An Application for Reconsideration

- by -

Penny Kang
(the "Employee")

- 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.: 2010A/002

DATE OF DECISION: March 16, 2010

DECISION

SUBMISSIONS

Penny Kang	on her own behalf
Stephanie Bogaert	on behalf of the Director of Employment Standards

OVERVIEW

1. Penny Kang (the "Employee") applies, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D133/09 issued on December 21, 2009. By way of this latter appeal decision, the Tribunal confirmed a determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on September 22, 2009 under file number ER158-452 (the "Determination").

2. I am adjudicating this application based on the parties' written submissions. I have before me submissions filed by the Employee and the delegate. Although invited to do so, the respondent employer did not file any submissions regarding this application. I also have before me the record that was before the Tribunal member who adjudicated the original appeal.

PRIOR PROCEEDINGS

3. The Employee filed a timely complaint under the *Act* alleging that Classic Caregivers Ltd. (the "Employer") "lied to her in the course of her employment, which caused her to quit her employment" (Reasons for the Determination, p. R2). The complaint was investigated and ultimately it was determined that the Employer had not contravened any possibly relevant provision of the *Act*. Accordingly, the Determination was issued in which the delegate concluded that there was no contravention of the *Act* and that "no further action will be taken".

4. According to the information set out in the "Reasons for the Determination", the Employer operates a homecare service for elderly and disabled persons. The Employee worked for the Employer from January 11, 2005 to May 28, 2008 and, when her employment ended, she was earning $12 per hour. On May 28, 2008, the Employee submitted a resignation letter (dated May 23, 2008); in her letter she indicated that her work had been "a wonderful experience" but that she nevertheless wanted "to quit my job". Her resignation was accepted. On October 18, 2008, she e-mailed the Employer stating that she wished to return to work but was later informed that no work was available for her.

5. In her Reasons for the Determination, the delegate noted that the Employee did not identify any particular provision of the *Act* that had allegedly been contravened. The delegate addressed whether the complaint could be characterized as one alleging a section 66 contravention (the so-called "constructive dismissal" provision) and concluded that the Employer never substantially altered any term or condition of employment (p. R5). The delegate also turned her mind to whether or not the Employee had voluntarily resigned (section 63(3)(c)) and ultimately concluded that the Employee had both the subjective intention to quit and irrevocably carried out that intention. Some five months later, the Employee had a change of heart; however, the Employer – at that point – was under no obligation to reinstate her employment (p. R6). The Employee's fundamental concern appeared to be in relation to a directive given to her by the Employer that she not

contact any clients directly and an admitted "lie" by the Employer. The latter event was addressed in the delegate's reasons (at p. R4) as follows:

> …[the Employer] was asked by Client A to remove [the Employee] as that client's caregiver and to provide a different caregiver. [The Employer's] clients pay for the services themselves and therefore direct who and when they would like an employee to come into their home. [The Employer] agreed to this request for a new caregiver. [The Employer] did not want [the employee's] feelings hurt as Client A had asked for a replacement caregiver. Instead, [the Employer] told [the Employee] that Client A was no longer a client of Classic and would no longer require [the Employee's] services. [The Employer] cannot speak for [the Employee] but in any case [the Employee] doubted the explanation for her removal and called Client A directly.

6. The delegate, at page R6 of her Reasons for the Determination, held that the above-described circumstance did not constitute a contravention of the *Act*:

> [The Employee] is concerned about a lie which prompted her to act contrary to company policy and to be reprimanded. Initially, [the Employee] acknowledges she should not have called the client but feels, ultimately, that it is the employer who is in the wrong for lying. There is no section of the Act which forbids an employer from using its discretion to filter information or to lie about certain facts so longs [sic] as the lie is not an inducement to take or keep employment such as a misrepresentation about the terms and conditions of employment [NOTE: the delegate is here referring to section 8 of the *Act*]. I find there is no contravention that has occurred as a result of telling an employee a lie to protect her from feelings of rejection.

7. On October 5, 2009, the Employee appealed the Determination to the Tribunal on the sole ground that the delegate failed to observe the principles of natural justice in making the Determination (section 112(1)(b)). The Employee did not, however, provide any particulars as to how or why she believed the delegate actually breached the rules of natural justice. It seems clear from the material that the Employee filed in support of her appeal that she considered herself to have been "wrongfully dismissed" (i.e., a section 66 case), however, she did not identify any terms or conditions of her employment that had been substantially altered; rather, she asserted that the Employer's "dishonesty made me leave my job, it was a wrongful dismissal". In other words, her appeal was apparently predicated on an error of law (section 112(1)(a)).

8. In her reasons for decision, the Tribunal Member took a liberal view of the Employee's allegations and addressed them through the prism of all three statutory grounds of appeal, namely, error of law, natural justice and "new evidence" (see section 112(1)). With respect to the latter ground, the Member noted that the Employee had submitted various documents in her appeal submissions that were not originally provided to the delegate.

9. The Member concluded that the new evidence was not admissible since the Employee had been clearly advised to submit all relevant information to the delegate and the documents in question all pre-dated the issuance of the Determination. Further, and in any event, the Member concluded the documents in question had little probative value. In the absence of any particulars regarding natural justice, the Member rightly concluded that the Employee had simply not met her evidentiary burden.

10. As previously noted, the Employee took the position on appeal that she had not, in fact, quit but rather had been "constructively dismissed". The Member turned her mind to section 66 of the *Act* and, at paragraphs 23 and 24 of her reasons, noted that there was no evidence before the delegate that the Employee's terms and conditions of employment had been substantially altered. The Employee, apparently for the first time, asserted in her appeal documents that her hours had been cut back during her employment and that this state of affairs contravened section 66. However, in the absence of any evidence about the nature of the parties'

employment agreement (especially regarding hours of work), coupled with the fact that this issue had not been argued before the delegate, the Member was not persuaded that the delegate erred in finding that section 66 had not been contravened. Thus, the Determination was confirmed.

THE APPLICATION FOR RECONSIDERATION

11. The Employee's application for reconsideration consists of the Tribunal's standard Form 2 to which is appended a written submission and further documents. In addition, the Employee submitted a 5-page "final reply" and a further brief "supplement".

12. In her material, the Employee makes the following assertions:

- "The main complaint issue was that I was reprimanded with a wrong warning letter…and this warning letter led me to leave my job. I appealed for wrongful dismissal.";
- "I did not get fairness from this Determination and Tribunal Decision, so I apply for reconsideration."

13. The Employee also says that there was no clear policy regarding direct e-mail communication with clients or other employees and thus her "warning letter" was not properly issued. She maintains that she never violated a work rule or policy. It is this unfair reprimand, she says, that forced her to leave her job.

14. In her reply, the Employee notes that her original complaint was filed in October 2008 and that the Determination was not issued until some 11 months later on September 22, 2009. She also complained about the Employer having opened a letter addressed to her and reiterated her complaints that the Employer reprimanded her without cause and was "dishonest". She says that her pay was "at the lowest level". She asks for "severance pay $30,000".

FINDINGS

15. While there is little doubt that the Employee feels aggrieved by the way her case has turned out to date, I cannot find that this application meets even the threshold test for reconsideration (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98).

16. For the most part, the Employee simply wishes to argue (now for the third time) points that have been fully argued and determined (and absolutely correctly, in my view) in prior proceedings. Further, and almost entirely, the Employee's various assertions are wholly irrelevant to the issue that was raised by her complaint. The stubborn fact is that the Employee quit her employment only to find, some five months later, that she regretted her perhaps precipitate decision. The Employer was under no legal obligation to rehire her and never terminated her in the first instance. Whether or not the Employee should have received a warning letter is wholly beside the point – the employer did not terminate her for contacting clients directly and, for my part, I do believe that the Employer was fully within its rights to insist that its employees not do so. Whether her pay was comparably low is also entirely irrelevant – the only issue under the *Act* is whether an employee is paid according to their contractually agreed and lawful wage rate for all hours worked. Further, this was, in the Employee's own words, a "wrongful dismissal" case, not an unpaid wage case. I might also note that the Employee's position appears to be internally inconsistent – on the one hand, she says that the workplace was not a welcoming one to her and that she had not been treated fairly; on the other hand, in her resignation letter she characterized her employment has having been "a wonderful experience" and she expressed a heartfelt desire to return to her former employer some five months later.

17. The Tribunal has no legal authority to award "severance pay" (and certainly not in the amount of $30,000) – that is a matter for the courts. The Employee would have been entitled to compensation under section 63 (and only in the amount of 3 weeks' wages given her length of service) if her claim under section 66 had been accepted, however, that claim was correctly dismissed.

18. It is regrettable that there was a lengthy delay in adjudicating her complaint in the first instance; however, there is nothing in the material that shows this delay in any fashion prejudiced the adjudication of her case. I also note that this issue does not appear to have been argued in the original appeal.

ORDER

19. The application to reconsider the BC EST # D133/09, issued December 21, 2009, is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal