

An application for Reconsideration

- by -

Man Soo Kyung

- 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: Yuki Matsuno

FILE No.: 2008A/129

DATE OF DECISION: February 3, 2009

DECISION

SUBMISSIONS

Man Soo Kyung	for himself
Ross Keegan	for Dennison Chevrolet Ltd.
Chantal Martel	for the Director of Employment Standards

OVERVIEW

1. Mr. Kyung applies for reconsideration of Decision Bcest #D100/08, issued by the Tribunal on October 7, 2008 (the “Decision”). The Decision was issued with respect to an appeal by Mr. Kyung of a determination issued by a delegate of the Director of Employment Standards (the “Director”) dated July 4, 2008 (the “Determination”). The Determination concerned Mr. Kyung’s complaint against Dennison Chevrolet Ltd. (the “Employer”), where Mr. Kyung was employed as an auto body painter from August 17, 1082 to August 10, 2007, when he quit his employment.

The Determination

2. The issues that the delegate had to decide in the Determination were (1) whether Mr. Kyung was entitled to compensation for length of service and (2) whether Mr. Kyung was owed a \$1,000.00 bonus on his 20th anniversary of employment in 2002. With respect to the first issue, Mr. Kyung testified that starting in 2003, he was treated so unfairly and poorly in his employment that he was forced to quit his job. The delegate approached the issue of compensation for length of service by first examining the question of whether section 66 of the *Employment Standards Act* (the “Act”) would apply to Mr. Kyung’s case. Section 66 provides that the Director may deem an employee’s employment to have been terminated if a condition of employment is substantially altered. The purpose of the section is to protect employees from changes that substantially alter their conditions of work. The delegate found that Mr. Kyung did not prove that any condition of his employment was substantially altered to the extent that he was brought within the ambit of section 66:

. . . Kyung has provided insufficient evidence to support his employment conditions were substantially altered, forcing him to quit. There was nothing presented showing Dennison changed Kyung’s wages, working conditions or benefits in any way which an objective, reasonable person would find to be unfair, unreasonable and unacceptable.

Accordingly, I am not persuaded that changes in Kyung’s working conditions, specifically the hours of work, constituted a substantial alteration in the conditions of Kyung’s employment within the meaning of Section 66 of the Act. Further, even if the above finding is wrong, I find Kyung accepted the alterations (if substantial) because he did not raise any objections to the changes within a reasonable period of time.

3. As a result, the delegate found that Mr. Kyung was not entitled to compensation for length of service. As for the issue of whether Mr. Kyung was entitled to a \$1,000.00 bonus upon his 20th anniversary, the delegate found that he was not so entitled, on the following basis: 1) she preferred the evidence of the

Employer that there was no policy to pay bonuses for length of service, and any payment of bonuses was at the discretion of the manager; and (2) even if Mr. Kyung had been found to be entitled to the bonus, the bonus was payable to him in 2002, and therefore Mr. Kyung would not be able to recover it because it did not become payable to him in the last 6 months of employment, as required in section 80 of the *Act*. The delegate determined that the *Act* had not been contravened.

The Decision

4. Mr. Kyung appealed the Determination, and his appeal was decided by a member of the Tribunal (the “Member”). In the Decision, the Member considered Mr. Kyung’s appeal with respect to two grounds of appeal: failure to follow the principles of natural justice, and error of law. With respect to the former, the Member found Mr. Kyung had the opportunity to hear and respond to the Employer’s evidence and that there was no evidence that the principles of natural justice were not followed.
5. With respect to error of law, the Member found, after reviewing the evidence that was before the Director, that Mr. Kyung did not discharge his burden of showing that the Director took a view of the facts during the investigation that could not reasonably be supported on the evidence before him. The Member also noted that it was apparent that Mr. Kyung was not satisfied with the outcome of the Determination and was looking for another opportunity to have his case reheard; this was underscored by the fact that Mr. Kyung, as part of his appeal, submitted the two sets of submissions that he had already forwarded to the Delegate prior to the Determination being made.

The Reconsideration Request

6. In his request for reconsideration, Mr. Kyung says that his account of his three and a half years of alleged mistreatment at work have not been carefully considered. He outlines a comparison of the hours worked by his co-worker and by him from June 2005 to June 2006, arguing that there was a large difference in the workload, his being the lighter. He alleges he was poorly treated by management and gives several examples. Mr. Kyung also maintains he should have been paid a bonus for his 20th anniversary.

ISSUE

7. When faced with an application for reconsideration, the Tribunal must consider two questions:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the member?

ARGUMENT AND ANALYSIS

8. Section 116 of the Act provides the Tribunal with the power to reconsider decisions:
- (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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
9. The Tribunal reconsiders decisions only in very limited and exceptional circumstances; reconsideration is not meant to as an opportunity for parties to have their case re-heard. In *Milan Holdings Inc.* (BC EST #D313/98, reconsideration of BC EST #D559/97), the Tribunal outlined a two-stage analysis in determining whether a decision should be reconsidered. The first stage is to determine whether the matters raised by the appellant in the application in fact merit reconsideration. In this regard, as stated in *Milan*:
- 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
10. The Tribunal's decision in *Zoltan Kiss*, BC EST #D122/96 noted a number of grounds on which a Tribunal ought to reconsider a decision:
- a failure by the Adjudicator to comply with the principles of natural justice;
 - there is some mistake in stating the facts;
 - a failure to be consistent with other decisions which are not distinguishable on the facts;
 - some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
 - some serious mistake in applying the law;
 - some misunderstandings of or a failure to deal with a significant issue in the appeal; and
 - some clerical error exists in the decision.
11. This, of course, is not an exhaustive list of the possible grounds for reconsidering a decision or order.
12. After weighing the factors relevant to the matter before it, the Panel may decide that the application is not appropriate for reconsideration, in which case it will usually give the reasons for its decision. On the other hand, if the Panel determines that one or more of the issues raised in the application is appropriate for reconsideration, it will proceed to review the merits of the application and make a decision.
13. In this case, it is my view that reconsideration is not warranted.

14. In his application, Mr. Kyung reiterates many of the facts that he has already presented to both the Director's delegate before the Determination was made and to the Member before the Decision was made. He says that the results of the Determination and Decision are wrong and that his situation was not properly considered. For instance, with the issue of the bonus, he says again that he was treated unfairly and that he should have received the bonus. However, as the Director's delegate points out in her reply submissions, the issue of the bonus is limited in any event by section 80 of the *Act*, which provides for recovery for amounts that become payable in the period beginning 6 months before the date of the complaint. Even if the Director's delegate had found that the Employer had policy to pay a bonus upon an employee's 20th anniversary (which she expressly did not), Mr. Kyung would not have been able to recover the amount for the bonus because it became payable six years ago.
15. It is clear that Mr. Kyung is looking to have his case re-heard and to make the arguments he has made before. As outlined above, however, a reconsideration is not another "kick at the can" for a party who is not satisfied with the results he or she has received so far. There must be a significant question of law, fact, principle, or procedure in order for a reconsideration of a decision to be warranted. Mr. Kyung's submissions do not raise any such significant question. The issue of the bonus, like the issue of compensation for length of service, was canvassed and decided in the Determination. Mr. Kyung had an opportunity to put forward all the information regarding his claim, attend the hearing, and testify before the Director made the Determination. Mr. Kyung then had an opportunity to appeal the Determination, and the Member who reviewed the Determination found no grounds to disturb its conclusions. In my review of the Decision, I find no grounds to disturb its confirmation of the Determination.
16. I find that Mr. Kyung's application reiterates the issues he raised on appeal, which were correctly addressed by the Member in the Decision. Mr. Kyung has not shown any cause for the Decision to be reconsidered, and no analysis of the Decision on the merits is therefore necessary.

ORDER

17. Pursuant to Section 116(1)(b) of the *Act*, I order that Tribunal Decision BCEST #D100/08, dated October 7, 2008, be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal