An Application for Reconsideration

- by -

Pioneer Distributors Ltd.
("Pioneer")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2013A/87

DATE OF DECISION: January 20, 2014

DECISION

SUBMISSIONS

Gwendoline Allison — counsel for Pioneer Distributors Ltd.

OVERVIEW

1. Pioneer Distributors Ltd. ("Pioneer") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST # D093/13, made by the Tribunal on November 20, 2013 (the "referral back decision").

2. The referral back decision completed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 27, 2012, an appeal decision on that Determination, BC EST # D095/12 dated September 19, 2012, (the "appeal decision") and a reconsideration decision, BC EST # RD012/13 dated January 25, 2013 (the "first reconsideration decision").

3. The Determination was made by the Director on a complaint filed by Sean Orr ("Orr"), who alleged Pioneer had contravened the *Act* by failing to pay overtime wages and accrued annual vacation. The Determination found that Pioneer had contravened Part 4, section 40 and Part 7, section 58 of the *Act* and ordered Pioneer to pay Orr wages and interest in the amount of $16,059.56 and administrative penalties in the amount of $1,000.00. The Determination dismissed a substantial portion of Orr's annual vacation pay claim.

4. Orr appealed that part of the Determination which had dismissed his annual vacation claim, seeking to have the Tribunal vary the Determination to require payment of all the annual vacation pay to which he had claimed entitlement.

5. The Tribunal Member of the appeal decision allowed the appeal in BC EST # D095/12, finding there were errors of law made in the Determination, found Orr was entitled to annual vacation pay that had been accumulated and carried forward on Pioneer's records since 2003, and ordered Orr's annual vacation pay entitlement be referred back to the Director to be recalculated based on the findings made in the appeal decision.

6. Pioneer filed an application for reconsideration of this decision, alleging it was wrong in law. The reconsideration also sought an oral hearing on the appeal and a stay of the Tribunal's proceedings pending the outcome of a decision in legal proceedings between Pioneer and Orr that were, at the time, before the Supreme Court of British Columbia. Those two aspects of the reconsideration were denied. The Tribunal Member deciding the reconsideration application considered the balance of the application on its merits, found there was no error of law made in the appeal decision and confirmed that decision.

7. The matter went back to the Director where, according to the order made in the appeal decision, Orr's annual vacation pay entitlement was recalculated and submitted back to the Tribunal and provided to the other parties. Submissions were made by the other parties on the Director's recalculation, generating some amendments to it, and the decision which is the subject of this reconsideration application was issued by the Tribunal.

ISSUE

8. In any application for reconsideration there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should grant the request to reconsider and cancel the original decision, as requested in the application, or, if appropriate, to refer the matter back once again, either to the Tribunal Member of the original decision or to a new panel.

ARGUMENT

9. The reasons provided by Pioneer to support this application for reconsideration substantially reiterate the submissions made by Pioneer in response to the recalculation made by the Director, to which Pioneer raised three substantive challenges, which can be summarized as follows:

(i). the Director incorrectly determined the "total wages" on which annual vacation pay is calculated includes vacation pay;

(ii). the Director acted without jurisdiction in changing the annual vacation pay calculation for the period November 1, 2008 to September 10, 2010; and

(iii). the Director erred in failing to "value" the vacation pay for the vacation time taken by Orr on the "full compensation" he received rather than on "merely an allocation for base salary".

10. The original decision addressed each of the above arguments, finding: first, that there was no error in the Director including annual vacation pay as a component of *"total wages during the year of employment entitling the employee to vacation pay"*; second, the Director made no error in calculating Orr's vacation pay entitlement for the period November 1, 2003, to the date of his termination – September 10, 2010; and third, the Director did not err by rejecting Pioneer's submission that vacation days taken by Orr should be "valued" to reflect a *per diem* rate for vacation pay that incorporated a consideration of all his earnings and that "value" should be deducted from the amount of accumulated vacation pay.

11. In this application for reconsideration, Pioneer says each of the conclusions made in the original decision on these arguments is an error and, as indicated above, with some minor differences in form but not substance, restates the challenges made to the Director's recalculations.

ANALYSIS

12. Section 116 states:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section
>
> (3) An application may be made only once with respect to the same order or decision.

13. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the application and interpretation"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

> . . . the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

14. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

15. The Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

16. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

17. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

18. Having reviewed the original decision, the material in the appeal file and the submissions of Pioneer on the reconsideration request, I am not persuaded this matter warrants reconsideration.

19. I shall comment briefly on each of the arguments raised to support a reconsideration.

20. Pioneer submits it is an error of law to include annual vacation pay as a component of "wages" when determining what are the *"total wages"* of an employee in the year of employment entitling the employee to vacation pay.

21. This argument is totally devoid of merit. It represents a fundamental misunderstanding, and misstatement, of annual vacation pay as "wages" under the *Act*. The interpretation and application of section 58 of the *Act* has been consistent and is adequately supported by the wording of the operative provisions in the *Act* and in the purposes of the legislation. That interpretation is accurately reflected in the following paragraph of the Tribunal's reconsideration decision, *Unity Wireless Systems Corporation*, BC EST # D041/05, a decision that is cited in the original decision:

> According to section 58 of the *Act*, the calculation of an employee's vacation pay is to be based on the employee's "total wages during the year of employment entitling the employee to the vacation pay". The term "wages" is broadly and non-exhaustively defined in s. (1) of the *Act* to include, among other things, "salaries, commissions or money, paid or payable by an employer to an employee for work". Vacation pay is earned and payable for work. The statutory definition of "wages" does not expressly exclude vacation pay that has already been paid. Accordingly, vacation pay forms part of "wages" within the meaning of the *Act* (*United Used Auto and Truck Parts Ltd.*, BCEST #D334101, *Xinex Networks Inc.*, BCEST #D068/99). The Tribunal has held that the term *"total wages"* in s. 58 included vacation pay (*National Leasing Group Inc.*, BCEST #D552/99, at paras. 32-33; *Markin*, BCEST #228/98, at para. 12; *Primco (PWL) Ltd.*, BCEST #D144/97, at para. 15; *Pay Less Gas Co. (1972) v. British Columbia (Director of Employment Standards)* (1991), 38 CCEL at 117 (BCSC)).

22. The original decision reflects a clear and correct statement of the law of the *Act*, as did the recalculation done by the Director. I will add one further comment. Although it is not expressly raised in either the appeal of the referral back or in this application, there is some suggestion that it was generally wrong for the Director to have calculated Orr's vacation pay entitlement as he did, as the vacation pay entitlement was technically not being calculated under section 58. In the recalculation, the Director stated that, "the . . . . calculation is based on the accrual of vacation pay using the same rationale found in section 58". I accept that it was entirely reasonable, and not an error of law, for the Director to have calculated Orr's vacation pay entitlement for the period from 2003 to the termination of his employment in a manner consistent with the calculation of such entitlement under the *Act*.

23. On the second argument, for the reasons stated in the original decision, I reject any suggestion that the order made in the appeal decision – to calculate the balance of vacation pay owed to Orr – precluded inclusion of the period from November 1, 2008, to September 10, 2010, in the recalculation. This matter is plainly a question of the intended scope of the language of the order made and is a matter in respect of which the Tribunal Member making the original decision was neither prohibited nor disqualified from addressing. I disagree with the characterization of Pioneer that the explanation given by the Tribunal Member was either a "reconsideration" or a "justification".

24. There is no error in the Tribunal Member of the original decision finding the Director had not acted outside the scope of the referral back order made in the appeal decision.

25. Lastly, I agree completely with the disposition of the argument that the Director erred by failing to "value" Orr's vacation days on his "total income" and reduce his accumulated vacation pay entitlement by that "value". An examination of the Record demonstrates this argument is without basis in fact; nor does it accord with any accepted interpretation, application or administration of the annual vacation pay provisions of the *Act*.

26. In sum, Pioneer has not shown the original decision was wrong in any respect. The Tribunal will not revisit the arguments made by Pioneer in its appeal of the referral back. The application for reconsideration is denied.

ORDER

27. Pursuant to section 116 of the *Act*, the original decision, BC EST # D093/13, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal