Employment Standards TRIBUNAL

Citation: Columbus Meat Market Ltd. (Re)
2024 BCEST 97

# EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

\- by -

Columbus Meat Market Ltd.

\- of a Determination issued by -

The Director of Employment Standards

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| PANEL: | Kenneth Wm. Thornicroft |
| SUBMISSIONS: | George Douvelos, legal counsel for Columbus Meat Market Ltd.<br>Colin White, on his own behalf<br>Courtney Milburn, delegate of the Director of Employment Standards |
| FILE NUMBER: | 2024/034 |
| DATE OF DECISION: | October 18, 2024 |

# DECISION

## OVERVIEW

1. On March 4, 2024, a delegate of the Director of Employment Standards ("delegate") issued a determination ("Determination") under section 79 of the *Employment Standards Act* (*ESA*) ordering Columbus Meat Market Ltd. ("employer") to pay $6,986.88 to a former employee ("complainant"), on account of section 63 compensation for length of service (seven weeks' wages), concomitant vacation pay, and section 88 interest.

2. Additionally, and also by way of the Determination, the delegate ordered the employer to pay $500 as a monetary penalty (see section 98) for having contravened section 63. Accordingly, the employer's total liability under the Determination is $7,486.88.

3. The delegate issued his "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination.

4. The employer appeals the Determination, relying on all three statutory grounds, namely, that the delegate erred in law and failed to observe the principles of natural justice, and also on the basis that it has "new evidence" (see sections 112(1)(a), (b), and (c) of the *ESA*). In essence, the employer says that the complainant quit his employment and, that being the case, he was not entitled to any section 63 compensation (see section 63(3)(c) of the *ESA*).

5. While I find that there is no merit to the "natural justice" and "new evidence" grounds of appeal, I am satisfied that the delegate erred in law in awarding the complainant section 63 compensation. Accordingly, I am cancelling the Determination

## BACKGROUND FACTS AND THE DELEGATE'S REASONS

6. The employer operates a butcher shop in Vancouver. The complainant worked for the employer as a butcher from October 20, 2014 until February 17, 2022. On March 15, 2022, the complainant filed an unpaid wage complaint that, in due course, was the subject of an investigation by the Employment Standards Branch (ESB). In his complaint, the complainant indicated that he had been wrongfully suspended and then terminated. In addition to his claim for compensation for length of service, the complainant advanced separate claims for unpaid overtime, vacation pay, and statutory holiday pay.

7. On May 16, 2023, an ESB officer issued an "Investigation Report" in which he summarized the parties' positions, but did not make any affirmative findings regarding either party's relative credibility, or whether the complainant had been unlawfully dismissed. Both parties were invited to file written responses to the officer's report, but only the employer filed a substantive response.

8. The parties generally agree about the essential facts relating to the complainant's termination of employment.

9. The complainant's position, as set out in the delegate's reasons, was as follows: (page R3)

> The Complainant stated that the Employer "suspended" his employment on February 17, 2022, reducing his hours to zero. On the morning of February 17, 2022, the Complainant attended the worksite to begin his regular shift. One hour into his shift, an owner, Eugenio Masi (Mr. Masi), instructed employees to wear a mask while working due to a British Columbia public health mandate. The Complainant refused, telling Mr. Masi that he believed the policy was ineffective and applied inconsistently. The Complainant continued to work for another hour before taking a break. At this point, Mr. Masi asked to speak with the Complainant in his office. The Complainant continued to argue against wearing the mask, so Mr. Masi told the Complainant that his employment was immediately suspended. The Complainant collected his personal belongings and left the worksite.

10. On March 9, 2022, the employer issued a Record of Employment which stated that the complainant would not be returning to the workplace due to a "Shortage of work/End of contract or Season" (code "A" on the form). The delegate's reasons (page R3-R4) continue:

> On March 27, 2022, the Employer emailed the Complainant, stating that his employment had not been terminated. The Employer stated that they had not heard from the Complainant since February 17, 2022, and that they were waiting for the Complainant to advise if and when he would return to work. They explained that they issued the ROE after not hearing from the Complainant and indicated on the ROE that the Complainant's status was unknown. The Employer invited the Complainant to call or meet with them to discuss his return to work.
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> On March 28, 2022, the Complainant emailed the Employer, stating that he believed his employment was no longer possible. He took issue with the sudden suspension and lack of communication regarding the duration of the suspension. He challenged the Employer's claim that he had not contacted them since February 17, 2022, stating that he emailed them on March 11, 2022, after the provincial government had lifted their mask mandates.
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> The Complainant argued that his employment was terminated due to a change in his conditions of employment, as the Employer reduced his hours to zero on February 17, 2022.

11. The employer's position, as set out in the delegate's reasons (at page R4), was as follows:

> ...the Employer stated that the Complainant "resigned his position due to his unwillingness to comply with a public health order."
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> ...
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> On February 17, 2022, Mr. Masi reminded all employees of the mask mandate issued by the British Columbian government, requesting all employees put their masks on. The Complainant, working as a butcher that day, refused. According to the Employer, the Complainant told Mr. Masi that he was "not putting that fucking mask on again. I refuse to put it on so go ahead and fire me."
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> Both Mr. Masi and another person named Giancarlo spoke with the Complainant to diffuse the situation and ensure his compliance with the mask mandate. As a result of failing to follow the mask mandate, Mr. Masi informed the Complainant that he was

> suspended. The Complainant allegedly yelled to other employees that he was suspended and that they should also refuse the mask mandate.
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> The Employer's position is that the Complainant quit by refusing to put on the mask and telling the Employer to fire him.
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> On March 27, 2022, The Employer contact [*sic*] the Complainant to make arrangements for his return to work. The Complainant refused to make any such arrangements. ... The Employer stated that the Complainant quit, but that even if he did not quit, his termination by the Employer was legally justified.

12. The above excerpts from the delegate's reasons are largely verbatim renditions from the ESB officer's Investigation Report. The delegate did not conduct any further inquiries. Rather, he issued the Determination and his reasons based solely on the information that had previously been submitted by the parties to the ESB during the investigation.

13. The delegate made several findings, only one of which is now before me in this appeal. First, he determined that the complainant was not entitled to any overtime pay. Second, he determined that, apart from vacation pay on the section 63 award, there was no outstanding vacation pay. Third, the complainant was properly paid for all statutory holidays during the wage recovery period. Finally, the complainant was entitled to section 63 compensation for length of service (and concomitant vacation pay). Since the complainant never appealed the delegate's finding on any of the first three matters, the delegate's determination of the section 63 claim is the only matter at issue in this appeal.

*Did the complainant quit?*

14. With respect to the section 63 claim, the delegate correctly noted that there was a factual dispute between the parties – the employer maintained that the complainant quit while the complainant maintained that he had been dismissed without just cause. The delegate also correctly identified the legal test for a quit, namely, that the employer must demonstrate that the employee *intended* to quit (the subjective element) and *behaved* in a manner consistent with having voluntarily quit (the objective element).

15. The delegate stated that "it is not clear that on February 17, 2022, the Complainant satisfied the subjective test for quitting" (page R7). The delegate's reasoning on this point is follows (at page R7):

> Not only did the Employer state in their March 27, 2022, email that the Complainant stated that he had not quit on February 17, 2022, but the Complainant's subsequent follow-up emails with the Employer corroborate his confusion over his employment status and do not support the notion that the Complainant formed an intention to quit on February 17, 2022. Rather, both parties agreed that the Complainant's work was "suspended," with the Complainant seeming to understand that he would return to work at some point after February 17, 2022. The Complainant's telling the Employer to "fire'" him does not demonstrate his intention to quit. An employee's resignation must be clear and unequivocal. Instead of indicating an intention to quit, telling the Employer to "fire" him reasonably indicates the degree to which he did not want to follow the mask mandate, not his desire to quit.

16. The delegate also determined that there was insufficient evidence to satisfy the "objective" element (at pages R6-R7):

> In his emails to the Employer, the Complainant indicated that the Employer suspended his employment on February 17, 2022, and that he was unsure of his employment status since that date. In the email from the Employer to the Complainant on March 27, 2022, the Employer stated that they suspended the Complainant's employment on February 17, 2022, for failing to follow the COVID-19 mask mandate. In that email, the Employer also indicated that the Complainant did not believe he had quit – he told employees that he had not quit – and that he understood his employment was suspended. The Employer also stated in the email on March 27, 2022, that they issued the Record of Employment on March 9, 2022, because the Complainant had failed to communicate when he would return to work...
>
> Given the Employer's email on March 27, 2022, and their statements, it does not appear that, at the time, they believed the Complainant had quit on February 17, 2022. Instead, they corroborated the Complainant's position that his employment was suspended. Regardless, even if the Employer did believe the Complainant had quit, they provided no evidence that they attempted to contact him in the days following the events of February 17, 2022. To the contrary, the email on March 27, 2022, confirms that they did not attempt to contact the Complainant until well after February 17, 2022, issuing the ROE without any confirmation of the Complainant's intention to return to work.
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> Again, the onus to confirm that an employee has willingly quit resides with the employer. I am not satisfied that the Employer performed their due diligence to verify that the Complainant quit on February 17, 2022.

*Was there just cause for dismissal?*

17. In its legal counsel's (not the same counsel who represents the employer in this appeal) response to the Investigation Report, dated May 30, 2023, the employer advanced alternative positions. First, the employer stated that it never terminated the complainant's employment: "At no time did Columbus terminate the employment of [the complainant], the decision to stop working at Columbus was that of [the complainant] when he said 'I am not putting that fucking mask on again ahead and fire me.'" Second, the employer argued that, apart from whether the complainant actually quit, there was nonetheless just cause for dismissal (in which case section 63 compensation is not payable):

> Columbus was doing everything in their power to follow the Mask Mandate and [the complainant] was refusing to comply and was engaged in insubordination. Despite that, management at Columbus still tried to persuade [the complainant] to be more reasonable and simply follow the Mask Mandate, but he continued to refuse.
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> Finally, on 27 March 2022, [the complainant] was contacted to make arrangements for his return to work and he refused to make any such arrangements.
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> The issue raised by [the complainant] in this complaint has been determined by our Courts and Human Rights Tribunal with the conclusion that refusal to comply with the Mask Mandate amounts to insubordination and is a ground for the termination of

> employment: see *The Customer v. The Store*, 2021 BCRT 39 and *The Worker v. The District Managers*, 2021 BCHRT 41.
>
> In the case the facts are that [the complainant] quit his position when he swore and said "go ahead and fire me" and even if the Employment Standards Branch somehow finds that his comments were not a voluntary resignation and that Columbus terminated his employment, then such termination was legally justified given his insubordination.

18. The delegate held that the employer was not entitled to advance alternative arguments (i.e., quit and just cause), stating (at page R8):

> The Employer cannot simultaneously believe that the Complainant quit and believe that they terminated the Complainant's employment with just cause. Either the Complainant terminated the employment relationship, or the Employer did. The Employer made it clear in their response to the investigation report that their belief on February 17, 2022, was that the Complainant had terminated employment. Moreover, in their email on March 27, 2022, the Employer stated that they had not terminated the employment. Instead, they "suspended" employment. If the Employer did not terminate the employment, they could not have terminated the employment with just cause. For these reasons, I cannot find that the Employer terminated the Complainant with just cause on February 17, 2022.

19. In any event, the delegate also determined that even if there had been a dismissal, that dismissal was not for just cause, since the misconduct in question – refusing to abide by a provincially-mandated mask mandate – did not constitute "major misconduct" (page R8). The delegate also stated (inaccurately) that the complainant had not been warned about his failure to abide by the mask mandate prior to February 17, 2022. The delegate also stated that the complainant was never warned about the consequences that might follow, including termination of employment, if he persistently refused to abide by the mask mandate.

20. The delegate also addressed, even though he acknowledged the employer never raised the issue, whether it could be argued that the complainant's suspension constituted a "temporary layoff" thereby relieving the employer from having to pay section 63 compensation. The delegate ultimately concluded that there was no merit to this possible argument.

*Section 65(1)(d)*

21. The delegate also addressed section 65(1)(d) of the *ESA* – this provision states that section 63 compensation is not payable where the employee was "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance" (subject to some exceptions, none of which is germane here). The delegate acknowledged that "[t]he COVID-19 pandemic and subsequent masking requirements in British Columbia could reasonably constitute unforeseen circumstances that could result in contractual obligations being unable to be met". However, he also stated that he was not satisfied that the provincial mask mandate applied "to the back of the store, where the public could not enter" (and where the complainant typically worked), and also stated that the employer failed to prove that "the Complainant's contractual duties could not be met or that special arrangements could not have been made" (page R9) to allow the complainant to continue to work.

*Deemed termination*

22. Finally, the delegate addressed section 66 of the *ESA*. This provision states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." "Conditions of employment" are defined in section 1(1) as meaning "all matters and circumstances that in any way affect the employment relationship of employers and employees." This provision is broadly analogous to the common law doctrine of "constructive dismissal."

23. The delegate, noting that the employer "reduced the Complainant's hours from 40 hours per week to zero hours, and...did not contact him regarding return to work until more than five weeks after doing so on February 17, 2022," held that this action constituted a "substantial alteration" within section 66 (pages R9-R10). The delegate determined that the complainant was dismissed as of February 17, 2022, and that he was entitled to section 63 compensation.

## THE EMPLOYER'S REASONS FOR APPEAL

24. As noted at the outset of these reasons, the employer is relying on all three statutory grounds. The employer's submission does not discretely identify the evidence and argument it says supports each of the three grounds.

25. The employer maintains that it suspended the complainant on February 17, 2022, because he refused to comply with the provincial masking mandate issued shortly after the onset of the Covid-19 pandemic within British Columbia. Ultimately, the employer says that the complainant "quit on his own" and that being the case, he should not have been awarded section 63 compensation for length of service. I presume the employer is arguing (although this is not explicit in its submission) that the delegate erred in law in finding that the complainant did not voluntarily quit his employment.

26. The employer's submission also addresses the complainant's claims for overtime pay, vacation pay, and statutory holiday pay as set out in his original complaint. However, I am puzzled as to why the employer raised these matters in its submission since the delegate did not award the complainant any monies on these accounts, and the complainant never appealed the Determination.

27. Although the employer checked off the "natural justice" ground of appeal in its Appeal Form, it did not make any argument in its appeal submissions regarding this matter. From my review of the section 112(5) record, I cannot find any legal or factual basis to support this ground of appeal.

28. The employer attached a significant number of documents to its various submissions, presumably as "new evidence" under section 112(1)(c) of the *ESA*. "New evidence" is admissible on appeal provided: i) the "new evidence" is such that, with the exercise of due diligence, it could not have been discovered and presented to the Director of Employment Standards during the investigation; ii) the evidence must be relevant to a material issue arising from the complaint(s); iii) the evidence must be credible in the sense that it is reasonably capable of belief; and iv) 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 (see *Davies et al.*, BC EST # D171/03). The employer's submission does not specifically address these considerations.

29. Insofar as these various documents are concerned – almost entirely consisting of payroll records, copies of emails, and documents from the section 112(5) record – these documents all predate the issuance of the Determination and, accordingly, were "available at the time the determination was being made". That being the case, these documents are presumptively inadmissible. Apart from that consideration, none of the documents has any probative value regarding the legal issue that arises in this appeal.

30. The employer does not contest the delegate's calculation of the complainant's unpaid wage award, assuming that the complainant is entitled to section 63 compensation.

## THE RESPONDENTS' SUBMISSIONS

31. The complainant says that the employer's assertions regarding his behaviour are inaccurate and maintains that the appeal is frivolous or otherwise made in bad faith (sections 114(1)(c) and (d) of the *ESA*). He says that he has been "honest" and "completely transparent" and that his former employer abused his authority. The complainant is frustrated about the length delay involved in this matter.

32. The Director of Employment Standards ("Director") noted that several facts were not in dispute including:

- "Both parties agreed that on February 17, 2022, the Complainant refused to wear a mask as required by the Employer. The Employer was, in keeping with the Provincial Health Orders, required to have employees wear a mask. As a result, the Complainant was 'suspended' from work by the Employer.
- "...both parties agreed that the Employer did not contact the Complainant after the suspension date to discuss the suspension, any steps he would need to take in order to return to work, or his employment status until the Complainant reached out on March 11, 2022 when the provincial mask mandate was lifted."
- "On March 28, 2022, the Complainant emailed the Employer and argued that the mask policy was not applied consistently during his employment. He also stated that after having his employment suspended, and waiting a few weeks for response, he would not return to work given their lack of response to his initial emails regarding his employment status on March 11, 2022."

33. Insofar as the merits of the appeal is concerned, the Director's position is that the appeal should be dismissed:

> The decision maker addressed in the determination that following the suspension, the Employer failed to make any effort to communicate with the Complainant, and then issued an ROE on March 9, 2022. They failed to demonstrate that the Complainant quit his employment. In contrast, when the mask mandate was lifted on March 11, 2022, the Complainant contacted the Employer to resume work, actions, which are

consistent with him believing that he was "suspended" and are inconsistent with the Employers assertion that the Complainant quit his employment.

## FINDINGS AND ANALYSIS

*The complainant's "deemed termination"*

34. The delegate's central determination regarding the complainant's section 63 entitlement was predicated on his finding that the employer's decision to suspend the complainant on February 17, 2022 constituted a "deemed termination" under section 66 of the *ESA*. Section 66 states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." The delegate determined that "the Employer unilaterally and substantially altered a condition of employment on February 17, 2022, effectively terminating employment on that date" (page R10).

35. The delegate noted that the employer "reduced the Complainant's hours from 40 hours per week to zero hours" (delegate's reasons, page R9), and that "there is no evidence that the Complainant consented to the reduction in hours on February 17, 2022," or that he "agreed to this decision" (page R10). However, these findings completely miss the point that if the employer had just cause to suspend the complainant, whether the complainant consented to, or otherwise accepted, the suspension it is wholly irrelevant.

36. In *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, the Supreme Court of Canada confirmed, at para. 43:

> The employer's power to impose a suspension as a disciplinary penalty is generally recognized and is not in issue in this appeal. The existence of this power has been uniformly recognized in the case law, both by specialized labour relations tribunals and by the superior courts in the exercise of their power of judicial review or of their direct jurisdiction over disputes arising out of contracts of employment.
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> (underlining in original text); see also paras. 45-46.

37. It is a matter of public record, and the Director in her submission concedes, that the employer was obliged to enforce a "masking rule" for all its employees, including the complainant. Although the complainant argued that he was not required to wear a mask, since he worked "in the back of the store" (delegate's reasons, page R9), there is nothing in the evidentiary record to support that assertion. Similarly, the delegate's finding that "I am further unsatisfied that the Employer demonstrated the Complainant's contractual duties could not be met or that special arrangements could not have been made" is a finding that is not supported by any evidence. Clearly, the complainant, as a butcher, could not have worked from home. The complainant did not provide any legal basis for his assertion that he was not required to abide by the mask mandate while at work.

38. The employer's uncontested evidence is that the complainant *was* complying with the mask mandate until the events of February 17, 2022. The complainant's own evidence, as recorded in the delegate's reasons, was that he decided to refuse to continue wearing a mask because he believed the provincially mandated masking policy "was ineffective and applied inconsistently." There is no evidence in the record to demonstrate that the complainant had

the requisite medical expertise to knowledgably comment on the policy's efficacy. The employer, of course, was legally bound to enforce the policy at its workplace. The complainant's refusal to abide by the masking policy, despite a clear and unequivocal direction from his employer, constituted major insubordination, particularly since his refusal placed his employer in serious legal jeopardy, and put his fellow employees', and the employer's customers', health at risk. Employees are not free to pick and choose what particular legally binding workplace orders they will follow. The Covid-19 global pandemic was a serious health emergency, one that ultimately caused thousands of deaths in British Columbia and in this context, legally binding public health orders were issued. The employer was required to enforce, and the complainant was legally obliged to follow, these health orders.

39. The employer's uncontested evidence is that when directed to wear a mask, the complainant responded that he was "not putting that fucking mask on again," and "I refuse to put it on so go ahead and fire me" (page R4). In a document entitled "Suspension Timeline of Events" that is contained in the section 112(5) record, and apparently prepared by the complainant, the complainant confirmed the employer's evidence in this regard. To make matters worse, the complainant then attempted to persuade other employees to also refuse to abide by the masking mandate. The employer attempted to diffuse the situation and, after a "cooling off" period, once again encouraged the complainant to abide by the masking mandate – but he adamantly refused.

40. Given the above evidence, in my view, the employer could have dismissed the complainant, with just cause, at that point. However, that is not the course the employer followed. Rather, the employer suspended the complainant. In essence, the employer waived the complainant's repudiatory breach, continued the employment contract, and imposed a lesser sanction, namely, suspension. The suspension was necessarily for an indefinite period, given that the duration of the mask mandate was, as of February 17, 2022, not known. In the circumstances, a lengthy suspension – even one continuing beyond the end of the mask mandate about one month later – was called for (I am of the view that up to a 3-month suspension would have been justified).

41. Since the employer had just cause to dismiss the complainant on February 17, 2022, it inevitably follows that it had just cause to impose a lesser sanction. I find that the employer had just cause to suspend the complainant on February 17, 2022. That being the case, there was no section 66 "deemed termination" at that point in time, and I find that the delegate erred in law in concluding otherwise. This is not a situation where the *employer* breached the contract, since it had an extant contractual right to suspend the complainant for proper cause (*Cabiakman*, *supra*). Rather, the *complainant* committed a repudiatory breach of the employment contract which, in turn, permitted the employer to either terminate the agreement or keep it in force (see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10).

42. As of February 17, 2022, the complainant's position was clear – he had no intention of returning to work if he was required to abide by the provincial health orders regarding wearing face coverings. At no time, while the mask mandate was in force, did he ever contact the employer

to advise that he was willing to return to work and would abide by the mask mandate. On March 8, 2022, the employer issued a Record of Employment" (ROE) regarding the complainant which stated that his last day of work was February 17, 2022, and that it was issued due to a "Shortage of work/End of contract or Season" (code A). Critically, the ROE was not issued due to a "quit" (code E) or a "dismissal" (code M).

43. On March 11, 2022, the mask mandate governing the employer's workplace was lifted. On that date, the complainant sent an email to the employer querying his employment status: "Since my suspension on February 17th, 2022 for not complying with your order to wear a face covering, I have not received any indications whether my suspension will continue and for how long, or, ultimately end in my termination of employment." He asked for a copy of his ROE (an electronic copy was provided to him on March 11, 2022).

44. On March 12, 2022, the complainant sent a short email to the employer: "In regards to my original question yesterday, could you please clarify my employment status." On March 27, 2022 (there was some delay since the employer's principal was away on vacation), the employer sent an email to the complainant which stated, in part, that the complainant was never terminated, and was welcome to return to work at the same job and at the same pay rate. The employer asked the complainant to contact it immediately to "have a discussion with the owner to resume [your] duties."

45. On March 28, 2022, the complainant responded, by email, setting out his view of the matter and ultimately stating:

> As for returning to work at Columbus Meat Market Ltd., that is not an option. The actions and lack of actions displayed on multiple occasions by Columbus Meat Market Ltd. has created a hostile work environment where I anticipate punishment, harassment, and the continued disregard for employment standards to occur if I return.

46. One would be hard-pressed to characterize the complainant's March 28, 2022 reply to the employer as anything other than a resignation. It was only at this point (i.e., on March 28, 2022, not February 17, 2022) that the parties' employment contract ended. However, section 63(3)(c) of the *ESA* specifically states that an employer is not obliged to provide written notice of termination, or pay compensation for length of service, if the *employee* terminates their employment (as occurred here). In my view, the delegate erred in law in awarding the complainant section 63 compensation for length of service. That being the case, the Determination must be cancelled.

## ORDER

47. Pursuant to section 115(1)(a) of the *ESA*, the Determination is cancelled.

*/S/ Kenneth Wm. Thornicroft*

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