

An Application for Reconsideration

- by -

Lawrence R. Bellman

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATORS: Carol L. Roberts, Panel Chair
David B. Stevenson
April Katz

FILE No.: 2003/41

DATE OF DECISION: January 14, 2004

DECISION

SUBMISSIONS:

On his own behalf: Lawrence Bellman
Counsel for the Director of Employment Standards: Robert Payne, Steele Urquhart Payne
Counsel for Public Service Employee Relations Commission: Marcia McNeil, Fuller Pearlman McNeil

OVERVIEW

The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (“Act”) confers an express reconsideration power on the Tribunal. Section 116 provides

- (1) On application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal, and
 - (b) cancel or vary the order or decision or refer the matter back to the original panel.

This is an application by Lawrence R. Bellman for a reconsideration of Decision #D203/03 (the "Original Decision"), issued by the Tribunal on June 25, 2003.

The relevant factual background is as follows.

Mr. Bellman was employed by the Province of British Columbia (“Province”) as an Industrial Relations Officer for the Employment Standards Branch (“Branch”) from December 15, 1975 until November 23, 2001. Mr. Bellman was on a paid leave of absence (“special paid absence”) until March 25, 2002 which exhausted his earned vacation pay and banked time as an excluded employee of the Province except for one archived day for which he was paid prior to April 1, 2002. Mr. Bellman was paid for 35 days as vacation pay for 2002, following which he proceeded to pension effective April 1, 2002. In addition to the special paid absence prior to retirement, Mr. Bellman received a severance payment.

On August 16, 2002, Mr. Bellman filed a complaint with the Branch contending that he was entitled to annual vacation pay for the 2001 year and annual vacation pay on his severance package.

Prior to filing his complaint, Mr. Bellman had initiated legal action regarding his termination. On November 22, 2001, Mr. Bellman accepted a settlement offer made by the Province, and signed a release. According to the terms of that release, Mr. Bellman released the Province of British Columbia

“...from all manner of actions, causes of actions... debts, accounts claims and demands whatsoever which I ever had, now have or hereafter can, shall or may have arising out of in or in any way connected with my employment or the severance of my employment from ...” the Province.

Mr. Bellman was at all times represented by counsel during the negotiation and signing of this release.

In a decision issued November 29, 2002, the delegate determined that the settlement agreement and release signed by Mr. Bellman was an agreement to waive the minimum requirements of the Act, and were therefore of no effect with respect to Mr. Bellman's claim.

The delegate concluded that Mr. Bellman was not owed any further annual vacation for the 2001 year. The delegate determined that part of Mr. Bellman's settlement was compensation for length of service, required to be paid under the Act. The delegate further determined that Mr. Bellman was owed annual vacation pay on the maximum compensation for length of service of eight weeks.

Both Mr. Bellman and the Public Service Employee Relations Commission (PSERC) appealed the Determination. Mr. Bellman contended that the delegate erred by failing to allow his claim in full. PSERC argued that the delegate erred by finding that Mr. Bellman was entitled to further compensation.

A member of the Tribunal adjudicated Mr. Bellman's appeal and cancelled the determination. With respect to Mr. Bellman's claim for 2001 vacation pay, the member dismissed Mr. Bellman's appeal for two reasons; first, because the settlement agreement and release signed by Mr. Bellman was *bona fide* and was intended to be inclusive of his annual vacation entitlement for 2001, and second, that Mr. Bellman had failed to demonstrate a reviewable error in the factual finding in the Determination that his 2001 annual vacation entitlement had been paid to him.

With respect to the issue of vacation pay on the severance payment, the member allowed PSERC's appeal, for "reasons advanced by Mr. Bellman", stating:

I find that the delegate erred in finding that Bellman was entitled to vacation pay on the severance payment. Specifically, I agree with Bellman that section 63 has no applicability to this case. This is a case about retirement. Bellman did not claim, and would not have been entitled to, compensation for length of service.

The member found that the employer did not terminate Mr. Bellman's employment. She noted that the severance agreement and release referred to Mr. Bellman's retirement. She concluded that the severance payment was not wages and did not attract vacation pay.

ISSUES

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, should the decision be cancelled or varied or sent back to the member?

The Threshold Test

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration

is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss BC EST#D122/96*)

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Mr. Bellman seeks reconsideration of the decision on several of the above noted grounds.

Mr. Bellman argues that the member:

- misunderstood the issue;
- made a decision inconsistent with other decisions;
- failed to apply principles of natural justice; and
- failed to give proper consideration to all the facts.

He argues that the member failed to apply the intent and purpose of the *Act*, specifically, sections 2(a) and (d), 57 and 58, and sections 67 and 68 of the Act.

Mr. Bellman further submits that the member erred in her characterization of the case as one of retirement, and her conclusion that section 63 would thus not apply to his case. He argues that the member failed to apply principles of natural justice in that she did not afford him an opportunity to respond to her determination that this was a retirement issue. He submits that this was never advanced as an argument. On this point, counsel for both PSERC and the Director agree with Mr. Bellman's submissions.

Mr. Bellman submits that the member failed to give proper consideration to all of the facts, and, in essence, repeats much of the submissions he made on appeal.

Finally, Mr. Bellman submits that the member made a decision inconsistent with other decisions, and ignored other decisions of both the Tribunal and the B.C. Court of Appeal on the issue of whether severance is included within the definition of wages.

ANALYSIS

Having reviewed the material, the reconsideration panel is of the view that a reconsideration of the matter is not warranted.

The panel notes at the outset that the member characterized the end of Mr. Bellman's employment as a retirement which did not attract the application of section 63, even though the case was not argued on that basis. The panel finds that, while the termination of Mr. Bellman's employment was not in dispute, a number of the submissions, including those of Mr. Bellman, made reference to both a resignation and a retirement. In his December 19, 2002 appeal submission to the Tribunal, Mr. Bellman states:

“... I retired on March 25, 2002 from the same Ministry in the same capacity. As part of my retirement, I was able to negotiate the regular retirement package afforded employees and a severance package (also known as compensation for length of service or clos).”

We agree that the member's characterization of the end of Mr. Bellman's employment as a “retirement” is not an accurate characterization for the purposes of the Act. Nevertheless, the panel is of the view that the original decision should stand.

Section 63 sets out an employer's liability for length of service compensation. That liability is discharged if an employee is given written notice of termination, receives a combination of notice and money equivalent to the amount the employer is liable to pay, or the employee terminates the employment, retires from employment or is dismissed for just cause.

In the panel's view, the issues raised by Mr. Bellman were resolved by settlement agreement and release. The release confirmed that the settlement reached by Mr. Bellman and the Province was with respect to his

...severance of employment from the Government of the Province of British Columbia, with the exception of any claim or entitlement [he had] arising under the *Pension (Public Service) Act* ...

The release provided that Mr. Bellman released the Province from

...all manner of actions, causes of action, debts, accounts, claim and demands whatsoever which I ever had, now have or hereafter can, shall or may have arising out of in or in any way connected with my employment or the severance of my employment from ...” the Province.

In the panel's view, the settlement agreement covered all that Mr. Bellman was entitled to under the Act. Furthermore, Mr. Bellman accepted the calculation of his earned vacation when he signed the release. As the delegate noted in the Determination, employees are credited with a full year of vacation entitlement each January 1 in advance of the vacation being earned. The delegate found that Mr. Bellman did not provide any evidence to support a finding that he had not been paid his earned 2001 vacation, other than his assertions to challenge the employer's interpretation of the vacation policy.

Mr. Bellman was represented by counsel when he entered into the release. The panel agrees with the member that the delegate should never have investigated Mr. Bellman's complaint once the severance agreement was determined to be *bona fide*.

One of the purposes of the Act is to “provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act” (s. 2). In his report "Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia", Professor Thompson noted that settlement was an important value, and one which was to be fostered:

...any statute such as this one should provide for the least expensive and most rapid procedures possible for resolving differences in these times of increasing legalism and expense in dispute settlement" (at p.29)

While there is a public policy interest in the enforcement of minimum employment standards, there is an equally compelling public interest in the enforcement of bona fide settlement agreements, even where the terms of that settlement may be something less than a party alleges they are entitled to under the Act. In our view, such settlements do not offend the Act. As the Tribunal stated in *Alnor Services Ltd.* (BC EST #D199/99):

The settlement of unpaid wage claims is an integral aspect of the Act...In my view, the entire scheme of the Act is undermined if bona fide settlements can be overridden simply because one party - with the benefit of hindsight - subsequently concludes that they made a bad (or at least not an optimal) bargain.

Mr. Bellman had significant experience as an industrial relations officer, and had sophisticated knowledge of his rights as an employee as well as the jurisprudence of this Tribunal. He could not be said to have entered into the settlement agreement and release without full knowledge and appreciation of the consequences of doing so. Furthermore, he was represented by counsel throughout the process and had the benefit of legal advice prior to signing both the agreement and the release.

ORDER

Pursuant to Section 116 of the Act, the panel denies the application for reconsideration.

Carol L. Roberts
Adjudicator, Panel Chair
Employment Standards Tribunal

David B. Stevenson
Adjudicator
Employment Standards Tribunal

April Katz
Adjudicator
Employment Standards Tribunal