

Citation: Frankie We Salute You Restaurant Inc. (Re)
2022 BCEST 16

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Frankie We Salute You Restaurant Inc.
(the “Appellant”)

- 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: John Chesko

FILE No.: 2021/096

DATE OF DECISION: March 3, 2022

DECISION

SUBMISSIONS

Christina Skinner

on behalf of Frankie We Salute You Restaurant Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), Frankie We Salute You Restaurant Inc. (the "Appellant") has filed an appeal of a determination issued on October 14, 2021 (the "Determination") by Melanie Zabel, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director").
2. The Determination held the Appellant contravened Part 8, section 63 (liability resulting from length of service) of the *ESA* in respect of the employment of Jennifer Poley (the "Complainant").
3. The Determination ordered the Appellant to pay the Complainant compensation for length of service, annual vacation pay and accrued interest totalling \$948.37. In addition, the Determination levied a mandatory administrative penalty of \$500 for a total amount payable of \$1,448.37.
4. The Appellant submits the Director failed to observe the principles of natural justice in making the Determination and seeks to have it set aside.
5. For the reasons set out below, I find the appeal should be dismissed.

ISSUE

6. 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

Employee complaint for failure to pay wages

7. The Appellant operates a restaurant in Kelowna, B.C.
8. The Complainant was employed by the Appellant as an assistant manager from April 25, 2019, until her employment ended when she either quit or was terminated later in the year.
9. The Complainant filed a complaint under section 74 of the *ESA*, alleging that the Appellant had not paid wages from October 20, 2019, to November 5, 2019, and compensation for length of service.

Investigation of Complaint

10. Leah Reinheimer, a delegate (the "Investigating Delegate") of the Director of Employment Standards, carried out an investigation of the complaint. As part of the investigation, the Investigating Delegate

requested records and communicated with multiple witnesses including the Complainant and the Appellant's representatives.

11. In addition to speaking with the Complainant and the Appellant's representatives, the Investigating Delegate received evidence from various witnesses including persons put forward by the Appellant.
12. The record of the investigation shows the Investigating Delegate provided both the Complainant and Appellant's representative updates and the opportunity to put forward their side of the story, present evidence and respond to evidence presented by the other side.
13. The record also shows the Investigating Delegate responded to inquiries from the Complainant and the Appellant as the investigation continued.
14. The Investigating Delegate provided an investigation report to the parties on July 7, 2021, setting out the positions and evidence received to date and invited further responses.
15. The Complainant did not submit any further information in response to the investigation report. The Appellant provided "a few missing details" regarding the "Information provided by Christina Skinner" in the Investigation Report.
16. By email on July 26, 2021, the Investigating Delegate advised the Appellant that the final determination was being prepared by the Adjudicative Delegate and further information was requested from the Appellant about certain wage statements. The Appellant provided the information requested.
17. The Complainant was subsequently provided with the Adjudicative Delegate's questions and the Appellant's answers and was provided with an opportunity to respond. The Complainant chose not to send a further reply.

Determination dated October 14, 2021

18. On October 14, 2021, the Adjudicative Delegate issued the Determination.
19. The Determination sets out the Complainant's and the Appellant's submissions on the complaint and the salient evidence provided during the investigation.
20. The Adjudicative Delegate held the Complainant had not quit in law under the *ESA* and was terminated by the Appellant on November 5, 2019.
21. As noted above, the Appellant was ordered to pay the Complainant compensation for length of service, annual vacation pay and accrued interest totalling \$948.37. In addition, the Determination levied a mandatory administrative penalty of \$500 for a total amount payable of \$1,448.37.
22. Concerning the Complainant's claim for regular wages from October 20, 2019, to November 5, 2019, the Adjudicative Delegate found in favour of the Appellant and dismissed that part of the claim.
23. The Adjudicative Delegate also considered the Appellant's submissions that the Complainant's conduct gave just cause for termination. In the findings and analysis section of the Determination, the Adjudicative Delegate noted that serious misconduct can sometimes result in just cause. "For a single act to constitute

misconduct it must be serious, deliberate and intentional, and fundamentally breach the employment contract." The Adjudicative Delegate also noted that minor misconduct may also result in just cause where the employer can show:

- a) there was a reasonable standard of performance established and communicated to the employee;
- b) the employee was provided a reasonable time and opportunity to meet the standard of performance;
- c) the employee was clearly warned "that failure to meet the standard was serious and would result in termination; and"
- d) the employee was unable to meet the performance standard.

24. Applying the law, the Adjudicative Delegate held there was not just cause in all the circumstances.

Appeal filed by Appellant

25. The Appellant filed an appeal of the Determination on November 8, 2021.

Appeal record completeness confirmed

26. On receiving the Appellant's appeal, the Employment Standards Tribunal (the "Tribunal") requested the section 112(5) record (the "Record") from the Director for purposes of the appeal. The Tribunal provided the Record to the parties and sought submissions on the completeness of the Record. As the Tribunal did not receive any objections to the completeness of the Record, I accept the Record as complete.

ARGUMENTS

Appellant submits Director failed to observe principles of natural justice

27. The Appellant submits that natural justice requires the Director "give equal weight and consider statements from all parties equally." The Appellant submits the Director did not treat all evidence equally in finding the Complainant did not quit.

28. In further support of the appeal, the Appellant referred to a disputed finding of fact in the Determination concerning another employee and submits the Director did not give proper weight to perceived failings in the Complainant's conduct.

29. The Appellant also submits the Director failed to acknowledge that the Appellant "did their due diligence when the Complainant resigned".

30. The Appellant requests that the Determination be set aside.

31. In the alternative, even if the appeal is not allowed, the Appellant requests clarification of what the Appellant should do next time in similar circumstances and requests that the Complainant contributes to the \$500 administrative penalty fee.

ANALYSIS

32. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.

Appeal of Determination

33. 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.

34. The Tribunal has consistently maintained that the purpose of an appeal is to correct errors within the parameters of section 112(1). An appeal is not a re-hearing of the case. Nor is it an opportunity to have another 'kick at the can' and reargue an appellant's view of the facts again.

Failure to observe principles of natural justice

35. Natural justice has been described as the right to a fair procedure. It includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (See *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05).

36. A party alleging failure to comply with natural justice must provide evidence in support of the allegation. There needs to be specific evidence about how the determination procedure did not meet requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

37. I have reviewed the Record and considered the Appellant's submissions carefully. I find there is no basis for the Appellant's argument on this ground nor is there any basis on the Record for concluding the Director failed to observe the principles of natural justice. The evidence is clear the Appellant was aware of the evidence and the case being made and had the right to respond and be heard. The Record indicates there was a thorough investigation of the issues raised in the complaint and the parties had ample opportunity to present and respond to the case. The Determination sets out in some detail the Appellant's submission including the Appellant's responses to the Complainant's submissions and evidence.

38. In response to the Appellant's submission the Director was not impartial and did not treat all evidence equally, I note it is the nature of the investigation and determination process that findings of fact will need to be made. "A fair and reasonable consideration of the information provided by a party may result in some being accepted" and some not and those reasoned decisions are not alone evidence of bias. (See *Renshaw Travel Ltd.*, BC EST # D050/08 especially page 6 at paragraph 34, confirmed BC EST # RD085/08) So long as the Director follows the requirements of natural justice - in most cases, listens to both sides of the story and makes a reasoned determination - it is not a failure of natural justice to make reasoned findings of fact or to apply facts within a legal test such as the test as to whether an employee has "quit" under the *ESA*. In the Determination, the Director considered the facts within the appropriate legal tests and concluded the Complainant had not quit as that term is to be decided under the *ESA*.

39. I find there is no merit in this ground of appeal, and it is dismissed.

Error of Law in Determination

40. The Tribunal has stated that it will take a broad view of an appeal and may consider grounds not raised by an appellant: (see *Triple S Transmission Inc. dba. Superior Transmissions*, BC EST #D141/03). While the Appellant submitted the Director failed to observe the principles of natural justice, the Appellant also appears to allege that the Director erred in concluding the Appellant did not quit in law but was dismissed. In this section I will also consider whether the Appellant's arguments could establish an error of law in the Determination.

41. To show an error of law the Appellant has the burden to show there has been a significant legal error in the decision. An error of law is not just a finding of fact an Appellant disagrees with. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion that is inconsistent with established principle. (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466)

42. Findings of fact may in rare cases amount to an error of law where the delegate “acted without any evidence or on a view of the evidence that could not be reasonably entertained” or arrived at a ‘clearly wrong conclusion of fact’. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence.

43. The Appellant appears to submit that the finding the Complainant did not quit was not reasonable. I have reviewed the Determination and the evidence in the Record carefully and do not find an error of law in the Determination.

44. Section 63 of the *ESA* creates liability on the employer for length of service on dismissal. To be excused from paying length of service under section 63(3), an employer has an onus to show that proper notice was given; wages equivalent were given; a combination of proper notice and wages were given; or the employee voluntarily quit, retired or was dismissed for legal cause. The onus is on the employer to provide evidence that the employee quit, and the legal test includes parts that are both subjective (real intention to quit) and objective (actions inconsistent with continued employment). (See *Burnaby Select Taxi Ltd. and Zolton Kiss (Re)* BCEST #D091/96, reconsideration refused BCEST # 122/96) The determination of whether an employee has quit under the legal test required in the *ESA* can be difficult to apply as it requires a nuanced assessment of evidence about an employee's ongoing state of mind and intention. The words “I quit” may not necessarily be unequivocal evidence of ending the employment relationship, especially where there is other evidence of emotional outburst such as in moments of anger, frustration, impairment, sickness or actions inconsistent with quitting after the fact.

45. I find there was no error of law in the Determination in finding the Complainant did not quit. The Determination properly considered the legal test and came to a reasoned conclusion on the evidence. As noted, it is clearly established in Tribunal decisions that the Tribunal will not generally re-evaluate the evidence or substitute its own view of the same evidence.

46. I have also considered the finding in the Determination that there was no just cause for dismissal. The test applied of whether there was just cause for dismissal was based on the correct legal test and supported on the evidence. Again, I would find there was no error of law in the Determination that there was no just cause for dismissal.
47. I have also considered the calculation of the amount owing to the Complainant for length of service, vacation pay and interest, as well as the amount of the administrative penalty owed by the Appellant. I find there is no error of law in the calculation of these amounts, and they are confirmed.
48. Lastly, the Appellant submits that even if this appeal is dismissed, the Complainant should nevertheless share in paying the administrative penalty. The law is clear that the administrative penalty owed by the Appellant is mandatory in the circumstances and there is no provision in the *ESA* for it to be paid or “shared” by an employee. (See *537370 B.C. Ltd.*, BCEST # D011/06)
49. Having considered the above issues in the Determination, I find there is no error of law and would dismiss this ground of appeal.

Section 114 of the *ESA*

50. 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 or 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.
51. As set out above, I find there is no reasonable prospect the appeal will succeed. Accordingly, the appeal should be dismissed under section 114(1)(f).

ORDER

52. Pursuant to sections 114(1)(f) of the *ESA*, the appeal is dismissed.
53. Pursuant to section 115 of the *ESA*, I confirm the Determination made on October 14, 2021, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal