one hour break;
- Guo was an inexperienced entrance level clerk, which was the position for which Tsang had advertised and the position to which Guo was hired;
- Guo was entitled to be paid for statutory holidays during her term of employment;
- There was no evidence Guo was paid for any statutory holidays;
- The ROE provided to Guo when her employment was ended indicated "shortage of work"; there was insufficient evidence to indicate she had, in fact, been terminated for cause, as alleged by Tsang;
- The allegations upon which Tsang sought to support Guo's summary dismissal were not supported by qualitative evidence in those areas– the playing of CD's, the theft of photocopy money and client records and the damage to computer equipment;
- On balance, Tsang had not shown just cause for summary dismissal;
- The records and assertions made by Tsang were accorded less weight in light of the discrepancy with the records provided to the Director, their paying Guo's wages monthly and their failure to provide complete pay slips; and
- Guo did not steal or falsify her ROE as alleged.

ARGUMENT AND ANALYSIS

The burden is on Tsang, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.

The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *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:*
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> *(a) the director erred in law:*
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> *(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 made.*

Much of this appeal does no more than restate the positions taken by Tsang during the investigation, challenging findings and conclusions of fact made by the Director in the Determination. I shall consider that aspect of the appeal in more detail later.

Tsang has sought to introduce "new evidence" under Section 112(1)(c) of the *Act*, in the form of witness statements from a former and current employee. The Tribunal has indicated in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal with evidence that could have been acquired and provided to the Director before the Determination was issued. The foregoing accurately describes the witness statements sought to be introduced in this case and I do not accept them and will not consider them.

Tsang has also submitted a copy of an Agreement in the Provincial Court between Tsang and Guo in which Guo has agreed to pay Tsang an amount of $735.00 and other amounts based on proof in affidavit form of a described state of events. I accept this document as "new evidence", but find it does not advance this appeal as it does not confirm or establish any facts relevant to the appeal. Specifically, it does not establish facts that show Tsang had just cause to terminate Guo on March 14, 2002 or, as suggested by Tsang, demonstrate the ignorance of the Director on matters arising under the *Act*.

The appeal raises allegations of bias against the Director, a failure by the Director to observe principles of natural justice, including a failure to provide Tsang with a reasonable opportunity to respond to the complaint, a failure by the Director to properly investigate the complaint and harassment by the Director. Tsang also accuses the Director of lacking common sense.

The allegations of bias are based on nothing more than the Director having accepted some of the information provided by Guo over information provided by Tsang. Because of this, Tsang has formed the impression that the Director "showed prejudice", conducted an investigation that was "one-sided", flawed and biased. The only real evidence relating to this allegation is found in the communications between the Director and Tsang during the investigation and the analysis conducted by the Director in reaching the conclusions set out in the Determination.

> Allegations of bias against the Director are not unique in the experience of the Tribunal. The source of such allegations is invariably made in an appeal by a party dissatisfied with the result of a Determination, as though by imputing the integrity of the person making the Determination, the validity of their appeal is somehow elevated. The Tribunal's view of such allegations is based on a realization that bias allegations are a serious attack on a person's integrity, which should not be made speculatively, on mere suspicions or impressions, but must be based on objective findings arising clearly from the evidence. The same view is expressed the following comments form our Court of Appeal:
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> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.).

> To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission) (*B.C.C.A.) September 28, 1999

The onus of demonstrating bias lies with the person who is alleging its existence, in this case Tsang. That onus has not been met. The allegations of impartiality, flawed investigation, lack of common sense, harassment and intimidation are similar, and related, to an allegation of bias. All impute the personal and professional integrity of the Director's delegate. Neither have any of those allegations have been shown on the evidence. This part of the appeal is dismissed.

Tsang says the Director erred in law by not refusing the complaint and/or by not ceasing to investigate the complaint. In support of this part of the appeal, Tsang refers to Section 79(3)(c).

This same argument was made during the investigation, where Tsang said Guo's complaint should be dismissed; that it was "frivolous" and that her motive in filing the complaint was to "harass" and cause trouble for Tsang. The Director did not, apparently, agree, as the investigation continued and a Determination issued, confirming the validity of much of Guo's claim.

There are two responses to this part of the appeal. First, the Director's authority under Section 79(3) to refuse to accept a complaint or to cease investigating that complaint for the reasons listed is discretionary. In other words, even if a complaint was perceived to be "frivolous, vexatious or not made in good faith", the Director may choose to accept the complaint and investigate. In such circumstances, the burden on Tsang would be to show that the Director's exercise of discretion was an abuse of power, outside the limits of the Director's authority or unreasonable. There is nothing in the appeal that would indicate the Director improperly exercised discretion by accepting and investigating the complaint. The same point applies to the assertion that the Director should applied Section 76(3)(e) and stopped investigating because there was insufficient evidence. As well, that point simply challenges whether there was any evidence on which the Director could make the findings of fact set out in the Determination. It is obvious from a review of the Determination that all of the relevant findings of fact made by the Director were supported by some evidence. In reality, this argument is nothing more than a disagreement with the findings made. The circumstances in which the Tribunal would interfere with such findings are very limited.

