An Application for Reconsideration

- by -

Witmar Developments Ltd. and Witmar Holdings Ltd. carrying on business as "Palisade Apartments", "Recreation Inn and Suites", "Ponderosa Motel", "Dilworth Joint Venture" and "Dilworth Inn"

(the "Witmar Group")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2017A/19

DATE OF DECISION: March 6, 2017

DECISION

SUBMISSIONS

Deborah Cushing	counsel for Witmar Developments Ltd. and Witmar Holdings Ltd. carrying on business as "Palisade Apartments", "Recreation Inn and Suites", "Ponderosa Motel", "Dilworth Joint Venture" and "Dilworth Inn"

INTRODUCTION

1. This is an application, made pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of appeal decision number BC EST # D003/17 issued on January 16, 2017, by Tribunal Member Stevenson (the "Appeal Decision"). This application was filed by legal counsel for Witmar Developments Ltd. and Witmar Holdings Ltd. carrying on business as "Palisade Apartments", "Recreation Inn and Suites", "Ponderosa Motel", "Dilworth Joint Venture" and "Dilworth Inn" (the "Witmar Group").

2. By way of the Appeal Decision, Member Stevenson confirmed a Determination issued on September 22, 2016, ordering the Witmar Group to pay its former employee, Nikola Milic ("Milic"), the total sum of $25,085.00 on account of unpaid wages and interest. The largest component of the unpaid wage award was $18,585.00 for section 63 compensation for length of service. The Determination also included an order requiring the Witmar Group to pay a further $2,000 on account of four separate $500 monetary penalties (see section 98 of the *Act*). Thus, the total amount payable by the Witmar Group under the Determination is 27,085.00

3. The sole basis for the application is that Member Stevenson erred in law in confirming that part of the Determination awarding compensation for length of service to Mr. Milic. The Witmar Group does not contest the delegate's calculation of Mr. Milic's section 63 award. Rather, it says that the section 63 award should be cancelled outright because the delegate erred in determining that the Witmar Group did not have just cause to dismiss Mr. Milic's employment (and that the Tribunal similarly erred in confirming Mr. Milic's section 63 award). The Witmar Group's legal counsel submits that the firm "had just cause to immediately terminate Milic's employment for fraud and he is not entitled to any compensation for length of service under the Act".

PRIOR PROCEEDINGS

4. Mr. Milic filed an unpaid wage complaint under section 74 of the *Act* and, in due course, this complaint was the subject of an oral complaint hearing, held on April 18, 2016, before a delegate of the Director of Employment Standards (the "delegate").

5. As recounted at pages R3 – R4 of the delegate's "Reasons for the Determination" issued on September 22, 2016 (the "delegate's reasons"), the principal representative of the Witmar Group (Mr. Walter Weisstock, a director of each of the two Witmar corporations) walked out of the hearing (and without any justifiable reason) before all of the parties' evidence could be presented. At this point, Mr. Milic had completed his direct testimony and had been cross-examined by Walter Weisstock. The delegate requested that each of the Witmar Group's other two representatives/witnesses present at the hearing, namely, Messrs. Tony Weisstock (also a director of both Witmar corporations) and Graham Weisstock, remain and carry on with the hearing but "both individuals left the hearing shortly after Walter Weisstock [and] the hearing continued with

Mr. Milic answering my questions about his case" (page R4). The delegate finished questioning Mr. Milic and then heard, by teleconference, the evidence of the Witmar Group's former bookkeeper.

6. After the oral complaint hearing concluded on April 18, 2016, the delegate "decided to conduct the remainder of the hearing by way of written submission [*sic*] giving the Employer an opportunity to respond to the complaint" (delegate's reasons, page R4). It should be noted that the delegate did not convert the matter into an investigation; the matter continued as a hearing albeit a hearing based partly on oral evidence and partly on written submissions.

7. On May 10, 2016, the delegate wrote to the parties advising that he was continuing the hearing by way of written submissions and, in that regard, in his letter he provided detailed summaries of Mr. Milic's and the bookkeeper's testimony from the April 18 hearing as well as copies of the documentary exhibits that had been entered into evidence at the hearing. The Witmar Group was requested to provide its submission – including any witness statements and relevant documents – by no later than May 24, 2016, and Mr. Milic was requested to file his reply submission by no later than June 7, 2016. The delegate's May 10 letter specifically directed the parties to address seven separately numbered issues including issue nos. 4 and 5: Was there just cause for dismissal and, if not, what is Mr. Milic's section 63 entitlement to compensation for length of service?

8. By letter dated May 19, 2016, the delegate granted the Witmar Group's request for an extension to file its submission – the request was predicated on a need to "gather and notarize witness statements" – and thus the Witmar Group's submission deadline was extended to May 31, 2016, and Mr. Milic's reply submission deadline was concomitantly extended to June 15, 2016. The Witmar Group filed its submission on May 31, 2016. This submission was prepared by Walter Weisstock and it included signed statements from Tony Weisstock, Graham Weisstock, a "head landscaper" employed with the Witmar Group and another statement from a plumber who worked for the Witmar Group. None of these latter statements, although signed, was notarized even though the Witmar Group's original submission deadline was extended for the specific purpose of obtaining "notarized" statements. Mr. Milic's legal counsel filed a final reply submission on June 15, 2016.

9. On September 22, 2016, the delegate issued the Determination and his accompanying reasons. On October 25, 2016, the Witmar Group appealed the Determination. In its appeal documents, the Witmar Group asserted that the Determination should be cancelled, and a new hearing ordered, because the delegate erred in law, breached the principles of natural justice and, finally, on the ground that it had "new evidence" – see subsections 112(1)(a), (b) and (c) of the *Act*. The Witmar Group's position with respect to its just cause for dismissal argument was, in essence, that Mr. Milic was embezzling substantial sums from the companies and that certain cheques made out to Mr. Milic drawn on Witmar Group accounts were fraudulent because neither Walter Weisstock nor Tony Weisstock signed theses cheques – the Witmar Group asserted that Mr. Milic must have forged their signatures on the cheques in question. The Witmar Group also asserted that Mr. Milic's claims regarding his working hours were grossly inflated and that he claimed to have worked (and was "fraudulently" being paid for) hours well beyond 40 per week despite having been expressly directed not to work excess hours.

10. The Witmar Group advanced these latter arguments before the delegate (see delegate's reasons, pages R10 – R11). The delegate's findings regarding these allegations were as follows. First, with respect to the "embezzlement" allegation, the delegate acknowledged that such an allegation, if proven, would constitute just cause for dismissal. However, the delegate was not satisfied that the allegations were proven (see delegate's reasons, page R22). Second, with respect to the "insubordination" argument – *i.e.*, that Mr. Milic continued to work more than 40 hours each week despite being instructed not to do so – the delegate noted that Mr. Milic continued to work very long hours (well beyond 40 per week) throughout his tenure with his

employer's knowledge and that there was no evidence he was ever warned that he would be dismissed if he continued working such long hours (see delegate's reasons, pages R22 – R23).

11. In the Appeal Decision, Member Stevenson concluded that the delegate's finding with respect to the alleged "embezzlement" and "forgery" claims were reasonable particularly since the Witmar Group failed to provide cogent and credible evidence that any funds had been embezzled, let alone evidence that Mr. Milic was the culprit (Appeal Decision, paras. 71 – 73). Accordingly, he rejected the Witmar Group's assertion that the delegate erred in law in awarding Mr. Milic compensation for length of service.

THE APPLICATION FOR RECONSIDERATION

12. As previously noted, this reconsideration application is solely predicated on the assertion that Member Stevenson erred in law in rejecting the Witmar Group's "just cause" argument. The Witmar Group seeks to have its appeal "referred back to a new panel for a determination".

13. The Witmar Group says that it had just cause to dismiss Mr. Milic because he committed a "fraud" against his employer. Counsel for the Witmar Group's argument on this point is as follows:

> As part of the proceedings related to the Determination, Witmar provided a sample of fraudulent cheques which had been issued to Milic and deposited to his own account in the expectation that this sample would be sufficient to show wrongdoing by Milic and just cause for his dismissal…Cheques issued to Milic, other than for his own wages and nominal business-related expenses which generally would be in amounts of $2,500 or less, were not authorized by Witmar and were fraudulent.
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> The Kelowna RCMP have an ongoing criminal investigation into the alleged fraud and Witmar is in the process of filing a civil claim against Milic…in order to recover at least some portion of the misappropriated funds…
>
> Witmar submits that the Tribunal and the delegate in the Determination made an error in law by putting the onus on Witmar to prove that the funds were not misappropriated by Milic. Milic admitted to payment of the funds to him as evidenced by the cheques and spreadsheets. The onus should then have been placed on Milic to prove that the cheques were for reimbursement of expenses as stated in his testimony. The records of Witmar would not show these payments; Milic's financial records should have been disclosed and examined to show the payment of expenses as alleged by Milic and the subsequent reimbursement.
>
> The failure to put the onus on Milic to prove that the funds were in fact a reimbursement of expenses paid was an error in law…
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> Witmar does not have access to Milic's bank records. Where Milic has asserted that the payments in question were reimbursement of expenses, the onus should have been placed on Milic to prove that the expenses were paid by him in the first instance. Simply referring to the cheques and spreadsheets establishes that payments were subsequently made to Milic, but does not establish that Milic initially paid out these significant amounts from his own accounts to pay expenses on Witmar's behalf. Milic should have been required to prove his bald assertions regarding expense reimbursement…
>
> This is especially so where Milic has destroyed Witmar's records including computer records so that the employer is hampered in responding to his claims…
>
> Witmar submits that it was contrary to law and procedurally unfair to require the employer to have to produce records to prove the extent of Milic's fraud. It was an error in law not to put the onus on Milic to prove his claims that the payments made to him through cheques he had issued were in fact reimbursement of expenses he incurred.

FINDINGS AND ANALYSIS

14. At the outset of my analysis, I wish to address three points raised in the Witmar Group's application. First, it has submitted further documentary evidence in support of its application, namely, "copies of additional cheques payable to Milic and accompanying spreadsheets". Second, the Witmar Group says it has retained a "a recovery specialist, Northern Computer, in order to try to restore its computer files" and it submitted "copies of the work orders of Northern Computer detailing the recovery actions taken". Third, and as noted above, the Witmar Group has apparently filed some sort of criminal complaint with the Kelowna RCMP regarding Mr. Milic's alleged fraudulent behaviour and further states it intends to file a civil action against, *inter alia*, Mr. Milic "to recover at least some portion of the misappropriated funds".

15. An appeal to the Tribunal, and even more so, a section 116 application for reconsideration of an appeal decision, is not a trial *de novo*. In a section 112 appeal, there are strict requirements governing the admissibility of evidence that was not before the delegate when the determination under appeal was made (see *Davies et al.*, BC EST # D171/03). The Witmar Group based its appeal, in part, on subsection 112(1)(c) of the *Act*: "evidence has become available that was not available at the time the determination was being made". Tribunal Member Stevenson held that this "new evidence" (consisting of computer payroll records from laptop computers used at certain hotels operated by the Witmar Group in 2014 and 2015) was not admissible on appeal since, with reasonable diligence, it could have been consolidated and presented to the delegate for his consideration prior to the issuance of the Determination. Tribunal Member Stevenson also noted that these documents should have been produced to the delegate pursuant to the demand for production of documents that was served on the Witmar Group (no payroll documents were produced in accordance with this demand and, accordingly, a $500 monetary penalty was levied against it – see delegate's reasons, page R20). In addition, Member Stevenson did not consider this "new evidence" to be either relevant or probative (see Appeal Decision, paras. 53 – 62).

16. The further documents that the Witmar Group now wishes to have me review in this application are not contained in the subsection 112(5) record, and I do not consider them to be relevant to the question of whether the Appeal Decision should be set aside on the basis of an error of law. This latter matter should be assessed based on the evidence that was properly before the Tribunal when the Appeal Decision was issued. To a large degree, the "new evidence" presented both on appeal and as part of this application reflect a strategy on the Witmar Group's behalf to rehabilitate and otherwise expand upon the evidence it submitted to the delegate. It may well be the case that the Witmar Group failed to provide all necessary and relevant documents to the delegate. However, that failing lies solely on the Witmar Group's (and, most particularly, its principal Walter Weisstock's) shoulders when it chose to follow the most unwise path of, essentially, "taking its marbles and going home" because it was dissatisfied with the substance of Mr. Milic's testimony before the delegate. Notwithstanding that unwise decision, the delegate afforded the Witmar Group yet another opportunity to present all of its relevant evidence by way of a written submission and if that submission was, with the benefit of hindsight, not as complete as it might have been, that does not justify setting aside the Appeal Decision on the ground that it is tainted by legal error.

17. Largely for the same reasons, any evidence that might be provided by the computer "recovery specialist" is not admissible in this application – and, in any event, there is no actual probative evidence at this juncture, merely an assertion that such an expert has been retained. If the Witmar Group wished to present this evidence, it should have done so while this matter was pending before the delegate (and with full compliance with the provisions of sections 10 and 11 of the *Evidence Act* concerning expert evidence to the extent that the "recovery specialist" would be providing expert opinion evidence).

18. With respect to the RCMP complaint and the civil claim that is apparently pending, in my view, these assertions have absolutely no probative value whatsoever in terms of the present section 116 application. Anyone can file a complaint with the local police authority and anyone can file a civil claim (provided they submit the proper form and pay the applicable filing fee). I must question why these assertions were even advanced since they have no bearing whatsoever on whether Member Stevenson erred in law in dismissing the Witmar Group's appeal. The Appeal Decision was based on the evidentiary record that was before the delegate when the Determination was issued and any subsequent complaint to the police, or the filing of a civil action, is not even remotely relevant to any question regarding the correctness of the Appeal Decision.

19. Section 63 compensation is a form of deferred wages (see the section 1 definition of "wages") that is presumptively payable, and in an amount fixed by subsection 63(2), to all employees covered by the *Act* upon the termination of their employment. However, in some circumstances, the employer's presumptive section 63 liability "is deemed to be discharged" including where the employee "is dismissed for just cause" (subsection 63(3)(c)). The burden of proving just cause lies on the employer; the employee need not show that his or her former employer did *not* have just cause.

20. "Just cause" is not defined in the *Act* and thus common law principles apply. An employer has "just cause" for dismissal where the employee has engaged in misconduct that "in the totality of the circumstances…was such that the employment relationship could no longer viably subsist" (*Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at para. 28) and that "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer" (*McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at para. 48). I agree with the delegate that "an employee who embezzles employer funds for personal use [gives the employer] grounds for immediate dismissal with just cause" (at page R22). There is nothing in the Appeal Decision that questions that legal principle.

21. The delegate determined, based on the evidentiary record before him, that the Witmar Group failed to discharge its burden of proving just cause. First, the delegate accepted that Mr. Milic actually worked very long hours and that the Witmar Group either knew, or was willfully blind, to that state of affairs. There was no evidence that cheques made payable to Mr. Milic had been "forged" – the Witmar Group could have, but for some reason did not – provided expert handwriting analysis that might have corroborated what was otherwise simply a bare assertion. The delegate further found that the Witmar Group "authorized [Mr. Milic] to use his personal funds to pay for the Employer's payroll and business expenses and agreed to reimburse those expenses to him as shown by the Prospera Deposited Cheques spreadsheet and corresponding cancelled cheques" and that the Witmar Group "did not challenge this evidence in its written submission or provide any contradictory documentary evidence" (page R22).

22. In the Appeal Decision, Member Stevenson correctly noted that whether an employer does, or does not, have just cause frequently turns on the findings of fact made by the decision-maker and he concluded (at para. 72):

> The *Act* places the burden of establishing the facts necessary to establish just cause on the employer. That burden has two elements: first, it requires an employer to show there is employee misconduct and, second, that the circumstances of the misconduct were sufficient to justify the employee's termination. In this case, simply put, the Director found Witmar had failed on the evidence to meet either element of that burden.

I simply do not see any error in Member Stevenson's view of the matter.

23. Counsel for the Witmar Group asserts – without pointing to even a scintilla of cogent corroborating evidence contained in the subsection 115(5) record that was before the delegate – that Mr. Milic "fraudulently" issued

cheques payable to himself. Counsel also asserts – similarly without any corroborating evidence to be found in the record – that these cheques were "not authorized by Witmar and were fraudulent" (this appears to be a veiled reiteration of the argument advanced on appeal that Mr. Milic "forged" signatures on the cheques in question).

24. However, there is no evidence of forgery whatsoever and the Witmar Group's former bookkeeper testified that she "understood Mr. Milic was working long hours because he regularly covered for absent staff members at the motels" and that the Witmar Group "often had insufficient funds for payroll" and thus Mr. Milic "was paying this cost from his personal account, and the Employer would reimburse him". The bookkeeper also testified that "it was not uncommon for Mr. Milic to pay for business expenses on behalf of the Employer", that he would prepare a reimbursement cheque "and submit it to the Employer's directors for signatures" and that she was "not aware of any instance where Mr. Milic signed cheques on behalf of the Employer" (all quotations from delegate's reasons, page R9). The bookkeeper's independent testimony corroborated Mr. Milic's evidence and, in the present application, the Witmar Group does not advance any evidence or argument as to why the bookkeeper's evidence should have been wholly discounted.

25. Counsel for the Witmar Group relies on two appellate court decisions in support of what I consider to be, in the circumstances of this case, the legally untenable submission that the delegate should have placed an evidentiary onus on Mr. Milic to prove that any cheques made payable to him on account of expenses were *bona fide* and not fraudulent.

26. The first of these two appellate court decisions is the British Columbia Court of Appeal's decision in *Huff v. Price*, 990 CanLII 5402 (leave to appeal to the Supreme Court of Canada refused: June 27, 1991). Counsel places particular emphasis on the following excerpt:

> *Once the fraud or breach of fiduciary duty is shown*, *then* the court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant *who has been found to have been fraudulent or in breach of fiduciary duty*. (my *italics*)

27. However, as is clear from the italicized portions referenced, above, before the burden can "shift" to the party who perpetrated the fraud or breached a fiduciary duty, the party alleging such conduct must demonstrate (on the ordinary civil standard of proof – see *F.H. v. McDougall*, [2008] 3 S.C.R. 41) that there was, in fact, such misconduct. The B.C. Court of Appeal emphasized this point in the very next paragraph of the *Huff* decision where it stated: "*In a case where fraud or breach of fiduciary duty has been established*, the burden of proof in relation to causation and damages will readily be discharged, at least in a *prima facie* way, by the plaintiff" (my *italics*).

28. The second decision, *581257 Alberta Ltd. v. Aujla*, 2013 ABCA 16, similarly involved fraud allegations, in this case against two former employees who allegedly misappropriated $350,000 from their employer. The trial judge specifically found that "the Employer had proven that the Employees had used a common scheme to convert money, spent an undetermined amount of it and deposited other converted monies to their bank accounts, at times commingling those monies with their own" (para. 10). The trial judge held that the "principle in *Huff v. Price* did not apply so as to impose on the Employees the evidentiary burden to disprove the amount of the loss incurred by the Employer [because]…the Employee's pilfering of the funds from the Employer did not involve either fraud or breach of fiduciary duty" (para. 31). On appeal, the Alberta Court of Appeal held that the trial judge erred in concluding that the employees were not fiduciaries (para. 46). With respect to *Huff v. Price*, the court stated (para. 48):

> The general principle as stated in *Huff v. Price* is that the onus is on the plaintiff to establish the amount of the loss. However, *once the fraud or breach of fiduciary duty is established, and the plaintiff has shown that it has made all reasonable efforts to determine the amount lost*, *then* the evidentiary burden shifts to the defendant to disprove the amount of the loss and the cause of the loss. (my *italics*).

The court also observed (para. 49): "It is true that for the burden to shift to a defendant, *a plaintiff must establish* that it has made all reasonable efforts to establish the amount of the loss"; and (at para. 60): "*before the onus is shifted*, there must first also be some basis on the evidence to support the amount of the loss being claimed" (my *italics*). Ultimately, the appeal court directed a new trial "on all extant issues" (para. 61).

29. In my view, neither *Huff* nor *Aujla* assists the applicant in this case for the straight forward reason that the Witmar Group manifestly failed to prove, even on a *prima facie* basis, that Mr. Milic engaged in any sort of fraudulent behavior. The delegate's conclusions with respect to the so-called "embezzlement" issue were amply supported by the evidentiary record (or, to put the matter another way, the delegate's conclusion that there was insufficient evidence of either fraud or forgery was entirely reasonable). Ultimately, the Witmar Group's allegations of misconduct on Mr. Milic's part stood (and continue to stand) as merely bald, wholly unsupported, assertions of wrongdoing.

30. In *Milan Holdings* (BC EST # D313/98), the Tribunal established a two-stage process for assessing section 116 applications. In my view, this application does not pass the first stage of the *Milan Holdings* test since is does not raise a serious and presumptively *bona fide* argument that the delegate erred in law in finding that there was no just cause for dismissal. In my view, Member Stevenson did not err in law in summarily dismissing the Witmar Group's appeal from that latter finding.

ORDER

31. The Witmar Group's application for reconsideration of the Appeal Decision is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal