Employment Standards TRIBUNAL

Citation: Stephanie McCarthy (Re)
2020 BCEST 28

An appeal

- by -

Stephanie McCarthy
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

PANEL: Carol L. Roberts

FILE NO.: 2019/209

DATE OF DECISION: April 6, 2020

DECISION

SUBMISSIONS

Stephanie McCarthy — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Stephanie McCarthy (the "Appellant") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on November 15, 2019 (the "Determination").

2. The Director found that Cancork Floor Inc. (the "Employer") had contravened sections 17 and 58 of the *ESA* in failing to pay the Appellant wages and vacation pay. The Director determined that wages and interest were owed in the total amount of $823.10. The Director also imposed two $500 administrative penalties on the Employer for the contraventions for a total amount payable of $1,823.10.

3. The Appellant appeals the Determination contending that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also says that new evidence has become available that was not available at the time the Determination was made.

4. Section 114 of the *ESA* provides that the Employment Standards Tribunal (the "Tribunal") may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.

5. This decision is based on the section 112(5) "record" that was before the delegate at the time the decision was made, the Appellant's submissions, and the Reasons for the Determination.

FACTS

6. The Employer is a flooring company with operations in Canada and the United States.

7. The Appellant worked for the Employer for approximately 6.5 years. First employed as an office assistant in April 2011, the Appellant became a sales manager in October 2011 earning an hourly wage plus commissions.

8. Liuxia (Julia) Yu, a director and officer of the Employer, and Lin Dong, an officer of the Employer, also worked in the store.

9. The parties agreed that the Appellant was not a manager for the purposes of the *ESA*. The parties did not have a written employment agreement.

Wages

10. At the time the Appellant was hired as a sales manager, her commission rate was 1% of all sales over $80,000 up to $130,000, 2% for sales over $130,000 and an additional percentage for each additional $50,000 incremental increase in sales.

11. In October 2014, the Employer proposed lowering the threshold for earning 1% commission from $80,000 to $70,000, a proposal the Appellant agreed to. Until August 2017, the Employer paid the Appellant commissions according to this formula (the "Old Formula"). The Old Formula did not take into account the number of days the Appellant worked or the number of vacation days she took per month.

12. The Appellant's vacation time was paid out of a vacation bank which reflected her hourly wage rate but did not reflect additional amounts earned through commission wages. Over time, this amounted to an excess amount accruing to the Appellant.

13. In December 2016, the Employer proposed another change to its commission structure that took into account the number of days in a month the Appellant worked as well as the number of days she took as vacation or other leave. Her earnings were prorated based on the number of actual working days per month (the "New Formula"). The Employer recalculated all of the Appellant's commission payments back to 2013 using this formula and in December 2016 unilaterally deducted $912.24, an amount it determined it had overpaid her during that period, from her vacation bank.

14. The Appellant communicated with the Employer on many occasions about the calculation of her commissions, both by email and in person. She also disputed the deduction from her vacation bank. The Employer ultimately reimbursed the Appellant for the deduction in January 2017. After receiving the reimbursement, there was no further communication between the parties about the New Formula. The Appellant denied that her acceptance of the repayment constituted acceptance of the New Formula and assumed that the Employer had returned to calculating her commissions according to the Old Formula. In fact, the Employer continued to calculate and pay the Appellant according to the Old Formula for the first six months of 2017. There is no dispute that in her last two years with the Employer, the Appellant never earned more than 1% commission.

15. In August 2017, the Employer began compensating the Appellant according to the New Formula. The Appellant disagreed with the Employer's decision to do so, stating that she had never agreed to the New Formula. Although Mr. Dong asked the Appellant to sign a new contract, she refused to do so. The Appellant contended that she was entitled to be paid according to the Old Formula and that the Employer unilaterally altered her employment contract without her consent. When they were unable to agree on a compensation scheme, the Employer encouraged the Appellant to file a complaint with the Employment Standards Branch.

16. On October 11, 2017, while still employed by the Employer, the Appellant filed a complaint alleging that she was owed wages including overtime and commission wages, as well as vacation pay, unauthorized deductions, and statutory holiday pay.

Termination of Employment

17. Due to the special needs of her son, the Appellant was unable to start work at 9:00 a.m. She began work between 9:15 and 9:30 a.m. on Tuesday to Friday, and 9:00 a.m. most Mondays. The Appellant believed that the Employer understood it was not possible for her to begin work at 9:00 a.m. each day and denied the Employer's suggestion that she was told repeatedly that she had to start work at 9:00 a.m.

18. The Appellant testified that the first day she recalled the Employer telling her that she was late was on November 20, 2017. The parties agreed that the relationship between the Appellant and Ms. Yu was difficult, in large part because of their differences over her commission wages.

19. On October 31, 2017, the Employer emailed all employees reminding them that working hours were between 9:00 a.m. and 5:00 p.m. Monday through Friday. The Appellant testified that she did not understand this email directive included her and said that she believed it meant employees could start work at different times. The parties corresponded by email on numerous occasions between November 1, 2017, and November 20, 2017, about the Appellant's starting time and her commission formula.

20. After arriving at work on November 20, 2017, the Appellant and Ms. Yu had a verbal argument regarding the Appellant's working hours. When the Appellant noticed that Ms. Yu was recording the conversation on her cellular telephone, they had a "physical scuffle" in which the Appellant took Ms. Yu's phone in an attempt to get her to stop recording. The Employer submitted the recording into evidence as part of the investigation.

21. The Appellant left the store to speak to her lawyer. When she returned, she told Ms. Ms. Yu that she "could not handle it anymore" and left. The parties agreed that Ms. Yu asked the Appellant to return to the store to raise her concerns with Mr. Dong, but the Appellant did not do so.

22. That afternoon, Mr. Dong emailed the Appellant informing her that her job would be held for her until November 21, 2017. The Appellant said she never received the email because she never checked her Gmail account.

23. Mr. Dong sent the Appellant a second email to her work email account on November 21, 2017, confirming the Employer's understanding that the Appellant had quit and requested that she provide the Employer with her computer password. The Appellant responded, providing the password and asking that the Employer not contact her anymore and to direct all their communication to her lawyer.

24. The Employer terminated the Appellant's employment on November 27, 2017. The Employer identified the Appellant's conduct on November 20, 2017, as well as her failure to report for work the following week as just cause for the termination.

25. The Appellant filed a second complaint on March 31, 2018, alleging that she had been constructively dismissed, and sought compensation for length of service, regular and commission wages, and annual vacation pay. She also claimed that the Employer retaliated against her in contravention of section 83 of the *ESA* for filing her first complaint.

26. The Director's delegate held two fact-finding meetings and informed the parties that both of the Appellant's complaints would be addressed in one Determination.

Wages

27. Following fact-finding sessions and after considering documents and written submissions, the delegate concluded that the Employer did not owe the Appellant statutory holiday pay.

28. The delegate also found that when the Employer changed its formula for calculating the Appellant's commission earnings in August 2017, it unilaterally and retroactively altered a condition of her employment without either notice or her agreement. The delegate determined that the Appellant was entitled to the difference in commissions she earned in August 2017 and the amount she was paid, plus vacation pay on that amount.

29. Neither of these two conclusions are under appeal.

30. The delegate determined that the Appellant became aware of the changes to her commission pay structure in August 2017 and while she objected to those changes, the delegate was not able to enforce the terms of her previous contract. The delegate wrote:

> The role of the Branch is not to enforce contractual terms between contracting parties, it is to apply the Act and to ensure that the Act's minimum standards are being met. However, I find that although it was not specifically argued, section 66 of the Act must be considered with respect to how Cancork's change from the Old Formula to the New Formula impacted [the Appellant's] employment.
>
> Under section 66 of the Act, if an employer substantially alters a condition of employment, the Director has discretion to determine that the employer has terminated employment. The remedy for a contravention of section 66 of the Act is not to enforce the previous employment agreement, rather it is for the employer to pay an employee compensation for length of service in accordance with section 63 of the Act.

31. The delegate noted that, in order to find that the Employer had contravened section 66, she had to not only find that the Employer had changed a condition of employment, but that the change also had to be substantial. If she determined both these factors had been met, she had the discretion to find that the change constituted a termination of employment.

32. The delegate concluded that although the Employer unilaterally changed a condition of the Appellant's employment effective August 2017, given that the New Formula resulted in a .03% -.04% reduction in her wages and did not affect her entitlement to vacation time, the change was not substantial. The delegate found that the Appellant's employment essentially remained the same after the implementation of the New Formula and met minimum standards prescribed in the *ESA*. The delegate concluded there was no basis for exercising the Director's discretion under section 66 to find that the Appellant's employment had been terminated.

Compensation for Length of Service

33. The delegate determined that the Appellant's employment was terminated for cause based on the Appellant's conduct on the morning of November 20, 2017. In light of her conclusion on that issue, the delegate found that she did not have to address the Appellant's argument that the Employer "constructively dismissed" her by substantially altering a condition of her employment, that is, by changing her working hours.

34. The delegate rejected the Employer's assertion that it had not acceded to a change in the Appellant's start time. The delegate noted that the Appellant normally started after 9:00 a.m., and the Employer never warned nor disciplined the Appellant about her tardiness. The delegate concluded that the parties had an understanding that the Appellant was not required to be at work at 9:00 a.m. and that the Employer enforced a policy of requiring the Appellant to start her shifts at 9:00 a.m. for the first time on the morning of November 20, 2017.

35. The delegate found the Appellant's conduct towards Ms. Yu the morning of November 20, 2017, to be loud, disrespectful, and condescending. The delegate noted that Ms. Yu made repeated requests that the Appellant go back to work, and the Appellant refused to do so. The delegate found that the Appellant "reacted in a disproportionately hostile and inappropriately physical way to being told that her start time was changing" and that the "trust" between the parties had been broken.

36. The delegate also found that the Appellant was insubordinate by deliberately refusing to perform duties she was hired and paid to do.

37. The delegate noted that, despite this breakdown in the employment relationship, the Employer did not decide to terminate the Appellant's employment rashly or emotionally. The first email sent by Mr. Dong expressed the Employer's view that the Appellant had quit. It informed the Appellant that, while it believed she had quit, the Employer would preserve her employment until the following morning. After the Appellant did not show up for work for a further seven days, the Employer treated the Appellant's conduct on the morning of November 20, 2017, and her refusal to return to work as a basis to terminate her employment for cause.

38. The delegate concluded that the Employer had just cause to terminate the Appellant's employment and thus that it was not liable to pay compensation for length of service.

39. The delegate also found that although the Appellant had shown up for work on November 20, 2017, she did not talk to any customers or place any orders that day. The delegate considered that the purpose of section 34 of the *ESA* was "to protect employees from employers who schedule shifts that are not worth the employee's commuting time" or who "send employees home early from scheduled shifts." She wrote "If an employee asks to leave work before working the minimum daily hours under this section and the employer agrees, the employer is only required to pay the employee for the actual time worked." The delegate found that the Appellant did not work for more than one hour on November 20, 2017, that she was not instructed to leave the workplace, and consequently, she was not entitled to minimum daily pay.

Vacation pay

40. The delegate determined that the Employer's method of calculating the Appellant's vacation by crediting an amount to a vacation bank did not comply with the *ESA*. Noting that the recovery period for vacation pay was limited to twelve months prior to the filing of the first complaint, being October 11, 2017, the delegate considered whether the Employer had calculated the Appellant's vacation pay between October 12, 2016, and November 27, 2017 (the "capture period"), in accordance with the legislation. The delegate concluded that the Employer had not and determined that the Appellant ought to have been credited with an additional amount of $662.48, following completion of her fifth year of employment.

Retaliation

41. The delegate found no evidence the Employer had retaliated against the Appellant for filing her first complaint. She noted that the Employer had in fact encouraged the Appellant to file the complaint in an effort to resolve the dispute the parties had about the commission payment scheme, and thanked her once she had done so. The delegate also noted that the Appellant was not able to identify any particular actions of the Employer that had a deleterious effect on her as a result of her filing the first complaint.

ARGUMENT AND ANALYSIS

42. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

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

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

44. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a large and liberal view of the appellant's explanation as to why the determination should be varied or cancelled or the matter should be returned to the Director (see *Triple S Transmission*, BC EST # D141/03).

45. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I find that the Appellant has not met that burden.

46. The Appellant's submissions consist of 14 pages. I will address the arguments in turn.

Errors of law

47. The Appellant alleges that the delegate erred in law as follows:

- in failing to find that the Employer contravened section 18(1) and (2). The Appellant says that her final pay cheque, dated November 27, 2019, was delivered by registered mail on November 29, 2017;
- in failing to find that the Employer contravened section 21(1) and 58 when they removed $912.62 from her vacation pay without written consent;
- in concluding that it was not the role of the Branch to enforce contractual terms between contracting parties. She contends that the delegate erred in finding that the Employer had given her reasonable notice of the change to the commission calculations;
- In failing to "interpret the commission agreement as a continuous earning that occurs because of actions done in the past and is not reliant on the employee being at work when it becomes payable";
- in concluding that the Employer had just cause for terminating her employment and did not owe her compensation for length of service; and
- in failing to find that she was entitled to a minimum of 2 hours wages for her work on November 20, 2017.

48. The Tribunal as 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.

49. The Appellant argues that the delegate failed to find a contravention of the *ESA* even though the delegate had determined that the Employer had contravened specific sections of the legislation, specifically 18(2) (final pay provisions) and sections 21(1) and 58. It is unclear to me what remedy the Appellant seeks, even if I had agreed with her submissions. The Appellant received her final paycheque, dated November 27, 2017, the same day the Employer sent her a letter terminating her employment, on November 29, 2017. While the Appellant appears to dispute her last day of employment, she has received her final pay. A finding of a contravention of section 18(2) would be of no benefit to the Appellant.

50. Similarly, although the delegate found that the Employer unilaterally deducted money from the Appellant's vacation bank, those funds were repaid in January 2017. Even if the delegate had found that the Employer had contravened any section of the *ESA* in taking this action, the Director has the discretion whether or not to take certain steps, including an order to comply with the *ESA* (section 79). If the delegate does make a determination under section 79, that person is subject to monetary penalties. Not only am I not able to find any reviewable error in the delegate's decision not to make any findings in this respect, any monetary order would not accrue to the Appellant in any event.

51. The Appellant also contends that the delegate erred in concluding that it was not open to the Director to enforce contractual terms between the parties. As I understand the Appellant's argument, the delegate erred in failing to require the Employer to enforce the payment of commissions according to the "Old Formula." I note that the parties did not have an employment contract. While the terms of an employment agreement can be altered, any alterations must both comply with the minimum standards outlined in the *ESA*, as well as section 66, which prohibits an employer from substantially altering a condition of employment. The delegate found that while the Employer had changed the method of calculating the Appellant's commission wages, she had been given notice of those changes in August 2017 and the changes were not substantial. The delegate declined to exercise her discretion to find that the Appellant's employment had been terminated.

52. As the Tribunal has noted on many occasions, the delegate must exercise her discretion for *bona fide* reasons, it must not be exercised arbitrarily, and it must not be based on irrelevant considerations (see *Takarabe et. al.*, BC EST # D160/98). There is no evidence the delegate failed to comply with any of these factors.

53. Although the Appellant relied on the Tribunal's decision in *TSI Telequip*, BC EST # D221/99, as support for her argument, I find that decision to be of no assistance. The facts were substantially different, as the parties had a written employment agreement and the issue was whether an employee was entitled to a commission, and when, not the amount of any commission wages.

54. In the alternative, the Appellant argues that the delegate "failed to interpret the commission agreement as a continuous earning that occurs because of actions done in the past and is not reliant on the employee being at work when it becomes payable." As I understand the Appellant's argument, her efforts resulted in sales that were realized when she was no longer employed and that she is entitled to commission wages on those sales, particularly those sales that occurred in August through October 2017.

55. The delegate considered that the Employer's commission wages, according to the New Formula which came into effect in August 2017, were based on the Employer's total monthly sales rather than the Employee's individual sales, as well as the number of days the Appellant worked in each month. There

was no evidence that there were any outstanding commission wages owed to the Appellant at the time her employment ended, and I find no basis for the appeal on this ground.

56. The Appellant also argues that the Employer contravened section 21(2) of the *ESA* when Ms. Yu threatened to require her to pay one half of the cost of an investigation into a harassment complaint she had filed. The basis for the Appellant's contention that the delegate erred in law is not clear. The record does not disclose any evidence being led on this issue, and the delegate made no findings or conclusions on this issue. In the absence of any underlying record on which to base this argument, I decline to find that the delegate erred in law.

57. The Appellant further argued that the delegate erred in law when she concluded that her employment had been terminated for cause. The Appellant contends that that the delegate did not consider whether the Employer had breached the employment contract by surreptitiously recording the parties' conversation and by demanding that the Appellant begin work at 9:00 a.m. The Appellant contends that she accepted the Employer's repudiation of the contract and, as such, she owed no deference to the company. She argues that her action of grabbing the phone occurred after the repudiation and that her actions were those of "a private citizen."

58. As with the Appellant's argument regarding a section 21(2) contravention, there is nothing in the record or the Determination to suggest that the Appellant raised the concept of contract repudiation at the time this matter was before the delegate. Given that the delegate did not have the opportunity to consider the Appellant's argument on this point at the hearing, I cannot conclude that she erred in any analysis.

59. The Appellant argues that, in determining that she was not entitled to compensation for length of service, the delegate considered her actions on the morning of November 20, 2017, to constitute just cause even though the Employer did not. The Appellant points out that the Employer agreed that she would have been allowed to continue working if she had shown up at work on November 21, 2017.

60. The fact that the Employer believed that the Appellant had quit and sought to confirm that by way of the November 21, 2017 email does not preclude a finding that the Employer had just cause to terminate the Appellant's employment for cause.

61. I find no error in the delegate's analysis in finding that the Appellant's conduct on the morning of November 21, 2017, to be sufficiently serious to constitute just cause. The facts demonstrate that there was a physical altercation between Ms. Yu and the Appellant accompanied by harsh words. The Tribunal has held that fundamental breaches of the employment relationship constitute just cause for terminating an employment relationship (see *Silverline Security Locksmith Ltd.*, BC EST # D207/96). Just cause included employee conduct that is wilful and deliberate and inconsistent with the continuation of the contract of employment (see *Jace Holdings Ltd.*, BC EST # D132/01).

62. Even if I am wrong in finding no error in the delegate's determination, the evidence suggests that the Appellant either quit or repudiated her employment following this incident.

63. On November 20, 2017, the Employer emailed the Appellant attempting to clarify whether she had quit:

> Your quit action this morning is not we expected despite of the dispute between us is not solved. So, we hold your employment relationship with Cancork till tomorrow morning. If you still do not

> show up to your working position by tomorrow morning, you are definitely quit from Cancork Floor Inc. [reproduced as written]

64. The Employer's email of November 21, 2017, stated as follows:

> Further to my email yesterday, based on the fact you failed to show up till noon of today. Our company firmly believe you had quit from Cancork Floor Inc.
> You are requested to release immediately the password to us for turning on the [company computer]..[reproduced as written]

65. Within the hour, the Appellant responded as follows:

> I have not quit. I have been forced out of Cancork Floor by the requirements forced upon me by yourself and Julia Yu. By forcing me out of my possition (sic), you have effectively fired me. You will receive further instructions from my lawyer on this subject.

66. After providing the computer password, the Appellant continued:

> Please refrain from contacting me again. You will direct all communiction (sic) though my lawyer.

67. In *Wichito Marine Services Ltd.*, BC EST # D014/15, and *K & R Poultry*, BC EST # D059/15, the Tribunal found that the test for assessing whether an employee had abandoned their employment was similar to that relating to a resignation:

> The parties agree that it is an implied term of every employment contract that an employee must attend work. They also agree that when an employee fails to comply with that term he or she will be taken to have abandoned (i.e., repudiated) the contract, entitling the employer to treat the contract as being at an end. Lastly, the parties agree that the trial judge properly stated the test for determining whether an employee had abandoned his or her employment, namely, whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract: *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 at 104 (B.C.S.C.); *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593 (CanLII), 47 B.C.L.R. (4th) 56 at para. 8.
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> (*Pereira v. The Business Depot Ltd*., 2011 BCCA 361 at para. 47)

68. Given the Appellant's comments on November 20, 2017 ("I am out of here"), the email communication directing the Employer not to contact her again but to direct all communication to her lawyer, coupled with her absence from the workplace for a further six days, a reasonable person, based on an objective view of the circumstances, would understand that the Appellant had abandoned her employment, or constructively resigned.

69. In light of these findings, it was unnecessary for the delegate to consider whether the Employer's insistence that the Appellant begin work at 9:00 a.m. constituted a substantial change to her conditions of employment (and thus constitute constructive dismissal). Had the Appellant remained at work rather than abandoning her job, the delegate may have had to consider this issue. At the time of the hearing, that was no longer an issue to be decided. I find no error in the delegate's decision not to consider the Appellant's argument in this respect.

70. Finally, I also find no basis to the Appellant's contention that the delegate erred in concluding that she was not entitled to minimum daily pay for November 20, 2017.

71. Section 34 of the *ESA* provides that an employee who is required to report for work on any day is entitled to be paid for a minimum of 2 hours at the regular wage, whether or not the employee starts work, unless the employee is unfit to work.

72. In *Terrace Kitimat Bldg. Maint. Ltd.*, BC EST # D150/97, the Tribunal found that the purpose of the predecessor to this section was to ensure that employees are not called into work only to be told to go home, without any work.

73. In *Hall Pontiac*, BC EST # D073/96, the Tribunal found that this section (as it then read) provides that the only time an Employer is not required to pay a minimum number of hours is when the work is suspended for reasons beyond the employer's control.

74. Although there is no dispute that the Appellant arrived at the workplace ready to work, she did not work. She engaged in a verbal and physical altercation with the Employer as soon as she arrived, left shortly thereafter, and refused to return despite the Employer's request that she do so. I find no error in the delegate's conclusion that the Employer was not obliged to pay the Appellant minimum daily pay in these circumstances.

Failure to observe the principles of natural justice

75. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

76. The Appellant contends that the delegate "did not allow [her] the defense of issue estoppel" even though she made it clear to the delegate that she wished to do so.

77. As I understand the submission, the Appellant made a claim with the Social Security Tribunal ("SST"), which ultimately issued a decision concluding that she had abandoned her employment with just cause. The Appellant contends that the delegate informed her that the SST viewed issues differently than the Branch and refused to allow her to raise the question of abandonment with just cause as part of her claim for compensation for length of service.

78. I find no basis for the Appellant's contention that she was denied natural justice. The delegate fully considered the Appellant's argument that her employment had been wrongfully terminated, and the record discloses that the SST ruling was before the delegate at the time the Determination was made.

79. It may be that the delegate refused to consider that decision as binding on her, which I do not find was in error. The Tribunal has long held that proceedings in other administrative tribunals, such as Employment Assistance or Income Tax rulings, are not binding given the different statutory schemes and purposes. (see, for example, *Dale Kent*, 2019 BCEST 119)

80. Such a ruling does not contravene the principles of natural justice and does not demonstrate that the Appellant was denied the right to be heard.

New Evidence

81. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:

> 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
> 2. the evidence must be relevant to a material issue arising from the complaint;
> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
> 4. the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.

82. As I understand the Appellant's argument, evidence of a Harassment Report would establish that the Employer retaliated against her contrary to section 83 of the *ESA*. She contends that Ms. Yu "wrote a falsified report with the intent to deceive Ms. McCarthy and subsequently WorkSafeBC, the SST, the ESB and the Human Rights Tribunal."

83. Not only did the Appellant not include the purported new evidence on appeal, it is difficult to understand how that report, even if the Appellant could substantiate that it was falsified, would have led the delegate to a finding that the Employer retaliated against her.

84. The delegate found:

> I find there is no evidence to support a finding Cancork was unhappy that the Complainant had filed the First Complaint. To the contrary, the evidence suggests the Employer asked the Complainant to file the First Complaint and it is undisputed Mr. Dong thanked the Complainant once she did so.
>
> While Ms. McCarthy initially took the position that Cancork retaliated against her due to her filing the First Complaint, she later conceded she was not sure whether she was penalized for filing the First Complaint. Ms. McCarthy agreed on cross examination that she did not know if the negative atmosphere at Cancork in the fall of 2017 was in response to her filing the first Complaint or because she was persistently voicing concerns with the Employer.

85. The record discloses that, in her First Complaint, the Appellant expressly stated that the Employer requested that she submit her complaint.

86. The record also contains an internal harassment report prepared by Ms. Yu. If this is the report referred to by the Appellant, it does not constitute new evidence. If it is not the report referred to by the Appellant, given that nothing was submitted, I have no basis to consider the appeal on this ground.

87. I find no basis to interfere with the Determination.

ORDER

88. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination dated November 15, 2019, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal