Employment Standards TRIBUNAL

An appeal

- by -

Dan A. Watson
("Mr. Watson")

- 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: Shafik Bhalloo

FILE No.: 2010A/176

DATE OF DECISION: March 21, 2011

Employment Standards TRIBUNAL

DECISION

SUBMISSIONS

Dan A. Watson	on his own behalf
Mike Shaw	on behalf of M. Shaw Enterprises Ltd., carrying on business as Clarke Hill Motors
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Dan A. Watson ("Mr. Watson") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against a determination of the Director of Employment Standards (the "Director") issued November 5, 2010, (the "Determination").

2. Mr. Watson was employed as a mechanic with M. Shaw Enterprises Ltd. carrying on business as Clarke Hill Motors ("CHM"), an autobody shop, since April of 2008.

3. On May 18, 2010, Mr. Watson filed a complaint with the Director under section 74 of the *Act* alleging that CHM contravened the *Act* by failing to pay him overtime wages and compensation for length of service (the "Complaint"). While Mr. Watson's Complaint included a claim for medical premiums allegedly deducted by CHM from his wages, this claim was resolved, abandoned or not pursued at the hearing of the Complaint conducted by the delegate of the Director on September 22, 2010, (the "Hearing").

4. The delegate, after the Hearing, issued the Determination concluding that CHM did not contravene the *Act* as Mr. Watson failed to "prove his complaint for overtime wages" and CHM had just cause to terminate his employment. In the result, no wages were found owing to Mr. Watson and the delegate concluded that no further action would be taken with respect to his Complaint.

5. Mr. Watson filed his appeal of the Determination on December 9, 2010. In the appeal, Mr. Watson invokes all available grounds of appeal under section 112 of the *Act*, namely, that the Director of Employment Standards erred in law and failed to observe the principles of natural justice in making the Determination and evidence has become available that was not available at the time the Determination was being made.

6. With respect to remedies, Mr. Watson, in the Appeal Form, has checked off all boxes setting out potentially available remedies he is seeking. More particularly he is asking the Tribunal to cancel the Determination, to change it or vary it and also to refer it back to the Director. While it would appear that Mr. Watson is seeking some of these remedies in the alternative, in his final submission in support of his appeal, it appears that he is more probably seeking the Tribunal to cancel the Determination and award him overtime wages and compensation for length of service.

7. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in 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. In my view, this appeal may be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

8. Did the Director err in law or fail to observe the principles of natural justice in making the Determination?

9. Has new evidence become available that was not available at the time the Determination was being made, such as to warrant a cancellation or a variation of the Determination or a referral back to the Director?

FACTS

10. Having reviewed the section 112 "record" and the Reasons for the Determination (the "Reasons"), I note that the delegate has comprehensively summarized the evidence of the parties in relation to both claims of Mr. Watson, namely, for overtime wages and compensation for length of service. I will refer to that evidence under two (2) separate subheadings below corresponding to the issues in Mr. Watson's Complaint.

(i) Overtime Wages

11. The Delegate notes in the Reasons that Mr. Watson claimed he consistently worked overtime hours and was not paid for them. More particularly, Mr. Watson claimed that he consistently worked from 8:00 a.m. to 6:00 p.m. and did not take a lunch break. However, Mr. Watson failed to keep any record of the hours he worked.

12. At the Hearing, Mr. Watson attempted to support his claim for overtime wages by adducing evidence from three (3) witnesses, none of them employees of CHM. The first was a friend of Mr. Watson, Andrew Moro ("Mr. Moro"), who drove him to work at CHM, on some occasions, at around 7:30 a.m. The second witness was Dan Barton ("Mr. Barton") of D&L Plumbing & Heating Ltd., who testified that on a number of occasions between 2008 and 2009 when he brought his company's vehicles for inspection, Mr. Watson was available at CHM from 8:00 a.m. to 6:00 p.m. The third witness was Don Anderson ("Mr. Anderson") of Snap-On Tools, a vendor who sold tools to CHM. Mr. Anderson testified that he had seen CHM open at 8:00 a.m. and that two (2) employees of CHM had told him that CHM was open at 8:00 a.m. Mr. Anderson also stated that when he attended on some Thursdays between 5:00 p.m. and 6:00 p.m., he did see that CHM's shop was open.

13. On CHM's part, the principal of CHM, Mr. Mike Shaw ("Mr. Shaw"), refuted Mr. Watson's and his witnesses' evidence, stating that Mr. Watson did not work overtime as his hours of work were from 9:00 a.m. to 5:30 p.m., with a one-half hour lunch break. Mr. Shaw further testified that he was daily at CHM's shop at 8:30 a.m. and worked at the shop until 6:00 p.m. to allow for customers to pick up their vehicles. Therefore, there was no need for Mr. Watson to be there at the end of the day, according to Mr. Shaw. Mr. Shaw also submitted that while Mr. Watson came in early every day and engaged in loud telephone conversations and was disruptive to the business next door to CHM, he did not start working until 9:00 a.m.

14. According to Mr. Shaw, if any work for customers was incomplete at the end of the day, he would call the customer to let them know the job would be finished the next day but did not require his employees to work overtime.

15. With respect to Mr. Moro's evidence, Mr. Shaw questioned the veracity of his evidence by contending that Mr. Watson did not need a ride to work from Mr. Moro, because Mr. Watson had his own vehicle and also access to the company vehicle to commute to work.

16. With respect to Mr. Barton's evidence that he took several vehicles to CHM for inspection and found CHM open at 8:00 a.m. to 6:00 p.m., Mr. Shaw challenged its veracity by noting that there was but one (1) invoice under Mr. Barton's name and no other vehicles under Mr. Barton's company's name.

17. With respect to Mr. Anderson's evidence that CHM's shop was open on Thursdays at 5:00 p.m. and that two employees told him that the shop opened at 8:00 a.m., Mr. Shaw testified that on Thursdays between 5:00 p.m. and 6:00 p.m. CHM's shop was open to feed the homeless, and employees of CHM helped in this regard, of which fact Mr. Anderson was unaware.

18. With respect to Mr. Watson's claim that he did not have the opportunity to take his lunches while working at CHM, CHM adduced evidence of witnesses employed at the shop, namely, Brendan Heaney ("Mr. Heaney") and Shane Vanderkuip ("Mr. Vanderkuip"). Mr. Heaney testified that he worked eight (8) hours per day, Monday through Friday, with one-half hour for lunch each day. He stated that the shop employees broke for lunch together at any time between 1:00 p.m. and 2:30 p.m. and, on many occasions, lunch was provided by Mr. Shaw. He also testified that he was never reprimanded by Mr. Shaw for taking lunch, but rather reprimanded by him if he did not break for lunch, as everyone at the shop broke for lunch as a group.

19. Mr. Heaney also testified that Mr. Shaw told him to stop working at the end of the day, if he tried continuing to work after hours. Mr. Heaney also corroborated Mr. Shaw's testimony that the latter was available to greet customers between 8:00 a.m. and 9:00 a.m., and like Mr. Watson, he did not have to start work until 9:00 a.m. He said, in his case, the reason why he attended work a little earlier was to "get his mind into the game" and prepare for the day.

20. Mr. Heaney also stated during the first six (6) months of his employment at CHM, Mr. Watson came to work earlier, but subsequently he came in later, anywhere between 8:30 a.m. and 8:45 a.m., and would spend his time on the phone or on the computer handling personal business before commencing work.

21. Mr. Heaney also claimed that he never saw Mr. Watson receiving a ride to work from anyone, but was aware that Mr. Watson came to work on his motorcycle or in the company's vehicle.

22. Mr. Vanderkuip testified that he worked from 9:00 a.m. to 5:30 p.m. at CHM's shop and took one-half hour lunch break with other employees, whenever it was convenient for the employees to break for lunch. He also stated that occasionally when he worked late or came to work on a weekend, he was always paid overtime.

23. The delegate, after considering the totality of the evidence of the parties and their witnesses, preferred the evidence of CHM's witnesses and concluded that Mr. Watson failed to discharge the onus on him to prove he had worked overtime or additional hours for which he was not paid. The delegate particularly noted that Mr. Watson did not keep any records of the days and hours he worked. Accordingly, the delegate dismissed Mr. Watson's claim for overtime wages.

(ii) Compensation for Length of Service

24. With respect to his claim for compensation for length of service, in his Complaint, Mr. Watson asserted that he was terminated from his employment without notice and without cause on December 8, 2009. More particularly, he stated that he gave his employer two months' notice that he was going on vacation, but Mr. Shaw "lost it" and told him that he could not take vacation. After this, Mr. Watson states that he attended with Mr. Shaw at a restaurant to discuss the matter and in that meeting Mr. Shaw told him that he could take the time off, but he would also have to take additional time off as Mr. Shaw did not want him to return in the middle of a pay period. As a result, states Mr. Watson, he went on vacation and returned to

work on December 7, 2009. While he does not recall what work he did on that particular date, Mr. Watson claims that he did some odd jobs at work and stayed out of Mr. Shaw's way as Mr. Shaw was working on a truck on that day. Subsequently, on the following day, on December 8, 2009, Mr. Watson stated that a torch blew up in his hand when at work, and Mr. Shaw "lost it" and called him names and told him he had to take some time off and that he was laying him off. Mr. Shaw then told him to come back to the shop next Friday to get his Record of Employment and when he returned to the shop, he was handed $1,000.00 and his Record of Employment, which was backdated to November 15, 2009.

25. At the Hearing of the Complaint, Mr. Watson adduced documentation from WorkSafe BC ("WBC") consequent to his claim for injury at his workplace on December 8, 2009. The document evidences that WBC, for its purposes, determined that Mr. Watson was injured on December 8, 2009, in a workplace injury. He received benefits from WBC and was told that he was fit to return to work on May 9, 2010. However, when he contacted Mr. Shaw to return to work, Mr. Watson stated that Mr. Shaw informed him that there was no work for him as he had been fired.

26. Mr. Shaw, in response, testified that CHM paid annual vacation to its employees in each paycheque. In the case of Mr. Watson, Mr. Shaw indicates that he had already taken his full allotment of holidays throughout the year and was not entitled to any more. When Mr. Watson asked to take holidays a couple of months before he intended to take them, Mr. Shaw stated that he advised him not to take vacation as the shop was not doing well. He stated that he let Mr. Watson know that if the latter defied him and took holidays, he would not have a job return to as his employment would be terminated.

27. According to Mr. Shaw, although Mr. Watson had a few months to think about what he had been told by him, Mr. Watson went ahead and took vacation commencing November 16, 2009, until December 7, 2009, when he returned to work.

28. According to Mr. Shaw, on December 7, 2009, when Mr. Watson returned to work, he told Mr. Watson that there was no work for him and that he should pack his stuff and go. According to Mr. Shaw, Mr. Watson then walked around the shop and talked to other employees informing them that his employment was terminated because he took vacation.

29. Subsequently, on December 8, 2009, Mr. Shaw states that Mr. Watson again returned to the shop and he picked up a torch to bring it into the shop but the torch blew up. Mr. Shaw stated that he threw Mr. Watson out of the shop on that occasion and told him not to come back. He also told him that his Record of Employment would be mailed to him, as it was already with CHM's accountant.

30. In January 2010, Mr. Shaw states that he received a phone call from WBC in regards to the torch incident at work on December 8, 2009, as Mr. Watson advanced a claim with WBC that he was injured on the job. While WBC determined that the accident had taken place at CHM's shop, Mr. Shaw did not believe that the torch injured Mr. Watson.

31. Mr. Heaney, one of CHM's witnesses, stated that while he saw Mr. Watson come to the shop sometime in December, he did not see Mr. Watson doing any work and he was not aware that Mr. Watson was assigned any work then.

32. Mr. Vanderkuip corroborated Mr. Shaw's evidence surrounding the termination of Mr. Watson's employment, stating that he overheard a conversation between Mr. Watson and Mr. Shaw when the two were arguing in relation to Mr. Watson's request for vacation. Mr. Vanderkuip states that he heard Mr. Shaw tell Mr. Watson that if he went on vacation, he should not bother to come back as he was fired. Mr. Vanderkuip

further testified that he saw Mr. Watson come to the shop in December and heard Mr. Shaw tell him to leave. He also did not see Mr. Watson perform any work.

33. The delegate, in concluding that CHM had just cause to terminate Mr. Watson's employment, reasoned as follows:

> Mr. Watson displayed insubordination by refusing to abide by a reasonable and lawful order by his employer. Generally, insubordinate conduct is the failure of an employee to carry out the lawful instructions of the employer. In most cases of employee insubordination the misconduct is minor and does not in and of itself warrant summary dismissal. However, in exceptional cases a single act may constitute just cause.
>
> The employer clearly informed Mr. Watson his employment would be terminated if he took unauthorized vacation and when Mr. Watson took his vacation in November his employment was terminated.

34. In the circumstances, the delegate concluded, CHM had not contravened the *Act* as it had just cause to terminate Mr. Watson and the delegate dismissed Mr. Watson's Complaint.

SUBMISSIONS OF MR. WATSON

35. In his written submissions dated December 8, 2010, in support of his Appeal, Mr. Watson states that his case was "not reviewed fairly" and delineates the following reasons in support thereof:

- The shop was open from 8:00 a.m. to 6:00 p.m. as stated (by) M. Shaw in his own notes.
- I was never given any verbal or written notice that I would be terminated for taking vacation.
- I was never made aware or seen any of the morning notes made by M. Shaw.
- My ROE states a temporary layoff.
- I was told that Employment Standards would be reviewing his record (DAYBOOK, ALL ENTRIES, LOGS, PAY STUBS, ETC.)
- I feel there is a discrepancy in my pay amount as most pay stubs differ, but pay out the same salary.
- WCB determined I was still employed at the time of my injury on December 8, 2009.

36. In his submission, Mr. Watson also requested an extension with respect to his Appeal to January 15, 2011, so that he could obtain some supporting documents, including a bank statement from a cheque cashed by him in the amount of $1,000, as well as a witness letter stating that he was working Mondays to Fridays from 8:00 a.m. to 6:00 p.m. While the Tribunal did not grant him an extension of his Appeal, he was advised that he could request an extension for his final Reply.

37. Subsequently, on January 21, 2011, Mr. Watson requested a further extension to file further submissions in the Appeal, and the Tribunal granted him an extension until February 1, 2011. Apparently, Mr. Watson wanted to engage the services of the Newton Advocacy Group Society ("NAGS") to assist him in preparing further appeal submissions. NAGS, by way of a letter dated February 2, 2011, sought a further extension of time to March 2, 2011, to prepare submissions on behalf of Mr. Watson. The Tribunal, by way of a letter dated February 3, 2011, granted that extension, allowing NAGS until March 2, 2011, to file or deliver its submissions.

38. NAGS then, on March 2, 2011, filed submissions on behalf of Mr. Watson attaching all the documents Mr. Watson previously adduced into evidence in support of his Complaint, including statements of Mr. Moro, Mr. Anderson and Mr. Barton. He also adduced payroll cheque stubs and his Record of Employment, amongst other documents that he previously adduced. While I do not intend to reiterate NAGS' entire submission on behalf of Mr. Watson here, I note, after carefully reading it, that these submissions largely, if not wholly, advance the same arguments Mr. Watson previously made. For example, with respect to Mr. Watson's claim for overtime wages, NAGS reiterates that Mr. Watson worked from 8:00 a.m. to 6:00 p.m. and sometimes for longer hours. NAGS supported this submission relying on the same evidence of witnesses, being the evidence of Mr. Barton, Mr. Anderson, and Mr. Moro, which Mr. Watson previously adduced at the Hearing. The same written statements from these three witnesses that were part of the section 112 "record" are re-submitted by NAGS on behalf of Mr. Watson.

39. NAGS also reviews the paystubs from July and August when Mr. Watson was an hourly rate employee, and purportedly worked longer hours before he changed over to being a salaried employee. These earlier paystubs, according to NAGS, should have formed the basis for the delegate to conclude that Mr. Watson continued working overtime throughout his employment. Since the delegate did not give these earlier paystubs "due weight", the delegate erred in making his Determination according to NAGS.

40. NAGS also argues that Mr. Shaw's "daybook" was not something Mr. Watson considered because he wasn't aware that he had to request Mr. Shaw's daybook. According to NAGS or Mr. Watson, Mr. Shaw's daybook would provide evidence of any overtime Mr. Watson worked, including evidence that he worked at the shop on December 7 and 8, 2009.

41. Similarly, with respect to Mr. Watson's claim for compensation for length of service, NAGS, on behalf of Mr. Watson, reiterates the argument Mr. Watson previously made at the Hearing of the Complaint, namely, he was terminated after coming back from his vacation and not due to insubordination. NAGS reiterates that Mr. Watson received express permission from Mr. Shaw before going on his vacation and Mr. Watson agreed with Mr. Shaw that he would not receive vacation pay on this occasion as he went on a previous vacation from March 16 to 25, 2009.

42. NAGS further argues on behalf of Mr. Watson that the Record of Employment Mr. Watson received from Mr. Shaw or CHM showed that he was laid off due to shortage of work. Since the record of Employment is "certified as true", then he could not have been terminated for insubordination but for lack of availability of work, according to NAGS. NAGS contends that "the Director made an unfounded assumption that the information (in the Record of Employment (ROE)) was falsified in order to serve as a benefit to [Mr. Watson] in applying for Employment Insurance" and, therefore, states NAGS "this assumption amounted to a bias" and "lack of consideration of relevant evidence" on the part of the delegate.

43. NAGS also submits that when Mr. Shaw told Mr. Watson to return to the shop on December 11, 2009, and handed him his Record of Employment together with a cheque for $1,000, this constituted evidence that Mr. Watson was not terminated for insubordination or for going away on unauthorized vacation. NAGS also submits that it is unlikely that Mr. Watson's Record of Employment would state that he was laid off, if he was terminated for going away on unauthorized vacation or for insubordination.

44. NAGS also advances, in the alternative, an argument previously not made by Mr. Watson that he was constructively dismissed when he was temporarily laid off. NAGS states that the Record of Employment shows that the expected date of recall is marked "unknown" and not "not returning". NAGS submits that the imposition of a temporary layoff is not negotiated within Mr. Watson's contract of employment and, therefore, it is "deemed to constitute a constructive dismissal".

45. Finally, NAGS argues, in the further alternative, that if the Tribunal is not satisfied that Mr. Shaw or CHM provided Mr. Watson with authorization to go on vacation, then the level of insubordination on Mr. Watson's part did not amount to just cause. NAGS states that "going on a vacation without authorization" does not amount to "an exceptional circumstance that warrants summary dismissal" and it is not "synonymous in nature with acts such as theft or fraud where a single instance may justify or warrant a summary dismissal". NAGS then reiterates that it was Mr. Watson's honest belief that he could go on vacation so long as he agreed to not receive pay while on vacation, and if there was any misunderstanding in this regard 'it may have been caused due to the brain injury" Mr. Watson sustained from his accident previously. Therefore, submits NAGS, any insubordination on Mr. Watson's part is not "wilful and/or deliberate" and the Tribunal should reverse the Determination and award Mr. Watson compensation for length of service.

SUBMISSIONS OF THE DIRECTOR

46. The Director submits that Mr. Watson is making the "same arguments" on appeal as he presented at the Hearing of his Complaint.

47. The Director submits that while Mr. Watson states that CHM's shop was open from 8:00 a.m. to 6:00 p.m. and CHM agrees that that was the case, the employees' shifts, however, started at 9:00 a.m. and ended at 5:30 p.m.

48. With respect to Mr. Watson's assertion that he was never give a warning that he would be terminated for taking vacation, the Director notes that there were witnesses to the conversation between Mr. Watson and Mr. Shaw who heard Mr. Shaw tell Mr. Watson that his employment would be terminated if he took vacation (contrary to Mr. Shaw's instructions).

49. The Director also notes that while Mr. Watson claims in his appeal submissions that he never saw Mr. Shaw's "morning notes", all documents of the parties were exchanged prior to the Hearing and Mr. Watson agreed that he had received the package of materials submitted by the employer, CHM.

50. With respect to Mr. Watson's contention that CHM indicated in his Record of Employment that he was temporarily laid off and not terminated for cause as a result of going on vacation, the Director notes that Mr. Watson had an opportunity at the Hearing to question his employer about his Record of Employment but did not do so. The Director notes that the delegate did not attach as much weight to the Record of Employment as to the testimony of the witnesses at the Hearing because the Record of Employment was created for insurance purposes and employers are usually reluctant to enter dismissal on the Record of Employment because it can potentially bar an employee from collecting benefits.

51. With respect to Mr. Watson's submission in the appeal that there were some discrepancies in his paystubs or in the manner in which he was paid by CHM, the Director notes that this was not an issue that was previously raised at the Hearing of the Complaint and is a new issue. The only issues or claims put before the delegate at the Hearing were Mr. Watson's claim for overtime wages and compensation for length of service.

52. With respect to Mr. Watson's assertion that the WBC determined that he was still employed as at December 8, 2009, with CHM, the Director notes that decisions of the WBC do not have a determinative effect on matters arising under the Act and that the WBC's decision was made "with an eye to the statutory purposes of its legislation".

53. Finally, the Director submits that while Mr. Watson asserts in his appeal that he will be providing further documents, there is nothing in his submissions or in the new information he purports to want to produce that could not have been provided at the time of the Hearing of his Complaint.

54. In summary, the Director reiterates that Mr. Watson is simply attempting to re-argue his case and that his appeal should be dismissed.

SUBMISSIONS OF CHM

55. I carefully reviewed all of the submissions of CHM made by Mr. Shaw and, as a result of my determination under the heading "ANALYSIS" below, I do not find it necessary to reiterate those submissions under this heading except to say that Mr. Shaw has highlighted those assertions or arguments Mr. Watson or NAGS on behalf of Mr. Watson has made in his appeal which the Director has already addressed in his submissions. I also note that Mr. Shaw has largely reiterated the evidence and arguments he made on behalf of CHM in response to Mr. Watson's arguments at the Hearing and in some cases reiterated the findings of facts made by the delegate in the Reasons for the Determination to reinforce CHM's position. As indicated, I do not find it necessary to reiterate Mr. Shaw's submissions here in light of my decision below.

ANALYSIS

56. Having reviewed the submissions of the parties, the Reasons for the Determination and the section 112(5) "record", I will deal with each ground of appeal of Mr. Watson under separate subheadings below.

(i) Natural Justice

57. With respect to Mr. Watson's natural justice ground of appeal, I note that in *Re: 607730 B.C. Ltd. (c.o.b. English Inn Resort)*, BC EST # D055/05, the Tribunal stated that the principles of natural justice are, in essence, procedural rights ensuring that 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.

58. In a subsequent decision in *Imperial Limousine Services Ltd.*, BC EST # D014/05, the Tribunal expanded 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; their 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 to respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.

59. The basis of Mr. Watson's reliance on the natural justice ground of appeal is his contention that the Director failed to consider relevant evidence in making his Determination. In particular, Mr. Watson argues that the Director "failed to give due weight to the information on [his] Record of Employment", as well as to his "paystubs from July 2, 2008, [to] August 15, 2008". Mr. Watson also submits that the Director made an "unfounded assumption in coming to the conclusion that Mr. Shaw did not correctly fill out [his] ROE due to the possibility that [he] would be barred from receiving Employment Insurance if it were marked on [his] ROE that [he] was dismissed".

60. I also believe that part of Mr. Watson's appeal under the natural justice ground is based on his assertion that at the Hearing, Mr. Shaw's "daybook was not considered" because he was not aware that he could request the daybook "be looked at". It is Mr. Watson's contention that Mr. Shaw's daybook would show evidence that he worked on both December 7 and 8, 2009, and as well that he worked overtime.

61. In my view, Mr. Watson has failed to discharge the onus on him to demonstrate that the Director breached the principles of natural justice in making the Determination. Mr. Watson, under this ground of appeal, appears to be challenging the findings of fact made by the Director's delegate. The delegate had the discretion to review all of the evidence adduced by the parties at the Hearing. It was well within the delegate's discretion to prefer the evidence of the witnesses of the employer, CHM, over the evidence of Mr. Watson or his witnesses. Even if the delegate were wrong in assuming that the Record of Employment was prepared for Employment Insurance purposes and the employer, in this instance, may have been reluctant to enter dismissal, the delegate, in concluding that Mr. Watson was properly terminated for cause, preferred the evidence of the employer's witnesses, namely Mr. Heaney and Mr. Vanderkuip. The latter testified that he witnessed the conversation wherein Mr. Shaw told Mr. Watson that he could not take vacation and if he disobeyed him that his employment would be terminated. The delegate in the Reasons for the Determination preferred the evidence of the employer's witnesses over Mr. Watson's evidence, noting particularly the inconsistency in Mr. Watson's evidence that he returned to work in the middle of the pay period on December 7, 2009, when he testified that Mr. Shaw permitted him to take vacation provided he would take the entire month off and return at the beginning of a pay period. According to the delegate there was no explanation offered by Mr. Watson for his earlier return, which was inconsistent with what Mr. Watson claimed he was told by Mr. Shaw. In my view, the delegate, in exercising his discretion in making findings of fact and preferring the evidence of the employer's witnesses over Mr. Watson's witnesses, does not give rise to a breach of natural justice.

62. Furthermore, Mr. Watson's contention that Mr. Shaw's daybook was not considered by the Director because Mr. Watson was unaware that he had to request the delegate to consider the daybook, in my view, does not give any basis for him to argue a breach of natural justice. The said daybook or notes of Mr. Shaw were produced to Mr. Watson in advance of the Hearing and they are a part of the section 112(5) "record" produced in the appeal. However, it appears that Mr. Watson did not, when he had the opportunity to examine Mr. Shaw at the Hearing, raise any questions pertaining to the daybook or notes of Mr. Shaw. I have looked at those notes and do not find anything in those notes that would call into question the findings or conclusions of facts reached by the delegate in the Determination, nor do I find any support for Mr. Watson's argument that a breach of natural justice has occurred.

(ii) Error of Law

63. After reviewing the written submissions of Mr. Watson, I am not very clear regarding the basis for his allegation that the Director erred in law in making the Determination. It would appear from his submissions throughout the appeal process that Mr. Watson is disputing findings or conclusions of fact made by the delegate. The *Act*, in my view, is very clear in delineating, in section 112(1), the limited grounds of appeal available to any appellant: error of law, breach of natural justice and new evidence grounds. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact, except where such findings raise an error of law. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal adopted the following definition of "error of law" in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12-Coquitlam)*, [1998] B.C.J. No. 2275:

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.

64. I find that Mr. Watson has not shown any misinterpretation or misapplication of the *Act* or any applicable principles of general law on the part of the delegate.

65. I also find that Mr. Watson has not shown the delegate was acting without any evidence or on a view of facts which could not reasonably be entertained when concluding that Mr. Watson did not provide compelling evidence to show that he was not paid for any work or that he is entitled to wages for overtime work.

66. I also find that the delegate acted on a view of facts which could be reasonably supported or entertained when he concluded that Mr. Watson was insubordinate when he disobeyed Mr. Shaw's clear instructions not to take vacation and CHM thus had just cause to terminate his employment.

67. In summary, in my view, it was open to the delegate, on the evidence adduced by the parties, to reasonably make the findings of facts and the consequent conclusions he did and ultimately in ultimately dismissing Mr. Watson's Complaint.

68. Finally, to the extent that Mr. Watson is relying upon the WBC decision which recognized his claim for injury resulting at work on December 8, 2009, to argue that the delegate erred in law in concluding that his employment was terminated for cause for taking unauthorized vacation because he was back at work after his vacation, I find that I am in agreement with the delegate's Reasons for the Determination and the Director's appeal submissions that the decision of WBC in respect of Mr. Watson is not determinative in any proceeding under the *Act*, nor binding on the Director. Further, WBC did not have the benefit of the evidence of the witnesses of CHM.

(iii) New Evidence

69. With respect to the new evidence ground of appeal, I note that Mr. Watson has submitted in the Appeal, as new evidence, a letter dated January 5, 2011, from CIBC containing a shrunken copy of the front and back sides of a cheque that appears to have been written by M. Shaw Enterprises Ltd. The back of the cheque is completely illegible and the front of the cheque, aside from showing the name of M. Shaw Enterprises Ltd., is not legible in respect of the date it was issued or the amount it was issued for. However, the letter from CIBC containing the shrunken copy of the cheque indicates that the cheque is for $1,000.00, and it was debited by CIBC on December 21, 2009.

70. Mr. Watson has adduced the said cheque to impugn Mr. Shaw's credibility, as Mr. Watson states that Mr. Shaw testified at the Hearing that he did not give Mr. Watson a $1,000.00 cheque. I note that in the section 112(5) "record" there is an undated submission made by Mr. Shaw on behalf of CHM wherein he indicates that on May 10, 2010, Mr. Watson attended at work with two other people to collect his tools and at that point Mr. Watson demanded $1,000 from Mr. Shaw, but Mr. Shaw refused to give him anything. I also note that in the Reasons for the Determination, the delegate has indicated that Mr. Watson's evidence at the Hearing was that he was asked by Mr. Shaw in December to attend at the shop to get his Record of Employment and when he did attend at the shop, he was given $1,000.00 and his Record of Employment. I did not see anywhere in the Reasons for the Determination, nor anywhere else in the section 112(5) "record", a denial by Mr. Shaw that he gave Mr. Watson $1,000 by way of a cheque in December. I do see, however, in the written submissions of Mr. Shaw that he refused to give Mr. Watson $1,000 on May 10, 2010. How the copy of the cheque in CIBC's letter assists Mr. Watson in his appeal is questionable as I do not think it is

probative of any issue in the appeal. Furthermore, I do not think it qualifies as new evidence under the fourfold test set out by the Tribunal in *Re: Merilus Technologies Inc.*, BC EST # D171/03, for admitting fresh evidence on appeal:

a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination being made;

b) The evidence must be relevant to a material issue arising from the complaint;

c) The evidence must be credible in the sense that it is reasonably capable of belief; and

d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

71. This Tribunal has indicated previously that the four-fold criteria in the test above are a conjunctive requirement and, therefore, any party seeking the Tribunal to admit new evidence on appeal of a determination must satisfy each criterion before the Tribunal will admit the purported new evidence.

72. I find in this case that Mr. Watson fails on the first of the four-fold criterion. That is, Mr. Watson has not provided any evidence to show that he could not, with the exercise of due diligence, have discovered or obtained the copy of the cheque he now adduces in the appeal of the Determination, during the investigation or adjudication of the Complaint and prior to the Determination being made. While I do not, at this stage, need to consider the purported new evidence under the balance of the criteria in the test, I note that I am not convinced that the purported new evidence is relevant to a material issue in this appeal or has a high potential probative value such that, if believed, it could have led the Director to a different conclusion on a material issue. In these circumstances, I reject the new evidence ground of appeal.

ORDER

73. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal