An Application for Reconsideration

- by -

Alpha Neon Ltd.
("Alpha Neon")

- 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.: 2012A/6

DATE OF DECISION: March 23, 2012

DECISION

SUBMISSIONS

Ashley R. Ayliffe	counsel for Alpha Neon Ltd.
Adrian Tuck	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application filed by Alpha Neon Ltd. ("Alpha Neon"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D105/11 issued by Tribunal Member David B. Stevenson on October 4, 2011 (the "Appeal Decision"). Tribunal Member Stevenson confirmed a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 17, 2011, that ordered Alpha Neon to pay its former employee, Adrian Tuck ("Mr. Tuck"), the sum of $66,529.78 on account of unpaid wages (including section 63 compensation for length of service) and section 88 interest. In addition, and also by way of the Determination, the delegate assessed $3,000 in monetary penalties (see section 98) against Alpha Neon. Accordingly, the total amount payable under the Determination is $69,529.78.

2. Mr. Tuck and the delegate both oppose this application.

PRIOR PROCEEDINGS

3. According to the information set out in the "Reasons for Determination" (the "delegate's reasons") appended to the Determination, Alpha Neon operates a neon sign manufacturing and sales business and employed Mr. Tuck as a salesperson from March 13, 2006, to May 31, 2010, on a salary plus commission basis. Mr. Tuck filed an unpaid wage complaint and on November 18, 2010, the delegate conducted a complaint hearing attended by Mr. Tuck and Mr. Tony Ziskos (for Alpha Neon). Following the hearing, the parties filed further submissions with the delegate. On March 17, 2011, the delegate issued the Determination and her reasons in which she concluded that Mr. Tuck was entitled to $10,000 in unpaid salary, $27,861.93 in unpaid commissions, $7,713.99 for 4 weeks' wages as compensation for length of service, $2,734.55 for vacation pay, $16,763.61 for reimbursable employment expenses and $1,455.70 for section 88 interest.

4. Alpha Neon filed a late appeal, albeit by only 15 minutes, and on June 29, 2011, Tribunal Member Carol L. Roberts extended the appeal period so that the appeal could be adjudicated on its merits (see BC EST # D068/11).

5. As previously noted, Tribunal Member Stevenson ultimately dismissed Alpha Neon's appeal and confirmed the Determination. The appeal was principally grounded on the assertions that the delegate denied Alpha Neon's representative at the appeal hearing, Mr. Ziskos, a fair opportunity to cross-examine Mr. Tuck and otherwise appeared to be biased against Alpha Neon (both of these assertions fell under the "natural justice" appeal ground set out in the *Act* (section 112(1)(b)). In addition, Alpha Neon alleged that the delegate erred in law in several respects (*Act*, section 112(1)(a)) including: i) receiving evidence from Alpha Neon's former office manager; ii) in regard to her determination of Mr. Tuck's unpaid commission entitlement; and ii) with respect to her finding that Mr. Tuck was "constructively dismissed" under section 66 of the *Act*.

THE APPLICATION FOR RECONSIDERATION

6. Alpha Neon's legal counsel (who has represented Alpha Neon throughout the entire proceedings before the Tribunal) says that the "the [Appeal] Decision [should] be varied and the Determination cancelled" because (Reconsideration Application, para. 3):

- "The Tribunal erred in law by applying the wrong standard of proof to the Applicant's evidence regarding a fair hearing"
- "The Tribunal erred in law by applying the wrong legal test to determine whether the [sic] was a reasonable apprehension of bias on the part of the Delegate"; and
- "The Tribunal erred in law by determining that the Delegate observed the principles of natural justice in making the Determination".

7. The Appeal Decision was issued on October 4, 2011. The application for reconsideration was filed on January 13, 2012. Rule 22 of the Tribunal's *Rules of Practice and Procedure* governs the reconsideration process and Rule 22(3) states: "The applicant should deliver the application for reconsideration as soon as possible after the Tribunal decision, but in any event within 30 days after the date of the tribunal decision." Thus, this application is untimely and, on that basis alone, Mr. Tuck submits it should be summarily dismissed.

8. The delegate does not ask the Tribunal to summarily dismiss the application simply because it is untimely but, rather, says that application fails to pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98) and, accordingly, should be summarily dismissed on that basis.

FINDINGS AND ANALYSIS

9. As noted above, the *Milan Holdings* test establishes a two-stage analytical framework for reconsideration applications. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

10. The present application is untimely and while that is not an absolute bar to the application going forward, it is an important factor to be considered at the first stage of the *Milan Holdings* analysis. Counsel for Alpha Neon, rather than filing a timely section 116 application of the Appeal Decision with the Tribunal, instead filed an application in the Supreme Court of British Columbia for judicial review of the Appeal Decision. Despite the long-standing administrative law principle that parties should exhaust their internal administrative remedies prior to proceeding to court for judicial review (see, for example, *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* 2011 BCCA 527 at paras. 46 *et seq.*), Alpha Neon's legal counsel did not file a section 116 application because, in counsel's own words: "The Applicant did not apply for reconsideration in the first instance because the application for Judicial Review is substantially the same as its initial appeal. It saw an application for reconsideration as *redundant*, costly and likely to result in further unnecessary delay." (my *italics*)

11. As I see it, the fundamental problem with counsel's frank admission regarding "redundancy" is that the whole point of reconsideration is to avoid redundancy in the sense that if the applicant is merely arguing, yet again, the same positions that were argued before the Tribunal on appeal, the application fails to meet the first stage of the *Milan Holdings* test.

12. I now turn to the three specific allegations raised in support of the reconsideration application.

13. Counsel asserts (Reconsideration Application, para. 38): "The Delegate ended the Applicant's cross-examination of the Respondent during the hearing after approximately two minutes of questioning and before the Applicant had an opportunity to fully question the Respondent." This issue was addressed at paras. 20, 32, 46 and 59-61 of the Appeal Decision. In sum, this assertion regarding the delegate's behaviour at the complaint hearing was a mere *allegation* not supported by any independent corroborating *evidence* or even evidence from Mr. Ziskos himself. The delegate vigorously denied the allegation as a factual matter, as did Mr. Tuck. Tribunal Member Stevenson concluded, at para. 61 of the Appeal Decision:

> Counsel for Alpha says the Delegate has simply denied the allegation, but it is not for the Delegate to disprove such an allegation, *but for Alpha to prove it on clear and cogent evidence*. Alpha has failed to prove the necessary evidence and has failed to meet the burden on them when alleging a breach of natural justice against a delegate. This argument fails. (my *italics*)

14. Counsel for Alpha Neon says that Tribunal Member Stevenson erred in law in stating that it was Alpha Neon's burden to prove its factual assertion by "clear and cogent evidence" and that he ought to have simply applied the ordinary civil burden ("balance of probabilities") consistent with the Supreme Court of Canada's decision in *F.H. McDougall*, [2008] 3 S.C.R. 41. I should note that although Tribunal Member Stevenson did refer to the "clear and cogent evidence" standard in para. 61, he also indicated, at para. 60, that it was Alpha Neon's burden to produce at least *some* evidence to support its bald assertion and that it had wholly failed to do so. Accordingly, and regardless of the burden applied, Tribunal Member Stevenson determined that there was simply *no evidence whatsoever* to support the allegation (see para. 60):

> The burden is on Alpha to provide *some evidence* in support of its allegation of denial of natural justice. *Not only has Alpha not established on any evidence* that the Delegate did end Mr. Ziskos' cross examination as alleged, *there is no evidence* identifying how this was done, the circumstances in which it was done, what comments may have been made by the Delegate at the time of the alleged denial of natural justice and what, if any further matters Mr. Ziskos was prevented from exploring as a result of the alleged conduct by the Delegate. This evidence could have been provided by way of affidavit … (my *italics*)

15. Further, *McDougall* addresses the burden of proof at an original fact-finding hearing. However, proceedings before the Tribunal are *appeal* proceedings and, therefore, the governing authority is not *McDougall* but, rather, *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and the governing test is either "correctness" or "palpable and overriding error" depending on the nature of the alleged error of law.

16. In sum, I see no merit whatsoever in the first asserted ground for reconsideration.

17. The second ground asserted in support of the reconsideration application concerns the proper legal test to be applied when there is an allegation of apprehended bias on the part of the original decision-maker. Tribunal Member Stevenson's analysis of this issue is addressed at paras. 62-76 of the Appeal Decision. This matter was fully canvassed in the Appeal Decision and I see no error in Tribunal Member Stevenson's review of the matter.

18. Similarly, the third ground asserted in support of the reconsideration application, namely, whether the delegate appeared to be biased against Alpha Neon, was fully canvassed in the Appeal Decision (particularly at paras. 67-75). Counsel simply wishes to re-argue the point on this application using essentially the same arguments that were advanced in the original appeal. I wholly agree with Tribunal Member Stevenson that, on the facts of this case, there was no reason to believe that the delegate was, or even appeared to be, biased against Alpha Neon. I note that counsel does not assert that the delegate was biased only that there was an apprehension of bias.

19. Given the delay in pursuing this matter – and I am not persuaded that a satisfactory explanation has been provided explaining the delay – coupled with the fact that, for the most part, this application is simply an attempt to re-argue the case advanced on appeal, I am unable to conclude that Alpha Neon has passed the first stage of the *Milan Holdings* test. That being the case, this application must be dismissed.

ORDER

20. The application to reconsider the Appeal Decision is refused. Accordingly, pursuant to section 116(1)(b) of the *Act*, BC EST # D105/11 is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal