

An appeal

- by -

Wesley International Trading Ltd. operating as Jey Beauty Consulting
("Wesley International")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2005A/36

DATE OF DECISION: May 9, 2005

DECISION

SUBMISSIONS

Jessy Cheung	on behalf of Wesley International Trading Ltd.
Angela Y.F. Chan	on behalf of Katie Foon King Liu
Ted Mitchell	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Wesley International Trading Ltd. operating as Jey Beauty Consulting (“Wesley International”) of a Determination that was issued on January 26, 2005 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Wesley International had contravened Part 3, Sections 18, 21 and 28, Part 4, Section 40, Part 5, Section 46 and Part 7, Section 58 of the *Act* in respect of the employment of Katie Foon King Liu (“Liu”) and ordered Wesley International to pay Liu an amount of \$2,405.98, an amount which included wages and interest.

The Director also imposed an administrative penalty on Wesley International under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$3000.00.

The total amount of the Determination is \$5,405.98.

Wesley International says the Director erred in law and failed to observe principles of natural justice in making the Determination. The submission sets out four points in support of the chosen grounds for appealing the Determination:

1. The Director failed to consider that the tuition payments payable by Liu to Wesley International were never paid;
2. The Director failed to consider that Liu was a student only and had not been hired by Wesley International as an employee. In this respect, the Director failed to consider the “true reasons” for Liu punching a time clock as a student and not an employee.
3. The Director failed to consider the nature and effect of the student contract signed by Liu.
4. The Director showed bias by giving weight and credibility to the evidence of a witness who was a close personal friend of Liu.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issues in this appeal are whether Wesley International has shown the Director erred in law and/or failed to comply with principles of natural justice in making the Determination.

THE FACTS

Wesley International is a beauty salon and beauty school. Liu filed a complaint with the Director claiming she had been employed by Wesley International from February 9, 2004 to April 22, 2004 and had not been paid all of the wages earned by her. Liu also claimed she had purchased items for the business and was entitled to be reimbursed the amount of those items.

In response to the complaint, Wesley International took the position that Liu was not hired as an employee, but rather was a student at the beauty school who performed some work after school hours and paid some of the expenses of the business in order to cover her beauty school tuition costs.

As part of the complaint process, the Director conducted an oral hearing, which both parties attended and provided evidence and argument in support of their respective positions.

The Director found that Liu was an employee of Wesley International for the period March 1, 2004 to April 22, 2004, that she had performed work during that period and was owed wages, including regular wages, reimbursement for business expenses paid, overtime wages, statutory holiday pay and annual vacation pay. In respect of the position of Wesley International that Liu was “working off” her tuition, the Director concluded that Liu had withdrawn from the facial course and had not committed to any course or study beyond the end of February, 2004 for which instalment payments would have been required.

All of these findings were adequately supported on the facts presented to the Director, which are set out in the Determination, and applied to the relevant provisions of the *Act*.

ARGUMENT AND ANALYSIS

Wesley International has the burden of persuading the Tribunal there is a reviewable error in the Determination. 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:*
- (a) *the director erred in law;*
 - (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.*

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 complaint process, hoping the Tribunal will reach a

different conclusion. An appeal is an error correction process with the burden of showing the error being on the appellant.

The first three points used to support this appeal do not raise any question of law. In reality, these points only challenge findings of fact made by the Director. Alleged errors in findings of fact is not a matter that is included as a ground of appeal under Section 112 of the *Act*.

The first point challenges the Director's factual finding that Liu had withdrawn from the facial course by the end of February 2004 and commenced employment with Wesley International. Implicit in that finding is that no instalments were "payable" by Liu. I will add that the student application enrolment form has no relevance to the issues raised by the complaint. Even if Liu was obligated to pay Wesley International the tuition amount according to payment plan attached to that form, that would be a credit obligation which would not, in the circumstances, affect Liu's wage entitlement under the *Act*. The Director noted the prohibition found in Section 21 of the *Act* against withholding or deducting payment of an employee's wage for any purpose and there is no evidence of a written assignment of wages by Liu in favour of Wesley International.

The second point challenges the conclusion that the time cards kept by Liu accurately recorded time worked. On this matter, the Director was faced with a choice between the evidence presented by Liu, that the cards showed the times she worked, and the evidence presented by Ms. Cheung on behalf of Wesley International, that the time cards were only a record of Liu's studying time. The Director chose the evidence of Liu on this point for reasons set out in the Determination. I cannot say there is any manifest error in that choice.

The third point raised in the appeal submission speaks directly to the effect of the student application enrolment form, which I have indicated above was, in the circumstances, irrelevant to the question of Liu's entitlement to wages under the *Act*.

The fourth point alleges bias. The Tribunal has noted in several decisions, such allegations, because they are serious allegations, require proof on clear and objective evidence. Wesley International has not provided any such evidence.

For the above reasons, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated January 26, 2005, be confirmed in the amount of \$5405.98, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal