

An appeal

- by -

Ken Chao  
("Mr. Chao")

- 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.:** 2011A/40

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

## DECISION

### SUBMISSIONS

Ken Chao	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

### OVERVIEW AND FACTS

1. Ken Chao (“Mr. Chao”) was employed as a fire assay technician with ALS Canada Ltd. carrying on business as ALS Laboratory Group (“ALS”) from 1993 to January 12, 2010, when his employment was terminated by ALS for cause.
2. On July 2, 2010, within the time period allowed under the *Employment Standards Act* (the “*Act*”), Mr. Chao filed a complaint alleging that ALS contravened the *Act* by failing to pay him overtime wages and compensation for length of service (the “Complaint”).
3. On December 9, 2010, a delegate of the Director (the “Delegate”) conducted a hearing into Mr. Chao’s Complaint (the “Hearing”). Mr. Chao attended at the Hearing on his own behalf and provided sworn testimony with the assistance of his interpreter, Ms. Zeta Yu. Ms. Karen Tilley (“Ms. Tilley”), HR Director for ALS, attended the Hearing on ALS’ behalf and gave evidence.
4. After taking into consideration all of the evidence of the parties at the Hearing, the Delegate issued her determination on March 18, 2011 (the “Determination”) concluding that the evidence of Mr. Chao did not establish that the *Act* had been contravened by ALS and thus no wages were owing to Mr. Chao. In arriving at this conclusion, the Delegate engaged in the exercise of weighing the credibility of the witnesses as set out in the B.C. Court of Appeal’s decision in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, and succinctly summarized the evidence of the parties on both issues - overtime wages and compensation for length of service - and analysed that evidence. With respect to the matter of the overtime claim, the Delegate stated:

While Mr. Chao states he is entitled to 7.5 hours in overtime wages, he was unable to provide any contemporaneous record of his hours worked or the date he actually worked for which overtime was incurred. In contrast, ALS provided detailed payroll hourly records of work and payments. The evidence ALS provided supports their *[sic]* position Mr. Chao regularly received overtime wages when worked. The record of hours worked indicates Mr. Chao worked additional hours in August 2009 and was paid accordingly. Subsequently, after reviewing the time sheets *[sic]* records ALS provided for the hearing, Mr. Chao was still unable to distinguish which day the alleged overtime was worked. There is no corresponding evidence to support Mr. Chao’s contention that he worked additional hours. In addition, Mr. Chao did not advise at any time ALS that he had incurred overtime nor does ALS have a record of overtime hours worked by Mr. Chao for which he has not been paid.

Further, Mr. Chao is a long-term employee of ALS having been employed by them since 1993 and has regularly worked overtime. Hence, Mr. Chao should be well aware of the overtime requirements to sign in. I find Mr. Chao’s testimony not credible when he states he was not aware of the sign-in procedure on the day the overtime was allegedly worked, especially after noticing others swiping their employee card. In addition, I have difficulty accepting a person with Mr. Chao’s tenure with the company that the reason he did not complain about the owed overtime was, as he stated, ‘afraid of being fired’. I find Mr. Chao’s testimony on this issue vague, not convincing or reliable on the facts. As a result, I am inclined to accept ALS’s overtime evidence in its entirety.

Consequently, as there is no record of overtime worked other than what ALS has already paid Mr. Chao for the month of August 2009, Mr. Chao has been unable to prove his allegation that he worked overtime. I find there is no contravention of section 40 by the employer.

5. With respect to Mr. Chao's claim for compensation for length of service, the Delegate reasoned:

The burden of proving the conduct of the employee justifies dismissal is on the employer. In this case, the employer takes the position Mr. Chao was fired for just cause. Just cause, in cases of misconduct, can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, breach of trust, insubordination or a significant breach of workplace policy. There is no rule of law outlining what degree of employee misconduct constitutes 'just cause'; there is, however, a test to be considered: 'Did the employee behave in a manner that is not consistent with the continuation of employment?' My analysis of the oral evidence leads me to conclude that ALS had just cause to terminate Mr. Chao's employment. I come to that conclusion for the reasons as follows.

First, there is no conflicting evidence concerning the circumstances around Mr. Chao's termination. ALS terminated Mr. Chao for his assault against his manager. This is not a case where the employer's evidence is based on suspicion, speculation, conjecture or little evidence and there is a need to determine on a balance of probabilities whether the employee, Mr. Chao, committed the act or not. Mr. Chao does not deny his actions for which he was held and charged by police.

Second, Mr. Chao stated his actions towards Mr. Yuen were a result of threats and intimidation he experienced from him. Mr. Chao did not let anyone with authority at ALS know what was going on between himself and Mr. Yuen. Mr. Chao had other options available to him to deal with such a situation, such as filing a formal complaint with the Human Resource Department yet failed to do so. As such, Mr. Chao's retaliation against Mr. Yuen was a breach of ALS's employee policy on how to deal with such matters in the workplace.

Third, Mr. Chao's assault was witnessed by numerous fellow employees who were all attending the same staff meeting; the consequence of Mr. Chao's actions required ALS to summon crisis counsellors to attend their offices to help staff deal with the situation. I have no doubt Mr. Chao's actions deeply eroded the trust and confidence ALS and its employees had in Mr. Chao. To that end, I find Mr. Chao's behaviour significantly changed his working relationship at ALS which is not consistent with the continuation of his employment.

In cases of deliberate and intentional misconduct, the Employment Standards Branch and the Tribunal have found that just cause can exist as a result of a single act. I find Mr. Chao's behaviour fundamentally breached the employment contract and therefore is sufficient to justify summary dismissal.

I find ALS's actions towards Mr. Chao were reasonable and understandable. Under the scenario described above, ALS did not contravene Section 63 of the *Act*.

6. After receiving an unfavourable Determination, on April 12, 2011, within the time limit for filing an appeal, Mr. Chao appealed the Determination. The sole basis for his appeal is that the Director failed to observe the principles of natural justice in making the Determination.
7. As to the remedy Mr. Chao is seeking in his appeal, he leaves unchecked on the Appeal Form the boxes identifying all of the available remedies the Tribunal may make on appeal of a determination. Instead, Mr. Chao sets out in a handwritten note, in brackets, the words "none of the above" and then a further written note stating "I am a victim of torturing over 10 years and ending without 8 weeks pay, the money just for a regular man's need [*sic*]." This note together with the written submission attached to Mr. Chao's Appeal Form suggest that Mr. Chao may be seeking this Tribunal to cancel the Determination and make an Order that ALS pay overtime wages and compensation for length of service which Mr. Chao requested in his Complaint.

- 8 Pursuant to section 36 of the *Administrative Tribunals Act* (the “ATA”), which is incorporated in the *Act* (section 103) 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 this case, neither party has requested an oral hearing of the appeal and, in my view, the 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

- 9 The sole issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination.

## SUBMISSIONS OF MR. CHAO

- 10 Mr. Chao’s Appeal form accompanies a single page of written submissions together with some supporting documents. The written submissions, at times, are difficult to understand, as Mr. Chao appears to lack facility with the English language. The written submissions consist of four (4) paragraphs in total. The first three (3) discuss Mr. Chao’s difficult history with his manager at ALS, Mr. Angelus Yuen (“Mr. Yuen”), since 1998. Mr. Chao reviews in some detail how, on various occasions, he was unfairly disciplined and written up for contraventions of the company’s policies and threatened by Mr. Yuen that his employment would be terminated. In none of these submissions does Mr. Chao discuss the incident that led to the termination of his employment for cause by ALS, namely, his stabbing of Mr. Yuen with a box cutter on January 12, 2010.
- 11 In the fourth and final paragraph of his written submissions, Mr. Chao states “everybody had written on the schedule for over time, but not my name [*sic*]”. He then proceeds to explain that ALS always called him for overtime work. He states that on January 12, 2010, he was called in without any notice and without any hint that he would be laid off. He then digresses and discusses how he supports his children and has lost all his RSP monies in doing so all his life, and the termination pay that he is seeking is for his children. He also notes that he can barely support himself or his “last child who is 16 years old”, and asks this Tribunal to help him.
- 12 The documents Mr. Chao attaches to his submissions include three (3) emails from himself to Mr. Yuen in June 2009 pertaining to certain issues, including issues regarding other employees. These documents were exhibits at the Hearing and are included in the Record produced by the Director in this appeal as well. Also adduced in the Appeal and at the Hearing is an email dated July 1, 2005, from Mr. Chao to his then lab manager at ALS, Mr. Keith Rogers. This email was prompted by Mr. Chao’s fear then that Mr. Yuen may threaten his job for revealing certain “critical information” to Mr. Yuen.
- 13 Mr. Chao also attaches a copy of his appeal submissions in his appeal to the Employment Insurance Commission after his employment was terminated with ALS. There is no explanation given for why the appeal submissions are adduced.
- 14 Also attached to the appeal submissions of Mr. Chao is a written warning, dated June 16, 2009, from ALS advising Mr. Chao of issues with his attitude regarding his assigned duties and his failure to follow procedures established by ALS with respect to various specific matters unrelated to any of the issues in Mr. Chao’s Complaint.
- 15 Mr. Chao also includes a page from ALS’ submissions during the investigation of the Complaint wherein ALS sets out Mr. Chao’s employment history. In that employment history, ALS indicates, *inter alia*, that Mr. Chao was terminated from his employment on November 18, 1998, due to shortage of work and he was paid one

(1) week of severance in lieu of notice. Mr. Chao argues that this is inaccurate in that the Record of Employment that was issued to him, a copy of which is also adduced by Mr. Chao in his appeal, shows that ALS has checked the box “unknown” for his expected date of recall in the Record of Employment for that period. Again, how this relates to the issues raised by Mr. Chao in his Complaint and decided in the Determination is not clear to me except that it may be an attempt on his part to suggest that ALS’ records may be inaccurate in terms of recording his overtime as ALS is purportedly inconsistent (according to Mr. Chao) in suggesting in its submissions to the Employment Standards Branch (“Branch”) during the investigation of the Complaint, that Mr. Chao’ employment was terminated but in the Record of Employment for the same period ALS indicates that it does not know when he will return. I do not think much turns on this as ALS in its submissions to the Branch in the investigation of the Complaint also noted when Mr. Chao was hired back subsequently and when again he was laid off.

16. In his reply submissions following the filing of the appeal, Mr. Chao continues explaining the previous warning letters and disciplinary notes he was issued for various contraventions at ALS, suggesting again that they were unjustified. Mr. Chao also goes on to reiterate that Mr. Yuen, prior to January 12, 2010, made it known to him that he would be laid off “indefinitely” and “not receive any sort of package”.
17. In his final Reply, Mr. Chao attaches nine (9) pages of what is a larger transcript of the evidence given in the criminal proceeding by Mr. Yuen who was called by the Crown. In particular, the transcript appears to a portion of the larger transcript of the criminal proceeding and relates to the cross-examination of Mr. Yuen by Mr. Chao’s counsel. I do not propose to review in great detail the content of the cross-examination transcription except to say that it is an incomplete transcript and the portion adduced in this appeal canvasses some of the history and dealings between Mr. Chao and Mr. Yuen at work, including past disciplinary meetings between Mr. Yuen and Mr. Chao.

## **SUBMISSIONS OF THE DIRECTOR**

18. The Director submits that Mr. Chao has failed to produce any evidence to support his contention that there has been a failure on the part of the Director to observe the principles of natural justice in making the Determination. The Director goes on to submit that Mr. Chao’s appeal submission is an attempt to re-argue the merits of the case. The Director continues that the issues at the Hearing of Mr. Chao’s Complaint were two-fold, namely, whether termination of Mr. Chao’s employment was caused by his retaliatory behaviour and, secondly, whether he was entitled to additional overtime wages. The Director argues that both these issues were fully canvassed at the Hearing by the Delegate and the latter’s findings in the Determination were reasonable. Therefore, Mr. Chao’s appeal should be dismissed as he is simply disagreeing with the Delegate’s findings and conclusions of fact.

## **ANALYSIS**

19. As noted earlier, Mr. Chao’s appeal is based on the natural justice ground of appeal. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal explained the principles of natural justice as follows:

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

20. In the case at hand, I am persuaded by the Director's submissions that Mr. Chao has not discharged the onus placed upon him to provide evidence in support of his allegation that the Director breached the principles of natural justice in making the Determination. Having reviewed the section 112(5) "record", I find there is sufficient evidence to show that the Delegate complied with the rules of natural justice and afforded Mr. Chao natural justice and procedural rights throughout the investigation, as well as during the Hearing leading to the Determination. Mr. Chao was aware of ALS' submissions in response to his Complaint and was afforded an opportunity to respond to those submissions using an interpreter, which he did. Moreover, in his appeal submissions, while Mr. Chao has checked off the "natural justice" ground of appeal, he has not made any submissions whatsoever suggesting that he was denied any natural justice or procedural rights during the investigation stage or at any other time leading to the Determination.
21. I find that Mr. Chao's appeal is based on his dissatisfaction with the findings and conclusions of fact made by the Delegate in the Determination, and that his appeal is an attempt to re-argue his case with a view to obtaining a different conclusion before the Tribunal. The purpose of an appeal is not for the appellant to have a proverbial "second kick at the can". The *Act* is very particular in the limited grounds it affords appellants and, in this case, Mr. Chao has not satisfied the natural justice ground of appeal he has invoked in his appeal, nor is there any basis for his appeal under any other grounds of appeal in the *Act*.
22. I also find that the Delegate has properly made credibility determinations, which she is in a better position to make than I am on appeal, and I find the Delegate's conclusions of fact and reasons for the Determination properly supported in evidence.

## **ORDER**

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

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