

An appeal

- by -

SPC Holdings & Construction Ltd.  
(“SPC”)

- 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 (as amended)

**TRIBUNAL MEMBER:** Robert E. Groves

**FILE No.:** 2010A/144

**DATE OF DECISION:** January 6, 2011

## DECISION

### SUBMISSIONS

Shing Ho on his own behalf

Bob Krell on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal brought by SPC Holdings & Construction Ltd. (“SPC”) challenging a determination dated September 9, 2010, (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) in which SPC was found to have contravened sections 18 and 58 of the *Employment Standards Act* (the “Act”) when it failed to pay wages to a former employee, Shing Ho.
2. The Delegate determined that Ho was owed \$8,895.60 in wages, \$355.82 for annual vacation pay, and interest of \$226.55. In addition, the Delegate determined that SPC should be required to pay two administrative penalties of \$500.00 each, one in respect of its failure to pay wages, and the other as a result of its failure to comply with a demand for the production of employer records as required under section 46 of the *Employment Standards Regulation*. The total found to be owed was therefore \$10,477.97.
3. I have before me the Determination, the Delegate’s Reasons supporting it, SPC’s Appeal Form and submission, the record the Delegate says was before him at the time the Determination was issued, a submission from the Delegate, and a submission from the complainant, Ho.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. SPC has requested an evidentiary hearing in respect of this matter, or a referral back to the Director for a re-hearing of the complaint. A review of the material that has been delivered by the parties persuades me, however, that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

### FACTS

5. SPC operates a roofing business from offices in the Lower Mainland. Ho was employed by SPC in different capacities during 2008 and 2009. On August 10, 2009, SPC summarily terminated Ho’s employment, allegedly for cause.
6. Ho filed a complaint under the *Act*, claiming that SPC had failed to pay him all his wages. Following a mediation conducted with the assistance of an officer of the Employment Standards Branch, the parties settled several aspects of Ho’s claim, but left for determination the question whether Ho was entitled to receive certain commissions or bonuses, and statutory holiday pay.
7. Ho provided a submission to the Branch identifying customers in respect of whom he had arranged contracts in the amount of \$444,780.00, for which he alleged he had not been paid commissions. Ho alleged that the rate of commission he and SPC had agreed upon was 2%, and so he was owed \$8,895.60. A copy of Ho’s complaint

form, setting out particulars of this calculation, was forwarded to SPC during the course of the investigation conducted by the Branch.

8. On March 10, 2010, a Branch officer forwarded a Demand for Employer Records to SPC, together with a Notice of Complaint Hearing. The Canada Post records supplied by the Delegate show that this material was successfully delivered to a Zhiyun Zhou on March 22, 2010. A corporate records search for SPC conducted by the Branch indicated that Zhou was a corporate officer of SPC.
9. The Notice advised that the Branch had appointed an adjudicator to conduct a hearing of the complaint via telephone on April 22, 2010. It provided that the adjudicator might make a determination on the information before him or her, even if a party chose not to participate or be represented at the hearing. It also said this:

Before the adjudication hearing, the parties must:

- Send the Branch two copies of any documents they intend to rely on in enough time for these documents to be provided to the other party;
- Provide a list of people they intend to call as witnesses with a brief summary of the relevant evidence those witnesses are expected to give; and
- Provide all documents required in the Demand for Employer Records, if one was issued.

It is the responsibility of both the Employer and the Complainant to ensure that two copies of any records of evidence they intend to produce and/or rely on at the hearing have been submitted to the Branch by 2:00pm April 8, 2010. These records must be exchanged with the other party, which will be done by the Branch, allowing enough time for all parties to review prior to the hearing.

#### **Adjournment of Hearings**

In extraordinary circumstances the Branch Adjudicator may grant adjournments. Requests for adjournments should be in writing, include reasons, and be delivered to the Branch Adjudicator at least one week before the scheduled date of hearing.

10. The Demand for Employer Records stipulated that SPC deliver to the Branch, again by April 8, 2010, all payroll records relating to Ho's wages, hours of work and conditions of employment, together with any sales records pertaining to him, including sales agreements, records of payments, and commission statements. It also advised that a failure to produce the records as required would result in a determination being issued and, where a contravention was found, an escalating administrative penalty of at least \$500.00.
11. SPC did not comply with the Demand, or with the disclosure requirements set out in the Notice. On April 9, 2010, the Branch emailed SPC noting this fact, and requesting an update.
12. Zhou replied via email on behalf of SPC later that same day, enclosing a Record of Employment for Ho, and some monthly payroll details. On April 12, 2010, the Branch again emailed SPC acknowledging receipt, but also stating that payroll records as defined in the *Act* had not been received. Specifically, no records of Ho's hours of work, or records of his sales, had been delivered. The email reproduced section 28 of the *Act*, which sets out in detail the records an employer is obligated to keep. The email warned that if it were determined there had been a contravention of the *Act*, administrative penalties would be assessed. In addition, the email asked SPC to indicate whether it intended to rely on any documents during the hearing or whether it intended to call any witnesses.
13. On April 13, 2010, Zhou emailed the Branch, attaching a record of Ho's hours of work, and rate of pay. She also attached a list of sales confirmed for SPC as a whole for the period March to July 2009. As for commission statements, Zhou's email stated "...as we mentioned before, there is no commission involved in this case." The email went on to say that SPC intended to call evidence relating to particulars of Ho's alleged malfeasance during

his period of employment with the company. The email indicated that two managers, in addition to Zhou, would be attending the hearing. It also asked whether SPC needed to fax all supporting documents to the Branch.

14. On April 14, 2010, the Branch emailed SPC in reply. The subject heading for the email was stated to be: “Adjudication hearing of Mr. Ho’s complaint under the Act.” The email went on to say this:

The additional two documents sent April 13, 2010 have been received and will be forwarded to Mr. Ho and the adjudicator.

In response to your question whether the supporting documents need to be provided, as previously explained and as set out on the Notice of Complaint Hearing the Branch was to have received two copies of any documents SPC Roofing intends to rely on by April 8, 2010. This was set to allow for enough time for documents to be exchanged with the other party so they can be reviewed prior to the hearing. For clarification, the adjudicator will only make findings regarding matters under the Employment Standards Act. A copy of Mr. Ho’s complaint form has been sent to you. The Settlement Agreement SPC Holdings & Construction Ltd. entered into with Mr. Ho only resolved his claim for regular wages and annual vacation pay; Mr. Ho’s claims for commissions and statutory holiday pay are still in dispute. If SPC has documents which it wishes to use at the hearing regarding Mr. Ho’s claims under The Employment Standards Act which have not yet been provided, yes, do send them to the Branch as quickly as possible so as to allow Mr. Ho the time to review them.

15. On April 15, 2010, Zhou forwarded a letter and supporting documents to the Branch. It appears this material was intended to support SPC’s allegation that Ho had misconducted himself during his employment, and that the company had commenced legal proceedings against Ho to recoup. In her letter, Zhou said this:

The supporting documents provided were to prove that Arthur Ho’s behaviour had greatly damaged SPC’s reputation and caused profound financial losses to SPC. It was the board of director’s decision to terminate his employment contract on August 10, 2009 and all performance-based bonus were waived (*sic*).

16. The Delegate conducted a telephone hearing on April 22, 2010. Ho attended, as did Zhou. On the basis of the material before him, the Delegate concluded that Ho had been paid 2% commission on certain contracts obtained by him, but not for the others that formed the basis of his claim. The Delegate also accepted Ho’s evidence that the payment of commissions was not discretionary, but was rather a fundamental, fixed term of his contract of employment.

17. The position advanced by SPC was that the payment of commissions was discretionary, and since Ho had been guilty of impropriety, and had been terminated, the directors of SPC had declined to pay him commissions on the last contracts obtained by him.

18. In his Reasons for the Determination the Delegate noted that while Zhou was the person representing SPC at the hearing, and was a corporate officer of SPC, she had not negotiated the terms of Ho’s employment, and in particular the circumstances under which Ho would be paid commissions. Another director of SPC, Zhong Shen, had been responsible for doing that. Shen, however, was out of the country at the time of the hearing, and so the Delegate did not hear his evidence regarding this aspect of the complaint. Notwithstanding the Delegate was deprived of the opportunity to hear what Shen might have to say, there is no evidence that Zhou, or anyone else on behalf of SPC, ever requested an adjournment of the hearing so that Shen’s account might be secured.

19. Not content, however, to treat this aspect of the complaint on the basis that SPC had simply failed to tender evidence from the person who was best situated to support its position regarding the discretionary aspect of the payment of commissions to Ho, the Delegate went on to say this in his Reasons:

Even if Mr. Zhou (*sic.* “*Sben*”) had attempted to contradict Mr. Ho’s version of the terms of the bonus agreement, absent evidence beyond Mr. Ho’s and SPC Holdings’ conflicting versions of the terms of employment, and all other evidence being equal, I would, on a balance of probabilities, accept Mr. Ho’s version as more probable. In my opinion, it would be unlikely that an employee would give an employer sole discretion to decide, from month to month, if the employee would be paid a significant portion of their remuneration.

20. In the result, the Delegate concluded that it was a term of Ho’s employment that he be paid 2% commission on contracts secured by him. He also concluded that the payment of commissions was not discretionary.
21. The Delegate also accepted Ho’s evidence of the contracts he had secured in respect of which he had received no payment of commissions. On this aspect of the complaint, the Delegate drew an inference adverse to SPC owing to its failure to produce, either in response to the Demand for Employer Records or otherwise, any sales agreements, contracts, or records of accounts paid and payable, so as to refute Ho’s claim. For the same reason, the Delegate rejected SPC’s compilation of sales because it must have been supported by actual sales records which SPC had in its possession, but which it had not produced.

## ISSUE

22. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

## ANALYSIS

23. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 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.

24. Section 115(1) of the *Act* should also be noted. It says this:

115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

25. An appellant has the burden of persuading the Tribunal that the Determination contains an error that is reviewable having regard to the grounds set out in section 112(1). Absent an error of the type engaged by section 112(1), an appeal will be unsuccessful even if the appellant can show that if it had presented its case in a different way, the determination might not have been the same as the one the Director decided to issue.
26. SPC’s appeal engages sections 112(1)(b) and (c). It argues that important evidence exists which should have been heard by the Delegate, but was not. It argues that since the Delegate did not receive the evidence, SPC was

denied a fair hearing. It also argues that it was incorrect for the Delegate to assume he would have come to the same substantive conclusion even if he had heard that evidence.

27. As the grounds of appeal relate to each other, I will consider them together.
28. The Tribunal's right to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been presented to the Director during the investigation or adjudication of a complaint and prior to a determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if an appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars*, BC EST # D570/98).
29. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director has in some respect been unfair. Examples of cases where natural justice concerns may arise include situations where a party like SPC has not received notice of a complaint, or has been deprived of a reasonable opportunity to respond to it. In other situations, a decision may be impeached if a party can show bias on the part of the decision-maker, whether actual, or reasonably apprehended.
30. In this case, SPC asserts that there was a misunderstanding concerning the nature of the proceedings leading up to the issuance of the Determination. Specifically, SPC states that it was Shen and Zhou who attended the mediation that occurred early in the complaint process. While they participated as representatives of SPC, they did not understand that what they might say at that session would not be considered as evidence when and if it came time to adjudicate Ho's complaint. SPC says that Shen does not speak English, and made statements at the mediation using Zhou as translator. Later, when the unresolved issues came to be adjudicated by the Delegate, SPC did not lead the evidence of Shen because it believed that he had already provided it.
31. SPC submits that if Shen had tendered his evidence at the hearing conducted by the Delegate he would have said, through a translator, that he and Ho established the terms of the latter's employment through verbal conversations in which it was clearly stipulated that the decision to pay extra remuneration to Ho (characterized by SPC as a "bonus") and the amount of any such payments, were to be determined at the sole discretion of SPC having regard to Ho's performance. Shen would also have clarified that the value of contracts in respect of which Ho had asserted he was owed commissions was far less than the \$444,780.00 figure provided by him because SPC could not collect on some of them, and Ho had in fact been remunerated for others in previous months. Finally, Shen would have alluded to other instances during Ho's time as an employee when SPC had exercised its discretion, and declined to pay Ho his "full performance bonus."
32. SPC's argument is summarized by its counsel, in this way:

The distinction between mediation proceedings and adjudication proceedings was not understood by the Employer and it is likely that this misunderstanding was rooted in the linguistic difficulties that the Employer and its representative have been having with the conduct of these proceedings in English without the benefit of a translator.

The Employer is entitled to an opportunity to be heard in accordance with the rules of natural justice and procedural fairness. That opportunity has been frustrated by the linguistic barriers and resulting misapprehensions referenced above.

As a result of the Employer's failure to effectively adduce Shen's testimony into evidence, the Employment Standards Branch relied solely on the Complainant's uncontradicted evidence with respect to the conversations that constituted the verbal employment contract.

33. SPC's counsel then went on:

At page 8 of the Determination, the Delegate postulates that, even if the Employer had given evidence to contradict the Complainant's evidence, the latter version would still have been accepted as more probable. We submit that it was incorrect for the Delegate to have made assumptions in that regard without hearing the content of Mr. Shen's testimony and balancing the weight of that evidence against the weight of the Complainant's evidence.

We aver that the only manner in which this matter can be determined in accordance with the rules of natural justice and procedural fairness is to refrain from any determination of the issues in the absence of hearing the Employer's evidence and providing a full and fair opportunity for that to occur.

34. While I accept that the principals of SPC may have misapprehended the distinctions between the mediation and adjudication functions performed by the Branch, I do not believe it follows that I must allow SPC's appeal. A reason for this is that there is no evidence that anyone acting on behalf of the Director contributed to the misapprehension, or was even aware of it. The fact is, SPC misled itself.

35. The Notice of Mediation Session that appears in the record provided to the Tribunal by the Director for the purposes of this appeal advises that the mediation services were being offered to assist the parties to resolve the issues in dispute before the matter would be scheduled for a formal adjudication. The Factsheet regarding mediation attached to the Notice, and easily available online, states clearly that nothing said or proposed during the mediation would form part of the record if the parties failed to agree and unresolved matters needed to proceed to adjudication.

36. The settlement agreement executed by Zhou following the mediation session sets out plainly that it did not settle the matters of commissions and statutory holiday pay which Ho might wish to continue to pursue. SPC was provided with Ho's complaint form explaining the basis for his claim relating to unpaid commissions. The email correspondence between the Branch and SPC following the mediation session makes it clear that the pending adjudication would deal with the question whether Ho was entitled to commissions and statutory holiday pay. The Branch gave notice that SPC should marshal its evidence, whether in the form of documents or witnesses, in order to address the issues to be considered at the adjudication hearing.

37. In my opinion, no reasonable person could have been mistaken that a key matter to be determined at the adjudication hearing was whether Ho was entitled to commissions, and if so, in what amount.

38. Shen's lack of facility in the English language is troublesome, but the record shows that Zhou, an SPC corporate officer, is almost entirely fluent, and that it was she who dealt capably with the Branch throughout the proceedings leading to the issuance of the Determination. There is nothing in the record which suggests the Delegate knew, or ought to have known, that SPC was misunderstanding the nature of the adjudication proceedings, or the onus on it to prepare its case and to present it effectively at the April 22, 2010 hearing. At no time does it appear that any representative of SPC informed the Branch that language was acting as a barrier to the company's responding substantively to Ho's complaint. The time between the delivery of the various demands, notices, and documents, and the adjudication hearing, were sufficient to permit SPC to translate that written material had it wished to do so.

39. It appears that there was a point during the hearing when it became evident that Shen might be an important witness for SPC, and was unavailable. However, there is no evidence that Zhou requested an adjournment. In

the circumstances, I do not believe it was incumbent on the Delegate to suggest one, or indeed, to order an adjournment on his own motion so that Shen's evidence could be procured. It was at all times SPC's responsibility to ensure that it had met its evidentiary burden in answer to Ho's claims that he was entitled to commissions. It was not for the Delegate to act in a pro-active way either to advise SPC that its case was insufficient, or to facilitate its taking steps to cure the problem. If the Delegate had done that it might well have affected Ho's perception of his impartiality, and led to an allegation of bias (see *James Hubert D'Hondt operating as D'Hondt Farms*, BC EST # RD021/05, *492907 BC Ltd. operating as Slumber Lodge Motel*, BC EST # D099/05, and *Orca Security Corporation*, BC EST # D003/09).

40. In summary, I do not accept that the Tribunal should receive Shen's evidence, or remit the matter to the Director for re-hearing, so that information said to be new can be received, the evidence heard at the original hearing re-considered in light of the new information, and different conclusions of fact drawn if warranted. The information Shen provided at the mediation was not conveyed to the Delegate at the hearing because of SPC's mistake regarding the nature of the various procedures made available during the complaint process, and not because of a failure on the part of the Delegate, or others at the Branch, to observe the principles of natural justice.
41. Shen's evidence and, to the extent it is different, the other evidence SPC now seeks to tender regarding the merits of the complaint also appears to be evidence which was available to SPC at the time the Determination was made. SPC now wishes to have it considered in order to bolster a case that failed to convince the Delegate at first instance. The language of section 112(1)(c) is intended to support the finality of a delegate's decision, and to encourage parties to take care to present their whole case in the proceedings leading to a determination. Otherwise, the purpose of the *Act* mandated in section 2(d), to provide fair and efficient procedures for resolving disputes that fall to be decided under it, will be significantly undermined.
42. Having said this, I do think it unfortunate that the Delegate decided to comment on the effect the evidence of Shen would have had on him had it been tendered. It was unnecessary for him to do that. However, it is because it was unnecessary that I believe it is insufficient to warrant a conclusion that the Determination should be disturbed, notwithstanding the Delegate chose to express his views on the topic. The matter was hypothetical. The evidence the Delegate had before him, tendered by Ho, was essentially uncontradicted, due in part to SPC's failure to apprise itself of the nature of the various proceedings involved in resolving Ho's complaint, and its failure to respond properly to the Demand for Employer Records delivered by the Branch. Ho's evidence provided a sufficient basis for the Delegate to issue the Determination, and it is that evidence on which the Delegate relied in reaching his conclusions. The reference to the potential effect of Shen's evidence was gratuitous, extraneous, and unhelpful, but I cannot conclude that it compromised the ratio of the Determination in so fundamental a way that I must impose the remedy SPC seeks in order to cure it.

## ORDER

43. Pursuant to section 115 of the *Act* I order that the Determination dated September 9, 2010, be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**