

An appeal

- by -

Superstar Auto Repair Centre Ltd.  
("Superstar")

- 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:** C. L. Roberts

**FILE No.:** 2000/671

**DATE OF HEARING:** January 8, 2001

**DATE OF DECISION:** January 18, 2001

## **DECISION**

### **APPEARANCES:**

For Superstar Auto Repair Ltd.: Eric Wong, Manager  
Steven Lam, Peter Li & Company, Barristers & Solicitors

On his own behalf: Peter Chan

For the Director No one appeared

### **OVERVIEW**

This is an appeal by Superstar Auto Repair Ltd. ("Superstar"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination issued by the Director of Employment Standards ("the Director") September 14, 2000. The Director's delegate found that Superstar had contravened Sections 40 and 63 of the Act, and Ordered that it pay Peter Chan ("Chan") \$1,194.16 in overtime wage, compensation for length of service, vacation pay and interest.

All of the parties and counsel spoke Cantonese. I was assisted by a Cantonese interpreter during the hearing of the appeal.

### **ISSUES TO BE DECIDED**

At issue is whether the delegate erred in the finding of facts with respect to the issues of whether Chan was owed overtime and compensation for length of service.

### **FACTS**

Chan was employed by Superstar, an autobody repair business, as an autobody technician from September 27 1999 to December 31, 1999 at a rate of \$20.00 per hour. Chan filed a complaint with the Director alleging that he reported to work and was sent home on three occasions but did not receive minimum daily pay, that he worked more than 8 hours per day on many occasions but was not paid overtime, and that he was terminated without receiving notice or compensation for length of service.

The Director's delegate investigated the complaint, and found insufficient evidence to support Chan's claim for minimum daily pay.

As part of the investigation, the delegate obtained Chan's time cards and payroll records. They indicated that a total of 29.5 hours were paid at straight time. The delegate found that

Chan should have been paid at time and one half for those hours. The delegate found that, although the time cards were confusing with respect to the lunch breaks, she concluded that Chan always took one half hour for lunch. She concluded that Chan worked overtime but did not receive overtime pay, and was entitled to 29.5 hours at 1/2 time.

As part of the investigation, the delegate also sought information from Superstar regarding Chan's termination. Superstar contended that Chan had been fired for just cause. In a number of documents, Superstar claimed that Chan had been warned on three occasions that if he did not complete his work within the scheduled hours, his employment would be terminated. No documentation or other information was provided to support that allegation. Despite being asked by the delegate for the name of the person who gave the warnings, that name was not provided. When asked why "shortage of work" was indicated as the reason for the termination on the Record of Employment (ROE), Superstar contended it did so because there were no witnesses to a conversation in which Chan allegedly threatened Mr. Wong, since everyone had finished work for the day. Based on Chan's evidence was that he was fired at noon, and his time cards indicating that he worked only 4 hours that day, the delegate determined, on a balance of probabilities, that Superstar had not established that Chan had been terminated for just cause. The delegate determined that Chan was entitled to one week's pay based on his normal hours of work over the previous 8 weeks.

## **ARGUMENT**

### **Overtime**

Superstar contends that Chan is not owed overtime for the following reasons:

- a) Chan was not requested to work overtime, and was requested to cease work at the end of the business day and go home, but that Chan refused to do so;
- b) on many occasions, Chan "lingered around [Superstar's] business past the end of the business day without due cause or reason and without clocking out on the time cards until much later;
- c) Chan "was not efficient and was not sufficiently skilled to complete his work in a timely fashion during the working day"; and
- d) Chan "wasted valuable working time during the business day whereby he was not working on his assigned tasks or diligently doing so".

### **Termination**

Superstar argues that Chan was terminated for the following reasons:

- a) Chan "was not as skilled and as experienced as he had represented to [Superstar] in his interview for employment;
- b) Chan was "inefficient, and he was unable to complete his work in a timely fashion which could reasonably be expected of a skilled and experienced tradesperson in his position";
- c) Chan "wasted valuable time during the business day not doing his work";
- d) Chan "solicited the clients of Superstar for himself personally";
- e) Chan "attempted to sell various vehicles which he drove to work during the business day at Superstar to the customers of Superstar"; and
- f) Chan "uttered threats and caused distress to Superstar's management personnel"

In her written submission, the delegate stated that Superstar provided contradictory evidence regarding Chan's termination, leading her to arrive at the conclusion she did. She argued that Superstar was attempting to call new evidence on appeal to explain its position, as well as to dispute other conclusions arrived at by the delegate, and that it ought not be entitled to do so. The delegate argued that submissions regarding Chan's attempt to solicit business for himself were never raised during the investigation, and that they were never advanced as a cause for termination despite numerous opportunities to do so.

The delegate states that, on June 19, she contacted Stanley Wong who advised her that he was acting as Superstar's representative because Mr. Lau could not speak English. She asked him for a record of daily hours. The delegate says that, between June 19 and July 11, she made five telephone calls to Mr. Wong seeking the outstanding time cards and indicating that Mr. Lau should respond to the allegation regarding Chan's termination. She then sent a letter to Mr. Lau and Mr. Wong giving a final deadline for receipt of these items. On July 12, she received the remaining time cards and a note from Mr. Wong stating that Chan was dismissed for "not following the company work schedule" and for "delaying work to get overtime". Mr. Wong was told by the delegate this was insufficient, and that Mr. Lau should respond to the allegations in detail, and to explain why the Record of Employment (ROE) indicated "shortage of work" as the reason for the termination if Chan was terminated for cause.

The delegate says that she attempted to speak with Mr. Lau, and was told by his wife that his English was not very good. The delegate further states that she left a message with Mrs. Lau that Mr. Lau needed to respond to the allegations in writing. Mr. Lau did not contact her, and she communicated with Mr. Lau through Mr. Wong.

The delegate argues that Superstar is now attempting to have the Tribunal conduct the investigation, and, as I understand it, contends that I ought not hear the new evidence as

Superstar had "ample opportunity" to respond to the allegations before the investigation was concluded.

## **EVIDENCE AND ANALYSIS**

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has not been met.

I will address the issues separately.

### **Overtime**

As I indicated to Mr. Lam at the hearing, the arguments advanced on appeal do not constitute grounds for denying Chan overtime. There is no dispute that Chan worked the hours indicated on his time cards. In fact, Chan was paid for those hours, albeit at straight time. Mr. Lam contended that Chan was paid straight time for his overtime as a "compromise" because Superstar felt he took too long to perform the work. Mr. Lam also argued that Chan never complained about the pay being insufficient until after his employment ended.

The requirements of the Act or the regulations are minimum requirements (section 4), and any agreement to waive any of the requirements is of no effect. Even if Chan's failure to dispute his entitlement to wages could be construed as an agreement, which I do not find there was, such agreement would be void.

Therefore, I find no basis for the appeal on the issue of overtime wages.

### **Termination**

The basis of Superstar's appeal is that the delegate made several factual errors in arriving at the Determination, and sought to call witnesses to establish its case that Chan was terminated for cause. Superstar also attempted to present evidence on appeal that was never provided to the delegate at first instance, specifically that Chan solicited business for himself.

The Tribunal has held on many occasions that, where an employer neglects or fails to participate in an investigation or neglects or refuses to provide evidence to the delegate at the first instance, it is precluded from doing so on appeal. (*Tri-West Tractor Ltd.* BCEST #D268/96 and *Kaiser Stables Ltd.* BCEST #D058/97) As the Adjudicator noted in *Tri-West*,

This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the

case that should have and could have been given to the delegate in the investigative process."

The delegate's submission, which was not disputed, shows that she attempted to obtain information from Superstar regarding Chan's termination on several occasions. Those attempts included a letter outlining the allegations and a Demand for Records being issued May 31, 2000. At the bottom of the Demand letter, in bold, is the following: "Failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations. See Attached Sheet. " The delegate's letter advised the employer of her telephone number in the event there were any questions about the process.

In response to that letter and Demand, Superstar's accountant, Mr. Wong, forwarded Chan's payroll to the delegate. No record of daily hours or response to the allegations were received. The delegate contacted Mr. Wong on June 19, who indicated he was acting as the employer's representative because Mr. Lau did not speak English. The delegate advised Mr. Wong that she required a record of daily hours worked. Mr. Wong forwarded some, but not all, of Chan's time cards two days later.

The delegate telephoned Mr. Wong approximately five times after this date regarding the outstanding time cards and indicated that Superstar should respond to the allegations regarding the termination. The delegate received the remaining time cards on July 12, along with a letter from Mr. Wong stating why Chan was dismissed. The delegate explained that this was insufficient, and that the employer should respond in detail to the allegations, as well as provide an explanation of the ROE. The delegate received two faxes following that conversation, one indicating that Chan had uttered threats to another employee which was not witnessed because it was the end of the business day.

On August 25, the delegate sent a letter, by fax, to both Mr. Wong and Mr. Lau, seeking specific information, and stating "Please respond by Thursday, August 31, 2000. If I do not receive this by this date I will issue a Determination based on the information I have".

Mr. Lam argued that Mr. Lau, the owner of Superstar, did not have sufficient command of the English language to be able to respond to the Director's requests, and relied upon "the translation efforts of several people" to communicate with the Director. Mr. Lam contends that Mr. Lau did not fully appreciate that the Director's investigation would result in a final determination of the matter and an Order. Mr. Lam argued that natural justice demanded that the delegate ensure that the Director satisfy herself that the parties are fully aware of what is being expected of them, and the consequences to them if they do not. As I understand Mr. Lam's argument, he suggests that, in this instance the Director ought to have had a Cantonese speaking representative contact the employer to ensure that he understood the process and the consequences of failing to comply with her demands.

I find no breach of natural justice by the Director. The delegate was initially unaware of Mr. Lau's difficulty with the English language. Nevertheless, upon being advised of his language limitations by Mr. Wong, the delegate communicated with both Mr. Lau and Mr. Wong. Mr. Wong and Mr. Lau both held Mr. Wong out as Mr. Lau's agent. The delegate is entitled to rely on the parties' assertion of that agency relationship. She has no reason or duty to inquire into the scope of Mr. Wong's actual authority. If Mr. Wong failed to communicate the delegate's requests fully and accurately to Mr. Lau, that is a matter for Mr. Wong and Mr. Lau. Given that Mr. Lau, through Mr. Wong, had full knowledge of the case against him, and a full opportunity to reply, I find no basis to allow new evidence on appeal. This case falls squarely within the principles outlined in *Tri-West*.

During the hearing, I determined that, if I found a breach of natural justice, I would consider whether Superstar had grounds for terminating Chan's employment. In the event I am wrong in concluding there is no breach of natural justice, I find no basis for terminating Chan's employment without compensation.

Grounds a), b) and c) advanced by Superstar are not reasons for terminating Chan's employment without compensation. The Act provides an employer with a three month probationary period in which to assess an employee, and in which compensation for length of service would not be paid. After that time, an employer must show just cause. Superstar contends that it discovered Chan's lack of skill "within a few days" after he began to work. It did nothing about those purported lack of skills. If Chan was not meeting performance standards after December 27, Superstar's obligation was to apply progressive discipline. There is no evidence it did so. Although Superstar argued that Chan was warned, such warnings were made orally, and in that respect, are insufficient. If Superstar was of the opinion that Chan was incompetent, it had an obligation to a) establish and communicate a reasonable standard of performance, b) give Chan an opportunity to meet the required standards and show that he was unwilling to do so, c) notify Chan that he had failed to meet the standards and that his employment was in jeopardy because of that, and d) dismiss him only when he failed or was unwilling to meet those standards. (see *Kruger BCEST #D003/97*).

Furthermore, Chan was paid for all his extra hours. If Superstar continued to pay him for those hours, although not at overtime rates, this action negates its argument that Chan's employment was terminated because he was inefficient. It seems to me that payment for additional hours condones his "inefficiency", if that could be found.

Superstar also alleges that Chan operated his own auto repair business, and solicited Superstar's clients for his own business while at work for Superstar. On this point, I heard the evidence of Mr. Eric Wong, Superstar's manager. Mr Wong testified that he had no evidence that Chan solicited Superstar's clients for his own business. He did testify, however, that on one occasion, he saw Chan selling one of his own cars to one of Superstar's customers while at work. The transaction took place in the back yard of the repair shop, and lasted

approximately 10 or 15 minutes. Mr. Wong could not remember the date of the transaction, and did not do anything about it because he "did not consider it to be a serious matter". It was never reported to Mr. Lau.

Not only is there a complete lack of any evidence that Chan solicited Superstar's clients for his own business, even if conducting a sale of a personal vehicle could be considered grounds for termination for cause, Mr. Lau had no knowledge of this transaction. It could, therefore, not be a factor in his dismissal.

The appeal is dismissed.

### **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination issued September 14, 2000, be confirmed, together with whatever interest may have accrued since that date, pursuant to Section 88 of the Act.

***C. L. ROBERTS***

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**C. L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**