Civil Resolution Tribunal

Date Issued: October 11, 2022

File: SC-2022-000399

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Tessema v. Nemesis Coffee Holdings Inc.,* 2022 BCCRT 1113

B E T W E E N :

DAGIM TESSEMA

APPLICANT

A N D :

NEMESIS COFFEE HOLDINGS INC. and JOSH SHEVLIN

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. This is an employment dispute about alleged wrongful dismissal. The respondent Nemesis Coffee Holdings Inc. (Nemesis) hired the applicant Dagim Tessema as a

courier driver. The respondent Josh Shevlin is Nemesis' general manager. After only one shift, Nemesis terminated Mr. Tessema's employment on December 13, 2021. Mr. Tessema seeks $2,400 as severance or wrongful dismissal damages, based on 4 weeks' pay. He also claims reimbursement of $60, which he paid for a criminal record check that Nemesis required as a condition of hiring him.

2. Nemesis says Mr. Tessema was still under a probationary period and so no notice was required. Nemesis also says that while it said it terminated Mr. Tessema without cause, in order to spare his feelings, it actually did so because it says he was a poor driver and not suited to the job. Mr. Shevlin says he is not personally liable but otherwise adopts Nemesis' position.

3. Mr. Tessema is self-represented. The respondents are both represented by Nemesis' owner, Max Wolinsky, who is also a lawyer.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

5. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

6. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

8. Mr. Tessema asked that this decision be anonymized. CRTA section 86(3) says the CRT may anonymize published decisions. The CRT's Access to Information and Privacy Policy says the CRT will anonymize a decision if a party establishes that the need for protection of personal information outweighs the goal of transparent CRT proceedings. In deciding whether to anonymize a decision, the CRT will consider:

    a. The circumstances of the case and nature of the evidence provided,

    b. The potential impact of disclosure on the person, and

    c. How anonymization would impact the CRT's goals of transparent decision-making processes and protection of personal information.

9. As noted, this is a wrongful dismissal dispute between an employee and his employer. I find the dispute's circumstances, and the evidence, are not unique or particularly sensitive. There is a strong common law presumption of openness in all judicial proceedings, including tribunal proceedings (see *British Columbia (Environmental Management Act) v Canadian National Railway Company*, 2022 BCSC 135, at paragraph 101). The purpose of openness is not to shame individuals but to ensure transparency in the judicial system (see *Sherman Estate v. Donovan*, 2021 SCC 25, at paragraph 44).

10. The openness presumption may be rebutted by matters of important public interest. Privacy is an important public interest when it protects individuals from an "affront to a person's dignity", which is more than mere discomfort or embarrassment

(see *Sherman*, paragraph 33). Mr. Tessema does not explain what the potential impact of this dispute's disclosure would be. I find there is nothing about the dispute's circumstances or the evidence before me that appears to have the potential to cause serious discomfort or embarrassment or an affront to dignity. On balance, I find there is no real risk of an affront to dignity here, so I find the public interest of privacy is not engaged. I decline to grant Mr. Tessema's request for anonymization.

11. Next, this is a claim for "severance" pay or wrongful dismissal damages under the common law. Mr. Tessema does not seek statutory entitlements under the *Employment Standards Act* (ESA), and the ESA section 63 says an employee is entitled to compensation for length of service after 3 months of work, if terminated without just cause. Here, Mr. Tessema was employed for only 1 shift. In any event, the CRT has no jurisdiction to grant ESA entitlements. So, I find this dispute falls within the CRT's jurisdiction over damages, under CRTA section 118. I also note this is not a dispute over unpaid wages. Rather, this dispute is only about whether Mr. Tessema is entitled to damages for Nemesis' termination of his employment and if so, how much.

ISSUES

12. The issues in this dispute are:

    a. Was Mr. Tessema under a probationary period?

    b. Was Mr. Tessema terminated for cause?

    c. Is Mr. Tessema entitled to reimbursement of $60 for a criminal record check?

    d. To what extent, if any, is Mr. Tessema entitled to wrongful dismissal damages for being terminated after 1 single shift of work?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, as the applicant Mr. Tessema must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read the parties' submitted documentary evidence and arguments but refer only to what I find relevant to provide context for my decision. I note the respondents chose not to provide any documentary evidence despite having the opportunity to do so.

14. There is no formal written employment contract, though I discuss where necessary the parties' pre-hire emails below. Mr. Tessema's first and last day of work with Nemesis was December 13, 2021. His next scheduled shift was December 16, 2021. On December 15, 2021, Nemesis called Mr. Tessema and terminated his employment. Nemesis did so without citing just cause. None of this is disputed. As discussed below, Nemesis argues it fired Mr. Tessema because his driving skills were allegedly poor and incompatible with his further employment as its courier driver.

Claim against Mr. Shevlin

15. The email evidence shows Mr. Shevlin was Nemesis' general manager. There is no evidence and no argument that Mr. Tessema contracted with Mr. Shevlin personally. While Mr. Shevlin communicated with Mr. Tessema in terms of the hiring and the termination, I find Mr. Shevlin did so as Nemesis' agent, which is not disputed. So, I find Mr. Tessema's claims are against Nemesis, not Mr. Shevlin. I dismiss Mr. Tessema's claims against Mr. Shevlin.

Wrongful dismissal - $2,400 claim against Nemesis

16. First, I do not accept Nemesis' submission that Mr. Tessema was under a probationary period when it terminated his employment. Nemesis' advertisement and the parties' email correspondence that led to Nemesis hiring Mr. Tessema make no mention of a probationary period. Mr. Tessema denies there was any applicable probationary period. I find the burden is on Nemesis to prove there was a contractual probationary period and find it has not done so.

17. I note that nothing turns on the fact that the ESA only provides statutory entitlement to compensation for length of service after 3 months of employment. Again, the CRT has no jurisdiction to grant ESA entitlements and as noted this is a claim for common law damages.

18. Second, I do not accept Nemesis' submission that Mr. Tessema's driving was so poor that it amounted to just cause and warranted termination. I say this because Mr. Tessema denies it and Nemesis submitted no evidence in support of this submission. My further reasons follow below.

19. An employer may dismiss an employee by giving reasonable notice of dismissal or pay in lieu of notice. However, if the employer shows just cause, it may dismiss the employee without notice or pay in lieu (see *Panton v. Everywoman's Health Centre Society (1988)*, 2000 BCCA 621 at paragraph 24). Just cause is conduct that is seriously incompatible with the employee's duties, goes to the root of the employment contract and fundamentally strikes at the employment relationship (see *Panton* at paragraph 25). Put another way, the test for just cause is whether the employee's misconduct amounts to an irreparable breakdown in the employment relationship: *McKinley v. BC Tel*, 2001 SCC 38 and *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at paragraphs 27 to 28.

20. At paragraph 53 of *Parakin v. Bandali Medical Services Inc.*, 1999 CanLII 2690 (BCSC), the court said incompetence may be just cause for dismissal, where the employer shows:

    a. The incompetence is serious or gross,

    b. The employee was aware of the employer's established standards of performance, which were objectively reasonable,

    c. The employer had clearly warned of dismissal if the standards were not met, and

d. The employee failed to correct their performance, despite a reasonable opportunity and sufficient time to do so.

21. Nemesis admits it did not rely on just cause when it terminated Mr. Tessema's employment, though I acknowledge it says that it did not do so in order to spare Mr. Tessema's feelings. I find just cause is the employer's burden to prove (here, Nemesis) and on the evidence before me I find that it has not done so. See *Staley v. Squirrel Systems of Canada, Ltd.*, 2013 BCCA 201. The parties disagree about whether Mr. Tessema's driving was poor and, even if it was not ideal, I find Nemesis has not proved it amounted to serious or gross incompetence. There is also no evidence Nemesis ever expressed any concern to Mr. Tessema about his driving during the shift. I find just cause unproven.

22. In short, I find Nemesis terminated Mr. Tessema's employment after 1 shift, without just cause and when he was not within any probationary period. Under the common law, I find this means Mr. Tessema is entitled to damages for wrongful dismissal.

Remedy for wrongful dismissal

23. Under the common law, when an employee is terminated without reasonable notice, they are entitled to damages equal to what they would have earned during the notice period (see *Matthews v. Ocean Nutrition Canada Ltd.,* 2020 SCC 26 at paragraph 59).

24. As noted, Mr. Tessema claims $2,400 for 4 weeks' severance pay based on $20 per hour. He says 4 weeks would equal a minimum of 120 hours of work. The undisputed evidence is that the parties agreed to $20 per hour and that Nemesis advised Mr. Tessema he could expect around 30 hours per week of work.

25. It is also undisputed that Mr. Tessema did not find employment for close to a month following Nemesis' termination. The burden is on Nemesis to prove failure to mitigate and I find it has not done so.

26. Under the common law, reasonable notice is based on factors such as Mr. Tessema's age, the type and length of employment, and the availability of similar employment in terms of responsibility, training, and compensation (see *Hawkes v. Levelton Holdings Ltd.,* 2012 BCSC 1219 at paragraph 224, affirmed 2013 BCCA 306 and *Frederiks v. Executive TFN Waterpark Limited Partnership*, 2022 BCSC 1725). These factors are commonly referred to as the Bardal factors, after *Bardal v. Globe and Mail Ltd*. (1960), 1960 CanLII 294 (ON SC).

27. According to Mr. Tessema's submitted driver's abstract, he is currently 32 years old. His resume indicates he worked between 2010 and 2015 in customer service, "tech support", and as a sales and marketing representative. He was a "wireless sales associate" from December 2015 to December 2018. He began working as a delivery driver in September 2017 and did so through October 2019. He also had a business venture in a foreign country between January 2019 and November 2021.

28. In *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 (CanLII), the court considered a "short service" employee who earned $60,000 a year in a non-managerial position and was terminated after about 9 months of employment. The court held at paragraph 15 (my bold emphasis added):

> Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, **the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility**.

29. Here, to the extent Mr. Tessema argues it, I find no evidence of bad faith. Mr. Tessema submitted no evidence of other job offers that he turned down, or even considered, before Nemesis hired him. So, I also find there was no inducement.

30. I find Mr. Tessema's position as a courier driver was a relatively low level position within Nemesis, which is not disputed and there is no evidence to the contrary. Further, I find the fact Mr. Tessema found alternate employment "close to a month"

after Nemesis' termination, after the holiday period had concluded, supports a conclusion that similar employment was reasonably available. I note Mr. Tessema did not give the date he found alternative employment in January 2022 but the evidence shows he applied for a position on December 15, 2021.

31. I have considered the Bardal factors and the court's comments in *Saalfeld*. I have also considered Mr. Tessema's circumstances, including his junior position with Nemesis, his relatively young age, ability to find alternative employment within a month that included a holiday period, and only a single day of service with Nemesis. On a judgment basis, I find Mr. Tessema is entitled to 3 weeks of damages in lieu of notice. This equals $1,800 (90 hours x $20 per hour).

Claim for $60 reimbursement for the criminal record check

32. As noted, Mr. Tessema claims reimbursement of $60 that he paid to obtain a criminal record check. Nemesis undisputedly required Mr. Tessema to provide a criminal record check as a condition of its hiring him.

33. I find nothing in the parties' communications that says this charge is reimbursable if Nemesis fired Mr. Tessema or if it even decided not to hire Mr. Tessema. Mr. Tessema does not say Nemesis ever promised to reimburse this charge.

34. I agree with Nemesis that Mr. Tessema is responsible for this charge, as providing the criminal record check was a condition of Nemesis hiring him. Mr. Tessema could have chosen not to apply for position but chose to do so. I dismiss this claim.

Interest, CRT fees, and dispute-related expenses

35. While Mr. Tessema argues he could have earned interest in an investment or savings account, there is no evidence the parties had an agreement about interest. In the absence of an agreement about interest, I find Mr. Tessema is entitled to interest under the *Court Order Interest Act* (COIA), which applies to the CRT. I find Mr. Tessema is entitled to pre-judgment interest on the $1,800 under the COIA.

Calculated from December 15, 2021 to the date of this decision, this interest equals $13.03.

36. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. Mr. Tessema paid no CRT fees and does not claim dispute-related expenses, so I make no order for them.

ORDERS

37. Within 21 days of this decision, I order Nemesis to pay Mr. Tessema a total of $1,813.03, broken down as follows:

    a. $1,800 in damages, and

    b. $13.03 in pre-judgment interest under the COIA.

38. Mr. Tessema is entitled to post-judgment interest, as applicable. I dismiss Mr. Tessema's remaining claims and all claims against Mr. Shevlin.

39. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair