



An appeal

- by -

Nyomi Enterprise Ltd. carrying on business as Select Hair Design
(“Select”)

- 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.: 2012A/111

DATE OF DECISION: February 14, 2013

DECISION

SUBMISSIONS

Khanh (Kim) Le	on behalf of Nyomi Enterprise Ltd. carrying on business as Select Hair Design
Tannis Boxer	on behalf of Sheila Sharifrazi
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Nyomi Enterprise Ltd. carrying on business as Select Hair Design (“Select”) has filed an appeal of a Determination issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on September 28, 2012. In that Determination, the Director ordered Select to pay its former employee, Sheila Sharifrazi, \$855.30 in compensation for length of service and interest for contravening section 63 of the *Act*. The Director also imposed an administrative penalty in the amount of \$500 for Select’s contraventions, for a total amount payable of \$1,355.30.
2. Select appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination.
3. These reasons are based on the submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Ms. Sharifrazi worked as an aesthetician at Select from August 1, 2008, until September 30, 2011, and was paid on a commission basis. Ms. Sharifrazi filed a complaint on March 7, 2012, alleging that Select had failed to pay her compensation for length of service. The parties agreed that if Ms. Sharifrazi was entitled to compensation for length of service, the amount owed was \$830.60. I infer from the Employer’s final response that an attempt to resolve this dispute by way of mediation was unsuccessful.
5. The delegate held a hearing into the complaint on August 15, 2012.
6. Ms. Le, who represented Select at the hearing, contended that Ms. Sharifrazi quit her employment after Ms. Le spoke with her about refusing to provide manicure and pedicure services to a client.
7. Ms. Sharifrazi claimed she had been away from work on medical leave and that, on her return, she advised Select that she should not be booked for certain services until the end of the month based on her doctor’s orders.
8. Ms. Le testified that she did not see the note and argued that Ms. Sharifrazi did not want to perform manicure and pedicure services because they took longer and Ms. Sharifrazi made less money than she would have performing other services. Ms. Le testified that she told Ms. Sharifrazi that she would be unable to pay her if she refused customers and that Select would have to hire other people to perform those services.

9. The parties agreed that on September 30, 2011, Ms. Le and Ms. Sharifrazi had a heated altercation.
10. Ms. Le testified that Ms. Sharifrazi pointed a finger at her, swore, and packed her possessions and left. Ms. Le said that she did not tell Ms. Sharifrazi that she was fired. Ms. Le acknowledged that she did not hear Ms. Sharifrazi say that she quit, but claimed that Ms. Sharifrazi threatened her and told her she would punch her in the face before leaving.
11. Ms. Le's sister, Lien Le, appeared as a witness for Ms. Le. Lien Le testified that although she did not hear all of the conversation, she heard Ms. Sharifrazi swear at her sister and threaten to beat her up. She also did not hear Ms. Sharifrazi say she quit.
12. Ms. Sharifrazi testified that Ms. Le approached her and told her to pack her stuff and leave, claiming that business was slow. Ms. Sharifrazi also said that Ms. Le told her that she was planning on hiring her own family to work for her. Ms. Sharifrazi testified that Ms. Le pushed and shoved her. A co-worker assisted Ms. Sharifrazi with taking her possessions to her vehicle.
13. Ms. Le testified that she thought Ms. Sharifrazi quit because she packed her bags and did not return to work.
14. The Delegate's analysis began with the following statement:

Both parties agree that swearing and yelling started after the termination of Ms. Sharifrazi's employment, as such I do not consider Ms. Sharifrazi's behaviour in front of clients to be justification for her termination and am not analyzing whether the Employer had just cause for termination.
15. The Delegate evaluated the facts surrounding the end of Ms. Sharifrazi's employment in light of the test set out by the Tribunal in *Burnaby Select Taxi* (BC EST # D091/96) and concluded that Select had failed to discharge its burden of demonstrating that Ms. Sharifrazi quit her employment.
16. The Delegate noted that although Ms. Sharifrazi had packed her belongings and left the premises, she did so at the behest of the employer. The Delegate also noted that Ms. Le contended that Ms. Sharifrazi abandoned her position by leaving and not returning to work. The Delegate observed that Ms. Le never contacted Ms. Sharifrazi after she left, even though Ms. Sharifrazi never said that she had quit. The Delegate found insufficient evidence to establish that Ms. Sharifrazi had formed an intent to quit and followed through with that intention.
17. The Delegate concluded that Select terminated Ms. Sharifrazi's employment and that Ms. Sharifrazi was entitled to compensation for length of service.
18. Ms. Le says that Ms. Sharifrazi failed to produce any evidence that her doctor recommended that she could not immediately return to her duties. Ms. Le acknowledged that she told Ms. Sharifrazi that she would not be able to pay the rent or operate the business if Ms. Sharifrazi continued to refuse customers.
19. Ms. Le further asserts that Ms. Sharifrazi began to swear at her and threaten her while packing up her belongings. Ms. Le argues that Ms. Sharifrazi's conduct would, in and of itself, constitute grounds for dismissal.
20. Ms. Le says that the Delegate's statement that both parties agreed that the swearing started after the termination of Ms. Sharifrazi's employment is incorrect. She says that no termination was determined at this point. She contends that the evidence was clear that Ms. Sharifrazi quit her own employment by leaving and

not returning to work. She further asserts that one week after Ms. Sharifrazi's departure, she asked her sister to call Ms. Sharifrazi and ask her to return the keys if she was not going to return to work.

21. Ms. Le says that Ms. Sharifrazi admitted she did not return the keys or return to work for a few weeks, and she did not give any notification to Ms. Le that she was going to return.
22. Ms. Le argues that Ms. Sharifrazi yelled, swore at and threatened her, which demonstrated a subjective intention to quit, and that she took her belongings and left never to return to work or contact her employer, demonstrating an objective intention to quit. Ms. Le argues that this is clear evidence of termination by Ms. Sharifrazi and because Ms. Le never told her she was fired, no compensation for length of service is owed.
23. The Director says that although Select now seems to be contending that it had just cause to terminate Ms. Sharifrazi's employment, Select did not advance this argument at the hearing and appears to be a response to a statement in the Determination. The Director says that, having failed to advance this argument at the hearing, the Employer cannot assert that it terminated Ms. Sharifrazi for cause. The Director says that Select argued that it had discharged its obligation to pay compensation for length of service because Ms. Sharifrazi had quit her employment.
24. Further, the Director says, because there were no witnesses as to what was said at the beginning of the conversation between Ms. Sharifrazi and Ms. Le, there was insufficient evidence to corroborate the Employer's version of events.
25. Ms. Sharifrazi's advocate contends that Select has not demonstrated that the Delegate failed to observe the principles of natural justice and that Select's appeal is nothing more than an attempt to re-litigate the facts of the case. Ms. Boxer further asserts that while a factual error that is completely unsupported by evidence may amount to an error of law, Select has not advanced an argument of an error of law. Furthermore, she says, even if Select had made such an argument, the burden of proving any error of law rests with the Appellant. She contends that the sole issue before the Delegate was whether or not Ms. Sharifrazi quit her employment and that there were two competing versions unsupported by any witnesses. Ms. Boxer argues that the Director's Delegate was able to assess the credibility of the witnesses and weigh that evidence. She contends that the Delegate properly determined that the Employer had the onus of demonstrating on a balance of probabilities that Ms. Sharifrazi intended, subjectively and objectively, to quit. Ms. Boxer says that Select has not identified any legal basis on which to disturb the factual findings of the Director.
26. Ms. Boxer further argues that the sole issue before the Delegate was whether or not Ms. Sharifrazi had quit her job and that Select is arguing for the first time on appeal that it had just cause to terminate Ms. Sharifrazi's employment. She says that the Delegate, quite appropriately, did not adjudicate this issue as it was not at issue before her. Ms. Boxer says that it is improper for the Tribunal to allow the Employer to raise a new argument on appeal that was not raised before the Director. Finally, Ms. Boxer says that although Select agreed that it had filmed Ms. Sharifrazi leave the premises, it chose not to file that video as part of the evidence at the hearing. She submits that had the video supported Select's position, it is logical to assume it would have been submitted in evidence.

ANALYSIS

27. Section 112(1) of the *Act* 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 made.

28. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
29. Although Select's ground of appeal is that the Director failed to observe the principles of natural justice, there is nothing in the submissions nor in the record that supports that ground of appeal.
30. 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.
31. There is no evidence, or suggestion, that Select did not know the case they had to meet or that it had full opportunity to respond to the evidence presented. Select submitted, in its final reply, that the "original" Delegate, "who had all of the original information" ought to have continued to handle the case. Given that this Delegate was likely a mediator, it was not appropriate that this officer adjudicate the complaint. Indeed, it would have been a breach of natural justice had the original Delegate (the mediator) then adjudicated the complaint. I am not persuaded that this ground of appeal has been substantiated.
32. In *JC Creations Ltd.* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."
33. As I understand Ms. Le's argument, the delegate arrived at the wrong conclusion on the evidence, which may be characterized as an error of law. Accordingly, I have considered the submissions in this light.
34. Although Select asserted in its appeal that it maintained that it did not fire or terminate Ms. Sharifrazi's employment, I accept that the sole issue before the delegate was whether or not Ms. Sharifrazi quit her employment.
35. As the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence or make an argument that ought to have been provided to the delegate at the hearing. Furthermore, as the Tribunal stated in its reconsideration decision *Mt. Rocky Investment Ltd.* (BC EST# RD 457/01) the power of the Tribunal is limited to those matters dealt with in the Determination.
36. Although Select submitted that it was "specious" to state that once an allegation is made the onus of proof shifts to "the one accused", I find that the delegate correctly placed the burden on the employer, in this case, Select, to show, on a balance of probabilities, that Ms. Sharifrazi quit.
37. The delegate properly considered the factors outlined in *Wilson Place Management Ltd.* (BC EST # D047/96) and found insufficient evidence to conclude that Ms. Sharifrazi quit. I find no error in the Director's conclusion that Select failed to discharge its burden of establishing that Ms. Sharifrazi quit her employment.

ORDER

38. Pursuant to section 112 of the *Act*, I dismiss the appeal. Accordingly, the Determination, dated September 28, 2012, is confirmed in the amount of \$1,355.30 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal