

An appeal

- by -

CathayOnline (Canada) Inc., CathayOnline Inc., CathayOnline (HK)
Technologies Ltd., CathayOnline BVI, Beijing CathayOnline
Technologies Co. Ltd., Lothian Bancorp Ltd., Sishuan CathayOnline
Technologies Ltd., Torchmail.com Inc. and Via Technologies Inc., Associated
corporations under Section 95 of the Employment Standards Act
("Cathay Online")

- 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.: 2001/710

DATE OF DECISION: December 20, 2001

DECISION

OVERVIEW

This is an appeal by CathayOnline (Canada) Inc. of a Determination by the Director of Employment Standards (the “Director”) dated September 25, 2001(the “Determination”). The Determination associated several companies, CathayOnline (Canada) Inc., CathayOnline Inc., CathayOnline (HK) Technologies Ltd., CathayOnline BVI, Beijing CathayOnline Technologies Co. Ltd., Lothian Bancorp Ltd., Sishuan CathayOnline Technologies Ltd., Torchmail.com Inc. and Via Technologies Inc. under Section 95 of the *Act*. For convenience, I shall refer to the appellant as “CathayOnline”. The Determination concluded CathayOnline had contravened Part 3, Sections 17 and 18, Part 4, Section 40, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Sheila Bennett (“Bennett”), Xin Feng (“Feng”), Paul Johnson (“Johnson”), Leslie Oman (“Oman”), Tomas Vrlik (“Vrlik”), Yan Zhao (“Zhao”) and Sheng Fa Zhu (“Zhu”) and ordered CathayOnline to cease contravening and to comply with the *Act* and to pay an amount of \$66,252.47.

CathayOnline says the Determination is wrong on the facts and conclusions of fact, wrong on the law and incomplete in its analysis of the facts. CathayOnline seeks to have the Determination varied and referred back to the Director for further investigation.

ISSUE

The issue in this appeal is whether CathayOnline has demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of amounts owed to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary it and/or refer it back to the Director.

FACTS

The Determination described the nature of the complaints made by each of the individuals and set out the background:

Bennett alleges that she is owed overtime wages (\$7000.00) and vacation pay on those overtime wages (4% being \$280.00) for an amount of \$7280.00. The complainants, excluding Bennett, allege being owed wages as outlined on the Records of Employment issued by the employer. Oman, Vrlik and Zhu allege Compensation for Length of Service based on no written notice from the employer.

BACKGROUND

The business developed internet or web based sites and software to provide service including e-mail, advanced messaging services, Fax over Internet (FoIP) and Voice over Internet (VoIP) which is under the jurisdiction of the Act. The

Complainants worked during the periods, at the job titles and at the rates of pay shown:

EMPLOYEE NAME	START DATE DD/MM/Y	FINISH DATE DD/MM/Y	JOB TITLE	RATE OF PAY
Bennett	36196	37045	Communications Coordinator	\$2800/month
Fenq	28/08/2000	15/07/2001	Accountant	\$42000/yr
Johnson	01/12/2000	15/07/2001	Web Designer	\$55000/yr
Oman	36532	37048	IT Project Manager	\$60000/yr
Vrlik	15/07/2000	15/07/2001	Programmer	\$1300/½ month
Zhao	36536	15/07/2001	Programmer	\$2083.33/½ month
Zhu	26/04/2000	15/07/2001	Systems Administrator and Web Developer	\$1700/½ month

The complaint was filed in the time period allowed under the Act.

CathayOnline, Inc. is the parent company of a group of companies that included Cathayonline (Canada) Inc. that issued the paycheques to the complainants.

- In July 2001 the employer was unable to meet the payroll. The complainants (except Bennett who had left the employ earlier) were issued Records of Employments (ROEs) and advised of the terminations. No prior written notice of termination was given. Amounts owed by the employer to the complainants are shown on the ROEs except for the Compensation for Length of Service (CLOS).
- In August 2001 the company was locked out of the offices it occupied by the landlord for failure to meet the rent or lease payment.

- On September 17, 2001 I was advised by Johnson that all the web sites of the employer were offline. I confirmed this and contacted the landlord. The landlord was not in contact with the tenant (the employer). I arranged access to the employer's premises and I arranged to meet with met Glenn Ohlhauser, the Chief Financial Officer (and Secretary and Treasurer of CathayOnline, Inc.) of the employer.
- On September 20, 2001 at the companies premises I met Ohlhauser. Ohlhauser and I discussed the complaints and the employer's corporate structure and copied certain employment records and obtained company information. I read Section 95 of the ES Act to Ohlhauser and he indicated that he understood what was meant by association under the act. I also advised him of tests of association concerning section 95 and he indicated that he understood the tests. For much of the meeting YuNing Wang, Director of Torchmail.com was present.
- On September 21, 2001 the landlord advised that since the employee's claims may exceed the amount that would be realized from the sale of furnishings and equipment at the employers offices that the offices would be opened to the employer to clear property out. .

Kenneth Levy was President and a Director of CathayOnline (Canada) Inc. and Cathay Online Inc. On June 18, 2001 he sent an e-mail to Ohlhuser, Bruce Ransom and Brian Ransom advising that he was resigning as a director of CathayOnline and states that he will no longer be involved as a director or officer.

In the appeal, CathayOnline appears to take issue with the conclusion that Bennett was an employee. The appeal says Bennett “provided services as an independent consultant and provided invoices on a semi-monthly basis”. The same suggestion also appears in respect of the other complainants, as a response to the conclusion that CathayOnline had contravened subsection 28(d) of the *Act* by failing to keep records of the hours worked. In respect of Bennett, CathayOnline follows by stating: “These invoices do not record or invoice for hours greater than a normal work week. At the time of leaving she verbally stated that although she felt entitled to overtime compensation, she was not going to pursue it”. CathayOnline also takes issue with the suggestion that there was some agreement about the amount of overtime worked by Bennett. CathayOnline says, in fact, that it had no record of the claimed overtime hours, did not know how such hours were recorded by Bennett, did not know if overtime had been approved and, generally, had no knowledge of whether or not the amounts claimed were correct as Bennett had never provided CathayOnline with any records supporting the amount claimed.

CathayOnline says that Oman, Vrlik and Zhu asked for their Records of Employment. The implication of this assertion is that those employees quit their employment with CathayOnline and are not entitled to length of service compensation.

CathayOnline says that Lothian Bancorp Ltd. (“Lothian”) is not associated with CathayOnline. The management services of Bruce Ransom were secured through Lothian, as well as “many of

the promotion, investor relations and financing arrangements were incurred by CathayOnline using the credit facilities of Lothian” and Lothian provided short term loans to CathayOnline which were used to reduce its debt or, from time to time, to meet payroll obligations.

The Director and several of the complainants have submitted responses to the appeal. Suffice to say, there is little of the appeal that is accepted by the respondents. The Director’s response submits that some adjustments to the Determination are justified, and has recalculated the amount owing to \$64,367.06.

ARGUMENT AND ANALYSIS

CathayOnline, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the “risk of non-persuasion”:

Rules about the legal burden, called by Wigmore “the risk of non-persuasion”, define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, “How to Approach the Burden of Proof and Presumptions” (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, “the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy”. In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of “burden of proof” is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an 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.

I shall address each of the areas of appeal in order.

With respect to Bennett’s claim for overtime. First, there is nothing to indicate that Bennett was not an employee of CathayOnline. Nor, for that matter, is there anything in the appeal to indicate any error in conclusion implicit in the Determination, that all of the complainants were employees for the purposes of the *Act*. As an employee Bennett is entitled to the minimum

employment standards provided in the *Act*. Even if she indicated at some point she did not intend to seek overtime entitlement, an assertion which she denies, such a representation does not prevent her from later claiming the entitlement provided in the statute if she does so within the time limits allowed. The statute is broad based social legislation and such comments as are alleged are insufficient to deny an employee rights under the *Act* or to relieve employers of obligations to provide their employees with the minimum terms and conditions of the *Act*. Second, there is evidence of agreement by CathayOnline that she did work overtime - leaving only the issue of the amount. In that respect, Bennett kept a record of the overtime hours she worked. It was contemporaneous to the time the work was done. This record was given to the Director during the investigation. CathayOnline kept no record at all of hours worked by employees. The Director found the record kept by Bennett to be “reliable and reasonable”. Third, nothing in the appeal does more than challenge, in a very general way, the amount claimed. Such a challenge does not approach satisfying the burden on CathayOnline to demonstrate an error in the facts, conclusions of fact or the calculations done by the Director.

With respect to the suggestion that none of the employees are entitled to length of service compensation, it is clear that none of the employees whose claim included length of service compensation received written notice of termination. In the absence of written notice, or a combination of written notice and compensation, the obligation on an employer to pay length of service compensation to a terminated employee is deemed to be discharged only in the circumstances identified in paragraph 63(3)(d): if the employee terminates the employment, retires from employment or is dismissed for just cause. CathayOnline suggests it was the employees decision to terminate their employment, but there is no evidence to support such a claim. It takes considerable temerity to suggest an employee who requests a Record of Employment when he or she has not been paid wages for six weeks has terminated the employment and I do not accept it. The burden on CathayOnline when alleging a self termination of employment is to show the employee’s decision to terminate the employment was voluntary; in this sense, voluntary means uninfluenced by the words, action or conduct of the employer, see *Wilson Place Management Ltd.*, BC EST #D047/96. They have failed to meet that burden. While it is not necessary, if I harboured any doubt that the employees did not terminate the employment on or about July 15, 2001, I would refer the matter back to the Director to consider whether there should be a deemed termination under Section 66 of the *Act* by reason of the failure by CathayOnline to pay employees wages for nearly six weeks.

In respect of the argument that the Director should not have associated Lothian, I find a sufficient factual foundation for the conclusion reached by the Director. That evidence show a degree of functional relationship between CathayOnline and Lothian to satisfy the requisite of common control or direction. CathayOnline says the intent of Section 95 of the *Act* is “to cover situations where the “business” is carried out through more than one legal entity but which in fact are all concerned with that business”. Even if that is an accurate statement of the intent of Section 95, it applies to the facts of this case. It is apparent from the submission of CathayOnline in the appeal and from other material on file that Lothian was directly involved in the “business” of CathayOnline, including managing, promoting and financing the operations of CathayOnline. There is also evidence that a key person in CathayOnline, Mr. Bruce Ransom, is also a director and/or officer of Lothian and a key person in that company.

In sum, I do not find merit in any of the grounds of appeal relied on by CathayOnline. The Director acknowledges there were some errors in calculating the amount found owing in the Determination and has submitted a revision of that amount. The revision is properly supported by argument and information and I accept the changes as being proper. The Determination will be varied to reflect the changes made by the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 25, 2001 be varied to show an amount owing of \$64,367.06, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal