

Citation: Naturally Home Grown Foods Ltd. (Re)
2020 BCEST 121

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Naturally Home Grown Foods Ltd. doing business as
Hardbite Handcrafted-style Chips
("NHGF")

- 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: Shafik Bhalloo

FILE NO.: 2020/110

DATE OF DECISION: October 29, 2020

DECISION

SUBMISSIONS

Gradin D. Tyler

counsel for Naturally Home Grown Foods Ltd. doing
business as Hardbite Handcrafted-style Chips

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Naturally Home Grown Foods Ltd. doing business as Hardbite Handcrafted-style Chips (“*NHGF*”) has filed an appeal of a Determination issued by a delegate (the “*delegate*”) of the Director of Employment Standards (the “*Director*”) on June 15, 2020.
2. The Determination found that *NHGF* contravened Part 8, section 63 (liability resulting from length of service) of the *ESA* in respect of the employment of Phet Phiothong (“*Mr. Phiothong*”).
3. The Determination ordered *NHGF* to pay *Mr. Phiothong* wages in the total amount of \$1,537.39 including accrued interest.
4. The Determination also levied an administrative penalty of \$500.00 against *NHGF*, pursuant to the *Employment Standards Regulation* (the “*ESR*”), for breaching section 63 of the *ESA*.
5. The total amount of the Determination is \$2,037.39.
6. *NHGF* appeals the Determination on the “error of law” and “natural justice” grounds of appeal under sections 112(1)(a) and (b) of the *ESA*.
7. In correspondence dated August 5, 2020, the Tribunal notified *Mr. Phiothong* and the *Director* that it had received *NHGF*’s appeal and it was enclosing the same for informational purposes only. The Tribunal also advised these parties that no submissions on the merits of the appeal were being sought from them at this time. The Tribunal also requested the *Director* to provide a copy of the section 112(5) record (“the record”).
8. On August 20, 2020, the Tribunal received the record from the *Director*, and on September 4, 2020, forwarded a copy of it to *NHGF* and *Mr. Phiothong*. Both parties were provided an opportunity to object to the completeness of the record, but neither objected. Accordingly, the Tribunal accepts the record as complete.
9. On September 30, 2020, the Tribunal sent correspondence to the parties advising them that a panel had been assigned to decide the appeal.
10. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other party. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons for the Determination (the “*Reasons*”), *NHGF*’s appeal submissions, and my review of the Record when the

Determination was being made. If I am satisfied that NHGF's appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite Mr. Phiothong and the Director to file reply submissions on the merits of the appeal. NHGF will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

11. The issue at this stage of the proceeding is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

FACTS

12. Based on a BC Registry Services online corporate search of NHGF conducted by the delegate on May 28, 2020, NHGF was incorporated in British Columbia, on July 12, 2002. It has five directors, namely, Braden J. Douglas, Wesley Vernon Heppell, Kirk Jaye Homenick, George Leroux, and Judith Lynn Richardson. NHGF has no officers listed.
13. NHGF operates a chip manufacturing company in Surrey, British Columbia, and sells its products under the name Hardbite Chips.
14. On March 26, 2019, Mr. Phiothong filed a complaint under section 74 of the *ESA*, alleging that NHGF contravened the *ESA* by failing to pay him compensation for length of service (the "Complaint").
15. On September 6, 2019, the delegate conducted a hearing of the Complaint (the "Hearing"). Both NHGF and Mr. Phiothong were represented by their respective counsels at the Hearing.
16. Mr. Phiothong testified on his own behalf. His wife, Vieng Phiothong ("Mrs. Phiothong") was also called as a witness.
17. Mindy Mudhar ("Ms. Mudhar") and Shifana Thandi ("Ms. Thandi"), Operations Manager and a human resources "generalist" respectively, testified on behalf of NHGF.
18. The delegate summarizes the evidence of both parties in the Reasons. I will set out this evidence, in some significant detail under the heading "Reasons for the Determination" below, as the questions raised by NHGF in its appeal make it necessary for me to do so. I will also delineate, under the same heading, the delegate's findings of facts and analysis of law which are in dispute in the appeal. Finally, I will set out the applicable law and the reasons for my decision under the heading Analysis below.

REASONS FOR THE DETERMINATION

19. It is not disputed that Mr. Phiothong is 58 years old and he was first employed with NHGF, in 2015, for four months. He was rehired by NHGF on February 1, 2016, in the capacity of a forklift operator and paid \$15.00 per hour.
20. During the second period of his employment with NHGF, Mr. Phiothong was assigned different duties and responsibilities. At the time his employment terminated on September 27, 2018, he was employed as a

fry operator. NHGF paid him \$17.00 per hour and a shift premium of \$1.50 per hour, because he worked the afternoon shift which started at 2:30 p.m. and ended between 11:00 p.m. and 1:00 a.m. His total wage rate was \$18.50 per hour.

21. In the Record of Employment NHGF prepared, the latter indicated that Mr. Phiothong quit his employment.
22. The penultimate issue in the Hearing was whether Mr. Phiothong quit or NHGF terminated his employment, and if the latter, was he owed compensation for length of service.
23. In the Reasons, the delegate first summarizes the evidence of Ms. Mudhar. Ms. Mudhar testified that she held the Operations Manager position with NHGF since July 2018. She is responsible for all operations at NHGF's facility and reports to NHGF's president, Kirk Homenick ("Mr. Homenick").
24. On September 19, 2018, Ms. Mudhar held a meeting for employees of NHGF to allow them to express individual and collective grievances and concerns (the "Employees' Meeting"). About 30 employees attended and 48 complaints were noted by Ms. Mudhar in a written document she prepared which also contained her responses to the complaints. The complaints and concerns expressed by the employees were on a variety of matters including pay, supervisors and workload.
25. The Employees' Meeting was also attended by Mr. Phiothong. According to Ms. Mudhar, Mr. Phiothong said that he felt overworked and, along with one other employee, complained that he did not like working at NHGF and was seeking other employment.
26. Ms. Mudhar said that Mr. Phiothong often complained about his wages and about not having sufficient help. She said he also went around work making false statements about other employees' wages, which was concerning to NHGF.
27. Sometime after the Employees' Meeting, Ms. Mudhar said she received a text message from Mr. Homenick that Mr. Phiothong had raised concerns with him directly and he would speak with her about the same the following day. She told Mr. Homenick that Mr. Phiothong had already raised the same concerns with her and informed him that Mr. Phiothong was the highest paid employee of NHGF on the afternoon shift.
28. On September 27, 2018, Ms. Mudhar said she called a meeting to follow up with Mr. Phiothong regarding his concerns (the "Meeting"). The Meeting was attended by Ms. Mudhar, Ms. Thandi and Mr. Phiothong. At this meeting, Ms. Mudhar said she told Mr. Phiothong she had discovered he was going around the company discussing the wages of others and this was unacceptable behaviour. She reminded him there was an annual review in place to deal with pay, and that was the time to raise wage concerns. She said she did not suggest discipline at any time. However, according to Ms. Mudhar, Mr. Phiothong got very defensive and wanted to know who was "spreading rumours" about him. She told him that that this information was confidential, and he became very angry. She said that she then "reiterated" that if he wanted to quit, he could do so, and Mr. Phiothong said "I quit" and walked out.
29. Ms. Mudhar said that she never asked Mr. Phiothong to resign or go home, and did not terminate his employment. She also did not recall raising the issue of Mr. Phiothong approaching Mr. Homenick.

30. After Mr. Phiothong walked out of the Meeting, Ms. Mudhar said she did not have any contact with Mr. Phiothong and the latter did not attend work again or make any further effort to contact NHGF.
31. Ms. Mudhar said she took notes of the Meeting. Her handwritten notes state:
- Meeting to follow-up from/based on your concerns.
- Sept. 19 meeting:
- Need help in fryer room
 - Wage
- Explained that during our investigation of the concerns he brought forward we have concerns.
- going around stating what others are being paid - which is inaccurate.
 - Vet got defensive - asked who told us this; told him we can't tell him that but needs to stop.
 - In regard to help in the fryer room we have hired help and he hasn't been performing all the duties of the position.
- Vet got defensive - stated "I resign/walk out right now."
32. The delegate also notes, under Ms. Mudhar's evidence, that NHGF provided two pay increase letters sent to Mr. Phiothong during the course of his employment. The first letter is dated August 22, 2017. In this letter, NHGF thanks Mr. Phiothong for his excellent service and announced a pay increase of \$2.00 an hour to his wage. The second letter is dated June 6, 2018, announcing an increase of \$0.50 per hour to his wage as part of the semi-annual review and thanks him for his "excellent service to the Operations department" of NHGF.
33. The delegate then goes on to summarize the evidence of Ms. Thandi.
34. Ms. Thandi works in the human resources department of NHGF and she has been with NHGF since 2014. She attended the Meeting with Ms. Mudhar and Mr. Phiothong.
35. According to Ms. Thandi, at the Meeting, Mr. Phiothong raised concerns about his wage and Ms. Mudhar addressed those concerns by informing him there would be an annual wage review process in the spring.
36. Ms. Thandi also stated that Ms. Mudhar told Mr. Phiothong that she had been informed that he was spreading rumours at work and this was not acceptable. Mr. Phiothong became defensive and wanted to know who had told management he was spreading rumours. Ms. Mudhar said that information was confidential. Subsequently, Mr. Phiothong became angry and said he was not going to work there any longer and he was going to walk out. Ms. Mudhar told him that was his decision. Mr. Phiothong then said "I quit" and began to walk out of the office.
37. According to Ms. Thandi, NHGF did not invite Mr. Phiothong to quit; he said he wanted to quit and that was his decision. Ms. Thandi said she then told Mr. Phiothong that if he was resigning, she needed to have his resignation in writing and followed him out of the office requesting a written resignation, but Mr. Phiothong refused.

38. Ms. Thandi then told Mr. Phiothong she needed his key fob and he provided it to her. He then asked if he could speak with his wife, who was working on the floor, and she agreed.
39. After Mr. Phiothong spoke with his wife, Ms. Thandi said she saw him leave. She said he took all his belongings from his locker and was accompanied out of the building by a representative of NHGF because a resigning employee is always escorted off the premises.
40. On September 29, 2018, Ms. Thandi electronically filed Mr. Phiothong's Record of Employment (the "ROE"). The ROE was adduced into evidence by NHGF and shows the code for quit.
41. Ms. Thandi also said she was contacted by an officer at Employment Insurance ("EI"), who told her they had received contradictory information from Mr. Phiothong. Ms. Thandi confirmed to that officer that Mr. Phiothong had quit. She did not recall whether she was aware that there was a dispute over whether Mr. Phiothong quit or was fired prior to hearing from the officer at EI.
42. After September 27, 2018, Ms. Thandi said she did not have any further contact with Mr. Phiothong. She did send Mr. Phiothong a registered letter dated September 28, 2018, confirming that he had resigned and enclosed with the letter his last pay statement and advised that the ROE had been filed with EI. She said she did not receive a response from him.
43. The delegate next turns to Mr. Phiothong's evidence at the Hearing. She notes in the Reasons that he testified that he and his wife moved to Ontario in 1986 from Laos as refugees. They then moved to British Columbia in 2014.
44. In July 2015, he worked with NHGF but left four months later because he did not get the raise he was promised by his manager, at the three-month mark, from \$11.00 to \$15.00 per hour. He provided one week's working notice to NHGF at that time. His wife, who was also employed with NHGF, continued working.
45. In 2017, when NHGF was unable to find a forklift operator, Mr. Phiothong was contacted and offered the position at a wage rate of \$15.00. He returned to NHGF and worked the afternoon shift.
46. Mr. Phiothong said he worked different jobs at NHGF when he returned and did whatever he was told. At the time his employment terminated on September 27, 2018, he was working as a fryer. In this position he loaded potatoes into the fryers. While there were three fryers, he worked alone on his shift most of the time. He said the day shift routinely staffed three fryers but his afternoon/evening shift was understaffed, and this created safety issues.
47. He testified that on one occasion he fell on the floor and injured his shoulder and raised his concerns with the plant manager, the day supervisor, the afternoon supervisor, and Ms. Mudhar.
48. When he saw Mr. Homenick in the workplace parking lot, and when questioned by him, Mr. Phiothong said he voiced his job concerns. He also said that he witnessed racism in the workplace and raised this with Ms. Mudhar. He also raised the issue of a pay increase. However, he said he did not, at any time, say he was unhappy at NHGF or he was seeking new employment. He said he planned to stay at NHGF until he retired. The delegate quotes Mr. Phiothong's testimony verbatim in the Reasons as follows:

"I didn't say I'm going to look for another job. I never said that. In this country I'm very happy enough to work and make money to support my family... I thought I would keep that job to retire and look after my family and myself. I swear to God I never say that."

49. With respect to the Meeting on September 27, 2018, Mr. Phiothong said that his floor supervisor told him that Ms. Mudhar wanted to speak with him in her office. In the Meeting, Ms. Mudhar said he made too many complaints and word had gotten back to her that he had been complaining to other employees about low wages and spreading rumours. She said this was unacceptable. He said he asked to speak and explain, but he was not given an opportunity to respond. The delegate, again, verbatim, sets out Mr. Phiothong's testimony:

"I said please let me explain ... when they do not allow me to talk and I'm only a worker and they not allow me to talk there is nothing I could do. I had to shut my mouth."

50. The delegate also notes that Mr. Phiothong denied complaining to other employees. He said he told Ms. Mudhar he needed help on his shift, and he asked for help on three previous occasions and reminded her of the same in the Meeting. However, she did not respond to him. He said he does not know if she heard him as she was talking over him. He said she was angry with him for raising an issue with Mr. Homenick and told him this was unacceptable, and he should have come to her.

51. Mr. Phiothong also said he believed that Ms. Mudhar did not like him because she thought he was a complainer. He said she told him there would have to be a discussion on whether or not he should stay at NHGF and asked him: "Do you want to stay or go?" He said she kept asking him this question and he told her he wanted to talk to his wife and walked out of Ms. Mudhar's office. The delegate sets out his evidence verbatim in the summary:

"I didn't say at the time. I have to see Vieng first. I didn't say I was going to go or stay. I didn't say the final words."

52. According to Mr. Phiothong, Ms. Mudhar's office is a short distance to the production floor where his wife was working. As he walked, he said Ms. Thandi followed him and wanted to know if he was going to stay with NHGF or go:

"[T]hey both keep asking me 'You want to stay or you to go?' I said 'I want to talk to Vieng before I make my decision.' They say not and not allow me to talk to Vieng. They said, 'Just hand me your fob.' How can I give her my fob? I can't even get anything out of my locker then."

53. He said both Ms. Mudhar and Ms. Thandi repeatedly asked him to sign a letter of resignation, but he said he would not sign one. He said that they then told him they would get someone to help him sign but he still refused. He testified that: "My heart pumping very badly. My hands shaking. I cannot control it."

54. When he went to the production floor and spoke with his wife, the delegate notes verbatim the evidence of Mr. Phiothong as follows:

"I said 'Vieng they not allow me to sit down and discuss with you. What can I do? They said hand me your fob.' People look at my face. Think somebody is ill. No time to talk, to discuss with Vieng. Say 'Hand me fob,' again and again. That's it. I hand the fob to her and walk out. Cannot come back when hand the fob. Cannot get into the door. Door won't be open for you."

55. After Mr. Phiothong informed his wife that his employment with NHGF had ended, his wife left with him because they have one car and she would be unable to get home without him. Mr. Phiothong said:
- ‘I said I have to go. They force me out. ...She said what can she do? No car. ‘If you go I have to go’ she said. No way to get home. She was crying very long. She want to stay but doesn’t have car to come home.’
56. Mrs. Phiothong has not worked since September 27, 2018.
57. Shortly after his employment ended with NHGF, Mr. Phiothong contacted WorkSafe BC and filed a complaint with the Worker’s Compensation Board for discriminatory action, but the complaint was unsuccessful.
58. Mr. Phiothong also said, since the incident of September 27, he was unable to sleep or eat. He started taking sleeping pills. His hands were also shaking.
59. He applied for work elsewhere and also applied for employment insurance but was informed by Service Canada that he was not eligible because he quit his job because NHGF told Service Canada that he went on holidays and did not return to work.
60. Mr. Phiothong said that he and Mrs. Phiothong had booked four weeks of leave, from October 8 to November 4, 2018, for a trip to Thailand as his mother had passed away and his family was gathering for a funeral. He provided copies of the airline tickets for himself and his wife.
61. After his employment with NHGF terminated, Mr. Phiothong said he had no money and he and Mrs. Phiothong relied on the food bank to survive until he found other employment on February 21, 2019.
62. The delegate notes in the Reasons that during the cross-examination of Mr. Phiothong by NHGF’s counsel, Mr. Phiothong said he felt overworked and was concerned about wages. He also said he did not recall either Ms. Mudhar or Ms. Thandi taking notes during the Meeting. He agreed that he felt upset because he believed he was falsely reported as making trouble with other employees. He also said no one told him he was fired but he felt he was fired when he was asked to return the fob, as without the fob one cannot access the building.
63. When asked by NHGF’s counsel why he did not respond to NHGF’s letter confirming his resignation, Mr. Phiothong acknowledged he received the letter, but he was too stressed to open it. His son eventually opened it.
64. The delegate also asked Mr. Phiothong what precisely he said to NHGF and his response was: “Mindy (Mudhar) asked me again and again you want to stay or you want to go. I say, ‘I have to go.’”
65. The delegate next summarizes the evidence of Mrs. Phiothong.
66. Mrs. Phiothong is 56 years old. She immigrated to Canada with Mr. Phiothong in 1986 and worked with him at NHGF from October 20, 2014, to September 27, 2018. She has not worked since leaving NHGF.

67. According to Mrs. Phiothong, Mr. Phiothong never mentioned to her that he wanted to leave NHGF or find other employment. If he had desired to find other employment, he would have told her.
68. Mrs. Phiothong was at the Employees' Meeting but did not recall what was discussed at the meeting.
69. She recalls that on September 27 she was working at NHGF and saw Mr. Phiothong in the glass hallway. The delegate sets out Ms. Phiothong's evidence verbatim as follows:
- His hands shaking. Supervisor called me to come in the room. Frank said 'I think I got fired.' I don't know if he has a job or not. After that I spoke to HR. HR asked 'Want to stay or leave?' I don't know why she asked me that. She left. Frank waiting outside the door. I told HR 'Can I talk to him a minute?' and she said 'No'. So after I go get my things in the locker. And I left.'
70. Mrs. Phiothong, like Mr. Phiothong, recalls receiving a letter from NHGF but she also did not open it as it was too stressful for her.
71. She testified that both she and Mr. Phiothong applied for employment insurance, but they were both rejected as they were informed that they quit.
72. After summarizing the evidence of the parties and their witnesses, the delegate identifies the statutory liability on an employer to pay compensation for length of service when an employee is terminated and when that liability is discharged, including if the employee quits. She then identifies the issue before her at the Hearing, namely, whether NHGF terminated Mr. Phiothong's employment or did the latter quit or abandon his employment. She notes the onus or the burden of proof, in this case, is on NHGF to establish that its liability for paying compensation for length of service has been discharged.
73. The delegate then identifies the applicable principles of law she must consider in determining the penultimate issue before her, whether NHGF terminated Mr. Phiothong's employment or did he quit. She notes that the right to quit is personal to the employee and accordingly, there must be clear and unequivocal facts to support the conclusion that, in this case, this right has been voluntarily exercised by Mr. Phiothong. She also refers to the often-quoted decision of the Tribunal in *Burnaby Select Taxi Ltd. - and- Zoltan Kiss, BC EST # D091/96*, which requires both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with further employment.
74. She also includes in her Reasons the rationale identified by the Tribunal in *Burnaby Select Taxi Ltd., supra*, for the approach it propounded for determining whether the right to quit was voluntarily exercised:
- ... the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship. *Re University of Guelph, (1973) 2 L.A.C. (2d) 348*

75. Having set out the applicable legal principles in this case, the delegate states that NHGF must establish, on a balance of probabilities, that Mr. Phiothong formed an intent to quit. In concluding that NHGF failed to discharge this burden, she reasons as follows:

In assessing whether Mr. Phiothong formed an intent to quit I considered the following questions: Were Mr. Phiothong's actions done in a spontaneous burst of anger, or out of emotional distress and frustration? Would it have been out of character for Mr. Phiothong to quit without notice? Can Mr. Phiothong's actions after September 27, 2018 sufficiently establish Mr. Phiothong had quit?

Ms. Mudhar said at the September 17 meeting Mr. Phiothong stated he was going to quit and was seeking other employment. She said Mr. Phiothong was unhappy with his wage and working conditions. Both Mr. Phiothong and Vieng stated that he intended on staying at Naturally Home Grown and had no intention of leaving his work. He did not have savings, he had an expensive holiday coming up in early October 2018, and he had no other employment. It is reasonable to expect that if Mr. Phiothong was considering leaving Naturally Home Grown, given his limited financial means, he would have secured employment first, and he and Vieng would have formulated a plan whereby she could retain her job at Naturally Home Grown.

Although Ms. Mudhar characterized the September 27 meeting as being called to address concerns Mr. Phiothong had raised previously, her notes indicate the meeting was disciplinary in nature and was called due to Employer concerns over Mr. Phiothong's workplace behaviour. Ms. Mudhar stated that Mr. Phiothong became very angry and defensive at the meeting. Mr. Phiothong says his hands were shaking. Vieng also recalls Mr. Phiothong being extremely upset.

Ms. Mudhar stated that at no time did she ask Mr. Phiothong if he wanted to resign, however she later stated that she "reiterated" to him if he wanted to quit he could do so. The word "reiterated" indicates a statement made more than once. This is consistent with Mr. Phiothong's recollection that Ms. Mudhar asked him repeatedly if he wanted to leave.

Ms. Mudhar's notes state Mr. Phiothong "got defensive" and said " I resign/walk out right now." This is consistent with Mr. Phiothong's evidence which was after being pressed repeatedly for an answer he said "I have to go."

Ms. Thandi stated she said to Mr. Phiothong that if he was resigning she needed his signature on a letter of resignation. She asked multiple times. Mr. Phiothong said she even offered to have someone help him sign as his hands were shaking. Mr. Phiothong's refusal to sign the letter of resignation should have indicated to the Employer that resignation may not have been Mr. Phiothong's intent.

Mr. Phiothong stated he asked to speak to his wife. Vieng says Mr. Phiothong's hands were shaking and his words to her were "I think I got fired."

The evidence from all parties was Mr. Phiothong was in a state of emotional distress when he said he was leaving his employment. It was the Employer and not Mr. Phiothong who raised the question of his continued employment. And it was the Employer who pressed him repeatedly for an answer he was clearly hesitant to confirm. I find Mr. Phiothong's words indicating he quit were part of an emotional outburst and did not manifest an intention to resign his employment.

When Mr. Phiothong quit his employment with Naturally Home Grown in 2015 after a wage dispute he gave the Employer one week's notice. It was not in his character to leave his employment suddenly.

76. The delegate also considered Mr. Phiothong's actions after the Meeting and found that he did not evince an intention to quit. She explains her reasons as follows:

The Employer argued that Mr. Phiothong left and did not return to work, did not respond to a letter from the Employer confirming his resignation, and soon after left on a lengthy vacation thus indicating he had abandoned his employment.

Mr. Phiothong stated, and the Employer did not dispute, that Ms. Thandi requested his fob. The fob is needed to enter the building. Without a fob the employee has no access to the workplace. Mr. Phiothong stated he believed he was fired because without the fob he could not access the workplace. I find this to be a reasonable assumption.

The Employer provided a copy of Mr. Phiothong's ROE. It was filed September 29, 2018, two days after the meeting. The Employer did not wait for a response to the letter confirming Mr. Phiothong's resignation before filing. Prior to leaving on vacation Mr. Phiothong contacted EI and Worksafe BC. He reported to both that he had been fired. EI contacted the Employer to investigate. The Employer was therefore aware that Mr. Phiothong believed he had been fired. The Employer was also aware Mr. Phiothong was leaving on a four-week vacation to Thailand as Mr. Phiothong had requested and been granted leave for that purpose. I do not find the fact that Mr. Phiothong took his planned vacation is evidence of abandonment of employment.

77. In the result, the delegate concluded, on a balance of probabilities, that Mr. Phiothong did not quit and ordered NHGF to pay him two weeks' wages for compensation for length of service, as he was employed with NHGF for more than two years but less than three years. She also ordered vacation pay on this amount.
78. The delegate also imposed a penalty of \$500.00 pursuant to section 98(1) of the *ESA* and section 29(1) of the *ESR* against NHGF for contravention of section 63 of the *ESA*.

SUBMISSIONS OF NHGF

79. In his appeal submissions on behalf of NHGF, counsel sets out his arguments under both the "error of law" and the "natural justice" grounds of appeal.

Error of law

80. With respect to the "error of law" ground, counsel relies on the decision of the Tribunal in *Re Philip* (BC EST # D058/04) for the proposition that where a delegate has not followed the legal test, including the test for determining whether an employee resigned, the delegate has erred in law.
81. He then refers to the Tribunal's comments on the applicable test for resignation in *Director of Employment Standards*, (BC EST # RD126/15, at paras. 48 – 50):

I do not disagree with the Director's statement that an employee's terminating the employment by quitting requires an examination of subjective and objective elements. However, I **cannot agree that in order for an employee to terminate the employment the employer must always establish a subjective intention on the part of the employee to bring the relationship to an end. In my view, the subjective element relates to the question of how the employee's intention is demonstrated, at least in situations where the allegation is that the employee has quit.**

There will be cases where an employee forms a subjective intention to terminate the employment relationship. If the employee acts on that intention in a way that is consistent with the subjective desire to quit, the employee may well be found to have terminated the relationship.

There will be other cases, however, where the employee forms no subjective intention to quit, but the employee's actions are sufficient to satisfy an objective observer that the employee did have that intention, and acted in a way that was consistent with the employee's achieving that result. In those types of cases, too, the employee may well have successfully terminated the employment relationship pursuant to section 63(3)(c) of the Act. [emphasis added]

82. Counsel also relies on the Tribunal's decisions in *Re Friend*, (BC EST # D209/96); *Re Clough*, (BC EST # D218/96); *Re Chang*, BC EST # D244/97); and *Re Gutierrez*, (BC EST # D108/05), to contend that the fact an employee elects to resign from their employment in the heat of the moment, in response to an action or comment by their employer they take issue with, or because they are displeased with certain circumstances at work, does not negate the element of intention or otherwise render a resignation invalid.
83. He also relies on *Re Gutierrez, supra*, to contend that there is no legal requirement under the *ESA* that an employer obtain a letter of resignation before concluding an employee has resigned; and the Tribunal's decision in *Re Kang* (BC EST # RD028/10) to contend that "the fact that an employee may later regret his or her decision to resign from their employment does not mean the employee did not intend to resign or otherwise render that decision invalid, particularly when their resignation has been accepted by the employer".
84. Having delineated the legal principles for the foundation of his arguments on the error of law ground of appeal, counsel argues that in this case the delegate erred in law in failing to follow the legal test for determining whether an employee terminated the employment relationship, by concluding Mr. Phiothong did not subjectively intend to resign based on irrelevant considerations. In doing so, he adds that the delegate ignored clear indications of a subjective intention to quit confirmed by objective conduct of Mr. Phiothong, in satisfaction of the established legal test.
85. Counsel identifies the following as irrelevant considerations made by the delegate in concluding Mr. Phiothong did not form an intention to quit:
- (a) The Employee was "unhappy with his wage and working conditions".
 - (b) Assumptions regarding the Employee's financial situation, including assuming he would not resign because he did not have savings, had an expensive holiday coming up in early October 2018, had no other employment, and was of "limited financial means" and therefore would have secured alternative employment first if he intended to resign.
 - (c) Interpreting the Employee's "state of emotional distress" to mean he could not have intended to quit.
 - (d) Determining that because his words "were part of an emotional outburst", they therefore did not amount to an intention to resign.
 - (e) Concluding the Employee must have "believed he was fired" because he was asked by his employer to return his fob (access to the workplace) after he advised them he was resigning.

86. He then argues:

The Employee's undisputed actions in this case were clearly sufficient to satisfy an objective observer that he subjectively intended to quit and confirmed that intention through objective conduct, including:

- (a) His express statement that he was resigning, and the absence of any evidence suggesting this statement was somehow involuntary.
- (b) Nothing occurred to suggest his employment was being terminated, such as being directed to leave the worksite or told not to return to work.
- (c) The Employee's actions following his resignation confirming his intention, including making no effort to rescind his stated resignation at any point in time, his failure to return to the workplace or attempt to attend work the following day, his election not to contact NHGF in any way about his job status, and the fact that he did not respond to or dispute a letter sent to him by NHGF confirming their acceptance of his resignation.

87. In the result, counsel claims the delegate erred by concluding Mr. Phiothong did not subjectively intend to quit.

Natural justice

88. With respect to the "natural justice" ground of appeal, counsel contends that the delegate committed several breaches of natural justice and denied NHGF their fundamental right to procedural fairness based on the following:

- (a) The delegate refused to permit counsel for NHGF to object to questions posed by Employee counsel to NHGF witnesses, including questions that were clearly irrelevant or otherwise improper, or had been repeatedly asked and answered, or where witnesses were being cut off in providing their answers.
- (b) The delegate permitted Employee counsel to make arguments regarding the Employee's version of events that were not put to any NHGF witness, whereby permitting clear violation of the foundational rule in *Browne v. Dunn*. This had the effect of denying NHGF the fundamental right to know the case to be met.
- (c) The delegate denied NHGF the right of cross examination of the Employee, by failing to permit certain questions to be asked/answered by the Employee, despite providing extremely broad (and unencumbered, given that objections were not permitted) latitude to Employee counsel during cross-examination.
- (d) Legal arguments were made by both parties, with NHGF proceeding first and the Employee then responding. However, NHGF was not provided with an opportunity to make reply submissions following the Employee argument, in violation of their right to procedural fairness and, more specifically, the opportunity to be heard.

89. Based on the foregoing submissions, counsel submits that the Determination should be cancelled, or, in alternative, the matter be remitted to the Director for a new hearing before a different delegate.

ANALYSIS

90. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

91. The Tribunal has consistently maintained that an appeal is an error correction process and the burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

92. NHGF, as indicated previously, contends that the delegate erred in law and breached the principles of natural justice in making the Determination.

93. The grounds of appeal delineated in section 112(1) of the *ESA* do not provide for an appeal based on errors of fact. In *Britco Structures Ltd.*, (BC EST # D260/03), the Tribunal held that it has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law.

Error of Law

94. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

95. Under the error of law ground of appeal, NHGF contends that the delegate improperly applied the legal test for determining whether an employee quit their employment. More particularly, counsel contends that the delegate misapplied the test by concluding that Mr. Phiothong did not subjectively intend to resign based on irrelevant considerations and disregarding or ignoring "clear indications of a subjective intention to quit confirmed by objective conduct".

96. The Tribunal has held that the question of whether an employee has quit is one of mixed law and fact, requiring application of the facts as found to the relevant legal principles developed under the *ESA*: see *Microb Resources Inc.*, 2020 Bcest 93.

97. In *Re Microb, supra*, the Tribunal also said:

A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error. As succinctly expressed by the Panel in *Britco, supra*: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error. *A decision by the Director on a question of mixed law and fact requires deference.* (italics mine)

98. In this case, the delegate heard the evidence of the parties and their witnesses. She meticulously summarized that evidence at pages R3 to R9 of the Reasons. She also delineated the correct test and the correct legal principles in addressing whether Mr. Phiothong quit. More particularly, she referred to the Tribunal's decision in *Burnaby Select Taxi Ltd., supra*, that recognizes there is a subjective element - that the employee communicated to the employer an intention to terminate the employment relationship - and an objective element - that such intention was confirmed by some subsequent conduct.

99. She also appropriately placed the burden of establishing that Mr. Phiothong quit his employment on NHGF and then went on to consider the following relevant questions in assessing whether Mr. Phiothong quit:

Were Mr. Phiothong's actions done in a spontaneous burst of anger, or out of emotional distress and frustration? Would it have been out of character for Mr. Phiothong to quit without notice? Can Mr. Phiothong's actions after September 27, 2018 sufficiently establish Mr. Phiothong had quit?

100. While counsel for NHGF contends that the delegate relied on "a number of irrelevant factors" (see paragraph 84 above) in concluding that Mr. Phiothong did not quit his employment, I do not agree. I find the said factors relevant. I also do not think it was improper for the delegate to infer, based on the evidence presented by Mr. Phiothong, that if the latter was considering leaving NHGF, given his limited financial circumstances, he would have secured employment first or formulated a plan with Mrs. Phiothong whereby she could retain her employment with NHGF. If I am wrong in this regard, I do not find that this inference was determinative in the delegate's decision that Mr. Phiothong did not quit. The delegate considered several factors in her Reasons (which I delineate below) that influenced her ultimate decision that Mr. Phiothong did not quit.

101. I am also not persuaded with counsel's contention that the delegate "ignored" those factors (delineated in paragraph 85 above) that counsel says sufficiently confirm that Mr. Phiothong subjectively intended to quit. I find the delegate did what is expected under the test for determining whether the employee quit, which is to search through all of the evidence adduced by both parties for whether Mr. Phiothong had clearly and unequivocally expressed an intention, through words or conduct, to quit his employment. The delegate does this at pages R10 to R12 of the Reasons. In concluding that Mr. Phiothong did not quit, she appears to have preferred the evidence of Mr. Phiothong and his wife over NHGF's witnesses. In particular, the following findings of fact by the delegate appear to be determinative in the delegate's decision:

(a) Ms. Mudhar, more than once, asked Mr. Phiothong if he wanted to quit, he could do so and his answer in the Meeting was "I have to go".

- (b) Ms. Thandi asked him multiple times that if he was resigning, she needed his signature on a letter of resignation, but Mr. Phiothong refused to sign the letter of resignation.
- (c) Mr. Phiothong said to his wife, “I think I got fired”, when he spoke with her on the production floor after the Meeting.
- (d) Mr. Phiothong was emotionally distraught when he said he was leaving his employment.
- (e) It was NHGF that pressed Mr. Phiothong repeatedly to answer clearly whether he was resigning, and he was hesitant to confirm.
- (f) Ms. Thandi requested his fob, without which he could not enter the building and would have no access to the workplace.
- (g) After September 27, 2018 and before he left for his preplanned vacation, Mr. Phiothong contacted EI and WorkSafe BC and informed both that he had been fired.

102. While counsel refers to the Tribunal’s reconsideration decision in *Director of Employment Standards, supra*, to contend that for an employee to terminate the employment an employer need not always establish a subjective intention, particularly where the employee's actions are sufficient to satisfy an objective observer that the employee did have that intention, I find that in this case the delegate, on the whole, had sufficient evidence to conclude that Mr. Phiothong did not evince an intention to quit. I am also not convinced that an objective observer would be persuaded otherwise, after considering all of the evidence adduced by the parties at the Hearing.

103. I find that this is a case where the delegate applied the accepted test for determining whether Mr. Phiothong had quit his employment, weighed the evidence presented and made a decision based on that evidence and NHGF disagrees with the result. NFGH, effectively, is challenging the delegate’s findings of fact and weighing of the evidence. As indicated previously, the grounds of appeal, in section 112 of the *ESA*, do not provide for an appeal based on errors of fact. The Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd., supra*.

104. The test for establishing findings of fact constitute an error of law is very stringent. In this case, in order to establish the delegate committed an error of law on the facts, NHGF is required to show the findings of fact and the conclusions and inferences reached by the delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13, at paras. 26 – 29.

105. Further, the weight of evidence is a matter for the Director and is a question of fact, not law: see *Glacier Park Lodge Ltd.*, BC EST # D059/09. It is only where a conclusion reached on the facts is one that could not reasonably be entertained that an error of law is shown. Findings of fact made by the Director require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact: see *Darvonda Nurseries Ltd.*, 2020 BCEST 103.

106. In this case, I am not persuaded the delegate committed an error of law on the facts in deciding whether Mr. Phiothong quit his employment. I find the findings of fact and the conclusions and inferences reached

by the delegate on the facts are not perverse or inexplicable, but adequately supported by the evidentiary record. I find that the delegate did not err in law in concluding that Mr. Phiothong did not quit his employment and dismiss this ground of appeal.

Natural Justice

107. In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court of Canada stated that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual." The Tribunal has jurisdiction to review determinations of the Director of Employment Standards based on a breach of this common law duty, because subsection 112(1)(b) of the *ESA* states that a person served with a determination may appeal it to the Tribunal on the basis that "the director failed to observe the principles of natural justice in making the determination". Thus, the delegate, in adjudicating Mr. Phiothong's complaint and making the Determination, owed to the parties a duty to observe the principles of natural justice or a duty of procedural fairness.
108. In *Re: 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, BC EST # D055/05, the Tribunal stated that 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.
109. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice, stating:
- 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 *BWI Business World Incorporated*, BC EST #D050/96).
110. Where a breach of the rules of natural justice is found, it is not necessary to ask whether the breach altered the outcome of the hearing. As Le Dain J. held in *Cardinal, supra*, at 661:
- ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.
111. In this case, NHGF contends that although the delegate has the authority to determine her own procedure to a certain degree, and the rules of evidence and procedure are not applicable in a complaint hearing, the combination of the following events, during the Hearing, denied NHGF of their fundamental right to a fair hearing and constituted a breach of the principles of natural justice by the Director under subsection 112(1)(b) of the *ESA*.

112. A party alleging a failure to comply with principles of natural justice must provide objectively cogent evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
113. I find that NHGF has failed to discharge this burden here. NHGF has provided general, and in some cases, subjective and impressionistic evidence under this ground of appeal. Counsel for NHGF, for example, does not specify what improper or irrelevant questions Mr. Phiothong's counsel asked NHGF's witnesses that he was not allowed by the delegate to object to and what comments, if any, the delegate made in voicing her objection. Counsel also does not specify what objectionable arguments Mr. Phiothong's counsel was allowed to make based on Mr. Phiothong's version of events that were not put to NHGF's witnesses and whether he registered any objection with the delegate and what comments, if any, the delegate made in response. Counsel also does not specify what questions the delegate did not permit him to ask Mr. Phiothong on cross-examination and what did this prevent NHGF from exploring as a result. Counsel also does not specify what questions Mr. Phiothong was prevented by the delegate from answering during cross-examination. Counsel also does not explain what reply submissions he wanted to make after Mr. Phiothong's argument, if he asked the delegate to make reply submissions, and what the delegate's response was. There is nothing in the Reasons that sheds light on any of the alleged objectionable conduct of the delegate that counsel raises in the appeal submissions under the natural justice ground of appeal.
114. NHGF could have provided all of the evidence by way of affidavit in its appeal, as the Tribunal has taken a broader view of additional evidence provided in the context of natural justice issues raised on appeal than with new evidence adduced in support of factual or legal challenges of the Determination on appeal: see for example *J.C. Creations Ltd. (c.o.b. Heavenly Bodies Sport)*, BC EST # RD317/03 (Reconsideration of BC EST # D132/03); *Alpha Neon Ltd.*, BC EST # D105/11.
115. I find NHGF has failed to prove the necessary evidence and has failed to meet the burden on them when alleging a breach of natural justice against the delegate.
116. Lastly, while counsel does not expressly contend that the delegate was biased, he certainly intimates that the delegate was not impartial by expressly referring to the Tribunal's decision in *Dr. Bean Café Inc.*, (BC EST # D017/09) for the proposition that delegates are acting in a quasi-judicial capacity when they exercise their authority in relation to complaints filed under the *ESA*, and their functions must, therefore, be performed in an unbiased and neutral fashion.
117. As noted by the Tribunal in *Dusty Investments Inc.*, *supra*, the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact:

. . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.
118. It is also important to note that an allegation of bias or reasonable apprehension of bias against a decision-maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

119. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court of Canada added the following to the concern expressed above:

Regardless of the precise words used to describe the test [of bias or apprehension of bias] the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

120. On the basis of the legal principles delineated above, the onus or burden of proving actual or a reasonable apprehension of bias is high and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances, would conclude the object of the allegation was biased against him. In this case, I do not find that NHGF has discharged or met the burden of proof.

121. I dismiss the natural justice ground of appeal.

122. In summary, I find NHGF's appeal has no presumptive merit and has no reasonable prospect of success and must be dismissed under subsection 114(1)(f) of the *ESA*.

ORDER

123. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, I order the Determination made on June 15, 2020, confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal