

Citation: Michel Mizrach and Juan Carlos Quintana (Re)  
2020 BCEST 105

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Michel Mizrach  
("Mizrach")

- and -

Juan Carlos Quintana  
("Quintana")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**PANEL:** Kenneth Wm. Thornicroft

**FILE NOS.:** 2020/044 & 2020/047

**DATE OF DECISION:** August 13, 2020

## DECISION

### SUBMISSIONS

Michel Mizrach	on his own behalf
Juan Carlos Quintana	on his own behalf
Harley Harris	legal counsel for Natural Trade Ltd. (only as to the completeness of the record)
Kristine Booth	delegate of the Director of Employment Standards (only as to the completeness of the record)

### OVERVIEW

1. I have before me two essentially identical appeals of a single Determination issued by Kristine Booth, a delegate of the Director of Employment Standards (the “delegate”), on February 4, 2020. The two appellants, Michel Mizrach (“Mizrach”) and Juan Carlos Quintana (“Quintana”), appeal the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination – see sections 112(1)(a) and (b) of the *Employment Standards Act* (the “ESA”). I shall refer to Messrs. Mizrach and Quintana jointly as the “appellants”.
2. The delegate determined “that the dispute that caused the complaints are resolved [and] [p]ursuant to section 76(3)(i) of the [ESA] I will not proceed with the complaints” [sic]. This latter provision states: “The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if...(i) the dispute that caused the complaint is resolved.”
3. I should note that delegate also turned her mind to section 76(3)(f) of the *ESA* but, ultimately, did not make any finding regarding the possible application of this provision, which provides as follows: “The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if...(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator”.
4. In my view, the delegate did not err in law or otherwise breach the principles of natural justice when she determined to stop investigating the appellants’ complaints. These two appeals have no reasonable prospect of succeeding and, that being the case, must be dismissed under section 114(1)(f) of the *ESA*.

### FACTUAL BACKGROUND & THE DETERMINATION

5. The delegate issued her “Reasons for the Determination” (the “delegate’s reasons”) concurrently with the Determination. As recounted in the delegate’s reasons, both appellants were employed by Natural Trade Ltd. (“Natural Trade”), a company that operates a specialized lumber products business. Mr. Mizrach was

Natural Trade's Chief Financial Officer when he resigned on or about April 27, 2017. Mr. Quintana was employed as a sales representative when he resigned on or about April 13, 2017.

6. At the time they resigned, both appellants had accrued certain commissions. Each appellant signed documents entitled "Release and Indemnity" following discussions with Natural Trade regarding their unpaid wages. The relevant terms of each release are set out in greater detail, below.
7. Mr. Mizrach's release, executed May 4, 2017, confirmed that he would be paid separate amounts of \$4,061.43 and \$13,879.23 on account of "purchasing and sale commissions", as well as a further sum of "\$57,709.32 that I will receive on a later date from the remaining purchasing and sales commissions, only once the customers I'm serving pay their outstanding invoices in full, and only if all the open orders are honored, shipped and Invoiced as per the margins I detailed." The first and second amounts were paid; the third amount has not been paid and this sum was the basis for Mr. Mizrach's original unpaid wage complaint.
8. The release in favour of Natural Trade states that Mr. Mizrach releases that company:

...from any actions, causes of action, contracts, covenants, whether expressed or implied, debts, liabilities, claims, demands and complaints of any kind which have existed, exist now or may in the future exist by reason of any matter or thing existing as of the date hereof with respect to or arising out of my hiring by the Employer, my employment by the Employer and the conclusion of that employment including, without limiting the generality of the foregoing, any claim for severance pay, vacation pay, or any other employment benefit whatsoever whether arising pursuant to statute or otherwise.
9. Mr. Mizrach's release also contains the following provisions:

**I FURTHER AGREE** that I hereby release and forever discharge the Employer from all claims by me against the Employer pursuant to the *Human Rights Act*, the *Employment Standards Act* of British Columbia, or claims which may now be before any Court or Tribunal, and agree that I will not make any other claim or take any other proceedings against any person or corporation with respect to any matters which may have arisen between me and the Employer up to the present time on which any claim could arise against the Employer for contribution or Indemnity or other relief.

...

**I ACKNOWLEDGE AND AGREE** that the payments provided for herein are made as a compromise to terminate controversy and not as an admission of liability and that the Employer expressly denies liability.

**I HEREBY ACKNOWLEDGE** that I do execute this Release voluntarily with full knowledge of its terms and conditions. I acknowledge that I have been advised to obtain legal advice prior to signing this Release and either have done so or have freely chosen not to do so.
10. Mr. Quintana's release, executed April 28, 2017, is very similar to that executed by Mr. Mizrach. This agreement confirmed that Mr. Quintana would be paid separate amounts of \$3,553.95 (apparently for vacation pay), and \$11,672.15 on account of "sales commissions", as well as a further sum of "\$17,722.90 that I will receive on a later date from the remaining sales commissions once the customers I'm serving

pay their outstanding invoices.” The first and second amounts were paid; the third amount was not paid and thus triggered Mr. Quintana’s unpaid wage complaint.

11. The release in favour of Natural Trade states that Mr. Quintana releases that company:

... from any actions, causes of action, contracts, covenants, whether expressed or implied, debts, liabilities, claims, demands and complaints of any kind which have existed, exist now or may in the future exist by reason of any matter or thing existing as of the date hereof with respect to or arising out of my hiring by the Employer, my employment by the Employer and the conclusion of that employment Including, without limiting the generality of the foregoing, any claim for severance pay, vacation pay, or any other employment benefit whatsoever whether arising pursuant to statute or otherwise.
12. Mr. Quintana’s release also contained the following provisions:

**I FURTHER AGREE** that I hereby release and forever discharge the Employer from all claims by me against the Employer pursuant to the *Human Rights Act*, the *Employment Standards Act of British Columbia*, or claims which may now be before any Court or Tribunal, and agree that I will not make any other claim or take any other proceedings against any person or corporation with respect to any matters which may have arisen between me and the Employer up to the present time on which any claim could arise against the Employer for contribution or indemnity or other relief.

...

**I ACKNOWLEDGE AND AGREE** that the payments provided for herein are made as a compromise to terminate controversy and not as an admission of liability and that the Employer expressly denies liability.

**I HEREBY ACKNOWLEDGE** that I do execute this Release voluntarily with full knowledge of its terms and conditions. I acknowledge that I have been advised to obtain legal advice prior to signing this Release and either have done so or have freely chosen not to do so.
13. On August 30, 2017, Mr. Mizrach filed a complaint under section 74 of the *ESA* alleging that he was owed \$57,709.31 (plus vacation pay) because: “The Employer has not paid earned commissions for sales that have been completed and customers have paid their invoices”. Mr. Quintana’s complaint, also filed on August 30, 2017, claimed unpaid wages of \$17,722.90 (plus vacation pay). The basis of Mr. Quintana’s claim was identical to that set out in Mr. Mizrach’s complaint: “The Employer has not paid earned commissions for sales that have been completed and customers have paid their invoices”. It should be noted that the two complaints sought payment of the exact amounts set out in the two release agreements reflecting commissions payable when the clients in question paid their invoices in full (less one cent for Mr. Mizrach’s claim).
14. On November 8, 2017, Natural Trade filed a Notice of Civil Claim in the British Columbia Supreme Court against various parties including Mr. Mizrach and Mr. Quintana. Among other claims, Natural Trade asserts that the appellants have established a competing business, are “engaged in an unlawful conspiracy” against Natural Trade, and are misusing confidential information.

15. On December 1, 2017, the appellants filed a Response to Civil Claim in which they denied any wrongdoing and, additionally filed a Counterclaim in which they asserted they were constructively dismissed and seek, among other things, unpaid commissions. By way of its Response to Counterclaim filed December 27, 2017, Natural Trade denied that any commissions were owing to either Mr. Mizrach or Mr. Quintana. Indeed, Natural Trade’s position is that it “overpaid” commissions to each appellant.
16. As noted at the outset of these reasons, the delegate, exercising her statutory discretion, decided not to proceed with the complaints, relying on section 76(3)(i) of the *ESA* (i.e., “the dispute that caused the complaint is resolved”). In determining not to proceed with the two complaints, the delegate made the following findings (at pages 11 and 12 of her reasons):

The Complainants each signed a Release. Both Releases stipulate that in consideration of the specified amounts the Complainants, on their own behalf, release and forever discharge Natural Trade from any action arising out of their hiring, employment, or conclusion of that employment. They further and specifically agree that they forever release and discharge Natural Trade from all claims under the Act. The Complainants did not argue that their respective Releases were unclear, that they misunderstood what they meant or what the terms were. There is no evidence before me to find that either Complainant signed their respective Release while under duress or that they were coerced into signing it. I find that the language in the Release indicates that the intention behind the settlement was to define a full and final agreement of any and all claims.

...

... The wording in each Release indicates that the Complainants were provided with the opportunity to obtain independent legal advice...I find that the Complainants had the option of seeking legal advice and decided on their own not to do so. This choice does not invalidate their agreement. Furthermore, by way of their positions and their personal corporate structures, the Complainants exhibit a level of sophistication that supports my finding that they understood their options and knew what they were signing.

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... The intention of the Act is to promote fair treatment of employees and employers, as well as ensure employees in B.C. receive at least basic standards of compensation. This must be balanced against the public interest in enforcing *bona fide* agreements. The purpose of a contract is to formalize an agreement made between two parties. Agreements cannot be overridden simply because one party has changed their mind with the benefit of hindsight; this would discourage agreements regarding the settlement of unpaid wages. I find that the agreements between Natural Trade and each of the Complainants were *bona fide* and that the public interest in upholding *bona fide* agreements outweighs looking behind the agreements the Complainants made with Natural Trade to determine whether they were entitled to what they received and therefore received consideration.

Ultimately, the Complainants are dissatisfied they did not receive the amounts in their respective Release that were identified as being payable in the future. My jurisdiction is limited to the Act and enforcing the provisions regarding payment of wages set out within it. I do not have jurisdiction to enforce the payment provisions of a Release.

I find that the Complainants have failed to establish why the agreements they made as reflected in the Releases they signed should be considered unconscionable. The intention of the Release

signed by the Complainants was to provide a complete resolution of matters outstanding at the end of their employment. The terms of the agreements were clear. The Complainants were both sophisticated and understood the agreements they were entering into. Setting aside the agreements they made would not promote fair treatment of the Employer.

In consideration of the above, I find the agreements the parties made should be given effect and pursuant to section 76(3)(i), I am refusing to continue to investigate the Complainants' complaints due to the dispute having been previously resolved. Because of this finding and the effect of the agreement, which includes a specific clause to forever release and discharge Natural Trade from any claims under the Act, I do not need to make a finding regarding the commissions claimed as owed in the counterclaim or make a finding regarding whether the investigation should stop on account of duplicitous proceedings.

## REASONS FOR APPEAL

17. The appellants' stated reasons for appeal are essentially identical. The appellants' reasons for appeal do not expressly set out their separate arguments under the "error of law" and "natural justice" grounds. However, as I read the appellants' appeal submission, it appears that their "error of law" ground is based on the following arguments:
- The Releases are unenforceable because the commissions to be paid to the appellants after the clients paid their invoices (\$57,709.32 for Mr. Mizrach; \$17,722.90 for Mr. Quintana) were never paid, and Natural Foods has never proved that these invoices were not paid by the customers in question; and
  - The releases should be set aside because Natural Trade negotiated the agreement in bad faith with no intention of ever complying with its terms.
18. As a corollary to these arguments, the appellants seek an order whereby the Tribunal would direct some sort of accounting – possibly requiring the third party customers to disclose their payment records – in order to determine which of the disputed invoices have been paid. The appellants request the Tribunal to "contact all the companies involved in the open orders [and order] Natural Trade to disclose all of its bank statements, to prove it have already been paid everything concerning the open orders, and therefore cancel the Director Determination, and order Natural Trade LTD. to pay...for unpaid commissions plus interest".
19. The appellants' "natural justice" arguments appear to stem from the following assertions:
- "...the determination...is a premature decision based on partial evidence and does not reflect the actual facts of the dispute being brought before it"; and
  - "...I started the complaint on August 27, 2017, and – as hard to believe as it looks – it took de [sic] ESB over two years to determine that the dispute was already resolved; which I find deeply aggravating."

## FINDINGS AND ANALYSIS

20. The Tribunal has issued several decisions confirming the importance of, and the need to respect, *bona fide* settlement agreements. Indeed, the *ESA* specifically authorizes the Director to assist parties to conclude a settlement agreement (see section 78; although I hasten to add that the settlement agreements at issue here were not section 78 agreements).
21. In *Bellman*, BC EST # RD003/04, a 3-member reconsideration panel observed (at page 6):
- While there is a public policy interest in the enforcement of minimum employment standards, there is an equally compelling public interest in the enforcement of bona fide settlement agreements, even where the terms of that settlement may be something less than a party alleges they are entitled to under the Act. In our view, such settlements do not offend the Act. As the Tribunal stated in *Alnor Services Ltd.* (BC EST #D199/99):
- The settlement of unpaid wage claims is an integral aspect of the Act...In my view, the entire scheme of the Act is undermined if bona fide settlements can be overridden simply because one party - with the benefit of hindsight - subsequently concludes that they made a bad (or at least not an optimal) bargain.
22. The British Columbia Supreme Court confirmed *Bellman* on judicial review (see *Bellman v. The Queen*, 2006 BCSC 426). The principles espoused in *Bellman* were recently again endorsed in *Coughlin*, 2019 BCEST 64.
23. The appellants fundamental challenge to the settlement and release agreements they concluded with Natural Trade does not concern the *validity* of these agreements. Rather, the appellants effectively say – without using this term – that Natural Trade has *breached* the agreements. Whether or not Natural Trade has breached these agreements is an issue for the civil courts, not the Director of Employment Standards or this Tribunal, to determine. Clearly, there is a live issue in the British Columbia Supreme Court regarding what commissions are owed to the appellants. Natural Trade asserts that the appellants have been overpaid (see *Natural Trade Ltd. v. MYL Trading Ltd. et al.*, 2019 BCSC 1368 at para. 152) whereas the appellants maintain that monies are owed to them. In granting an interlocutory injunction against the appellants (see *Natural Trade Ltd. v. MYL Trading Ltd. et al.*, 2018 BCSC 1176), the court observed: “Mr. Mizrach and Mr. Quintana have also counterclaimed for commissions they say they earned but which have not been paid by Natural Trade” (para. 30).
24. The delegate determined, entirely correctly in my view, that the settlement/release agreements were clear and comprehensible, and that there was nothing surrounding the execution of these agreements that rendered them voidable at the option of the appellants (for example, duress or unconscionability). Both appellants, who are relatively sophisticated businessmen, were afforded the opportunity to seek independent legal advice prior to signing the agreements.
25. As is recounted in the delegate’s reasons, the relationship between the appellants and Natural Trade was quite amicable when the two men resigned. The purpose of the settlement/release agreements was to finalize the two appellants’ future financial entitlements. Mr. Quintana “agreed with the amounts set out in the Release and expected to periodically meet in the future as invoices were paid” (delegate’s reasons, page R9). For his part, Mr. Mizrach “calculated the amounts in the Release” and that when presented

with the document, “[h]e did not raise any concerns with its contents other than in relation to the amounts, which were revised” (delegate’s reasons, page R10). Although there is an ongoing dispute between the parties regarding their respective rights and obligations under the release/settlement agreements, the purpose of these agreements, concluded shortly after the two appellants’ employment relationships with Natural Trade ended, was to finalize Natural Trade’s financial obligations to the appellants under the *ESA* and in all other respects.

26. This appeal is not about release agreements that are alleged to be void due to some fundamental contractual failing (for example, a lack of contractual capacity or illegality). Rather, the appellants now maintain that Natural Trade has fundamentally failed to perform (i.e., that it has breached) the agreements, and is now suing (through their Counterclaim filed in the B.C. Supreme Court action) to recover the monies that they say are due to them under their release/settlement agreements. The appellants’ complaints (and these appeals) constitute an attempt to use the wage recovery provisions of the *ESA* to enforce a settlement agreement. However, the B.C. Supreme Court is the proper forum to pursue these breach of contract actions.
27. In my view, it cannot be reasonably argued that the delegate acted in bad faith when she decided to stop investigating the complaints under section 76(3)(i) of the *ESA*. I would have taken the same view had the delegate decided to stop investigating under section 76(3)(g), since the B.C. Supreme Court would appear to be the more appropriate forum to sort out the question of the appellants’ commission entitlements, if any, under their settlement agreements.
28. With respect to the appellants’ natural justice arguments, I am not persuaded that the delegate’s decision to stop investigating the complaints was “premature”. The record indicates that the parties were afforded a full and fair opportunity to present their evidence and argument prior to the Determination being issued. The Determination was predicated on facts that were not in dispute between the parties. While I agree that there was an unreasonably long delay between the date the complaints were filed and when the Determination was eventually issued, this delay is explained, in part, by the fact that the delegate was on medical leave for several months (delegate’s reasons, page 4). Further, and in any event, it does not appear that this delay prejudiced the adjudication of this matter in the sense that important documentary evidence was lost, or relevant witnesses were no longer available. It does not appear that any party took any formal steps, such as a mandamus application to the B.C. Supreme Court, to have the investigation proceed more quickly (all parties had legal representation throughout the delegate’s investigation).
29. The delegate’s decision to stop investigating the complaints was not tainted by any sort of bad faith. In my view, the delegate exercised her statutory discretion in an entirely appropriate manner. That being the case, these two appeals must be dismissed.



**ORDER**

30. Pursuant to sections 114(1)(f) and 115(1)(a) of the *ESA*, these appeals are dismissed and the Determination is confirmed.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**