Employment Standards TRIBUNAL

An appeal

- by -

Millennium Technology Inc.
("Millennium Technology")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/470

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

This is an appeal filed by Millennium Technology Inc. ("Millennium Technology") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Millennium Technology appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on August 9th, 2002 (the "Determination").

The Director's delegate determined that Millennium Technology owed its former employee, Mr. Yan Wu ("Wu"), the sum of $5,423.64 on account of 4 weeks' wages as compensation for length of service (section 63) and section 88 interest.

By way of a letter dated November 6th, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

THE DETERMINATION

According to the information set out in the Determination, Mr. Wu was employed by Millennium Technology from May 1st, 1997 until December 7th, 2001 as an engineer; at the point of termination his annual salary was $66,000. These latter facts are not contentious.

Under the *Act*, a "temporary layoff" (defined in section 1) does not constitute a "termination of employment" (also defined in section 1) unless the employee is not recalled within a defined time period (typically, 13 weeks). Wu maintained that he was laid off on December 7th, 2001 and, not having been recalled within the permissible temporary layoff period, was thus deemed to have been terminated as of the original date of layoff [see section 63(5) of the *Act*]. Millennium Technology, for its part, maintained that it first attempted to recall Mr. Wu, via e-mail, on February 15th, 2002; the proposed return to work date was March 1st, 2002. Mr. Wu denied receiving such a communication (or any other) and raised several points that challenged the veracity of the employer's assertions. The delegate requested that Millennium Technology provide clarification with respect to a number of points and in the absence of a reply from Millennium Technology determined, on the balance of probabilities, that Wu had not been recalled.

I might add that the delegate also appears to have relied on some "similar fact" evidence in that, prior to the Wu investigation, another Millennium Technology employee was laid off and not recalled within the statutory time frame; on May 31st, 2002 (about 2 months prior to the instant Determination) the delegate issued a determination in favour of that employee.

REASONS FOR APPEAL

Millennium Technology's reasons for appeal raise a number of issues that are not relevant; for example, that it has in the past laid off employees without incident (an assertion that is, based on the material before

me, simply not accurate) and that Mr. Wu contravened a restrictive covenant in his employment contract. The only relevant ground of appeal is expressed as follows:

> "The Company provided all the necessary evidences to prove that we have done all the required procedure to layoff and recall staff. Meanwhile, the lay-off employee, Yan Wu, trying to maximize his receipt by simply denying without the received of the recall notice. He denied receiving recall from company by simply saying, 'this is a make-up'. Then what kind of evidence he can provide in this case? None." [sic]

In other words, Millennium Technology says that it recalled Wu within the temporary layoff period but he refused to accept the recall offer.

FINDINGS

Although Millennium Technology says that is recalled Wu, I do not have *any* evidence before me to corroborate that assertion. Millennium Technology was specifically requested, in a letter from the Tribunal's vice-chair sent to all the parties on September 10th, 2002, to file a submission that "specif[ied] the facts and arguments about the appeal" and "include[d] a copy of all records and documents that support" its position. The parties were directed to file their submissions by no later than October 1st, 2002. Despite this clear and unequivocal direction, Millennium Technology did not file any submission, let alone any *evidence*, that would corroborate its position that Wu was recalled to work.

I do have before me a submission, dated September 13th, 2002, from the Director's delegate, which shows that the delegate made every reasonable effort to secure corroborating evidence from Millennium Technology but that, whatever the reason, Millennium Technology chose not to respond to the serious attack on the credibility of its assertions. Given that all parties concede that Mr. Wu was laid off, it was incumbent on Millennium Technology to show that Wu was lawfully recalled within the temporary layoff period. The delegate concluded, and I can hardly disagree with the delegate on this point, that Millennium Technology failed to discharge its evidentiary burden of proving that it did, in fact, recall Wu within the temporary layoff period.

In an appeal to the Tribunal, it is the appellant who bears the burden of proving that the Determination is incorrect. Given the complete absence of *any* evidence (let alone exculpatory evidence) from Millennium Technology that would call into question the correctness of the delegate's conclusions, this appeal must fail.

ORDER

Pursuant to sections 114(1)(c) and 115 of the *Act*, I order that this appeal be dismissed and that the Determination be confirmed as issued in the amount of **$5,423.64** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal