

An appeal

- by -

Happy Video & Electronics Ltd.
("Happy Video" or the "employer")

- 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: Norma Edelman

FILE No.: 2001/5

DATE OF HEARING: April 9, 2001

DATE OF DECISION: May 4, 2001

DECISION

APPEARANCES:

Victor Ko Que for Happy Video & Electronics Ltd.

Daniel Tong on his own behalf

Steven Chan, Interpreter

OVERVIEW

This is an appeal by Happy Video & Electronics Ltd. ("Happy Video" or the "employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination issued on November 29, 2000 by a delegate of the Director of Employment Standards. The delegate concluded that Happy Video owed Daniel Tong ("Tong" or the "employee") overtime wages, statutory holiday and vacation pay, compensation for length of service and interest in the amount of \$17,923.11.

Victor Que ("Que"), on behalf of Happy Video, filed this appeal on December 22, 2000. Que says Tong is not entitled to compensation for length of service. He also says the delegate erred with respect to determining Tong's wage rate and the number of hours he worked and, although, Tong is owed some vacation pay, he is not owed overtime wages and statutory holiday pay.

This appeal was heard at the Tribunal's offices in Vancouver on April 9, 2001 at which time I heard evidence from Que, Tong and Que's witness Larry Tiefenbach ("Tiefenbach"). Tong testified through an interpreter. The delegate did not attend the hearing.

ISSUES TO BE DECIDED

There are several issues in this appeal. There are preliminary issues about the admissibility of certain documents provided by Happy Video and Tong, and whether Tong is entitled to use an interpreter. The substantive issues are whether the delegate incorrectly determined Tong's wage rate and hours of work, and thus his wage entitlement, and whether Tong is entitled to compensation for length of service.

Preliminary Issues

The first preliminary issue concerns the admissibility of certain documents provided by Happy Video and Tong on the appeal.

The Tribunal has previously ruled that evidence is not to be admitted on an appeal from a Determination if that evidence "should have and could have been given to the delegate in the investigative process." *Tri-West Tractor Ltd.*, BCEST #D268/96; see also *Kaiser Stables Ltd.*,

BCEST #D058/97. That principle must, however, "be balanced against the right of the parties to have their rights determined in an administratively fair manner." Specialty Motor Cars (1970) Ltd., BCEST #D570/98. The Tribunal also said in Specialty Motor Cars, supra,

There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and...an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason it was not initially disclosed and any prejudice to the parties resulting from such non-disclosure.

In this case, the documents in question are a letter of warning dated April 14, 2000, statements from 6 current or former employees of Happy Video dated April 7, 2001 (the "6 employees"), a statement from an Account Manager at Panasonic Canada dated April 4, 2001, and various documents pertaining to the issue of Tong's entitlement to overtime, vacation pay and statutory holiday pay.

In the Determination, the delegate said the employer did not provide him with any letters of warning issued to Tong, although it did provide statements from two employees, Precious Gan ("Gan") and David Lee ("Lee"). In his appeal filed on December 22, 2000, Que said he did send the letter of warning to the delegate. The delegate, in his reply to the appeal, does not address Que's statement. As a result, I am satisfied that this document is not newly supplied evidence and I will admit it on the appeal.

I will not admit the unsigned letter dated April 4, 2001 from the Account Manager at Panasonic Canada and the statements from the 6 employees regarding Tong's performance which were submitted by Que at the hearing. Que provided no reason why these documents, which are of limited value as the writers were not present to give direct evidence and be cross-examined, were not given to the delegate during the investigation process.

Finally, there are the various records pertaining to Tong's wage entitlement.

The delegate sent a letter and Demand for Employer Records dated July 31, 2000 to Happy Video advising that Tong had filed a complaint regarding vacation pay and termination pay. The delegate asked Happy Video to provide records relating to wages, hours of work, and conditions of employment, including employee schedules, daily record of hours and payroll by August 23, 2000. Happy Video provided Payroll Detail Reports for the years 1998, 1999 and 2000. These reports do not show daily hours, just a summary of the gross and net wages paid to Tong per month. The delegate said he sent two additional letters, dated October 16, 2000 and November 2, 2000 to Happy Video. The first was sent by regular mail and was not returned. In this letter, the delegate again advised Que that Tong said he was owed vacation pay and termination pay. He advised Que that if he did not agree, then he should provide daily time records for the period April 19, 1998 to the date of Tong's termination. The November 2, 2000 letter was sent by fax and the delegate included a confirmation note showing it was received on the same day. In this letter, the delegate advised Que that Tong claimed he was shorted wages for a number of months and he asked Que to provide daily time and payroll records. None were provided and as a result

the delegate used Tong's records in his investigation, which he describes as the "best evidence". These records amount to some pay statements and verbal statements from Tong that his hours of work on a daily basis were a reflection of the store's hours of operation. It is the delegate's position that Que was given ample opportunity to provide records during the investigation.

Que claims the delegate did not give him the opportunity to submit evidence regarding Tong's entitlement to overtime and statutory holiday pay. He acknowledges he received the Demand for Employer Records but it did not state that Tong was claiming overtime or statutory holiday pay so he never submitted any evidence on these issues. He said he did not receive the delegate's October and November letters. He said he was involved in settlement discussions with the delegate in November concerning the vacation pay and termination pay issues. At no time during these discussions did the delegate mention he had sent two letters or ask him why he had not responded to the letters. Que said the only issues brought to his attention were Tong's claim for vacation pay and termination pay. Had he known the delegate was making a decision on overtime and statutory holiday pay, he would have submitted evidence (now submitted on the appeal) in regard to those issues. In his last conversation with the delegate, the delegate said he would get back to him regarding an offer which was in the range of \$3,000.00 to \$4,000.00. Que said the delegate never got back to him, and then he was "surprised" with the Determination.

Part of the documents submitted by Que is Tong's records of hours for the period April 1998 to April 2000 that he kept on a monthly basis. Tong said the delegate never asked him for these records which show his "real" and "accurate" hours of work, nor did he provide them to the delegate. The information he verbally gave to the delegate were the times when the store was open and then the delegate did an "estimate" of his hours. For example, the Determination shows he worked 7.5 hours on April 7, 2000 and 9 hours on June 26, 1999 because he usually worked those hours, but he actually worked an additional hour on April 7, 2000 and zero hours on June 26, 1999 because he was told to take that day off.

In his reply to the appeal, Tong submitted some pay statements for 1995 and 1996, as well as one for May 1998, which were not previously given to the delegate. Tong provided no explanation for why he did not give these statements to the delegate at the same time as he gave him the 5 other statements.

I have decided to admit all the documents provided by Que and Tong pertaining to Tong's wage entitlement. The documents are important in this appeal. Neither party agrees with the delegate's calculations and the documents shed light on the issue of Tong's wage entitlement. Moreover, neither party argued any prejudice resulting from the non-disclosure. Finally, I am satisfied neither party willfully withheld documents from the delegate. In my view, Tong simply did not know what he should have provided to the delegate. As for Que, I accept as legitimate his explanation for why he did not provide the documents to the delegate. There is no evidence the delegate advised Que he had not complied with the Demand. There is no conclusive proof Que was aware of the delegate's October and November letters. The fact that the November letter was received at the employer's business does not necessarily mean Que received the letter. Further, there is no evidence he knew specifically that Tong was claiming overtime and statutory

holiday pay prior to the issuance of the Determination. Indeed, as will be seen below, Tong says he never even claimed overtime until sometime in November. Finally, the delegate did not dispute Que's evidence that he was waiting to hear from him on a settlement offer relating to vacation pay and termination pay when he received the Determination. I accept, therefore, that Que was "surprised" when he received the Determination which awarded Tong approximately \$12,000.00 for overtime and statutory holiday pay in addition to the vacation pay and termination pay. I believe that had he known Tong was claiming overtime and statutory holiday pay he would have supplied additional documents to the delegate.

The second preliminary issue is whether Tong is entitled to use an interpreter at the hearing. Que and his witness Tiefenback stated that since Tong communicated in English at work and could write submissions in English they found it unnecessary for him to use an interpreter. Tong stated he nevertheless wanted an interpreter to translate his evidence from Cantonese to English and vice versa. I advised the parties at the commencement of the hearing that I would allow Tong to use the services of the certified interpreter provided by the Tribunal. My reasons were as follows: Tong's first language is not English, I found no prejudice to the employer by allowing Tong to use an interpreter, and I found no basis to question Tong's good faith in requesting an interpreter.

The Substantive Issues

The employer operates a video and electronics sales business. Tong worked from 1995 to 1996 as a salesperson. He was paid on a commission basis with a guaranteed monthly salary. He quit and then re-commenced employment on March 1, 1997. His last day of work was July 16, 2000.

Tong kept a record of his daily hours. These records were provided to the employer on a monthly basis.

At the end of each month Tong received a paycheque and on certain occasions he received a pay statement. The statements for May 1998, April 1998, February 2000, April 2000, May 2000 and June 2000 indicate Tong was paid \$7.50 per hour for a specific amount of hours, less statutory deductions. The amounts of hours shown on the statements match Tong's record of hours. Pay statements issued to Tong in 1995 and 1996 show he was paid either an amount for salary or for commissions. There is no hourly rate of pay or hours of work on these statements.

On April 7, 2000 and April 12, 2000, Tong requested his vacation pay from Que.

Tong's hours of work and, thus his earnings, were reduced by at least 50% effective April 13, 2000.

Tong filed a complaint with the Employment Standards Branch on April 17, 2000. He alleged he was owed vacation pay and that his employment was terminated given the reduction in his hours of work. Later, he alleged he had not been properly paid for work performed in certain months.

Que was notified of Tong's complaint on or about July 31, 2000. Tong was scheduled to work on August 6, 2000 but, at some point after Que learned of Tong's complaint and before August 6, 2000, Tong was advised that he no longer had a job at Happy Video.

The delegate found that Tong's rate of pay was \$7.50 per hour commencing March 1, 1997 and he was owed overtime pay, vacation pay and statutory holiday pay.

Que said that Tong was always paid on a commission basis with a guarantee of \$1200.00 per month and he is not owed any overtime or statutory holiday pay. He submitted a statement showing the amount of sales generated by Tong in January 1996 and his commission earnings on those sales, as well as monthly records of commissions earned by Tong for the period March 1997 to July 1999. Que said Tong never earned commissions in excess of his guaranteed monthly wage. He also said he has six to eight other employees who are/were hired on an hourly basis. All hourly employees are required to use punch cards. Tong did not use a punch card because he was not paid on an hourly basis. Que submitted a copy of a punch card for Gan and copies of pay summaries for the hourly paid employees for the period December 14, 1998 to April 2, 2000 which show earnings (both regular and overtime) based on hourly rates of pay. Statements submitted by Que from the 6 employees, including Gan and Lee, confirm they were paid by the hour and punched a time card, in contrast to Tong.

Que said that Tong kept a record of his hours on his own initiative. He acknowledges receiving a copy of Tong's records on a monthly basis. He paid Tong for those hours at a rate of pay of \$7.50 per hour. He never questioned the accuracy of the records. The records were not reviewed or approved by the employer, or verified by anyone, except to the extent that he would review Tong's pay at the end of the month and if Tong's hours seemed in line with the commissions he earned, then Tong would be paid. Que said although he realized Tong's hours were misleading, inaccurate and unverified, he nevertheless paid Tong based on the hours he submitted in order to be fair as he could see that Tong was unable to meet his sales objectives. He said Happy Video recorded and calculated the amount of commissions Tong earned each month to determine if he was entitled to more than his guaranteed monthly wage. Although not obligated to pay Tong more than his guaranteed monthly salary, Tong was paid more than his guaranteed amount based on the hours he submitted at month end. For example, in July 1998, Tong earned \$666.81 in commissions but was paid \$2437.50 which reflects the hours submitted by Tong multiplied by \$7.50 per hour. Que provided similar examples for the months of October 1999 and January 2000. Que said this method of paying Tong was not an agreement to pay on the basis of an hourly rate. Rather, it was a method to calculate some fair remuneration for Tong in excess of the guaranteed monthly amount.

Que said the hours shown on the pay statements issued to Tong in 1998 and 2000 were never reviewed, approved or verified by him and are internal accounting records used to reconcile the guaranteed monthly wage paid to Tong. Tong was not issued a pay statement indicating the number of hours he worked when he got his pay cheque. The statements Tong received were requested by him from the bookkeeper on isolated occasions. Besides his pay cheque, the only records Tong received were the Payroll Detail Reports.

Que said that Happy Video posts a Counter Schedule showing the hours each employee is scheduled to work. He submitted the Counter Schedules for his employees, including Tong, for the period March 30, 1998 to August 13, 2000. Que said that Tong's schedule was recorded not as a basis of calculating an hourly rate but to show the time when he was expected to work. These documents show Tong was scheduled to work, for the most part, 39 hours per week, up to mid April 2000. Que said that although Tong was given a schedule he would nevertheless stay late, often doing nothing. He said he told Tong a number of times he was not to work past a certain time and to go home, but Tong on his own initiative, without approval or authorization, stayed late. Que also stated that as a salesperson Tong preferred to stay longer trying to make sales. Que said that he opened the store almost every day and Tong, at least one-third of time, arrived more or less an hour later than when the store opened and left more or less an hour early, and this is not reflected in Tong's records or in the Determination. Statements submitted by Que from the 6 employees confirm that there was a posted schedule at the store and that Tong came in later than the opening time, he never stayed to closing, nor was he the last to leave, and Tong was told by management to go home after his scheduled shift but he would stay longer doing nothing.

Que further said that Tong did not work on some of days that are shown as work days in his records and in the Determination. Que said that his store is closed on January 1 and December 25 and when there are staff parties. He provided no specifics regarding the latter. He said the Determination says Tong worked on January 1, 2000, January 1, 1999, June 21, 1999, June 26, 1999, July 10, 1999 and August 12, 1998 but Tong did not come to work on those days or the store was closed, and Tong's records show he worked 16 days that he was not authorized or scheduled to work. Furthermore, the Determination says he worked 9 hours on November 13, 1999 but he only worked 6 hours; Tong's record for February 14, 2000 says he worked from 11:30 to 9 when the store was only open from 11- 7; there are numerous differences between Tong's records and the Determination; and Tong fabricated his hours for 1997 using his T4 to reconstruct his hours.

Que said that Tong never asked for overtime pay during his employment, just his vacation pay, and it is unfair and unconscionable for him to now claim overtime, knowing that Happy Video cannot verify his time records.

Que agrees that Tong is owed vacation pay in the amount of \$2015.70. This figure is based on 4% of the amount Happy Video has already paid Tong.

At the hearing, Que alleged that Tong forged two letters that he had submitted on the appeal. Tong wrote the letters to Que. One is dated May 8, 2000 and is Tong's reply to the letter of warning. Que says it is forged because it doesn't show he received it on August 7, 2000. The other letter is dated April 12, 2000 and is a request for vacation pay. Que says his copy doesn't match Tong's copy. Que claims these letters prove Tong is not to be believed on any matter. I find no fraud or intent to fraud with respect to these letters. Regarding the May 8, 2000 letter, Tong admitted in his submission he did not give this letter to Que until August 7, 2000. As for the April 12, 2000 letter, there are two versions of this letter, which explains the discrepancies, and Tong submitted both on the appeal.

Tong said when he returned to work at Happy Video in 1997 it was agreed his rate of pay would be \$7.50 per hour. Tong said Que told him not to punch in because the other salesperson (Jessie) was not paid hourly and if she had seen him punch in, she would want the same deal. Tong said that the commission summaries and the comparison of commissions to wages paid submitted by Que are irrelevant as he was paid on a hourly basis. Further, Que's position regarding a guaranteed monthly amount is inaccurate. He was guaranteed \$1000.00 per month in 1995 and 1996 and he earned commissions in excess of that amount. He submitted 1995 and 1996 pay statements to confirm the foregoing. When he returned to Happy Video in 1997, he was not paid on a guaranteed salary basis, which is confirmed, in particular, by the fact he received less than \$200.00 per month in May, June and July 2000. He further said there were no sales objectives for him to meet as he was paid on an hourly basis.

Tong said that Que's wife once questioned him regarding his February, 2000 record, which showed he worked 223 hours, but she was later satisfied he worked the hours he claimed on February 14, 2000 and February 26, 2000 and issued him a cheque for these hours at \$7.50 per hour. Tong denied he left early, unless Que told him to, and he never came in late. Sometimes he had to leave late because he was only one in the store. He said he worked the hours shown in his records and the employer authorized his hours of work. Tong said at the beginning of each month he wrote down his start and end times for the previous month. He totaled the hours and multiplied them by \$7.50. He made a copy of the record and gave the original to Que's wife. He believes Que's wife paid him based on his records. When he got a pay statement with his paycheque he would reconcile them. He never saw the Payroll Detail Reports until the appeal. Tong says upon reviewing these reports, he discovered that from April 1998 to July 2000 his records match the cheques he received, except for 6 times when he was underpaid a total of \$86.25. Had he received pay statements each month he would have earlier realized this error. He wants to claim this amount in addition to the other wages owed to him by Happy Video.

Tong said his name appeared on the Counter Schedules after he filed his complaint at the Employment Standards Branch. He says the schedules are false. For example, they show he worked June 21, 1999, June 26, 1999 July 10, 1999, but he did not, nor was he paid for these days.

Tong said he became aware of his entitlement to overtime after he filed his complaint at the Employment Standards Branch and therefore in November 2000 he added it to his complaint.

Tongs says his records show he did not work on December 25, January 1, 2000, January 1, 1999, June 21, 1999, June 26, 1999, July 10, 1999 and August 12, 1998 and that he worked 6 hours and not 9 on November 13, 1999. The Determination does not reflect his actual hours of work. Regarding February 14, 2000, Que's wife approved and paid for the hours he claimed on this day. As for the 16 days, his records show he only worked 14 of these days, and he says he was scheduled to work these days. Further, the discrepancies between his records and the Determination is due to the delegate not using his records in the calculations. Finally, he says that he never claimed his hours for 1997 were exact, like his records for 1998 to 2000. Rather, they were an approximation based on his T4.

I am satisfied that effective March 1, 1997 Tong was paid \$7.50 per hour and not on a commission plus guaranteed salary basis. Tong submitted hours of work to Happy Video. In turn, Happy Video paid Tong \$7.50 per hour for certain hours of work. Pay statements issued by Happy Video in 1998 and 2000 show Tong was paid on an hourly basis. In contrast, pay statements issued in 1995 and 1996, when there is no dispute that Tong was paid commissions and salary, show Tong was paid either a commission or a salary each month. If Tong continued to be paid in the manner claimed by Que, there would be no reason for his statements to change in 1998 and 2000. Further, Que's explanations concerning the pay statements and how he paid Tong are not convincing. Que said the pay statements were internal documents used to reconcile the monthly wage paid to Tong. I fail to see the connection and, according to Que, Tong was not even paid a monthly wage. He was paid more, based on his hours of work. Que said he paid Tong more than his guarantee and commissions in order to be fair. He also said if Tong's hours seemed in line with his commissions he would pay him based on his hours of work. These two statements are not consistent. Moreover, it is clear, based on a review of the commission summaries supplied by the employer, that Happy Video paid Tong based on his hours even if his commissions were significantly lower than his hours. Finally, the fact that Tong did not punch a time clock in contrast to other hourly paid employees, does not establish that Tong was paid on the basis claimed by Que.

I am also satisfied that Tong's records for the period April 1998 to April 2000 are an accurate reflection of his hours of work.

I do not accept that Tong was late and left early as claimed by Que. Que did not provide information concerning specific days. Further, the amount of time involved is significant and I find it unlikely that Que would pay Tong for that amount of time if Tong had not worked the hours. Moreover, if it were true, I would have expected Que to mention it in his letter of warning or in the verbal warnings that he said he gave Tong. The amount of time that Que says Tong was late or left early is far more serious than some of the other issues that are listed in the letter of warning and yet this misconduct is not mentioned in the letter. Finally, the statements from the six employees on this issue are of limited worth as the writers were not at the hearing and the information contained in their statements is non-specific as to days and times.

I also do not accept that Tong stayed late or worked 16 days without authorization. Que provided no specifics regarding the former, nor did the 6 employees, whose statements are hearsay in any evident, and Tong's records and the Determination show Tong did not work some of the 16 days. Further, there is no evidence that Que dealt with the problem at the time or ever raised it as an issue with Tong prior to his filing a complaint for overtime. As a result, particularly given Que's admittance that as a salesperson Tong preferred to work longer to make sales, I am not convinced that Tong worked hours without his employer's knowledge and approval.

As for Tong's 1997 records, these records are different than the ones submitted for the period April 1998 to April 2000. They were not produced on a monthly basis. There is no dispute Tong reconstructed these hours based on his T4. The hours are not exact, but there is no evidence to

support the view that the hours are essentially false. Most significantly, however, these records have no bearing on Tong's wage entitlement because they concern hours of work outside the period that Tong can claim for under the *Act*. Further, there is no dispute that Tong did not work on Christmas and New Years, June 21, 1999, June 26, 1999, July 10, 1999 and August 12, 1998, and he only worked 6 hours on November 13, 1999.

On the whole I prefer Tong's evidence regarding his hours of work.

There is no dispute Tong prepared his records on a monthly basis and he was paid for all those hours, with the exception of 11.5 hours. Happy Video did not keep a daily record of Tong's hours of work as required by the *Act*. The Counter Schedules do not establish Tong's actual hours of work. For example, they show Tong was scheduled to work in August yet he ceased working in July.

Que never questioned Tong's hours at the time. Tong said Que's wife once questioned his hours, including his hours on February 14, 2000, and the matter was resolved in his favour. Que's wife was not at the hearing to contradict Tong.

Tong said that when he got a statement he would reconcile his hours to his pay. He did not receive pay statements for the months where there are shortfalls in his pay. I do not believe that he received the Payroll Detail Reports while he was employed at Happy Video. In April 2000 Tong requested his vacation pay. If he had received the Payroll Detail Reports he would have realized he was shorted hours in March 2000 and I can see no reason why he would not have requested the shortfall at the same time he requested his vacation pay. That he did not leads me to conclude that the first time Tong learned of the shortfall was after he was dismissed. Que did not offer any explanation regarding the shortfall in Tong's pay, nor did he specifically challenge Tong's claim to be paid for these hours. Accordingly, I accept that Tong worked the 11.5 hours, as well as the other hours set out in his 1998 to 2000 records, and he is entitled to be paid for these hours. I am referring the matter of Tong's wage entitlement back to the delegate to redo the calculations based on Tong's records.

Que argued that it was not fair that Tong did not advise him of his overtime claim when he worked at Happy Video. If Tong had been aware of his rights to overtime at the time he worked at Happy Video, he could have raised the issue at that time. However, there was no onus on him to do so under the *Act*. In contrast, there is an onus, under the *Act*, for an employer to keep a daily record of hours for each employee and to pay overtime when an employee works in excess of 8 hours in a day or 40 hours in a week.

The delegate also found that Tong was entitled to compensation for length of service as his employment was terminated without just cause at the end of a temporary layoff.

Que says that Tong is not entitled to compensation for length of service. He said that Tong was verbally warned about 20 times prior to April 2000 about his inability to meet sales objectives, his poor attitude towards customers and staff, and his inappropriate conduct and attire. He

submitted letters he says were written in March 2000 by two of his employees, Gan and Lee, describing Tong's inability to carry out his duties.

Que said Tong refused to correct his behaviour. Accordingly, he decided to reduce his hours and give him a letter of warning. The letter, dated April 14, 2000, was given to Tong on April 15, 2000. In the letter, Que advised Tong that his sales had been terrible; he had been warned 20 times he was driving away customers due to his bad attitude and he had not improved; customers, suppliers and staff complained about his bad attitude and although he had promised to improve, he did not; customers and staff complained about his odor; his attire was bad; he refused to write clearly which caused the inventory to be inaccurate; and he refused to keep the price tags of products in the original places. Que wrote: "By virtue of your bad attitude & manners, by virtue of your driving customer away, by virtue of your un-professionalism in your attire & your in-cooperation to work as a team with your co-employees & me, you have cause our store to lost at least \$500,000.00 in sales...This letter is to bring all of the above to your attention for the last time. You are hereby informed that if I received another complain about you, I will have no other option but to terminate your employment immediately."(reproduced as written)

Que said Tong continued to ignore him and refused to change after he received the letter of warning. Thus, at the end of the 13 week layoff, he had just cause to dismiss Tong. As well, another reason he dismissed Tong had to do with his complaint to the Employment Standards Branch. Que said he wanted to give Tong work in August, but after he learned that Tong had filed a complaint he figured it was not proper to keep a person who was suing the company and so he let him go in August 2000.

Tong said he received the letter of warning on May 5, 2000. He believes the letters from Gan and Lee were created after May 5, 2000, as the first time he saw them was on the appeal. Prior to receiving the letter of warning, he did not receive any warnings about his performance, conduct, attire or attitude. He denies all the claims made by Que, Gan and Lee, except with respect to the claims concerning cutting his toenails, leaving his tooth on the stereo, spitting and complaints about his food. He says these latter matters were rectified or discontinued a long time ago, or were an accident. None of the claims made by Que, Gan and Lee occurred after he received the letter of warning.

Tong said that Que queried him about a sale on April 12, 2000. Que said Tong had not sold anything and he gave him a new working schedule. Tong was also advised he would get new schedules in the future. As a result, Tong contacted the Employment Standards Branch.

Tong said one of the employees at Happy Video left him a message on August 2, 2000 asking if he could work on August 6, 2000. On August 4, 2000, the delegate advised him that he had sent a letter to Que earlier in the week. On August 4, 2000 he phoned the store to confirm he was working on August 6. Later than day he received a call from one of the staff at the store (Mila) who said it was not necessary for him to work anymore.

Tong says he was given no further work due to his employer being informed he had filed a complaint with the Employment Standards Branch. He further says his employment was terminated on April 12, 2000 when he was advised his hours were going to be reduced. Therefore, the letter of warning is irrelevant as it was issued after he was dismissed.

As indicated above, the delegate found that Tong was on a temporary layoff when his hours were reduced by 50% in April 2000.

Section 1(1) of the *Act* says:

"termination of employment" includes a layoff other than a temporary layoff.

The *Act* defines "temporary layoff" as

- (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
- (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks.

Section 62 of the *Act* defines "week of layoff" as "a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wages, averaged over the previous 8 weeks."

An employee laid off for less than 13 of 20 consecutive weeks is on a temporary layoff and is not considered to have been dismissed under the *Act*. An employee laid off in excess of 13 weeks is considered dismissed under the *Act*.

Tong was on a layoff because his wages were reduced by more than 50% commencing the week of April 16, 2000. This state continued beyond 13 weeks and thus his employment was terminated on July 15, 2000. The employment relationship ceased when the temporary layoff ended on July 15, 2000. His employment status became final on that day and not, as Tong says, on April 12, 2000, when he was notified of the reduction in his hours..

The issue is whether Tong is entitled to compensation for length of service.

The Tribunal has held on numerous occasions that just cause can include a single act of misconduct if the act is willful, deliberate and of such a consequence as to repudiate the employment relationship. In the absence of a fundamental breach of the relationship, such as in this case, an employer must be able to demonstrate the following to prove just cause (Kruger, BCEST #D003/97):

1. A reasonable standard of performance was established and communicated to the employee;
2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

I am not satisfied that Tong received any verbal warnings prior to the letter of warning dated April 14, 2000. Tong denies that he received any verbal warnings and there is no evidence to confirm that prior to April 14, 2000 Tong was clearly and unequivocally informed that unless he changed or improved his performance, attitude, conduct, and attire he would be dismissed.

In contrast, the letter of warning dated April 14, 2000 does establish that Tong was clearly and unequivocally warned that his employment was in jeopardy. However, I do not accept that the issuance of this letter satisfies the test of just cause. First, reducing an employee's hours of work by 50% does not allow the employee to meet the standard of performance set by the employer, especially as regards sales. Second, there is no evidence to support Que's claim that Tong did not change or improve after he received the letter of warning. Third, although Tong's employment was terminated on July 15, 2000 under the *Act*, Que only took steps to sever the employment relationship in August after he learned Tong had filed a complaint at the Employment Standards Branch. This is what prompted Que to dismiss Tong and not Tong's continuing problems with work performance, conduct, attitude or attire. In conclusion, I find Tong was dismissed on July 15, 2000 without just cause. He is entitled to 3 weeks compensation for length of service in the amount calculated by the delegate. I note that had Que dismissed Tong prior to July 15, 2000 for filing a complaint he may also have violated Section 83 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 29, 2000 be confirmed as it relates to Tong's entitlement to compensation for length of service. The amount of Tong's entitlement for overtime, statutory holiday pay and vacation pay is referred back to the delegate for calculations based on Tong's record of hours for the period April 1998 to April 2000.

NORMA EDELMAN

Norma Edelman
Vice-Chair
Employment Standards Tribunal