

An appeal

- by -

Zilin Z. Wang

- 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:** Carol L. Roberts

**FILE No.:** 2011A/177

**DATE OF DECISION:** February 13, 2012

## DECISION

### SUBMISSIONS

Zilin Z. Wang	on his own behalf
Johnny Shih	on behalf of Osaka Teppanyaki Restaurant Ltd.
Megan Roberts	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Zilin Z. Wang, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “*Director*”) issued October 25, 2011.
2. Mr. Wang was employed as a chef by Osaka Teppanyaki Restaurant Ltd. (“*Osaka*”) from December 19, 1998, until December 27, 2010. Mr. Wang filed a complaint with the Director alleging that Osaka had contravened the *Act* in failing to pay compensation for length of service.
3. Following a hearing, the Director concluded that the *Act* had not been contravened and that no wages were outstanding. The Director’s delegate determined that no further action would be taken.
4. Mr. Wang contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have it “overturned”. Mr. Wang contends that the delegate’s findings were based on “false information”.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is based on the written submissions of the parties.

### ISSUE

6. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

### FACTS AND ARGUMENT

7. The Director’s delegate held a hearing into Mr. Wang’s complaint on October 17, 2011. Osaka was represented by Mr. Shih and Roland Lasaleta, both of whom are directors and officers of Osaka. Mr. Lasaleta is also Osaka’s head chef. The delegate heard evidence from Mr. Lasaleta and Mr. Shih as well as from Oliver Patricio, one of Osaka’s chefs, Jerome Santo, a dishwasher, and Andrew Lai, Osaka’s service manager, on Osaka’s behalf. She also heard evidence from Mr. Wang. Mr. Wang called no witnesses.
8. Briefly, the evidence before the delegate was that on December 19, 2010, Mr. Wang had a verbal and physical altercation with Mr. Patricio. The evidence of Mr. Lasaleta, Mr. Patricio, and Mr. Santo was that Mr. Wang grabbed Mr. Patricio by the throat and punched him. She also heard evidence that after Mr. Wang and Mr. Patricio were physically separated, Mr. Wang continued to yell at Mr. Patricio and grabbed a kitchen knife, pointed it at Mr. Patricio’s face and asked him if he “wanted to die”. After Mr. Wang was physically

restrained, he changed his clothes and sat in the restaurant lounge for the balance of the evening and did not perform any duties.

9. The day following the incident, Mr. Lasaleta met with Mr. Shih and other “stakeholders” who decided to terminate Mr. Wang’s employment. Mr. Shih’s evidence was that the incident with the knife was critical in Osaka’s decision to terminate Mr. Wang’s employment.
10. Although Mr. Wang agreed that he and Mr. Patricio had a verbal and physical altercation, it was his evidence that Mr. Patricio uttered racial slurs and shoved him, and that he responded by shoving Mr. Patricio back and telling him not to touch him. Mr. Wang testified that after they were separated, he went into the hallway for about 15 minutes after which he returned to the kitchen and resumed cooking. Mr. Wang denied using a knife against Mr. Patricio or threatening him with one.
11. Mr. Wang said that the following weekend he called Osaka to see if he was needed for work and that Mr. Shih told him that the restaurant was not busy and that he did not have to come to work. A few days later, Mr. Wang received his Record of Employment that indicated that his employment had been terminated on December 27, 2010. According to Mr. Wang, Mr. Shih told him that Mr. Lasaleta was behind the termination and that the decision was made after they were made aware that Mr. Wang had “reached to grab a knife”.
12. After reviewing all of the evidence and submissions, the delegate determined that Osaka had just cause to terminate Mr. Wang’s employment. She found that Mr. Wang was involved in a confrontation with Mr. Patricio the evening of December 19, 2010. The delegate preferred the evidence of Osaka’s witnesses to that of Mr. Wang. She noted that Mr. Wang simply denied that he grabbed a knife or uttered threats against Mr. Patricio, alluded to a conspiracy between the witnesses against him and made allegations of questionable business practices and ethics against them. She noted that although Mr. Wang agreed the altercation became physical, he contended that Mr. Patricio threw the first punch. The delegate noted that Mr. Wang provided no evidence to corroborate his assertions that Mr. Patricio assaulted him.
13. The delegate found Osaka’s witnesses to be credible and convincing. She found each to be clear and forthcoming. She also found their testimony to be consistent and reasonable. She found the evidence of Mr. Lasaleta and Mr. Santo to be consistent and believable. Although she found Mr. Patricio’s evidence to be less detailed and in conflict with the other witnesses on some points, she found his evidence that Mr. Wang grabbed and punched him and pointed a knife in his face to be consistent with that of the other witnesses.
14. The delegate found no evidence to support Mr. Wang’s claim that Osaka’s evidence was contrived against him.
15. The delegate concluded as follows:

In considering all evidence provided, I find that Mr. Wang did obtain and yield a kitchen knife in a threatening and aggressive manner against Mr. Patricio while stating “you wanna die”. Furthermore, I accept the situation was diffused only when Mr. Santo stepped in and grabbed the knife from Mr. Wang’s hand and Mr. Lasaleta and Mr. Lai further intervened.
16. The delegate did not accept that Mr. Wang’s behaviour was justified even if Mr. Patricio had called Mr. Wang names. She also found no evidentiary basis for Mr. Wang’s contention that he acted in self-defence, that the fight was consensual, or that it was instigated by Mr. Patricio.

17. The delegate concluded that the acts perpetrated by Mr. Wang were “unacceptable, harmful and serious enough in nature to jeopardize the immediate physical safety and well being of Mr. Patricio and other employees”. The delegate concluded that Mr. Wang “damaged his relationship with Osaka so significantly that it was not reasonably able to continue beyond that point”.
18. The delegate concluded, based on all of the evidence, that Osaka had demonstrated that it had just cause to terminate Mr. Wang’s employment.

## ARGUMENT AND ANALYSIS

19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
  - the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was made.
20. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
21. Although Mr. Wang alleges a failure to comply with principles of natural justice as the ground of appeal, his written submissions are, in essence, an assertion that the conclusions contained in the Determination are wrong.
22. Mr. Wang repeats arguments he presented to the delegate at the hearing. He submits, among other things, that Mr. Patricio was drinking heavily during the evening and not performing his work and that Mr. Patricio provoked the confrontation making racial slurs against him. Mr. Wang denies that he punched Mr. Patricio or used a knife in the altercation and contends that the witnesses lied. Mr. Wang also repeats assertions he made at the hearing that Osaka had been sanctioned by the Liquor Control Board for allowing chefs to drink alcohol while on the job.
23. Mr. Wang argues that the delegate failed to consider a resignation letter he submitted to Osaka in 2008 which was refused because he was such a good worker.
24. Finally, Mr. Wang asserts that the delegate failed to give proper consideration to his limited English and inexperience in conducting a hearing, including his lack of skill at cross-examination and evidentiary rules.
25. The delegate submits that Mr. Wang’s appeal consists essentially of a re-argument of his position in the hearing, disputing the credibility of Osaka’s witnesses. She also contends that although Mr. Wang submits that his lack of legal expertise prevented him from cross-examining witnesses and presenting his argument and evidence, he did in fact question each witness in detail as noted in the Determination.
26. The delegate says that Mr. Wang’s evidence, including his resignation letter, was fully considered, but submits that she considered the resignation letter to have no relevance to the issue of whether or not Osaka had just cause to terminate his employment.
27. Finally, the delegate submits that Mr. Wang participated in the Employment Standards Branch complaint resolution process in addition to participating in a mediation with a Branch Officer prior to the hearing. As such, she submits, Mr. Wang was educated on the requirements of the *Act* and the adjudication process. She

contends that at no time prior to or during the hearing did Mr. Wang indicate or present that he was having difficulty understanding or required assistance or representation.

28. The Director sought confirmation of the Determination.
29. Osaka submits that it had just cause to terminate Mr. Wang's employment due to his violent behaviour towards other staff and also seeks to have the Determination upheld.
30. In a reply submission, Mr. Wang repeats his assertion that he did not pull a knife on Mr. Patricio and that this evidence was "fabricated by [Mr. Lasaleta] and his co-workers".
31. It appears that Mr. Wang has equated his view of "fairness" with a natural justice argument. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
32. I am satisfied that Mr. Wang had a fair hearing and had a full opportunity to present his case. I accept that he was provided with extensive information on the hearing process and that he had the ability to employ an agent, advocate or counsel if he felt unprepared to conduct the case himself due to language difficulties or unfamiliarity with the process. I further accept, based on the Determination, that Mr. Wang did ask questions of all of the witnesses. In short, I find no merit to Mr. Wang's ground of appeal.
33. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."
34. I have, accordingly, analyzed the Determination in light of Mr. Wang's submissions.
35. In essence, Mr. Wang disputes the factual findings of the delegate. The *Act* does not provide for an appeal based on errors of fact unless such findings also raise an error of law. (*Britco Structures Ltd.* BC EST # D260/03). The Tribunal's appeal authority extends only to questions of mixed fact and law where an identifiable question of law can be extricated and shown to have resulted in the error.
36. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
  1. a misinterpretation or misapplication of a section of the Act;
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
37. Mr. Wang has not established that the delegate relied on no evidence or irrelevant facts, nor, for that matter, a view of the facts that cannot reasonably be entertained. She simply preferred the evidence of the employer

over that of Mr. Wang. Mr. Wang has asserted that all Osaka's witnesses are liars without presenting any evidence in support of his assertions. Mr. Wang makes the same arguments on appeal as he did to the delegate and asks for a different result. An appeal is not an opportunity to re-argue the facts.

38. I find that Mr. Wang has not met the burden of showing that the conclusion reached by the Director was unreasonable or unjustified on an objective assessment of the evidence before her.
39. The appeal is dismissed.

### **ORDER**

40. Pursuant to section 115 of the *Act*, I order the Determination dated October 25, 2011, be confirmed.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**