Second, as a matter of law and policy, Section 76(2)(c) is not intended to be used to defeat valid employment standards claims. In *Provident Security and Event Management Corp.*, BC EST #D279/01, the Tribunal said the following about the purpose of Section 76(3)(c):

> The purpose of Section 76(2)(c) [now 76(3)(c)] of the *Act* is not to refuse or discontinue investigation of valid employment standards claims. The purpose and objective of that provision is to allow the Director to prevent abuses of the legislation, where it is apparent that a complaint has been filed not for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In *Re Health Labour Relations Association of British Columbia et al v. Prins et al*, (1982) 140 D.L.R. (3d) 744 (BCSC), the Court stated, at page 748:
>
> > It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this [the *Act*] legislation.

> The same considerations would apply in Section 76(2)(c) [now 76(3)(c)]. It would take the clearest kind of circumstances to deny an employee the basic standards of compensation and conditions of employment provided by the *Act*.

Based on the information provided to the Director with the complaint, it was probable that Guo had a valid complaint and it was eminently reasonable for the Director to accept the complaint and to investigate it. Guo's objective or motivation have little or no relevance where, on its face, the claim being made was valid. If, at some later stage in the investigation, the validity of the claim became doubtful and the motivation of the complainant suggested the process was being misused, it was open to the Director to reassess the complaint in light of the purpose and objective of Section 76(3)(c), but on the facts the need to reassess never arose. There is no merit to this argument.

Tsang argues the Director did not comply with Section 77 of the *Act*, and erred in law, by failing to make reasonable efforts to provide them an opportunity to respond. The facts do not support that argument and it is dismissed. To the extent there is any suggestion in the foregoing argument that the Director failed to observe principles of natural justice by not providing Tsang with an adequate degree of procedural fairness, that suggestion is also not supported on the facts and is also dismissed.

Tsang argues the Director erred in calculating minimum daily hours and statutory holiday pay. Those arguments are based on statutory provisions that were not in force during the period Guo was employed by Tsang. Using the applicable statutory provisions, I can find no error in the Determination relating to either the minimum daily hours or statutory holiday pay. This part of the appeal is dismissed.

Tsang says the Director erred in calculating "termination pay". While the appeal refers to the error arising from calculations made under Sections 56 and 57 of the *Act*, I accept this argument is intended to challenge the conclusions and calculations made by the Director under Section 63 of the *Act* and that references to Sections 56 and 57 are made to demonstrate that Tsang was not required by any provision found in the *Act* to grant Guo either leave or vacation time off in, and around, December of 2001. This argument entirely misses the points being made by the Director in concluding Guo was entitled to length of service compensation. Those points were: first, that Guo did not quit her employment on November 29, 2001, but was allowed by Tsang to take a period of "vacation leave" that ran through December 2001 and into January 2002; and second, that because Guo's employment was continuous she was entitled to length of service compensation as Tsang had not established just cause for dismissal. There is nothing in the appeal that would allow me to vary the conclusions reached by the Director on those points. This part of the appeal is dismissed.

The main element of this appeal is a continuing, and adamant, assertion that Guo's claim is a tissue of lies and deceit that should never have been accepted by the Director. As I indicated at the outset of this analysis, an appeal is not a re-investigation nor is it simply an opportunity to re-argue positions taken during the investigation. An appeal is an error correction process with the burden of showing the error being on the appellant. In this appeal, Tsang has not shown any error in the findings and conclusion made by the Director that would justify the intervention of the Tribunal to cancel the Determination as requested.

The final point raised by the appeal is that the Director erred in not recognizing Tsang was allowed to deduct $2.00 an hour for the first 500 hours of Guo's employment for entry level wage rate. In response, the Director says that Tsang may not, a year after the fact, seek to "claw back" wages already paid to Guo on the assumption they could have paid Guo a lesser hourly rate than they did. Such a claim is

inconsistent with Section 4 and 21 of the *Act*. In any event, the Director says that Guo's work experience in other fields in other countries would count in calculating the 500 hours of work experience. It was Tsang's responsibility to satisfy themselves they were paying Guo at the applicable or proper rate.

I agree with the Director. There is simply no basis, in law or fact, for clawing back wages already paid to Guo. This argument, and the appeal, is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 28, 2003 be confirmed in the amount of $739.49, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal