Employment Standards TRIBUNAL

An appeal

\- by -

MacNutt Enterprises Ltd.
("MacNutt")

\- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2013A/4

**DATE OF DECISION:** March 12, 2013

Employment Standards Tribunal
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British Columbia

# DECISION

## SUBMISSIONS

Mark W. Hundleby — counsel for MacNutt Enterprises Ltd.

## INTRODUCTION

1. Pursuant to subsection 112(1)(a) of the *Employment Standards Act* (the "*Act*"), MacNutt Enterprises Ltd. ("MacNutt") appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on December 21, 2012, ordering it to pay its former employee, Carl Bergman ("Bergman"), $9,420.36 representing 8 weeks' wages as compensation for length of service (see section 63) together with concomitant 6% vacation pay (section 58) and interest (section 88). In addition, and also by way of the Determination, the delegate levied a single $500 monetary penalty (section 98) against MacNutt thus bringing the total amount of the Determination to $9,920.36.

2. MacNutt says that the Determination should be cancelled because the delegate erred in law in failing to give effect to its position that Mr. Bergman was not entitled to compensation for length of service because he voluntarily quit or otherwise abandoned his employment (see subsection 63(3)(c)).

3. At this juncture, I am considering whether or not this appeal should be dismissed under subsection 114(1)(f) of the *Act* as having no reasonable prospects for success. If I am satisfied that the appeal has some presumptive merit, the Tribunal will advise the respondents and seek their submissions regarding the matters raised by MacNutt's appeal. Otherwise, the appeal will be dismissed.

4. I am adjudicating the matter based on the material filed by MacNutt's legal counsel and, in addition, I have reviewed the delegate's "Reasons for the Determination" (the "delegate's reasons") and the material that was before the delegate (the subsection 112(5) "record") when he was making his Determination.

## BACKGROUND FACTS

5. MacNutt operates a commercial trucking business in Nanaimo and employed Mr. Bergman as a driver from June 3, 1995, to January 6, 2012. When his employment ended, Mr. Bergman was earning $24.00 per hour. On February 13, 2012, Mr. Bergman filed a timely complaint under section 74 of the *Act* seeking compensation for length of service. The delegate presided at a complaint hearing on July 4, 2012, at which he heard evidence from three witnesses from MacNutt and from Mr. Bergman on his own behalf. Several months later, on December 21, 2012, the delegate issued the Determination and his accompanying reasons in Mr. Bergman's favour.

6. Mr. Bergman suffered a back strain at work and was off work and in receipt of WCB benefits from early September through December 2011. During the time that he was off work, he was in regular contact with MacNutt keeping them apprised of his medical condition. Mr. Bergman's evidence at the complaint hearing, summarized at page R3 of the delegate's reasons (and confirmed by MacNutt's business records), was that after mid-December 2011 he made several telephone calls to MacNutt with a view to firming up a return to work date but it appears that his efforts to determine a fixed return to work date were rebuffed. The evidence before the delegate was that at no time did anyone from MacNutt contact Mr. Bergman and advise him that he would not be allowed to return to work. At some point, Mr. Bergman determined that since he

was not being recalled to work, he should initiate an employment insurance claim and, to that end, in mid-January 2012 requested (through his wife) and was given a Record of Employment ("ROE").

7. I wish to briefly comment on the ROE. Apparently two ROEs were issued, the second – and the only one contained in the record – was issued on February 23, 2012, to replace an earlier ROE that contained an error regarding the date of Mr. Bergman's last paid day of work. The second ROE is under the signature of Ms. Jenta Madsen who is MacNutt's office/payroll manager and she took the lead role in presenting MacNutt's case at the complaint hearing. Above her signature on the ROE is a certification: "I am aware that it is an offence to make false entries and hereby certify that all statements on this form are true". The code used to explain the "Reason for issuing this ROE" is code "K" – the code for "other". There are separate codes for, among other things, "shortage of work" (A), "illness or injury" (D), "quit" (E), and "dismissal" (M). There is nothing on the ROE itself that explains what the "other" reasons might be for issuing the document.

8. At the complaint hearing, Ms. Madsen testified that she experienced some difficulty in obtaining a note from Mr. Bergman's physician and in mid-December 2011 and again in early January 2012 apparently informed Mr. Bergman that he would not be permitted to return to work without some sort of medical assurance from his physician that he was fit to do so. On January 4, 2012, Mr. Bergman sent a fax to Ms. Madsen in which he stated, in part: "If there is no work I would like to request a layoff form...". The note also asked for his outstanding "holiday pay" and also directed Ms. Madsen to contact WorkSafe BC (*i.e.*, the Workers Compensation Board) "at your discretion".

9. On January 6, 2012, Mr. Bergman faxed a doctor's note (the note is dated January 5, 2012) that stated: "The above-named individual ["Carl Bergman"] has recovered from his work-related injury. He is able to return to work full time, full duties as of Jan 3, 2012". Ms. Madsen testified that she heard "rumours" that Mr. Bergman had secured other employment and did not wish to return to MacNutt but she also stated that she never confirmed those rumours with Mr. Bergman. At page R5 of his reasons, the delegate noted: "...when he demanded the ROE, she thought it was the end of the relationship as this would be consistent with someone leaving their employment. Ms. Madsen stated they did not hear from Mr. Bergman past January 6, 2012, and they had seen him driving for someone else so they assumed he had quit."

10. I presume Ms. Madsen is referring to Mr. Bergman's request for a "layoff form" to be a request for an ROE but, if that is the case, I note that Ms. Madsen had two occasions to issue an ROE and, in each case, the ROE was coded as having been issued for "other" reasons (code K) rather than a "shortage of work" (code A – which would be consistent with a layoff) or a "quit" (code E). Further, if Ms. Madsen assumed Mr. Bergman had "quit", I have to question why the ROE would not have reflected that belief and, even more problematic from MacNutt's position, if Ms. Madsen believed Mr. Bergman had quit his employment, why did she not simply confirm that belief with him? – a simple telephone call would surely have sufficed (see delegate's reasons at page R5 where she conceded she never confirmed with Mr. Bergman that he did *not* wish to return to work). I might also add that MacNutt's own records show that Mr. Bergman contacted MacNutt as late as January 24, 2012, enquiring about whether there was any work for him.

11. MacNutt's evidence – at least that given by Ms. Madsen – seems to be inconsistent with her own note of a telephone conversation with a WCB officer on January 5, 2012, where she apparently advised the officer that Mr. Bergman would be returning to work (with lighter job duties). Further, of MacNutt's two other witnesses, one (Mr. Ball) confirmed that Mr. Bergman had called him on several occasions (about six) enquiring about returning to work and the other (Mr. Kersch) confirmed that he had never called Mr. Bergman to confirm his return to work date even though Mr. Bergman testified that he had called Mr. Kersch on several occasions about returning to work.

12. The delegate ultimately concluded that the evidence fell short of establishing "clear unequivocal evidence" that Mr. Bergman quit his employment (page R7). The delegate's reasons continue:

> ...there has been no evidence lead by MacNutt that Mr. Bergman quit his employment. Rumours and suspicions will not relieve an employer from payment of compensation for length of service. In order to be discharged from the obligation MacNutt was required to present evidence that shows Mr. Bergman voluntarily formed and communicated the intent to quit his employment....Starting from December 14, 2011 Mr. Bergman was communicating his intention to return to work. As late as January 23, 2012 when he was picking up his T4 he was still asking if there was work for him.
>
> The burden of proof was on MacNutt to show on a balance of probabilities that Mr. Bergman quit and they are discharged from the obligation to pay compensation. They have not met that burden...

## MacNUTT'S REASONS FOR APPEAL

13. MacNutt's position is that the delegate erred in law in awarding Mr. Bergman compensation for length of service since he "was not terminated but voluntarily resigned, quit, or abandoned his job as a driver for MacNutt". MacNutt "submits that the [delegate] acted on a view of facts which could not be reasonably entertained and ignored certain facts entirely when making the Determination" and its submission continues:

> In the [delegate's] view, the legal test for a legal resignation requires voluntary formation of the intention to quit, clear communication of that intention, and the commission of acts or actions inconsistent with continued employment. MacNutt does not dispute this summation, but disputes the [delegate's] application of it to the evidence.

14. MacNutt says that Mr. Bergman's intention to quit can be inferred from a number of facts including his request for his ROE and that, when he requested his ROE, he had not yet provided any medical evidence regarding his fitness to return to work.

15. The record includes a letter dated January 5, 2012, from WorkSafe BC to Mr. Bergman regarding his WCB claim. This letter was also copied to MacNutt. The Claims Officer decided that Mr. Bergman's temporary disability – and his concomitant entitlement to wage loss benefits – ended as of December 12, 2011. The decision letter includes two references regarding Mr. Bergman's reticence to return to work: first, the letter refers to a report from an Occupational Rehabilitation officer and continues "The report noted that you were uncertain whether or not you would return to your pre-injury job at the time of discharge, but that you agreed you were capable of performing all the job demands"; second, "You confirmed in our conversation of January 6, 2012, that there is currently no work available to you with your employer [and] you also advised that you have concerns regarding the safety of the equipment at your workplace and whether your employer will be supportive of your need to take stretching/walking breaks approximately every two hours". MacNutt says that these references could be taken as a "reflection of his subjective assessment of his injury status and work capability and his dissatisfaction with his employer" and that "it is unreasonable to believe that Mr. Bergman had not formed the intention to not return to employment with MacNutt".

16. MacNutt says that not only had Mr. Bergman formed the subjective intention to quit but that his intention was manifested by the following specific behaviours. MacNutt says that Mr. Bergman did not make a "meaningful or effective" effort to contact the MacNutt employee responsible for scheduling drivers. More particularly, MacNutt submits: "When Mr. Bergman did not contact MacNutt, and in particular [the drivers' supervisor], to determine his work schedule, MacNutt was entitled to consider that as a clear intention, communication, and action that Mr. Bergman did not intend to return to MacNutt".

## FINDINGS AND ANALYSIS

17. Subsection 63(3)(c) of the *Act* states that an employer's presumptive obligation to pay compensation for length of service is "deemed to be discharged if the employee…terminates the employment [or] retires from employment". The Tribunal has repeatedly ruled, consistent with the common law, that a voluntary resignation is an employee's personal right that must be evidenced by a subjective intention to quit coupled with objective behaviour that is consistent with that subjective intention (see *Canadian Chopstick Manufacturing Co. Ltd.*, BC EST # D448/00).

18. In this case, MacNutt does not say that the delegate applied the incorrect legal test but, rather, that he misapprehended or misapplied the evidence concerning whether Mr. Bergman legally quit his employment. At the complaint hearing, MacNutt's position was set out in the testimony of three witnesses. Ms. Madsen, the office manager, testified that Mr. Bergman called her on December 14, 2011, advising that he would be able to return to work on January 3, 2012, (delegate's reasons, page R4). Ms. Madsen again spoke with Mr. Bergman on January 3, 2012, and advised him that there was work for him but that he would need to provide a physician's note confirming his fitness to return to work (page R4). On January 6, 2012, Mr. Bergman faxed in a physician's note confirming his fitness to return to work as of January 3, 2012, (page R5). Ms. Madsen also testified that she heard "rumours" that Mr. Bergman was working elsewhere and did not wish to return to MacNutt but she also stated that she never confirmed this information with Mr. Bergman directly (page R5). She further testified that she considered Mr. Bergman's request for an ROE as confirmation of his desire not to return but it should also be noted that his request (by fax to MacNutt) is framed as follows: "*If there is no work* I would like to request a layoff form…" (my *italics*). Mr. Bergman framed his request in conditional terms and only did so in order to pursue a claim for employment insurance benefits if MacNutt was not going to put him back on the payroll. In the circumstances, I think the delegate quite rightly considered this statement to fall well short of evidencing a subjective intention to quit. I might add that Ms. Madsen testified as follows: "When asked if Mr. Bergman had ever spoken words to the effect that he was not interested in returning to work, Ms. Madsen said no…" (page R5).

19. MacNutt's next witness at the complaint hearing was Mr. Kersch, the drivers' supervisor and the person in charge of their work scheduling. Ms. Madsen testified that she spoke with Mr. Kersch and informed him that Mr. Bergman would be returning to work (page R3). Mr. Bergman's evidence was that he made several attempts to contact Mr. Kersch (by telephone and by attending MacNutt's offices) but that he never spoke with him and that Mr. Kersch never returned his calls (pages R2-R3). Mr. Kersch testified that he never received a call or voice mail message from Mr. Bergman (page R5) and although he had been told that Mr. Berman would be returning to work, he never scheduled him for a shift and never called him. Mr. Kersch said he did not call Mr. Bergman because "he was rude to me a couple of years ago" and also because he heard second-hand that Mr. Bergman did not wish to return to work (pages R5-R6). The delegate did not resolve the conflict in the evidence as between Mr. Kersch and Mr. Bergman regarding whether Mr. Bergman actually attempted to contact Mr. Kersch. However, the delegate did observe that since there was ample evidence that Mr. Bergman *did* apparently wish to return to work (evidenced by his various calls to Ms. Madsen and Mr. Ball – discussed below) and Mr. Kersch had been so informed by Ms. Madsen, "Mr. Kersch or someone from MacNutt should have called Mr. Bergman regardless of what had happened two years previously [a reference to Mr. Bergman's alleged "rudeness" to Mr. Kersch] and clarified the situation" particularly since "on the one hand Mr. Bergman was making apparent efforts to return to work and on the other rumours were circulating that he did not want to return" (page R7). I wholeheartedly endorse the delegate's observations in these latter respects.

20. Mr. Anthony Ball is MacNutt's dispatcher and he was its final witness at the complaint hearing. He gave conflicting evidence – during his direct examination, he stated that Mr. Bergman never spoke with him about

returning to work; in cross-examination, he conceded that Mr. Bergman called him about six times inquiring about returning to work and that, each time, he referred Mr. Bergman to Mr. Kersch (page R6).

21. As noted above, the delegate did not resolve the conflict in the evidence as between Mr. Bergman and Mr. Kersch concerning whether the former contacted the latter. That said, I think the most reasonable inference to be drawn from the uncontested evidence is that Mr. Bergman did attempt to contact Mr. Kersch but that the latter ignored the matter presumably because he had some enmity toward Mr. Bergman. Mr. Bergman called both Ms. Madsen and Mr. Ball on several occasions and it may be that Mr. Bergman continued to call Mr. Ball because Mr. Kersch was simply not returning his calls. I find it hard to believe that Mr. Bergman would repeatedly contact Ms. Madsen and Mr. Ball but not Mr. Kersch, especially when he was directed to do so. In any event, I entirely agree with the delegate that MacNutt should not have simply assumed – based on only hearsay evidence and in contrast with all the other available evidence that Mr. Bergman *did* wish to return to work – that Mr. Bergman did not wish to return to work. I further agree with the delegate that someone from MacNutt should have taken the simple step of actually calling Mr. Bergman and confirming, once and for all, whether he actually wished to return to work.

22. In my opinion, the delegate correctly placed the burden on MacNutt to show, by clear and unequivocal evidence, that Mr. Bergman had a subjective intention to quit that was, in turn, manifested by objective behavioural evidence consistent with that intention. The evidence before the delegate fell well short on both counts. There was no cogent evidence before the delegate that Mr. Bergman intended to quit his job – the evidence, in my view, overwhelmingly suggested precisely the opposite. Further, there was simply *no objective evidence* that Mr. Bergman refused to return to work thereby abandoning his position or that he otherwise voluntarily resigned his employment. Finally, it would appear that MacNutt did not believe that Mr. Bergman had voluntarily resigned his employment, at least at the time it issued the two ROEs neither of which references the fact that Mr. Bergman quit.

23. In my opinion, this appeal has no reasonable prospects of success and, accordingly, should be dismissed.

## ORDER

24. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Accordingly, it follows that the Determination is confirmed as issued in the amount of $9,920.36 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**