

An appeal

- by -

Zad Holdings Ltd. carrying on business as Canadian Home Flooring
(“Zad”)

- 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.: 2015A/115

DATE OF DECISION: October 16, 2015

DECISION

SUBMISSIONS

Nader Kianzad

on behalf of Zad Holdings Ltd. carrying on business as
Canadian Home Flooring

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Zad Holdings Ltd. carrying on business as Canadian Home Flooring (“Zad”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 23, 2015.
2. On March 17, 2014, Maria Palfrey (“Ms. Palfrey”) filed a complaint with the Director alleging that Zad contravened the *Act* in failing to pay her commission wages and compensation for length of service. The parties resolved the issue of commission wages after the complaint was filed.
3. Following a hearing, a delegate of the Director concluded that Zad had contravened section 63 of the *Act* in failing to pay Ms. Palfrey compensation for length of service. The delegate determined that Ms. Palfrey was entitled to compensation including vacation pay and interest in the amount of \$4,216.77. The delegate also imposed two administrative penalties in the total amount of \$1,000 for Zad’s contraventions of the *Act*, for a total of \$5,216.77.
4. Zad contends that the Director failed to observe the principles of natural justice in making the Determination.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that 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.
6. These reasons are based on Zad’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Palfrey and the Director may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

ISSUE

7. Whether or not Zad has demonstrated any statutory ground of appeal.

FACTS AND ARGUMENT

8. A delegate of the Director held a hearing into Ms. Palfrey’s complaint on September 30 and November 18, 2014. Ms. Palfrey was represented by counsel and Zad was represented by Nader Kianzad (“Mr. Kianzad”), its sole director.
9. Briefly, the facts are as follows.

10. Mr. Kianzad and Ms. Palfrey both worked for Canadian Carpet and Tile Inc. (“CCT”), a flooring and cabinetry sales and installation business. Mr. Kianzad purchased the assets of CCT in August 2013 and continued to operate the business as Zad. The purchase agreement was silent on the status of the existing employees.
11. When Mr. Kianzad and Ms. Palfrey worked together, Mr. Kianzad was aware that Ms. Palfrey was one of the highest producing salespersons. Mr. Kianzad and Ms. Palfrey met at the end of August 2013. According to Ms. Palfrey, she and Mr. Kianzad discussed sales, the amount of walk-in traffic and how the store was performing in general. Mr. Kianzad’s evidence was that he interviewed Ms. Palfrey, in part, to discuss what her future plans were.
12. On September 1, 2013, Mr. Kianzad and CCT’s owner informed the employees of the sale and notified them of a changed pay structure. Mr. Kianzad’s evidence was that he explained to Ms. Palfrey that he wanted her to continue to work for Zad and that any work, commissions and vacation pay outstanding with CCT had to be resolved between her and CCT.
13. Ms. Palfrey’s employment was not terminated by CCT and her employment with Zad continued without any change to her work schedule. Although the name and ownership of the business changed, Ms. Palfrey continued to perform the same duties, including selling flooring and cabinetry, ordering product scheduling and coordinating kitchen and bathroom renovations and collecting payment. The terms of her commission wages changed however, and she no longer received a vehicle or telephone allowance.
14. Mr. Kianzad was aware that the employees were having difficulties recovering their compensation for length of service from CCT. Mr. Kianzad and Ms. Palfrey discussed the security of her employment with Zad and Mr. Kianzad told Ms. Palfrey that he had no plans to lay her off or terminate her employment.
15. Ms. Palfrey began looking for other employment in October 2013, a fact that became known to Mr. Kianzad.
16. On November 27, 2013, Mr. Kianzad provided Ms. Palfrey with a company cellular telephone along with new business cards that reflected the new number, and told her she was to use that telephone for work purposes. He also asked her if she had found other work. Ms. Palfrey said that she had received two job offers and told Mr. Kianzad that she would let him know of her intentions. When Mr. Kianzad told her he needed a commitment, Ms. Palfrey asked him if he wanted her to leave immediately. Mr. Kianzad’s evidence was that it was to the effect of “well, if that is what you want.” According to Ms. Palfrey, Mr. Kianzad said that she was “being subsidized” and did not want her working for him if she was not fully committed. She then asked him if he wanted her to leave, to which he replied yes, because she could steal his customers. Ms. Palfrey said that she had no other options so she left. She asked Mr. Kianzad how he would characterize her leaving for purposes of Employment Insurance and he said he “would figure it out later.”
17. Several days later, Ms. Palfrey returned the phone to Mr. Kianzad, telling him that she did not want to use it as she did not want to risk damaging it. The phone had been restored to its original settings and Ms. Palfrey had erased all the contact information, text messages and emails. Ms. Palfrey’s evidence was that she was unfamiliar with Android phones as she used an iPhone and did not want a new cellular telephone.
18. Ms. Palfrey left the store and, two hours later, texted Mr. Kianzad the message “I’ll drop off the keys this week.” She also provided information about a meeting she had later that day and the name of the client that the samples on her desk were for. Mr. Kianzad thanked her, and, later that day, texted her that he did not want her at the store for any reason without him being there.

19. Mr. Kianzad denied that he told Ms. Palfrey she had to leave and that it was her decision to quit. Mr. Kianzad's evidence was that he had extensive training and management experience and if he had fired Ms. Palfrey, he would have ensured she took all her belongings and would have escorted her to the door.
20. Ms. Palfrey testified that she did not have another job to go to and that she did not intend to quit that day. She said that she needed the income and had two projects near completion on which she would have earned commissions. She said that if she had quit, she would have informed her customers and arranged for someone else to handle her work. She also testified that if Mr. Kianzad had asked her to stay, she would have.
21. On December 19, 2013, Ms. Palfrey arrived at Zad's office to pick up her Record of Employment (ROE). When she saw the notation indicating that she had quit, she questioned Mr. Kianzad. He replied "Because you quit". She replied "No I didn't, you let me go". Ms. Palfrey disputed the ROE and was later determined to qualify for EI benefits.
22. Mr. Kianzad agreed that he did not call or contact Ms. Palfrey to ask her to return to work or to confirm that she had quit. He said that he relied on her expertise and had no plans to terminate her employment.
23. Mr. Kianzad argued that Ms. Palfrey's actions on December 2, 2013, constituted evidence that she had quit her employment. He also contended that if compensation for length of service was owed, her employment with Zad began September 1, 2013. Ms. Palfrey said that she began work with CCT on August 5, 2003, and said that she was terminated without compensation for length of service.
24. Ms. Palfrey called one witness, Shahab Safarkhah ("Mr. Safarkhah"), who was Ms. Palfrey's co-worker at CCT and Zad. Mr. Safarkhah testified that he had spoken to CCT's owner about severance, and that the previous owner denied any obligation to pay severance. Mr. Safarkhah understood his employment was continuous. Mr. Safarkhah testified that Mr. Kianzad met with four CCT employees and outlined a new pay structure that was to be in place for six months. Mr. Safarkhah also testified that he spoke to CCT's owner and was told that since the company was being transferred to Mr. Kianzad, CCT would not be obliged to pay severance.
25. The delegate determined that Ms. Palfrey did not quit her employment. The delegate found no evidence Ms. Palfrey ever told Mr. Kianzad that she quit, or specifically advised him that she was not returning. The delegate noted that Mr. Kianzad did not know that Ms. Palfrey was not returning to work until Ms. Palfrey texted him asking him not to throw her things out and telling him that she would be returning the keys. The delegate also noted that Mr. Kianzad "did not clarify the situation", or establish if Ms. Palfrey could or would be returning to work, and advised her not to attend the store without him being present.
26. The delegate said as follows:

Under the circumstances of such an exchange between employee and employer, the true intent behind words spoken and actions taken may be difficult to understand. As a result, the assessment of Ms. Palfrey's actual intention to quit goes beyond action taken in the heat of conflict. Ms. Palfrey denies she intended to quit and states that she did not have another job and was unprepared to be unemployed. Furthermore, the balance of her day was booked with appointments and did not take her personal belongings from the worksite upon leaving.
27. The delegate concluded, that the circumstances surrounding Ms. Palfrey's leaving the business and offer to return the keys were ambiguous at best and, in the delegate's mind, did not show an unequivocal intent to quit. The delegate also found that Ms. Palfrey's interpretation that she was being terminated was not unreasonable. Further, the delegate found that even if Mr. Kianzad did offer Ms. Palfrey an opportunity to

return to Zad, which Ms. Palfrey denied, that offer, made several weeks later, did not change the events that occurred on December 2, 2013.

28. The delegate concluded that Ms. Palfrey was entitled to compensation for length of service.
29. In determining the amount of that compensation, the delegate noted that Mr. Kianzad purchased CCT, assuming the lease, goodwill, assets and customer lists. The delegate found that this constituted a disposition of the business under section 97 of the *Act*. The delegate found that although there were some changes to Ms. Palfrey's compensation scheme, her duties did not change and that she continued to provide her services to Zad without interruption. The delegate determined that Ms. Palfrey's employment was continuous and that her compensation was calculated from her start date of August 5, 2003. The delegate calculated Ms. Palfrey's compensation to be equivalent to eight weeks regular wages, or \$3,793.71 plus vacation pay of \$227.62.

Argument

30. Mr. Kianzad contends that the Determination is based on "incorrect/incomplete premises and suppositions and at worst based on having missed crucial facts that were presented at the hearing."
31. Mr. Kianzad outlines his business experience in his appeal submission and poses a number of questions. He asks what his motivation would be to fire Ms. Palfrey, an employee he says he had great admiration for and who was an outstanding performer. He says he has a clear understanding of the procedures he must follow to terminate an employee. Mr. Kianzad makes factual assertions that I infer he made at the hearing before the delegate, including that on December 2 2013, Ms. Palfrey returned the company cellular telephone she had been using for the previous two weeks in a fully restored to original condition. He submits that this is equivalent to handing in the keys to the store. He denies that he asked Ms. Palfrey for the store keys, asserting that she offered to return them, and told him how to handle an appointment with a client later that afternoon. He argues that this is evidence of Ms. Palfrey "washing her hands clean of any further ties with the business...."
32. Mr. Kianzad says that although the delegate found that he took no steps to clarify Ms. Palfrey's employment situation, Ms. Palfrey's actions were clear and there was nothing to clarify.
33. Mr. Kianzad also contends that the delegate unfairly "put the onus" on him and did not fairly assess what his intention was. Mr. Kianzad also asserts that after Ms. Palfrey applied for Employment Insurance, EI determined that Ms. Palfrey had voluntarily resigned her position.

ANALYSIS

34. 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 being made.
35. 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.

36. Although Zad alleges a failure to comply with principles of natural justice as the ground of appeal, Mr. Kianzad's written submissions are, in essence, an assertion that the delegate's conclusion is wrong, or that the delegate erred in law.
37. In *J.C. 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."
38. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. 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. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
39. I am satisfied that Zad knew the case it had to meet and had a full opportunity to respond. There is no assertion, or evidence, that the delegate was biased. In short, I find no merit to this ground of appeal.
40. As I understand Mr. Kianzad's argument, the delegate arrived at the wrong conclusion on the evidence.
41. Mr. Kianzad asserts that he did not fire or terminate Ms. Palfrey's employment, because he had no motive to do so and because he understands what steps are necessary to properly terminate an employee.
42. 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.
43. I find no error or unfairness in the fact that the delegate correctly placed the burden on the employer, in this case, Zad, to show, on a balance of probabilities, that Ms. Palfrey quit her employment.
44. The delegate properly considered the factors outlined in *Wilson Place Management Ltd.* (BC EST # D047/96) and found insufficient evidence to conclude that Ms. Palfrey quit. In *Wilson Place*, the Tribunal held that the act of resigning, or "quitting" employment:
- is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved.
45. The delegate heard Mr. Kianzad and Ms. Palfrey's evidence. I must defer to her factual findings unless I am persuaded that they are perverse or unreasonable. Mr. Kianzad does not allege any errors of fact.
46. The delegate weighed all the evidence and found that Zad had not met its burden of establishing that Ms. Palfrey voluntarily quit. There is nothing in Zad's appeal that persuades me the delegate's analysis of the facts is incorrect.
47. The appeal is dismissed.

ORDER

- ^{48.} Pursuant to section 115 of the *Act*, I order the Determination dated July 23, 2015, be confirmed in the amount of \$5,216.77 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