

Citation: The Vancouver Korean Press Ltd. (Re)  
2018 BCEST 31

An appeal

- by -

The Vancouver Korean Press Ltd.  
("VKPL" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE NO.:** 2018A/8

**DATE OF DECISION:** March 27, 2018

## DECISION

### SUBMISSIONS

Jong Kuk Kim

on behalf of The Vancouver Korean Press Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), The Vancouver Korean Press Ltd. (“VKPL” or the “Employer”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 30, 2017 (the “Determination”).
2. The Determination found that VKPL contravened Part 3, sections 27 (wage statements) and 28 (payroll records); Part 4, section 40 (overtime wages); Part 8, section 63 (liability for length of service) of the *Act* and Part 8, section 46 (production of records) of the *Employment Standards Regulation* (the “Regulation”) in respect of the employment of Yong Joon Moon (“Mr. Moon”). The Determination ordered VKPL to pay Mr. Moon wages in the total amount of \$8,609.46 inclusive of accrued interest. The Determination also levied five administrative penalties against VKPL totaling \$2,500 for breaches of sections 27, 28, 40, and 63 of the *Act* and section 46 of the *Regulation*. The total amount of the Determination is \$11,109.46.
3. VKPL appeals the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.
4. On January 17, 2018, the Tribunal corresponded with the parties advising them that it had received VKPL’s appeal. In the same correspondence, the Tribunal requested the Director to produce the section 112(5) “record” (the “Record”) and notified the Director and Mr. Moon that no submissions were being sought from them on the merits of the appeal at this stage.
5. The Record was provided by the Director to the Tribunal on January 31, 2018. A copy of the same was sent by the Tribunal to VKPL and Mr. Moon on February 7, 2018, and both parties were provided an opportunity to object to its completeness.
6. Neither VKPL nor Mr. Moon objected to the completeness of the Record, although Jong Kuk Kim (“Mr. Kim”), a director of VKPL, made submissions on the merits of the digital evidence in the Record. In the circumstances, the Tribunal accepts the Record as complete.
7. On February 28, 2018, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed under section 114(1). If all or part of the appeal is not dismissed, the Tribunal would seek submissions from Mr. Moon and the Director on the merits of the appeal.
8. In this case I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of VKPL’s submissions, the section 112(5) Record and the Reasons for the Determination (the “Reasons”).

## ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

## THE FACTS AND REASONS FOR THE DETERMINATION

10. VKPL was incorporated under the laws of British Columbia on November 16, 1992. Mr. Kim and Duk Won Park (“Mr. Park”) are its directors.
11. VKPL operates a newspaper business and employed Mr. Moon as a staff writer from September 1, 2011, to June 30, 2017. Mr. Moon received a salary of \$3,700.00 per month, paid semi-monthly, based on eight hours of work per day and 40 hours of work per week
12. On July 14, 2017, Mr. Moon filed a complaint under section 74 of the *ESA* alleging that VKPL contravened the *ESA* by failing to pay compensation for length of service and overtime (the “Complaint”).
13. On October 31, 2017, a delegate of the Director conducted a hearing of the Complaint (the Hearing”).
14. A preliminary issue at the Hearing concerned some four audio files and one video file (the “Digital Evidence”) submitted by Mr. Moon to the Employment Standards Branch (the “Branch”) on October 14, all of which Mr. Moon translated and for which he provided a written transcript. These submissions were provided by a Branch representative to VKPL’s legal counsel, by way of three separate emails, on October 19, 2017.
15. Counsel, at the Hearing, objected to the submission of the Digital Evidence on the basis that the evidence was edited and as such could not be considered accurate representations of the entire conversations and lacked context. Counsel also submitted that that VKPL did not receive a copy of Mr. Moon’s translations and Mr. Kim only briefly viewed the video and listened to the audio recordings and therefore, the latter was unable to attest to the content in the clips.
16. The delegate, while finding that the Branch provided counsel a copy of Mr. Moon’s translations in one of the emails sent on October 19, 2017, decided not to rely on the Digital Evidence and related transcripts of Mr. Moon for several reasons including she did not speak Korean and was unable to verify the accuracy of Mr. Moon’s translations; Mr. Kim could not verify the accuracy of Mr. Moon’s translations; and the overall context of the originating conversations in the clips could not be ascertained.
17. Having resolved the preliminary issue of the Digital Evidence and the related transcript, the delegate then went on to consider the evidence of the parties on the penultimate issues arising from the Complaint, namely: (i) Is Mr. Moon entitled to overtime wages? If so, in what amount? (ii) Did VKPL have just cause to terminate Mr. Moon’s employment?
18. The evidence of both parties and their witnesses, adduced at the Hearing, is summarized in the Reasons.

19. Mr. Moon testified:

- He worked as a staff writer for VKPL since 2011.
- His regular working hours consisted of 40 hours per week, Monday to Friday, 8:30 a.m. to 5:30 p.m.
- VKPL employed only two writers, and therefore, he had to work extra hours each week.
- Each week he submitted a work report to VKPL's editor-in-chief, Mr. Kwon and to Mr. Kim.
- He worked 107 hours of overtime from January 4 to June 9, 2017.
- The hours he recorded include the time it took him to drive to and from each interview in addition to the time it took to conduct each interview.
- Mr. Kim did not pay his overtime.
- He was a very good worker and had his own column, interviewed people, and wrote 15 stories each week.
- VKPL gave him a raise each year until Mr. Kim took over in 2016.
- Since Mr. Kim took over approximately one half of VKPL's staff quit or were fired.
- On April 10, 2017, he received verbal notice that his employment was terminated but no written notice at any time in April.
- Mr. Kim fabricated both the April 10 termination letter that VKPL submitted as evidence and VKPL's reasons for his termination.
- The reason for his termination is that he voiced concerns to Mr. Park about Mr. Kim's treatment of an illegal foreign worker employed at VKPL and Mr. Kim subsequently fired him.
- He has known Young oh Kyoung ("Ms. Kyoung") for approximately 15 years.
- He worked for about two or three months after receiving verbal notice of termination on April 10, 2017, from VKPL's HR Manager, Jae Kwon Ko ("Mr. Ko").
- Within one week of receiving verbal notice, he wrote a letter asking Mr. Kim to postpone his termination.
- He was aware of VKPL's policy that employees must ask permission before working overtime hours.
- Mr. Kwon had authority to and approved his overtime hours.
- Mr. Kim did not approve his overtime but Mr. Kim was aware that he worked overtime hours and he provided his overtime hours to Mr. Kim on weekly work reports.
- His contract stated that he was required to get pre-approval to work overtime from his boss who was Mr. Kwon.
- The Vanchosun website corroborates his overtime hours.
- He interviewed Sungja Jung ("Ms. Jung") on the evening of February 16, 2017. He met Ms. Jung in public, somewhere in Surrey or Langley or downtown Vancouver. Ms. Jung owns a cafe and he thinks he met her there at 6:00 p.m. The period of 6:00 to 10:00 p.m. includes his driving time to and from the interview. He arrived home at approximately 10:00 p.m.
- He maintained a record of his hours on his computer. His summary of 107 hours of overtime is

from his record and was provided on weekly reports to VKPL.

- There is insufficient time to request employer's permission before working extra hours, but he did usually obtain permission from the editor-in-chief, Mr. Kwon.

20. Mr. Kwon testified:

- He was the Editor-in-Chief for VKPL from October 2009 until his employment ended in July 2017.
- He supervised four staff, including Mr. Moon.
- Mr. Moon reported his hours verbally to him and in writing to Mr. Kim, using weekly reports.
- He was authorized to approve Mr. Moon's overtime as he was Mr. Moon's boss.
- He was given authority to approve overtime by the previous owner of VKPL.
- When Mr. Kim took over VKPL the previous year, the staff was told that nothing was supposed to change. Therefore, he understood that he was still authorized by Mr. Kim to approve staff overtime.
- There was no limit on the number of overtime hours he could authorize.
- He usually granted a couple hours of overtime per week. 10 hours of overtime would be considered a lot and 40 hours of overtime per week would not be allowed.
- He never discussed overtime with Mr. Kim who was his boss and oversaw VKPL's finances.
- He did not have any authority regarding VKPL's finances and Mr. Kim never spoke with him about VKPL's finances.

21. The Employer presented three witnesses at the Hearing, Mr. Kim, Mr. Ko, and Ms. Kyoung.

22. Mr. Kim testified:

- He purchased VKPL on May 1, 2016.
- VKPL fired Mr. Moon on April 10, 2017, when it provided a letter of termination to him. In addition, he also had the HR Manager, Mr. Ko, verbally advise Mr. Moon of the termination of his employment.
- Mr. Moon requested that the Employer delay his firing to obtain a mortgage and he acceded to Mr. Moon's request and allowed the latter to work eleven (11) additional weeks although Mr. Moon was only entitled to five (5) weeks' notice of termination (under the *ESA*) as an employee of five years and 10 months.
- VKPL provided Mr. Moon with a new contract of employment, which he did not sign.
- Mr. Moon was aware of the overtime policies of the Employer contained in the contract - that all overtime request must be made in advance to and approved by him.
- Mr. Moon chose not to follow the Employer's overtime policy.

- Mr. Kwon did not have authority to approve Mr. Moon's overtime.
- Mr. Moon never submitted an overtime request to him before working additional hours.
- Mr. Moon also did not submit anything to him after working additional hours; therefore he was unaware that Mr. Moon worked any additional hours.
- He did not delegate his authority to anyone regarding the approval of overtime.
- He disciplined Mr. Moon several times before he was terminated; once for being too loud in the workroom and distracting the other workers, and another time for complaining about management when speaking to staff members.
- Mr. Moon had a bad attitude and he was given a notice about his character.
- He gave Mr. Moon verbal notices and advice about how to improve but did not issue Mr. Moon written warnings that his employment would be terminated.
- He told Mr. Moon that it would be difficult for them to work together if Mr. Moon continued his behaviour.
- He terminated Mr. Moon's employment because, on February 28, 2017, Mr. Moon met with Ms. Kyoung, who at that time was a prospective employee of VKPL and was going to be interviewed.
- When Mr. Moon became aware of the interview, he contacted Ms. Kyoung to request that they meet outside of work. During the meeting, Mr. Moon threatened Ms. Kyoung and discouraged her from working at VKPL.
- Ms. Kyoung told Mr. Ko what happened and Mr. Ko communicated the same to him on February 28 or March 1.
- He decided to wait and get more information before disciplining Mr. Moon.
- In the meanwhile, Mr. Moon advised him in an email that he would be leaving for Korea, but left two days earlier than he said he would.
- After Mr. Moon returned from Korea in early April, Mr. Ko told Mr. Moon on April 10 that his employment was terminated effective immediately and gave him a letter of termination.
- A few days later Mr. Moon wrote a letter requesting that the Employer to defer the termination so that he could obtain a mortgage to purchase a property.
- Mr. Moon said to him that after he purchased the property he would inform him and await his decision about the termination. He agreed with Mr. Moon.
- When Mr. Moon told Mr. Kim that he had obtained the mortgage, Mr. Kim issued the new termination letter on June 30, 2017, terminating Mr. Moon's employment immediately but referencing the original termination date of April 10, 2017. The letter cited Mr. Moon's February 28 meeting with Ms. Kyoung as the reason for the termination.

- Regardless of hours worked, Mr. Moon received a salary of \$3,700.00 paid semi-monthly. He received six per cent vacation pay per year or 15 days. Mr. Moon's employment was deemed continuous after he purchased the business.
- Mr. Moon submitted weekly reports but the reports recorded only if he was present or absent that week. The weekly reports did not actually include the number of hours Mr. Moon worked.
- Mr. Kwon's report of weekly hours was detailed whereas Mr. Moon's report was simplified and made it difficult to understand what work Mr. Moon performed.
- He allowed Ms. Kyoung to work beside Mr. Moon for three months because she is capable and experienced and because there was no other available workspace.
- VKPL had just cause to terminate Mr. Moon's employment but it provided Mr. Moon with alternative written notice nonetheless.

23. Mr. Ko testified:

- He is the Marketing Manager and HR Team Leader at VKPL.
- He had a meeting with Mr. Moon in the conference room on April 10, 2017, during which he advised Mr. Moon that his employment was terminated.
- He also showed Mr. Moon a letter at the meeting and thinks he gave a copy to him but is not sure if the letter was a written notice of termination.
- He thinks that Mr. Kwon may have been present at the meeting.

24. Ms. Kyoung testified that:

- She has been a writer with VKPL for ten months and had been a writer for many years before working with VKPL.
- She saw VKPL's advertisement and applied for the job.
- She had an interview and VKPL offered her the position in February 2017.
- She does not recall if Mr. Moon contacted her in a threatening manner, but she recalls that he said negative things to her about VKPL.
- She received an email from Mr. Moon before her interview; they spoke on the telephone and subsequently met in person. She is not sure how Mr. Moon obtained her contact information.
- She thinks she first met Mr. Moon in 2012, before she started work with VKPL.
- While they were not friends, they did, several times before, meet.
- Mr. Moon's comments worried her but not enough to deter her from working at VKPL.
- Mr. Moon did not threaten her but he said negative things to her.

25. In addition to the evidence of the witnesses above, VKPL presented to its legal counsel the record of its employees' hours worked for inclusion with its submissions at the hearing. The record was in Korean and not translated in time to be submitted for the hearing. Moreover, VKPL's counsel expressed concerns that the record contained private information about other employees unrelated to the proceedings and, therefore, could not be submitted in its original form.
26. Based on the foregoing evidence, the delegate went on to determine the issues before her starting with the questions of whether Mr. Moon was entitled to overtime wages and, if so, in what amount. By way of a preamble to her determination of these questions, she notes the requirements of section 35 and 40 of the *ESA*. She then notes in the Reasons that it is undisputed that VKPL required its employees to seek permission before working overtime hours, or hours in excess of what are required to receive the agreed-upon salary, and Mr. Kim affirmed that VKPL's wages were paid based on eight hours per day and 40 hours per week. She also notes that it was undisputed that Mr. Moon was aware of the overtime policy even though he refused to sign VKPL's new employment contract, which included the overtime policy, in late 2016. She then considers the evidence of both parties and in preferring the evidence of Mr. Moon and Mr. Kwon over the Employer's witnesses and deciding that VKPL owed Mr. Moon overtime wages, she reasons as follows:
- In keeping with that policy, Mr. Moon's evidence is that he did in fact seek and obtain approval from VKPL's editor-in-chief, Mr. Kwon. Mr. Kwon's evidence supports Mr. Moon's statements. Mr. Kwon submits that Mr. Moon asked for his approval and also submitted a weekly report of his hours directly to Mr. Kim, as required. Mr. Kim's evidence supports Mr. Kwon's statement but differs on the content of Mr. Moon's reports, stating that his reports indicated only if he was absent or at work.
- As one of only two writers, I find it is not unreasonable that Mr. Moon worked an average of four to five hours of overtime per week. Given that Mr. Moon's record provides specific days on which he worked and the name of each person he interviewed, I find his evidence is reasonably specific and supported. In contrast, VKPL states that it has maintained a record of Mr. Moon's hours but it did not provide that record into evidence. I therefore find that Mr. Moon's record of overtime hours is the best available evidence and it will be used to determine the amount of overtime owed.
27. Having determined that overtime was owed to Mr. Moon, the delegate then proceeded to calculate overtime wages owed to him after taking into consideration his monthly salary of \$3,700 per month and calculating his hourly wage multiplied by the overtime hours actually worked and unpaid. She also levied an administrative penalty of \$500 against VKPL for contravention of section 40 of the *ESA*.
28. The delegate also levied administrative penalties of \$500 each for VKPL's failure to provide all records in accordance with the Demand, maintain records in English, and issue a compliant wage statement to Mr. Moon contrary to sections 46 of the *Regulation* and 28 and 27 of the *ESA* respectively.
29. With respect to the question whether VKPL had just cause to terminate Mr. Moon's employment, the delegate noted that VKPL contended that it had just cause to terminate Mr. Moon's employment but gave him an abundance of notice thereby extinguishing any further liability.



30. The delegate also reviewed the tests governing termination of employment for cause as well as the governing provision in the *ESA*, section 63, establishing an employer's responsibility to give working notice or compensation for length of service upon terminating an employee.
31. In determining that VKPL neither established cause for terminating Mr. Moon's employment nor provided him with proper notice of termination under section 63 of the *ESA*, the delegate reasoned as follows:

It is undisputed that VKPL did not issue written warnings to Mr. Moon throughout the employment relationship, or certainly not while Mr. Kim owned the company, and Mr. Kim provided only verbal notices and advice to Mr. Moon in response to what Mr. Kim categorizes as a bad attitude and disruptive behaviour. Mr. Kim states that Mr. Moon's termination was a direct result of his actions on February 28. Rather than immediately terminating Mr. Moon, Mr. Kim elected to gather additional information. It was not until April 10, after Mr. Moon returned from Korea, that Mr. Kim states VKPL issued a letter citing four reasons for the termination, none of which specify Mr. Moon's meeting with Ms. Kyoung on February 28.

Upon consideration of Mr. Moon's subsequent request to defer the termination, Mr. Kim allowed Mr. Moon to continue working for VKPL and to sit beside Ms. Kyoung. Mr. Kim ultimately terminated Mr. Moon's employment on June 30, and again issued Mr. Moon a letter, this time citing reasons related only to Mr. Moon's meeting with Ms. Kyoung.

I find that neither letter provides for a period of written working notice, and allowing Mr. Moon to work beyond April 10 does not serve as an appropriate notice period regardless of its length. Mr. Moon's June 30 letter was issued after he worked what VKPL suggests was his notice period, contrary to the purpose of a written working notice.

The June 30 letter specifies that Mr. Moon made statements of a violent nature that contravened not only company rules but also social law. Clearly VKPL regards the February 28 incident to be serious in nature and requiring termination; therefore I find it difficult to reconcile the alleged significance and seriousness of this offense with VKPL's response. I find it inconsistent that Mr. Kim allowed Mr. Moon to continue working at VKPL after Mr. Ko advised Mr. Kim about the incident on February 28 or March 1, and I question why Mr. Kim would allow Mr. Moon to occupy a workspace in close proximity to Ms. Kyoung, whom Mr. Kim states Mr. Moon threatened.

I therefore find that VKPL has failed to prove it had just cause to summarily dismiss Mr. Moon, that it otherwise progressively disciplined Mr. Moon, or that it provided Mr. Moon with appropriate written working notice, any of which would eliminate its liability for compensation for length of service.

32. Having determined that the Employer failed to establish just cause for terminating Mr. Moon's employment or, alternatively, provide appropriate working notice to Mr. Moon, the delegate concluded that Mr. Moon is entitled to five (5) weeks' wages as compensation for length of service pursuant to section 63 of the *ESA* and six (6) percent vacation pay on the said wages pursuant to section 58 of the *ESA*. She also ordered interest on the total amount pursuant to section 88 of the *ESA* and levied an administrative penalty of \$500 for contravention of section 63 of the *ESA* against VKPL.

## SUBMISSIONS OF EMPLOYER

33. As indicated above, VKPL appeals the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination. In the first set of written submissions accompanying VKPL's Appeal Form, Mr. Kim states, in the preamble, "I have some objections to the adjudicator's findings and would like to apply for an appeal for the following reasons and grounds".
34. Mr. Kim, then, under separate headings for each of the witnesses, goes on to delineate his "objections" to the delegate's "findings". He does the same, that is, delineate his objections to the delegate's findings on the questions of overtime wages owing and termination of Mr. Moon's employment. I have read Mr. Kim's submissions carefully and propose to set out them out verbatim below:

### 1. Regarding Mr. Yong Joon Moon's statement

- Mr. Moon stated that he had to work overtime every week due to a lack of workers as the Vancouver Korean Press Ltd. ("Company" hereafter) hired only two reporters. This statement is wrong because the Company hires and maintains four employees (including one editing reporter) at all times. Therefore, he did not have to work overtime due to lack of manpower.
- Mr. Moon claimed that he worked 107 hours of overtime from January 4 until June 9, and this claim is not true. The interviews he conducted were mostly done during the working hours and there is no basis or evidence that he worked overtime.
- The overtime data that Mr. Moon submitted cannot be relied upon. Lacking details such as time, location, and content, they cannot be verified. He testified that he could not hand in the details as his computer file was damaged. This excuse is not acceptable, in my opinion.
- The witness, Mr. Kwon, testified that he was Mr. Moon's supervisor and that he approved Mr. Moon's overtime. However, it was evident that Kwon received no data [material] from Mr. Moon-
- Mr. Moon said that he had his own column. However, it cannot be a column but general interview article(s) because it was neither editorial nor review.
- Mr. Moon complained about not getting any raise in salary after Mr. Kim took over the company in May 2016. I assert that promotions are determined in accordance with the company's periodic evaluation on employee's performance, not by an individual's request.
- He recounted that half of the staff left the company. During that period, the fact is that four of them resigned from the company on their own initiative while Mr. Moon was dismissed due to misdeed(s). Therefore, it is not a matter for censure.
- In regard to the notice dated April 10, [2017], the company presented a Written Notice, and [i] declare that the four items in the notice were written based on facts. I assert his claim on the fourth item which was concerning 'actions causing harm to the company' was wrong. Furthermore, he stated that he was mistreated not because he

threatened Ms. Kyoung but because he informed Mr. Park, the Partner, of the 'treatment of illegal foreign workers.' That was Mr. Moon's arbitrary and one-sided claim, denoting his malicious intent by distorting facts.

- He asserted that he is entitled to receive five weeks compensation and that he did not receive the Written Notice. On the contrary, the Company provided him with 11 weeks of compensation and the fact that the Company gave him five weeks plus additional six weeks was written on the Letter of Request (April 12).
- Mr. Moon said that he reported his overtime to Mr. Kwon and, in turn, Mr. Kwon approved them - this is a violation of regulations. According to the company regulations, all employees of the company including Mr. Moon must obtain an approval directly from the CEO, Mr. Kim, and Mr. Kwon did not have the authority to do so. Mr. Moon said that he reported it to Mr. Kim by Weekly Report. According to company regulations, overtime must be reported not by way of weekly report but by using a different form. Furthermore, I confirm that there was no mention of overtime on the Weekly Reports submitted by Mr. Moon during the period at issue.
- It was suggested that the Company website proved his overtime, but that was not so. The articles shown on the website do not indicate the hours when they were written and they were usually drawn up during the working hours.
- There was no prior or after report on interviewing Sungja Jung. Granted that he did so on this occasion, it would be too dramatic to consider it as 107 hours of overtime.
- While Mr. Roxborough requested Mr. Moon to submit details regarding his overtime, Mr. Moon said he could not provide the details due to malfunction of his computer. This is an unacceptable excuse.
- Lastly, he testified that he obtained approvals of his overtime from Mr. Kwon as he did not have time to get them directly from the CEO. This was an obvious pretext - Mr. Kim was working full time during that period and all other employees did not have any problem getting prior approvals for vacation, overtime, outside duty and etc.

## 2. Regarding Mr. Min Soo Kwon's testimony

- The principle in managing the Company is to operate task and administration separately. Thereby, Mr. Kwon was not given any authority for administration.
- Mr. Kwon was in charge of the desk, and his duties were to plan, distribute, and integrate articles in order to publish newspaper. He had no right to decide on matters such as vacation, overtime, benefits, etc. that would incur expenses.
- Since Mr. Kim had never authorized him, his testimony about approving Mr. Moon's overtime was false.

## 3. Regarding Mr. Jong Kuk Kim's statement

- Mr. Kim has been the CEO of the Company since May 1, 2016. He gave Mr. Moon the Notice of Termination dated April 10, 2017 through Mr. Ko (Officer of HR Team), notifying Mr. Moon of his dismissal.

- The Notice is composed of four items (Please refer to the attached document), and the fourth item is a significant contravention.

#### 4. Regarding Ms. Young Oh Kyoung's testimony

- Ms. Kyoung stated what Mr. Moon said in their meeting was negative things about the Company, but this was not an accurate description. What he said to her was of an intimidating nature and a serious misconduct.
- In the Company's viewpoint, he violated the Company's regulations. This was an infringement of management rights and a serious wrongful conduct disturbing the order and peace of the Company.

#### 5. Is Mr. Moon entitled to overtime wages?

- In the Determination, it reads, "Mr. Kwon's evidence supports Mr. Moon's statements. Mr. Kwon submits that Mr. Moon asked for his approval and also submitted a weekly report of his hours directly to Mr. Kim, as required." Mr. Kwon's testimony on this matter was false evidence. Mr. Kwon did not have the authority to give an approval and did not report Mr. Moon's overtime to Mr. Kim.
- In the Determination, it reads, "Mr. Kim's evidence supports Mr. Kwon's statement but differs on the contents of Mr. Moon's reports, stating that his reports indicated only if he was absent or at work." The Adjudicator misunderstood this part. Mr. Kwon's report contained descriptions of work he did only - it did not include what Mr. Moon did. What Mr. Kim expressed was that Mr. Kwon's report, in comparison with Mr. Moon's report, was more detailed than Mr. Moon's. Mr. Kim did not say Mr. Kwon's report included matters related to Mr. Moon.
- The Adjudicator's decision that Mr. Moon's overtime in average of four to five hours a week seemed reasonable as there were only two reporters working and Mr. Moon was one of the two is very far off. As mentioned earlier, there were four reporters in the editorial department in the Company. For the past several years, there has been no occasion where we lacked manpower and the employees had to work overtime. Mr. Kwon also confirmed this fact in his evidence that he supervised four staff including Mr. Moon.
- In addition, the Adjudicator found the materials submitted by Mr. Moon were reasonably specific and supported. I would like to say it again that most of these materials were drafted during regular working hours. The Company does not record and keep his regular-hour works; the company manages and controls overtime tightly by way of prior or after approval.

#### 6. Did VKPL have a just cause to terminate Mr. Moon's employment?

- The termination of Mr. Moon went through two steps. The first step was to give Mr. Moon the Notice of Termination on April 10, [2017]. It was a five-week's notice, but was extended to 11 weeks with his earnest request. (Please refer to the attachment)

- Around the time when the 11<sup>th</sup> week was passing, a reminder was given, but he did not comply. Subsequently, another Letter of Dismissal dated June 30 was issued as a second step.
- In that Notice of Termination, four items of violation were clearly stated (Please refer to the attachment). The fourth item was the same as the one in the Notice issued as the second step. There were two reasons why there had been a delay from the incident date which occurred on February 28, 2017 until the Notice of Termination dated April 10, 2017.
- The first reason was that we needed time to investigate because the incident took place outside the Company, and the second was that Mr. Moon went on vacation to Seoul without due notice (from March 20 until April 9).
- As explained earlier, five weeks were extended to eleven weeks in total because of his plea. The Adjudicator felt strange about having him seated next to [Mr. Kim] during the extended period, but the office was compartmentalized. Furthermore, the workroom itself was one space, and all staff was working together in that space. Therefore, there was no atmosphere of intimidation whatsoever.
- Aside from the fact that Mr. Moon's words were very threatening, he demonstrated unexpected behaviors such as taking confidential information from another department, leaving the company premise without due notice, calling out a scheduled interviewee outside the company and meeting her. These actions disturbed personnel related works, encroached on management rights, and broke the order and peace of the company. These are unacceptable behaviors as an employee, but the Adjudicator overlooked this aspect.
- I hereby end the Company's point of view concerning some matters brought up in the Determination Letter. I would like to add that it would have been better if the Adjudicator had rendered a more formal determination and a more thorough examination of the supporting documents since the Adjudication meeting was the final meeting.

Regards,

The Vancouver Korean Press Ltd

- <sup>35.</sup> Accompanying the above submissions of Mr. Kim is an index of the List of Documents for Complaint Hearing together with the documents listed in the index which were previously presented at the Hearing of the Complaint and contained in the Record.
- <sup>36.</sup> In the second set of written submissions of Mr. Kim, dated February 21, 2018, Mr. Kim provides his submissions on the merits of the Digital Evidence, which the delegate decided not to rely upon in making the Determination. The submissions appear to be an attempt to provide context and further explanation of the recordings made together with some criticisms of Mr. Moon for not obtaining the consent of the other party in the conversation before making the recordings. I do not find it necessary to set out Mr. Kim's submissions on the Digital Evidence here.

## ANALYSIS

37. The burden is on VKPL, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination and that the Tribunal should intervene to correct that error. 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. The grounds upon which an appeal may be made are found in subsection 112(1) of the *ESA*, which says:

### **Appeal of director's determination**

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 being made.

38. The grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

39. VKPL has grounded its appeal in a failure by the Director to observe the principles of natural justice in making the Determination.

40. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05).

41. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96)

42. Having reviewed the Determination including particularly the Record and the written appeal submissions of Mr. Kim, I do not find VKPL has discharged its burden to persuade the Tribunal that there is an error in the Determination on the natural justice ground of appeal. More particularly, there is no specific aspect of the

Complaint process or how the Director administered the Complaint and the Complaint Hearing that is disputed in the appeal submissions under the natural justice ground of appeal. Throughout the proceedings leading to the Determination, VKPL had legal representation. VKPL was aware of the case against it, presented its evidence by calling its witnesses and had sufficient opportunity to cross-examine Mr. Moon and his witness. I find sufficient evidence in the Record and the Reasons to conclude that the delegate of the Director afforded VKPL all of the procedural rights within the meaning of the decisions in *Imperial Limousine Service Ltd.* and *607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, *supra*. Therefore, I find there is no merit to the natural justice ground of appeal.

43. My assessment of the appeal as a whole indicates that this appeal is nothing more than a disagreement by VKPL and Mr. Kim with the conclusions reached by the Director in the Determination. This is abundantly transparent in the preamble of Mr. Kim's submissions where he states "I have some objections to the adjudicator's findings" and then goes on to reargue the submissions made at the Hearing, perhaps more forcefully, but without showing there was any error made in respect of the challenged findings. As indicated previously, the Tribunal has no jurisdiction to decide appeals on alleged errors of fact unless such findings raise an error of law. Such errors may include making findings without any evidence or where the evidence does not provide any rational basis for the finding made. In this case, VKPL has not raised the error of law ground of appeal nor is there any error of law apparent in the findings made by the delegate. To the contrary, I find that there was sufficient evidence before the delegate to support her conclusions on both issues: whether Mr. Moon was owed overtime wages and if VKPL had just cause to terminate his employment or alternatively provided him sufficient notice of termination of his employment. More particularly, on the first issue, it was open for the delegate to prefer the evidence of Mr. Moon and his witness over the Employer's to conclude that overtime was owed to Mr. Moon. It is not for this Tribunal to interfere with that finding. With respect to the second issue, I am in agreement with the delegate's review of the law governing termination of employment at pages R8 and R9 of the Determination and I find her analysis of the evidence of the parties and resulting conclusions that VKPL failed to prove just cause for termination of Mr. Moon's employment and failed to provide Mr. Moon appropriate working notice sound. In the circumstances, I find no basis to interfere with any of the delegate's conclusions of fact in the Determination.
44. As concerns Mr. Kim's submissions pertaining to the Digital Evidence submitted by Mr. Moon at the Hearing, I reiterate that the delegate did not consider this evidence in making the Determination. Therefore, I do not find it necessary to address Mr. Kim's submissions relating to the Digital Evidence.
45. In the result, pursuant to section 114(1)(f) of the *ESA*, I dismiss VKPL's appeal of the Determination.

## ORDER

- <sup>46.</sup> Pursuant to section 115 of the *ESA*, I confirm the Determination made on November 30, 2017, together with any additional interest that has accrued under section 88 of the *ESA*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**