

An appeal

- by -

Michelle Unkerskov

- 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)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2010A/175

DATE OF DECISION: February 9, 2011

DECISION

SUBMISSIONS

Michelle Unkerskov	on her own behalf
Sam Singh	on behalf of Full Line Specialties Inc.
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Michelle Unkerskov, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued November 5, 2010.
2. Ms. Unkerskov worked as a bookkeeper for Full Line Specialties Inc. (FLS) from July 28, 2003, until May 17, 2010. On June 1, 2010, Ms. Unkerskov filed a complaint alleging that she was owed compensation for length of service. The Director’s delegate held a hearing into Ms. Unkerskov’s complaint on October 4, 2010. FLS was represented by Mr. Sam Singh. Ms. Unkerskov was self represented.
3. Following the hearing, the delegate determined that Ms. Unkerskov quit her employment and that FLS was not required to pay compensation for length of service. The delegate also determined that, in the alternative, had Ms. Unkerskov not quit her employment, FLS had just cause to terminate her. The delegate concluded that FLS had not contravened the *Act*.
4. Ms. Unkerskov contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. She also contends that evidence has become available that was not available at the time the Determination was being made.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

6. Whether or not the delegate erred in finding that Ms. Unkerskov quit her employment.
7. Whether or not the delegate failed to observe the principles of natural justice in making the Determination.
8. Whether new and relevant evidence has become available that would have led the delegate to a different conclusion on the material issue.

FACTS AND ARGUMENT

9. The evidence before the delegate was as follows.

Undisputed evidence

10. Ms. Unkerskov began working for FLS in 2003. In 2006, she leased a truck and FLS made the lease payments on her behalf.
11. In 2009, Sam Singh (Sam) purchased FLS from its previous owner, Ken Ehman. Mr. Singh's father, Chhinder Singh (Chhinder), was responsible for FLS's financial matters. After Sam purchased FLS, he told Ms. Unkerskov that due to FLS's financial situation, it would no longer make the lease payments on her truck. The lease payments stopped on December 1, 2009.
12. On or about May 17, 2010, Chhinder noticed that Ms. Unkerskov's wages had increased after the company had changed ownership and asked her about that. Ms. Unkerskov's response was that she required more money to make the lease payments on her truck and said that the salary increase had been authorized by Mr. Ehman before he sold FLS.

Employer's evidence

13. Sam testified that when he asked Ms. Unkerskov about her salary increase, Ms. Unkerskov said "I don't need this. I quit." and left the office. Sam's evidence was that he followed Ms. Unkerskov and asked her to discuss the situation. Although Ms. Unkerskov told him that she would continue the discussion after she returned from lunch, she never did.
14. Chhinder testified that he heard Ms. Unkerskov say "I quit. I can't take this, my health is more important." and although she told Sam she would return after lunch to discuss the matter, she never did.
15. The delegate also heard from three FLS employees. The Sales Manager, Dan Walker, testified that he heard three parties in the office having an argument. He heard something about payments and then heard Ms. Unkerskov say "I can't take this ... I quit." He then saw Ms. Unkerskov walk out.
16. The office manager, Gail Strudwick, testified that she observed Ms. Unkerskov walk out of the office. Ms. Unkerskov told her that she was possibly being let go so she was "out of here". Ms. Strudwick observed Chhinder ask Ms. Unkerskov to come back to the office and Ms. Unkerskov reply that her health was not worth it and that she was going to leave. Ms. Strudwick said that Chhinder then asked Ms. Unkerskov to sign resignation papers but Ms. Unkerskov refused. Ms. Strudwick saw Sam ask Ms. Unkerskov to return to the office to discuss the situation but Ms. Unkerskov said that she was going for lunch and would return to talk about it.
17. Ms. Strudwick testified that Ms. Unkerskov stopped at the "in/out board" and said that she was probably going to get "canned" so they should take her name off the board. Ms. Strudwick did not remove Ms. Unkerskov's name for 6 days as she continued to believe that Ms. Unkerskov would return and Sam did not tell her otherwise.
18. Lynn Finley, who shared an office with Ms. Unkerskov, testified that Chhinder called Ms. Unkerskov into his office and asked for the payroll information on the three salaried employees in the office. Ms. Finley said that when Ms. Unkerskov returned, she was upset and said that she was probably going to be "canned". When Chhinder asked Ms. Unkerskov to come back into his office, Ms. Unkerskov responded that her health wasn't worth it. Ms. Finley's evidence was that Ms. Unkerskov said that she needed to clear her head and would return after lunch, but did not do so.

19. Sam testified that he had no intention of firing Ms. Unkerskov as he did not have anyone to replace her and denied telling her that she was fired. He said that, as it turned out, it took him six weeks to find a replacement for Ms. Unkerskov and during this time he worked up to 10 hours a day to do his own work as well as her work.
20. Sam testified that he did not try to contact Ms. Unkerskov for 5 days on the advice of his lawyer and after 5 days had elapsed, he placed two telephone calls to her which were not returned. Ms. Unkerskov eventually sent him an email stating that her boyfriend would pick up her last paycheque.

Employee's evidence

21. Ms. Unkerskov testified that after explaining that her salary increase had been authorized by Mr. Ehman, Chhinder began yelling at her so she walked out of his office. She claimed that Chhinder called her a 'thief' in front of Ms. Strudwick and Ms. Finley and accused her of stealing from the company to pay for her truck. Ms. Unkerskov also testified that Chhinder told her that she was not going to get a paycheque the following week because she had been "double dipping". She said that she denied that she had been double dipping and told Chhinder that she had stopped the lease payments as of November 30. Ms. Unkerskov claimed that at this point, Chhinder told her that she owed FLS money for the November and December lease payments and that they would have to arrange a payment plan. Ms. Unkerskov told Chhinder that she would not be able to do that because she would go bankrupt again. Ms. Unkerskov's evidence was that Sam and Chhinder began yelling at her, that Sam told her that she "better have a good lawyer" and that he should not have trusted her. Ms. Unkerskov testified that she told Sam that if he didn't like her he should "give her her walking papers".
22. Ms. Unkerskov's evidence was that Chhinder told her that he wanted her gone. He asked her to write up her paperwork and said that he would write her a cheque. Sam then said that she was not going to receive any money because she had quit. Ms. Unkerskov told him that she did not quit, that he had fired her.
23. Ms. Unkerskov testified that she had not intended to return to the office after lunch because Chhinder had fired her. When Sam asked her if anyone had told her that she was fired, she replied that his father wanted her gone. Sam told her that Chhinder did not have any authority to fire her. Sam asked Ms. Unkerskov why he would stop making lease payments of \$303.00 a month and give her a \$530.00 raise instead. Ms. Unkerskov said that Sam had no intention of honouring a contract she had with FLS so she raised her wages in accordance with an agreement she had with Mr. Ehman.
24. Ms. Unkerskov contended that she could not afford to quit and that Sam said that he could not afford to fire her as he had no one to replace her.

Delegate's decision

25. The delegate referenced the Tribunal's decision in *Burnaby Select Taxi* (BC EST # D091/96) noting that there was both a subjective and an objective element to quitting.
26. The delegate also referenced the test for assessment of credibility set out in *Faryna v. Chorny* ((1952) 2 D.L. R. 354, B.C.C.A.).
27. The delegate found that Ms. Unkerskov increased her own wages by \$503.00 (which I presume should be \$530.00 in accordance with the evidence) per month in accordance with an alleged agreement with the previous owner of FLS. The delegate found that the wage increase occurred after the company had been sold

and before Sam told her that the company would not continue to make the lease payments on her truck. The delegate further noted that Ms. Unkerskov had not informed her employer that she had increased her wages.

28. The delegate considered the differing versions of the discussions that occurred once the employer discovered this wage increase. The delegate noted that Ms. Unkerskov acknowledged that Sam did not tell her she was fired. The delegate considered the evidence of two employees who testified that they overheard Ms. Unkerskov say she quit. The delegate noted that two employees testified that they overheard Ms. Unkerskov saying that she was “probably” going to be “canned” and observed her leaving the office saying that she would return after lunch.
29. The delegate found the witnesses to be credible.
30. The delegate also considered Ms. Unkerskov’s evidence that the employer demanded that she repay the company and she told them that she would be unable to do so. The delegate concluded:

I find it probable that Ms. Unkerskov did not want to repay the funds she had received from the company. She formed a subjective intent to quit her employment and announced that she quit. She then objectively followed through with her intent to quit by not returning to the office.

I find there is no evidence to support Ms. Unkerskov’s contention that she was fired. She herself admitted no one told her she was fired; rather Chhinder stated he wanted her gone.

However, if the employer had fired Ms. Unkerskov, I find that the employer would have had just cause.

Ms. Unkerskov stated that she knew that her employer would not honour the “contract” she had with the previous owner of the company and yet she increased her wages after the company had changed hands.

31. The delegate found that Ms. Unkerskov’s act of increasing her wages without notifying her employer “could be considered dishonesty or even theft”:

Ms. Unkerskov did not act in good faith when she gave herself a raise knowing that her employer would not honour her agreement with the previous owner of the company (if in fact there was an agreement at all).

32. The delegate concluded that Ms. Unkerskov quit her job and was not entitled to compensation for length of service. The delegate concluded that, in the alternative, if Ms. Unkerskov was fired, the employer had just cause.

Argument

33. Ms. Unkerskov contends that she had a “pre-existing condition of employment” respecting her wages with the previous owner, Mr. Ehman. She submits that by failing to honour that agreement, FLS terminated her employment. She argues that the delegate erred in not giving more weight to a letter she submitted at the hearing from Mr. Ehman and contended that she was not being dishonest when she followed the company owner’s orders. Ms. Unkerskov also contends that although she was informed that the delegate would call Mr. Ehman, the delegate made no attempt to do so.
34. Ms. Unkerskov also contends that Sam told her that if she had proof of the agreement with Mr. Ehman, he would honour it. She contends that he subsequently changed his mind and by his actions, Sam fired her.
35. Finally, Ms. Unkerskov claims that the delegate failed to find that FLS had contravened other sections of the *Act* including not receiving her final paycheque on time.

36. The delegate acknowledged that in her decision, she did not refer to Mr. Ehman's evidence about a conversation he had with Mr. Singh about the truck lease payments and wage increase. However, the delegate submits that she put little weight on this letter because she determined that Ms. Unkerskov quit rather than been fired. Further, the delegate says that because Mr. Singh did not have an opportunity to respond to the letter, she placed little weight on it.
37. The delegate contends that the sole issue before her in the hearing was whether or not Ms. Unkerskov was entitled to compensation for length of service and when she asked if there were any other issues to be addressed, Ms. Unkerskov indicated that they had been resolved prior to the hearing.

ANALYSIS

38. Section 112(1) of the *Act* 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; or
 - evidence has become available that was not available at the time the determination was being made
39. The burden of establishing the grounds for an appeal rests with an Appellant. Ms. Unkerskov must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal. A disagreement with the result, in and of itself, is not a ground of appeal.
40. Ms. Unkerskov raises new issues in reply to the delegate's submissions. The delegate considered and dealt with Ms. Unkerskov's initial argument that she was entitled to compensation for length of service. On appeal, Ms. Unkerskov contends, for the first time, that there were pre-existing conditions of employment that were "transferred from the asset vendor to the asset purchaser". In *Renshaw Travel* (BC EST # D050/08), the Tribunal held that it was a contravention of the appeal provisions of the *Act*, the Tribunal's *Rules of Practice and Procedure* as well as the objectives of the *Act* for a party to raise a new issue on appeal for the first time in reply submissions. The Tribunal found that:

A reply submission is meant to address arguments raised in the submissions of respondents delivered in response to the materials filed by an appellant in support of its appeal. It is not meant to raise new issues which the respondents have not had an opportunity to address in their submissions, and which were not identified as issues on appeal in the material an appellant has filed with the Tribunal in order to perfect its appeal.

41. I have not addressed Ms. Unkerskov's new arguments.
42. I have concluded that Ms. Unkerskov has not demonstrated either an error of law or a denial of natural justice for the following reasons.

Error of Law

43. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the *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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
44. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
45. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
46. The delegate firstly considered whether or not Ms. Unkerskov quit her employment or was fired. The delegate heard the evidence of the parties. She also heard the evidence of employer's witnesses, all of whom testified that they heard Ms. Unkerskov say that she quit and that she did not return to work after leaving the employer's premises. She assessed the credibility of the parties and found the employer's witnesses to be credible. The delegate considered Tribunal jurisprudence and concluded that on both an objective and subjective basis, Ms. Unkerskov quit her employment.
47. As the Tribunal stated in *Burnaby Select Taxi* (BC EST # D091/96)
- The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is 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 his or her further employment. The rationale for this approach has been stated as follows:
- . . . 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)
48. The evidence was that the employer was upset that Ms. Unkerskov had unilaterally increased her wages without its consent. In turn, Ms. Unkerskov was upset that she was being questioned about her salary. Although Ms. Unkerskov announced to her co-workers that she "quit" because she was being fired, she acknowledged that she had never been told that she was fired. Nevertheless, Ms. Unkerskov did not return to the office and did not contact the employer for at least 5 days after she left.
49. I find no basis to interfere with the delegate's conclusion that Ms. Unkerskov quit her employment. There is also nothing in Ms. Unkerskov's submission that suggests she disputes the delegate's finding in this respect.
50. The delegate also concluded, in the alternative, that the employer had just cause to terminate Ms. Unkerskov's employment. It is on this alternative conclusion that Ms. Unkerskov takes issue. Although this is an alternative conclusion and Ms. Unkerskov does not dispute the delegate's conclusion on the first issue, I will briefly address Ms. Unkerskov's submissions on this point.
51. Ms. Unkerskov does not dispute the delegate's conclusion that she increased her wages after FLS was sold because FLS stopped the lease payments on her vehicle. The delegate concluded that this act could be considered dishonesty or theft. Ms. Unkerskov's appeal submissions centre on an agreement she had with Mr. Ehman. Whatever those arrangements were, the fact is that Ms. Unkerskov unilaterally increased her

salary without the employer's knowledge or consent. In my view, that action constitutes a repudiation of the employment relationship and constitutes just cause for dismissal.

52. I dismiss the appeal on this ground.

Natural Justice

53. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

54. Ms. Unkerskov contends that the delegate erred in failing to call Mr. Ehman in the hearing. As I understand the evidence, the parties attended the hearing in person and Ms. Unkerskov presented the delegate with a letter from Mr. Ehman regarding the lease payment arrangement he had with Ms. Unkerskov. At no time did Ms. Unkerskov ask the delegate to telephone Mr. Ehman. Consequently, I find no basis to conclude that the delegate failed to observe the principles of natural justice. Furthermore, although Ms. Unkerskov also contends that the delegate did not properly consider this evidence, given that it was not relevant to the issue of whether or not Ms. Unkerskov quit her employment, I do not find it necessary to address this issue further.

New Evidence

55. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential 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.

56. The “new evidence” presented by Ms. Unkerskov is an accounting of her paycheques before and after the increase in wages. I do not find this new evidence, as it was clearly available at the time of the hearing before the delegate. Furthermore, I do not find that this evidence would have led the delegate to a different conclusion on the issue of whether or not Ms. Unkerskov quit her employment.

57. The appeal is dismissed.

ORDER

58. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated November 5, 2010, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal