Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Howard C. Chui o/a Label Express
(the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/70

DATE OF DECISION: June 29, 2004

DECISION

SUBMISSIONS:

Anthony M.M. Remedios — Legal Counsel for Howard C. Chui

INTRODUCTION

This is an application filed by Howard C. Chui, carrying on business as "Label Express" (the "Employer"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision issued on March 9th, 2004 (B.C.E.S.T. Decision No. D040/04).

I have before me the reconsideration application filed on behalf of the Employer, however, despite being invited to reply to that application (by way of the Vice-Chair's letter dated April 21st, 2004), neither the respondent employee nor the Director of Employment Standards filed any submission with the Tribunal.

PREVIOUS PROCEEDINGS

The Determination

Xiaoming Lu ("Lu") filed a complaint alleging that the Employer failed to pay her all the wages to which she was entitled.

Ms. Lu was being trained by the Employer during the period from June 5th to July 31st, 2000; her "training wage" was $500 per month. Following her training period, Ms. Lu continued, at the minimum hourly wage, until she quit her employment on or about July 3rd, 2001. Among other things, Ms. Lu claimed that she was not paid all of the wages to which she was entitled during her training period; she also claimed statutory holiday pay and vacation pay. Her claim totalled in excess of $1,000.

A delegate of the Director of Employment Standards (the "delegate") investigated Ms. Lu's unpaid wage complaint and determined that no wages were owing; indeed, the delegate concluded that Ms. Lu had been "overpaid" by $166.22. In reaching this latter conclusion, the delegate held that the Employer's time records were more credible than Ms. Lu's records since the Employer's records, unlike Ms. Lu's records, appeared to have been kept contemporaneously. Accordingly, on March 31st, 2003, the delegate issued a Determination (the "Determination") dismissing Ms. Lu's complaint. It should be noted, however, that the Employer, contrary to its statutory obligation, did not keep any payroll records covering Ms. Lu's "training period".

The Initial Appeal Decision

On April 23rd, 2003, Ms. Lu appealed the Determination to the Tribunal on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination [see sections 112(1)(a) and (b) of the *Act*].

In a decision issued on July 23rd, 2003 (B.C.E.S.T. Decision No. D240/03), Tribunal Member Love made the following findings (at pp. 4-5 of his reasons):

> I note that the complaint in this matter was made by Ms. Lu, in writing, on December 7, 2001. It appears that the Delegate met with the Employer's representative, almost one year later, on December 4, 2002, prior to issuing the Determination on March 31, 2003. Upon the filing of an appeal, the Delegate is required to transmit the record to the Tribunal: see section 112(5). There is nothing in the record provided to me which suggests that the Delegate notified Ms. Lu that a meeting was to take place, provide Ms. Lu an opportunity to attend at meeting of December 4, 2002 [sic], or an opportunity to review and respond to information provided by the Employer at that meeting. In my view, given the lengthy delay in investigating this matter, and the failure of the Delegate to invite Ms. Lu to the meeting of December 4, 2002, and the failure to provide an opportunity to Ms. Lu to consider or respond to information provided by the Employer, there was a failure by the Delegate to provide Ms. Lu with a reasonable opportunity to participate in the investigation. I recognize that considerable latitude is given to the Delegate to conduct an investigation, however, it is apparent that the Delegate did not extend to [Ms. Lu] an opportunity to hear or respond to information presented by the Employer. This amounts to a failure by the Delegate to accord a reasonable opportunity to Ms. Lu to participate in a meaningful way in the investigation...
>
> The breach of section 77 appears to have resulted in an error with regard to the Delegate's conclusion that Ms. Lu was not entitled to wages during the training period...it appears that [Ms. Lu] worked pursuant to an oral training agreement to accept $500.00 per month in return for the training. I note that this type of an agreement is contrary to section 4 of the *Act*, where the employee in fact works hours which would yield wages in excess of $500 per month, calculated on a minimum wage basis. Such an agreement is not enforceable, and Ms. Lu is entitled to be paid for the hours that she actually worked during the training period...
>
> I am satisfied that the issue of wage entitlement during the training period, must be reconsidered by the Delegate, in light of the failure of the Delegate to accord a reasonable opportunity to Ms. Lu to participate in the investigation....
>
> Ms. Lu claims that a number of other errors were made by the Delegate in interpreting the records provided to him by the Employer. Given my findings, that Ms. Lu was not provided with an adequate opportunity to participate in the investigation, it is my view that the entire Determination is flawed, and ought to be re-investigated, or set for an oral hearing to provide both the Employer and [Ms. Lu] an opportunity to participate in providing information and evidence to the Delegate.

Tribunal Member Love issued the following Order:

> **ORDER**
>
> Pursuant to s. 115 of the *Act* the Determination dated March 31, 2003 [sic], I refer this matter back to the Director to re-investigate or re-hear this matter and in particular; (a) present to [Ms. Lu] the information obtained by the Delegate from the Employer during the meeting on December 4, 2002, and (b) to obtain from Ms. Lu further evidence and submissions, prior to rendering a decision on the wage claims made in her complaint dated December 7, 2001.

The Delegate's Further Investigation and Referral Back Report

A second delegate conducted the further investigation and prepared a referral back report dated November 13th, 2003. In this latter report, the delegate noted that he considered Ms. Lu's time records to be reliable

and that, based on those records, Ms. Lu was entitled to an additional $1,191.67 on account of unpaid wages earned during the June 5th to 30th, 2000 "training period" including concomitant 4% vacation pay and section 88 interest.

At the outset of the delegate's November 13th report, the delegate indicated that the report was prepared based, in part, on information obtained at a meeting held on October 10th, 2003 at the Burnaby office of the Employment Standards Branch "attended by [Ms. Lu] and [a third delegate]".

The Tribunal provided the referral back report to the parties for their review and comment and then the report, as well as the parties' further submissions, were considered by Tribunal Member Love. I note that the Employer's position, set out in two separate submissions dated November 30th, 2003 and January 8th, 2004, respectively, was that Ms. Lu's evidence regarding her working hours and wages actually received was untruthful.

In a decision issued on March 9th, 2004 (*i.e.*, the decision that is the subject of the Employer's application for reconsideration), Tribunal Member Love ordered that the Determination be varied "to provide for payment to [Ms. Lu] in the amount of $1,191.67 in accordance with the referral back report dated November 13, 2003, together with interest pursuant to section 88 of the *Act.*"

THE APPLICATION FOR RECONSIDERATON

The Employer's application for reconsideration was submitted to the Tribunal on April 20th, 2004. Although the application is timely and, on its face, is not frivolous, I am not able to conclude, based on the material filed by the Employer, that Tribunal Member Love's decision ought to be varied or cancelled.

The Employer seeks reconsideration of Tribunal Member Love's March 9th, 2004 decision on the grounds that:

i) he "failed to comply with principles of natural justice";

ii) he "erred in applying the law"; and

iii) "significant new evidence has become available that would have led the Member to a different decision".

ANALYSIS

As previously noted, I do not find any of the above grounds to be meritorious. I shall deal with each ground in turn.

Natural Justice

The Employer complains that it was not present at the meeting that took place on October 10th, 2003 at the Employment Standards Branch Burnaby branch office. I note that the Employer never complained about this omission in its submissions to the Tribunal that it was requested to file in response to the delegate's referral back report.

Further, and in any event, *the delegate did not conduct an evidentiary hearing on October 10th, 2003.* It should be recalled that Tribunal Member Love gave the Director an option to either holding a new evidentiary hearing or to simply give Ms. Lu an opportunity to respond to the Employer's evidence. The Director chose the latter option.

The purpose of the October 10th meeting was to allow Ms. Lu to put her case forward and respond to the evidence previously submitted to the Director by the Employer. The October 10th meeting took place in the course of an *investigation*, the meeting was not intended to be a full *evidentiary hearing* at which both parties would present their respective cases to a delegate who, in turn, would consider the parties' evidence and then issue an final and binding decision. While, in the latter case, it would be inappropriate for a delegate to conduct a hearing if only one party was notified and permitted to appear at the hearing, where the delegate is conducting an *investigation* no such procedural rule applies (see *Medallion Developments Inc.*, B.C.E.S.T. Decision No. D235/00).

When conducting an investigation, a Director's delegate is entitled to speak to the parties separately (and this is often the only practical way to proceed). However, and this was the nub of Tribunal Member Love's initial decision to order the matter referred back to the Director, both parties are entitled to know about, and make submissions regarding, material evidence submitted by the adverse party (see section 77 of the *Act*).

The Employer was entitled to receive and make submissions with respect to the material submitted to the delegate at the October 10th meeting and that, in fact, occurred in this case. Upon receipt of the referral back report, the Tribunal's Vice-Chair wrote to the Employer on November 17th, 2003, enclosed a copy of the referral back report, and invited the Employer to reply to that report. As previously noted, the Employer did reply--by way of submissions dated November 30th, 2003 and January 8th, 2004, respectively--and in those submissions the Employer never raised any question about the October 10th meeting having taken place in the absence of the Employer. Even if the Employer had complained, it was subsequently given a full opportunity (and it availed itself of that opportunity) to respond to the evidence submitted to the delegate by Ms. Lu.

I consider that the principles of natural justice have been fully satisfied in this case.

Error of Law

The Employer's entire submission with respect to error of law is as follows: "The October 10th, 2003 hearing proceeded *ex-parte*" [sic]. I do not consider this assertion to raise even a *prima facie* allegation of error of law. Separate from that observation, I consider this argument to be wholly devoid of merit.

First, as noted above, the October 10th meeting was part of an investigation; it was not an independent evidentiary hearing. Second, the Employer was given a full and fair opportunity to respond to the information obtained by the delegate from Ms. Lu at the October 10th meeting. Third, I reiterate that in its submissions filed with respect to the referral back report, the Employer never took issue with the fact that it was not present at October 10th meeting.

New Evidence

The Tribunal has consistently held that a reconsideration request will only be granted on the ground of "new evidence" if that evidence is material and could not, with due diligence, have been placed before the

original Tribunal Member: see *e.g., Kiss,* B.C.E.S.T. Decision No. D122/96; *Steelhead Business Products*, B.C.E.S.T. Decision No. D237/97; *Allard*, B.C.E.S.T. Decision No. D256/97).

The "new evidence" submitted by the Employer in support of its reconsideration application is not "new" (for example, the Employer submits a cheque dated July 31st, 2000 made payable, apparently, to Ms. Lu's husband). All of the Employer's so-called "new evidence" could have been placed before the delegate and/or Member Love.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is **refused.**

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal