

An application for Reconsideration

- by -

Ivan Gaspar  
("Mr. Gaspar")

- 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:** Shafik Bhalloo

**FILE No.:** 2008A/14

**DATE OF DECISION:** April 11, 2008

## DECISION

### OVERVIEW

1. This is an application filed by Ivan Gaspar (“Mr. Gaspar”) under Section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of B.C.E.S.T. # D111/07, dated November 27, 2007 (the “Original Decision”), issued by a member of the Tribunal (the “Member”) confirming a determination (the “Determination”) of a delegate (the “Delegate”) of the Director of Employment Standards (“the Director”) issued on August 10, 2007. In the Determination the Delegate concluded that Mr. Gaspar’s employer, Commercial Body Builders Ltd. (“CBB”), did not contravene the Act in terminating Mr. Gaspar’s employment and not paying him compensation for length of service as the termination was for cause.
2. Mr. Gaspar’s application for reconsideration is dated February 17, 2008 and was filed on February 18, 2008. It is in excess of 6 weeks past the deadline for filing reconsideration applications set out in Section 22(3) of the Rules of Practice and Procedure of the Tribunal. Moreover, Mr. Gaspar has not offered any explanation for the delay. I propose to deal with the Mr. Gaspar’s delay in filing his Reconsideration Application later in the section entitled Analysis herein.
3. I also note that the Reconsideration Application will be considered without a hearing on the basis of the written submissions of the parties, the record of the Director and the Determination.

### FACTS

4. By way of background, Mr. Gaspar filed a complaint under Section 74 of the Act alleging that his former employer, CBB, contravened the Act by failing to pay him compensation for length of service (the “Complaint”).
5. The Delegate conducted a hearing into the Complaint on June 14, 2007 (the “Hearing”) and subsequently, dismissed Mr. Gaspar’s complaint in the Determination.
6. Mr. Gaspar, thereafter, appealed the Determination on all three grounds available in Section 112 (1) of the Act, namely: (i) the Director erred in law in making the Determination; (ii) the Director failed to observe the principles of natural justice in making the Determination; and (iii) new evidence has become available that was not available at the time the Determination was being made. Mr. Gaspar was unsuccessful in his appeal as the Member hearing the Appeal confirmed the Determination in the Original Decision.
7. The Member succinctly summarizes the facts relating to Mr. Gaspar’s Complaint including the facts considered by the Delegate in the Determination in the Original Decision and I have decided to set them out verbatim below:
  - Commercial manufactures bodies for buses, fire trucks and ambulances. It employed Mr. Gaspar as an electrician from August 8, 2000 until it terminated his employment on August 28, 2006.
  - Commercial alleged that Mr. Gaspar's employment was terminated for just cause.

- In support of this contention, Commercial presented evidence to the Delegate from its general manager, Bruno Sutter, to the effect that Mr. Gaspar's performance and attitude deteriorated once Mr. Sutter came to the conclusion that Mr. Gaspar did not have the requisite skills to lead the company's electrical team. Thereafter, the relationship soured further as other employees received raises designed to recognize performance, and Mr. Gaspar did not.
- In June 2006 Mr. Gaspar complained to Mr. Sutter about the size of his pay increase. Mr. Sutter testified that Commercial was about to perform work on a new contract for a bus prototype plus further units. Mr. Sutter invited Mr. Gaspar to lead the project, and promised a "nice incentive".
- No blueprints were made available to Commercial to assist it in building the bus prototype. Instead, the customer provided specifications and ready access to its engineering staff for the members of the Commercial team working on the project, including Mr. Gaspar.
- The evidence accepted by the Delegate indicates that Mr. Gaspar finished the wiring on the first bus to be completed on the project a few days prior to his being terminated. That work was completed without the assistance of blueprints. Mr. Sutter then told Mr. Gaspar to start working on bus number two.
- On August 24, 2006, Mr. Sutter noticed that no work had been started on bus number two. He was concerned about meeting a production deadline. Mr. Sutter spoke to Mr. Gaspar, who informed him that what he was working on would take but a couple of hours. A couple of hours later, and at the end of the workday, Mr. Sutter noted that there was still no work, which had been commenced on bus number two.
- On the morning of Friday, August 25, 2006, Mr. Sutter observed that Mr. Gaspar was still performing work unrelated to bus number two. Mr. Sutter again spoke with Mr. Gaspar, and tempers flared. Mr. Gaspar told Mr. Sutter that he required "schematics" in order to complete the wiring for bus number two. Mr. Sutter reminded Mr. Gaspar that no blueprints had been provided for bus number one, the prototype, and that Mr. Gaspar was to wire bus number two in the same way that he had wired bus number one. Mr. Sutter also told Mr. Gaspar that he was to make the work on bus number two a priority, that he should do nothing except work on bus number two, and that he should start that work or he would be fired.
- Mr. Sutter then returned to his office to take a telephone call. Looking out the window of his office onto the shop floor he saw Mr. Gaspar working on a vehicle at the opposite side of the shop to where bus number two was located. When the telephone call was concluded, Mr. Sutter exited his office to search for Mr. Gaspar, but the other employees informed him that Mr. Gaspar had left. Mr. Sutter received no communication directly from Mr. Gaspar during the remainder of that business day. However, the record contains a document marked "Bruno's Notes" which indicates that another employee told Mr. Sutter that Mr. Gaspar had telephoned to say he had visited his doctor, that he was "stressed", and that he might not be in on the following Monday.
- Mr. Sutter later discussed the situation with Commercial's CEO. It was decided that Commercial would terminate Mr. Gaspar's employment on the grounds of insubordination.
- Mr. Gaspar did not report for work the following Monday, August 28, 2006. Mr. Sutter telephoned Mr. Gaspar's number and left a message. Mr. Gaspar returned Mr. Sutter's call, at which time Mr. Sutter informed him that his employment was terminated.
- Mr. Gaspar testified that Mr. Sutter took a dislike to him within months of his being hired, among other things because Mr. Gaspar had said uncomplimentary things about Commercial to a friend,

and because Mr. Gaspar had gone over Mr. Sutter's head to complain about certain aspects of his job to Commercial's CEO.

- At the hearing conducted by the Delegate, Mr. Gaspar did not dispute Mr. Sutter's recollection of the events of August 25, 2006 in many of its essential particulars (misdescribed by the Delegate as having occurred on August 24, 2006 on page 5 of the Reasons for the Determination). Mr. Gaspar conceded that Mr. Sutter told him to make his work on bus number two a priority and that he was not to work on anything else. He also testified that "Sutter said he's going to fire me if I do not do as he says."
- Following that conversation with Mr. Sutter, Mr. Gaspar said he felt ill. The material the Delegate had in hand from Mr. Gaspar before making the Determination indicates that Mr. Gaspar was upset and shaking as a result of what he construed to be an unwarranted verbal assault perpetrated by Mr. Sutter, and that he felt it would be unsafe for him to continue to work. He decided to visit the first aid attendant. She told him she had no medication to calm him down, so he decided to leave the workplace and see his physician. He did see his doctor later that day, who told him to return on August 28, 2006 if he did not feel any better. Mr. Gaspar felt no better on August 28. He telephoned the Commercial first aid attendant and informed her he would not be coming to work. He then made a further visit to his physician. Arriving back home, he returned Mr. Sutter's telephone call and was informed that he had been terminated."

8. The Member then reviews the three grounds of appeal raised by Mr. Gaspar starting with the "new evidence" ground of appeal. The Member notes that Mr. Gaspar, in support of the new evidence ground of appeal, referred to earnings statements which clarified the matter of whether he received a raise in 2004 and also adduced a letter from Sun Life Financial dated January 29, 2007 confirming that his medical and dental coverage ceased as of August 25, 2006. The Member notes Mr. Gaspar did not provide any explanation of why this evidence was not available to him at the time the Determination was being made and, in any event, the Member noted that the evidence was not probative in the sense that it was material to a relevant issue raised on the appeal and therefore the new evidence ground of Appeal of Mr. Gaspar was baseless.
9. With respect to the "natural justice" ground of appeal, the Member notes that there is nothing in the record or the appeal submissions of the parties that supports that Mr. Gaspar was deprived the opportunity to know the case being made against him or denied a reasonable opportunity to respond. The Member also notes that while Mr. Gaspar argues that the Delegate failed to observe the principles of natural justice because she decided to accept the evidence CBB tendered over the evidence adduced by Mr. Gaspar, evaluating the quality of the evidence in making findings of fact are part of the obligation of the Delegate. The mere fact that the Delegate drew conclusions contrary to the position that Mr. Gaspar was asserting, could not, on its own, support an argument that the Delegate failed to observe the principles of natural justice, according to the Member. Accordingly, the Member dismissed the natural justice ground of appeal of Mr. Gaspar.
10. With respect to Mr. Gaspar's error of law ground of appeal, the Member notes that Mr. Gaspar appeared to rely upon Section 67 of the Act to argue that the termination of his employment by CBB was ineffective as he was dismissed while he was on sick leave. Section 67(1)(a) of the Act provides that a notice given to an employee under Part 8 of the Act has no effect if the notice period coincides with a period during which the employee is, inter alia, unavailable for work due to medical reasons. The Member notes that while Mr. Gaspar did not appear to raise a concern relating to the application of Section 67 in the proceedings before the Delegate, CBB did make a submission to the Delegate on the matter although the Delegate did not refer to it in the Determination. Notwithstanding, the Member

sought to deal with the issue by referring to the decision of the Tribunal in *Rupert Title Search Ltd.* B.C.E.S.T. # D070 which clarifies the interplay between Section 67 governing rules about notice and Section 63 which deals with liability resulting from length of service. The Member, based on the latter decision, concluded that Section 67 of the Act only comes into play when there is notice to be given to an employee under Section 63. Where an employee is dismissed with just cause, there is no requirement under Section 63 to give notice to the employee. Accordingly, the Member concluded that Mr. Gaspar could not succeed on his appeal on the basis of Section 67 of the Act, if he was dismissed for just cause.

11. The Member then dealt with the matter of whether the Delegate correctly concluded that CBB properly dismissed Mr. Gaspar for just cause. The Member stated:

While I may have interpreted the circumstances leading to Mr. Gaspar's dismissal differently, I am not persuaded that Mr. Gaspar has demonstrated that the Delegate acted perversely, on inexplicably, in concluding that Mr. Gaspar wilfully disobeyed a clear and lawful instruction on an issue of substance. Part of my difficulty emanates from the fact that the Delegate did not discuss in any detail the fact that Mr. Gaspar left the worksite on August 25, 2006 due to illness which required medical attention. One inference which the Delegate could have drawn from this evidence was that Mr. Gaspar's failure to respond to Mr. Sutter's instruction was not wilful because it was due to his becoming ill. It must be remembered, however, that the Delegate conducted a hearing at which both Mr. Gaspar and Mr. Sutter gave testimony. The Delegate therefore had the benefit of hearing these witnesses give their evidence, and observing them in cross-examination. I have not. A mere fact that the Delegate did not discuss Mr. Gaspar's evidence of illness in depth is insufficient to warrant my interfering with the Delegate's findings of fact. It is also clear that the Delegate was entitled to prefer the testimony of one witness over another, and to place more weight on some parts of the evidence than others....

The Delegate referred in her Reasons for the Determination to Mr. Gaspar's evidence that he became ill, so it cannot be said that she ignored it, or misconceived it in a way that affected the result. The inference I am forced to draw is that the Delegate decided that Mr. Gaspar was disobedient in such a way as to give cause for dismissal notwithstanding that he later departed the worksite due to illness. The material before me reveals some evidence on the basis of which a reasonable person, acting judicially and properly instructed as to the relevant law, could have come to that conclusion. I cannot say that in arriving at this conclusion the Delegate committed errors of fact amounting to errors of law, or misconstrued the applicable legal tests.

12. The Member, accordingly, dismissed Mr. Gaspar's ground of appeal based on error of law and ultimately dismissed Mr. Gaspar's appeal.
13. With his Reconsideration Application Form, Mr. Gaspar has attached three pages of submissions, primarily disputing the Delegate's findings of fact and conclusions. Mr. Gaspar has also provided further information disputing the evidence presented by CBB at the Hearing. There is nothing in the submissions that addresses any errors on the part of the Member in the Original Decision. I do not, therefore, propose to set out those submissions here but I note that I have reviewed them very carefully and will comment, in a general way, on these submissions under the heading of Analysis herein.
14. Mr. Gaspar also refers in his submissions to mediation he participated in with CBB before the Hearing on December 18, 2006. He asserts that the parties reached an agreement at the mediation and under that agreement CBB was required to pay him \$3,100.00 for settlement of his claim. However, Mr. Gaspar indicates that he did not receive the payment from CBB because he refused to sign a release in favour of the latter. Mr. Gaspar indicates that he adduced this evidence in his appeal to support his position that he

was dismissed from his employment with CBB without cause but the Member did not consider this evidence in the Original Decision.

15. Mr. Gaspar also retained counsel to file a final reply in the Reconsideration Application. The written submissions of Mr. Gaspar's counsel do not challenge the Member's Original Decision on any technical or substantive ground but simply challenge the findings of fact and conclusions of the Delegate in the Determination and further seek to respond, on behalf of Mr. Gaspar, to the evidence of CBB presented at the Hearing before the Delegate. I do not wish to set out these submissions here but I have carefully reviewed them and will deal with them in a general way under the heading Analysis herein.
16. CBB, through its counsel, submits in response to Ms. Gaspar's Reconsideration Application that Mr. Gaspar has failed to disclose or present any grounds for reconsideration and that Mr. Gaspar's application is "simply a restatement of the arguments and evidence heard at the Hearing".
17. The Director, in his submissions, in response to Mr. Gaspar's Reconsideration Application, submits that Mr. Gaspar has failed to show or raise a serious question of law, fact, principle or procedure that merits a review of the Original Decision and therefore Mr. Gaspar's application should be dismissed forthwith.
18. The Director also points out, in response to Mr. Gaspar's reference to the mediation offer made to him by CBB, that the mediation was on a "without prejudice" basis and the evidence of the mediation is neither admissible for the purposes of determining whether CBB contravened the Act nor is it relevant.
19. In the balance of the Director's submissions, the Director addresses the specific findings of fact and conclusions that the Delegate made in the Determination, which Mr. Gaspar is challenging. I do not find it necessary to set out those submissions here due to my decision pertaining to the submissions of Mr. Gaspar and his counsel.

## ISSUES

20. In reconsideration applications there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the Act to reconsider the original decision. If the Tribunal, in the threshold issue, is satisfied that the case is appropriate for reconsideration, then it will proceed to the next stage and consider the substantive issue or the merits of the application. Thus, the penultimate question is whether this is an appropriate case for the Tribunal to exercise its discretion under section 116 of the Act.

## ANALYSIS

21. Section 116 of the Act, while not setting out the basis on which the Tribunal may reconsider a decision, sets out the Tribunal's power of reconsideration:

### *Reconsideration of orders and decisions*

- 116** (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.

22. In *Re Ekman Land Surveying Ltd.*, [2002] B.C.E.S.T.D. No. 413 (QL), the Tribunal indicated that reconsideration is not a right to which a party is automatically entitled. Instead, reconsideration is undertaken at the discretion of the Tribunal. It is only in exceptional circumstances that the Tribunal will agree to reconsider a decision because the Act intends that the Tribunal appeal decisions be final and binding.
23. In *Milan Holdings Ltd.* [1998] B.C.E.S.T.D. No. 339 (QL), the Tribunal articulated a need for a principled and responsible approach to its reconsideration power in Section 116 of the Act. The Tribunal delineated a two-stage analysis for deciding whether it should exercise its discretionary reconsideration power. In the first stage, the Tribunal decides whether the matter raised in the application for reconsideration warrants reconsideration. If the answer in the first stage is in the affirmative, then in the second stage the Tribunal considers the merits of the application.
24. Having said this, the Tribunal in *Milan Holdings Ltd.* went on to delineate the considerations in the first stage of the analysis and stated that the following factors weigh against reconsideration:
- (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay;
  - (b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Tribunal; and
  - (c) the application arises out of a preliminary ruling made in the course of an appeal.
25. In *Re Zoltan Kiss* [1996] B.C.E.S.T.D. No. 129 (QL), the Tribunal delineated a non-exhaustive list of grounds in favour of exercising the reconsideration power under Section 116 of the Act. These grounds include:
- (a) a failure by the adjudicator to comply with the principles of natural justice;
  - (b) there is a mistake in stating the facts;
  - (c) a failure to be consistent with other decisions which are not distinguishable on the facts;
  - (d) some significant and serious new evidence has become available that would have led the adjudicator to a different decision;
  - (e) some serious mistake in applying the law;
  - (f) some misunderstanding of a failure to deal with a significant issue in the appeal; and
  - (g) some clerical error exists in the decision.
26. In my view, Mr. Gaspar's application for reconsideration fails in the first stage of the analysis proposed in the *Milan Holdings* decision and therefore does not warrant reconsideration. While I have not specifically delineated all of the submissions of Mr. Gaspar and his counsel, I have very carefully reviewed them and they essentially dispute findings of fact and conclusions of the Delegate in the Determination which findings of fact and conclusions are not unreasonable in my view. Further, in my view, the Member, in hearing the Appeal of Mr. Gaspar, applied the appropriate tests and law in considering all of the grounds of appeal under Section 112 of the Act Mr. Gaspar advanced and properly dismissed Mr. Gaspar's appeal. While Mr. Gaspar and his counsel have not challenged the technical basis of the Member's Original Decision, I reiterate that both Mr. Gaspar and his counsel have sought to dispute the findings of fact and conclusions of the Delegate and simply reargue Mr. Gaspar's entire case in the reconsideration application. It is not only improper for the applicant to rehash and re-argue its case in the reconsideration

application but it is also contrary to the spirit and intent of the Act to allow such as it defeats the statutory purpose of providing fair and efficient procedures for resolving disputes delineated in Section 2(d) of the Act. Accordingly, this Tribunal will not exercise its discretion under Section 116 to reconsider the Original Decision.

27. I also add that another factor in the *Milan Holdings* decision that weighs against Mr. Gaspar in his Reconsideration Application is that he filed his Application late by at least 6 weeks without offering any explanation. While my decision to not exercise the discretion the Original Decision under section 116 of the Act is primarily based on my view that Mr. Gaspar is simply rearguing his case with a view to obtaining a different outcome this time, the unexplained delay in filing his Application is, nevertheless, an added influencing factor in my decision.

### **ORDER**

28. Pursuant to Section 116 of the Act, I order the decision B.C.E.S.T. #D111/07 confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**