

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Nature's Choice Foods Limited
("NCFL")

- 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.: 2020/117

DATE OF DECISION: November 17, 2020

DECISION

SUBMISSIONS

Herbert Hanna

on behalf of Nature's Choice Foods Limited

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Nature's Choice Foods Limited (“NCFL”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 3, 2020.
2. The Determination found that NCFL contravened Part 8, section 63 (liability resulting from length of service) of the *ESA* in respect of the employment of Denise Smadello (the “Respondent” or “the Complainant”).
3. The Determination ordered NCFL to pay the Respondent wages in the total amount of \$248.07, including accrued interest.
4. The Determination also levied an administrative penalty of \$500 against NCFL, pursuant to the *Employment Standards Regulation* (the “ESR”), for breaching section 63 of the *ESA*.
5. The total amount of the Determination is \$748.07.
6. NCFL appeals the Determination on the “error of law” and “natural justice” grounds of appeal under section 112(1)(a) and (b) of the *ESA*.
7. In correspondence dated August 12, 2020, the Tribunal notified the Respondent and the Director, that it had received NCFL's appeal and it was enclosing the same for informational purposes only and 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 record (“the record”).
8. On August 20, 2020, the Tribunal received the record from the Director and forwarded a copy of it to NCFL and the Respondent. 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 October 6, 2020, the Tribunal sent correspondence to the parties advising them that a panel is assigned to decide the appeal.
10. On October 6, 2020, by email, Herbert Hanna (“Mr. Hanna”), owner and CEO of NCFL, sent the Tribunal unsolicited submissions (“unsolicited submissions”), which I will discuss below.
11. 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).

ISSUE

12. 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*.

BACKGROUND

13. The delegate of the Director investigated the Complaint and obtained evidence from both parties which he meticulously summarizes in the Reasons for the Determination (the “Reasons”). I have carefully reviewed the delegate’s summary of the evidence and I do not find it necessary to reiterate the same here. However, I will set out the delegate’s analysis of the parties’ evidence in the section below.
14. Based on an online BC Registry Services Search conducted on May 27, 2020, with a currency date of February 28, 2020, NCFL was incorporated in British Columbia on July 15, 2002. Mr. Hanna is listed as its sole director and sole officer.
15. NCFL operates a market and coffee shop in Maple Ridge, British Columbia, and employed the Complainant as a barista from October 25, 2018, to November 18, 2019, at the rate of pay was \$13.85 per hour.
16. On December 10, 2019, the Complainant filed a complaint under section 74 of the *ESA*, alleging that NCFL contravened the *ESA* by failing to pay her compensation for length of service (the “Complaint”).
17. Before assessing the evidence of both parties and deciding the penultimate issue in the Complaint, namely, whether NCFL terminated the Complainant’s employment, the delegate explained the statutory obligation of the employer under section 63 of the *ESA*. He noted that under section 63 an employer has an obligation to pay compensation for length of service to an employee but that obligation may be discharged, if the employee is given written notice of termination equal to the amount of compensation the employer is liable to pay, or if the employee quits, retires, or is dismissed for just cause.
18. The delegate delineated the test, propounded in the Tribunal’s decision in *Burnaby Select Taxi Ltd – and – Zoltan Kiss*, BC EST # D091/96, for determining whether an employee voluntarily quit her employment. He explained that the test for determining whether an employee quit her employment involves both a subjective and an objective element: subjectively the employee must form an intent to quit employment; objectively the employee must carry out an act inconsistent with further employment. He also set out the rationale for this test identified by the Tribunal in *Burnaby Select Taxi Ltd., supra*, namely:
- ...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*
19. Having laid out the applicable law and legal principles, the delegate then assessed the evidence adduced by both parties. In concluding that the Complainant did not form an intention to quit and NCFL did not discharge the burden to relieve itself of its statutory obligation under section 63 of the *ESA*, the delegate reasoned as follows:

Although there is a dispute as to whether the Complainant stated that she quit her job, the decision will not turn on whether she said “I quit” before she left the cafe on November 18, 2019, but rather on whether her actions ought to be interpreted as quitting or abandoning her employment within the meaning of the test set out above. There must be unmistakable evidence of an employee’s intention to quit before the Employer can be relieved of its obligation to pay compensation for length of service.

The parties agree that [the Complainant] met with Ms. Hanna in the morning on November 18, 2019 and that this meeting escalated to an argument when [the Complainant’s] mother, Ms. Smadello, and Ms. Hanna’s daughter, Nicky, became involved. The parties do not agree about what was said during the argument or how the argument ended.

The Employer alleges that Ms. Hanna told [the Complainant] to tell Ms. Smadello to leave the building so that they could continue their discussion. The Employer further alleges that [the Complainant] then told Ms. Hanna she quit her employment and left the store and that [the Complainant] verbally confirmed her resignation when Ms. Hanna followed her out to Ms. Smadello’s truck by saying that she would “never come back.” It is the Employer’s position that neither the Employer, nor Ms. Hanna, nor Nicky said the words “you’re fired,” but that even if Nicky did say those words, she did not have the authority necessary to hire and fire employees on behalf of the Employer. Accordingly, it is the Employer’s position that [the Complainant] quit or otherwise abandoned her employment.

The Complainant alleges that the Employer explicitly told her and her mother, Ms. Smadello, that Nicky was a manager of the Employer’s business before Nicky approached the Complainant and repeatedly told her that she was fired. The Complainant denies that Ms. Hanna followed her to Ms. Smadello’s truck to confirm her resignation. It is the Complainant’s position that the Employer terminated her employment with no notice, compensation in lieu of notice, or just cause.

The parties agree that the Employer did not follow up with the Complainant the following day or any day afterwards to ascertain or clarify her intentions with respect to her employment with the company.

There are no clear and unequivocal facts to support a conclusion that the Complainant left the cafe on November 18, 2019 for any reason other than an emotional response to the argument between Ms. Smadello, Ms. Hanna, and Nicky. Both parties agree that the argument occurred and became highly emotional.

Additionally, both parties agree that the Complainant was not an active participant in the argument aside from appearing visibly upset. Accordingly, I find that the Complainant did not form the intention to quit her employment at Nature’s Choice Foods Ltd. and the Employer has not satisfied the subjective element of the above noted legal test for establishing that an employee quit his or her employment. Therefore, I find that the Employer has not met its burden to relieve itself of its statutory obligation to pay compensation for length of service.

20. Having concluded that the Complainant did not quit, the delegate then goes on to calculate the amount NCFL is liable to pay her based on her regular wages earned in the last 8 weeks. As the Complainant worked for NCFL for a period of slightly over a year – from October 25, 2018, to November 18, 2019 – the delegate awarded her 2 weeks’ termination pay plus vacation pay and interest for a total of \$248.07.

SUBMISSIONS OF NCFL

21. In his appeal submissions submitted on behalf of NCFL on August 10, 2020, Mr. Hanna states:
- ...I'm the owner and CEO of Nature's Foods Limited including the cafe/ coffee shop.
- The only manager here is Mara Hanna, and she is the one who handle [sic] ALL the employees. This includes: Hiring, firing, scheduling, training, discipline actions, payroll, T4S PAYROLL, ECT. [sic]
- We do not have any other managers.....
- Nicole Hanna is co-worker with Denise Smadello.
- Nicole Hanna, never scheduled, hired, fired, train, discipline, do payroll and / or ever Manage/ Supervisor any part of Nature's Choice Foods, including the cafe/ coffee shop. [sic]
- We disagree with the findings, from Ali Al-Samak | Employment Standards Officer, as this suggest [sic] that Nicole Hanna was in a position of authority (manager/supervisor) which is not true.
- In addition, it is "OUR OPINION" Ms. Smadello, was the sole INSTIGATOR of the Denise Smadello quitting her position at the Cafe. As a fact Denise Smadello was always dropped off at the workplace by her mother, Ms. Smadello.
- If the complainant had no intention to quit her employment at Nature's Choice Foods Ltd., the complainant[sic] mother, Ms Smadella [sic] would not have parked her vehicle and entered our premise, she (Ms. Smadello) would have left Denise Smadello at then [sic] work site, as she usually does.
- On this, particular day Ms. Smadello stayed in the Parking lot and entered the CAFE and embarrassed her daughter Into QUITTING her workplace.
- Mara Hanna asked, Denise Smadello three time [sic] if she wanted to re-consider [sic], and her response, "She will never come back."
- Furthermore, Ms. Smadello returned and asked Mara Hanna to change Denise Smadello [sic] ROE, so she can collect EI.
- Denise Smadeilo has [sic] not FIRED.**
- Nature's Choice Foods, workplace, including-owner and manager did not create an environment to cause Denise Smadello to quit.**
- Outside events, out of control of Nature's Choice Foods Ltd, may have caused Denise Smadello to QUIT. (eg MOTHER, Ms. Smadello and/or other circumstances)
- The complainant has adjusted their story to fit their needs and have influence Ali Al-Samak in the FACTS.
22. After the expiry of the time to file any objections to the record on October 4, 2020, and after the Tribunal received no objections to the completeness of the record from either party and assigned the appeal to this panel on October 6, 2020, Mr. Hanna sent additional unsolicited submissions. In those submissions, he states:

The Information we provided it to [the delegate] is not complete. He omitted a lot of information , like for example we have videos of Denise and the mother that day. We don't have the audio but the video showing how the mother waited in the parking later to come in and verbally attack one of the staff (Nikki). Denise was told since the [sic] day one that the only person manager is [sic] Mara Hanna, no one else. This case is very simple. Denise quit , she was asked at least 3 times to reconsider. she didn't want to reconsider. Denise quit her job and maybe later her mother advises her to come and harass us asking to change the ROE an official document containing accurate hrs and wages. [sic]

Denise and the mother premeditated all this.

It is hard to believe all the time invested in this case for something very simple . Denise quite [sic] her job . thank you.

ANALYSIS

23. 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.
24. 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.
25. NCFL contends that the delegate erred in law and breached the principles of natural justice in making the Determination.
26. The grounds of appeal delineated in section 112 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

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

28. 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
29. 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)
30. In this case, the delegate correctly applied the accepted test for determining whether the employee quit her employment, weighed the evidence presented by the parties in the investigation and made his decision based on that evidence. NCFL disagrees with the decision. In his appeal submissions on behalf of NCFL, including his unsolicited submissions of October 6, 2020, Mr. Hanna largely reiterates the submissions he made to the delegate, by way of emails, on May 11 and 18, 2020, during the investigation of the Complaint. I find this is a classic case of the appellant attempting to take the proverbial "second kick at the can" and have this Tribunal take a different view of the facts and arrive at a different conclusion than the delegate. 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*.
31. 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, NCFL 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.
32. I have carefully read the evidence of the parties in the Record and as summarized by the delegate in the Reasons and I am not at all persuaded that the findings of fact and conclusions and inferences the delegate reached in this case are without a rational basis or perverse or inexplicable. I also note that the Tribunal is generally reluctant to substitute the delegate's finding of facts even if it is inclined to reach a different conclusion on the evidence.
33. In summary, I do not find there is any merit in the error of law ground of appeal, and I dismiss it.

Natural Justice

34. 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.

35. 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.

36. In this case, there is ample evidence in the record that during the investigation of the Complaint, the delegate afforded NCFL the right to know the case against them and the right to present their evidence and the right to be heard by an independent decision-maker. However, in the unsolicited submissions of Mr. Hanna on October 6, 2020, the latter raises an issue that, on its face, engages natural justice concerns. He states the delegate “omitted a lot [sic] of information”. He provides a single example stating that “we have videos of Denise and the mother that day” but “[w]e don’t have the audio”. He says the video shows “how the mother waited in the parking” and later came in the store to verbally attack Nicky Hanna. I am not certain whether the video he is referring to was provided to the delegate as it does not appear to be part of the record produced in the appeal and NCFL did not object to the completeness of the record. Notwithstanding, I doubt how probative the video without the audio would have been in this case.

37. I do not find NCFL has made out a case showing a breach of natural justice on the part of the delegate and I dismiss this ground of appeal as well.

38. As an aside, I note that Mr. Hanna was not present to witness most of the exchanges between Ms. Smadello, Ms. Hanna, the Complainant and Nicky Hanna in the café or the store. While he claims Nicky Hanna was verbally attacked, Nicky Hanna did not give any evidence in the investigation.

39. I find that the natural justice ground of appeal is primarily invoked by NCFL to dispute the delegate’s findings or conclusions of fact. I have already stated that the findings of fact and conclusions and inferences the delegate reached in this case are not without a rational basis or perverse or inexplicable. Therefore, this Tribunal will not substitute the delegate’s finding of facts even if it is inclined to reach a different conclusion on the evidence.

40. In summary, I find NCFL’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

41. 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 July 3, 2020, confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal