An application for Reconsideration

- by -

Retirement Concepts Seniors Services Ltd., Retirement Concepts Holdings Ltd., Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd.
("the associated entities")

- 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: David B. Stevenson

FILE No.: 2007A/12

DATE OF DECISION: May 14, 2007

DECISION

SUBMISSIONS

David T. McDonald	on behalf of Retirement Concepts Seniors Services Ltd., Retirement Concepts Holdings Ltd., Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd.
G. James Baugh	on behalf of 94 employees
Michelle Alman	on behalf of the Director

OVERVIEW

1. Retirement Concepts Seniors Services Ltd., Retirement Concepts Holdings Ltd., Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. (collectively, the "Applicants") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of three decisions of a Member of the Tribunal: BC EST #D08/07, BC EST #D09/07 and BC EST #D010/07. All of the decisions are dated January 23, 2007. The Applicants say the first two decisions will only need to be reconsidered if they are successful in their application on BC EST #D010/07. For the purposes of this decision, I shall refer to BC EST #D010/07 as the "original decision".

2. A Delegate of the Director of Employment Standards (the "Delegate") found there was a group termination and that, as a result, Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. had contravened Section 64 of the *Act* by failing to pay group termination pay. The Delegate ordered Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. to pay affected employees an amount of $729,761.87, an amount which included group termination pay, annual vacation pay and interest. An administrative penalty was imposed on Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. under Section 29 of the *Employment Standards Regulation* in the amount of $500.00.

3. Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. appealed the Determination. The appeal raised the following issues:

    1. whether the Director's finding on Section 97 of the *Act* was an error of law;
    2. whether the Director's inclusion of "casual employees" in the group entitled to notice or compensation under Section 64 of the Act was an error of law;
    3. whether there was a failure to observe principles of natural justice in making the Determination;
    4. whether an oral hearing on the appeal was necessary;
    5. whether the calculation of entitlements was correct; and
    6. how "on-leave" employees should be treated.

4. The Tribunal Member making the original decision considered each of the listed issues and made the following decisions on them:

1. the Director's finding on Section 97 of the *Act* was not an error of law;
2. the Director's decision to include "casual employees" within the group entitled to notice or compensation under Section 64 of the *Act* was an error of law;
3. there was a breach of natural justice arising from the delegate's change of position on the scope of entitlement without giving notice to the parties of that change in position;
4. an oral hearing was unnecessary;
5. the calculation of entitlements was incorrect; and
6. "on-leave" employees were included in the group entitled to notice.

5. This application seeks reconsideration of the original decision on the finding relating to Section 97 of the *Act*.

6. The applicant contends there is an error of law in the original decision on that issue.

ISSUE

7. In any application for reconsideration 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 satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is whether there was an error of law in the conclusion that Section 97 of the *Act* did not apply.

ANALYSIS OF THE PRELIMINARY ISSUE

8. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 of the *Act* which reads as follows:

> *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.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section*
>
> *(3) An application may be made only once with respect to the same order or decision.*

9. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose,

found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. Briefly stated, the Tribunal exercises the reconsideration power with restraint. As outlined in *Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BCEST #RD046/01:

> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

10. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and to the system generally. An assessment is also made of the merits of the original decision: see *Director of Employment Standards (Re Walker)*, BC EST #RD048/01. The focus of a reconsideration application is the original decision.

11. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal stated:

> 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. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions: "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96) . . .

12. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

13. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

14. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue or issues raised by the reconsideration.

15. After review of the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.

16. In my view, the original decision reflects no error, let alone a serious error, concerning the interpretation and application of Section 97 of the *Act*. On the facts as found in the Determination, it is consistent with previous decisions of this Tribunal. It accords with the language of Section 97, the structure of the *Act* in relation to Sections 63 and 64, and the objects of those sections in light of the overall purpose of the *Act*.

17. Since the Tribunal's decision in *Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97), it has been accepted that Section 97 does not operate in respect of an employee who has been terminated prior to or at the time of disposition.

18. Nothing in this application for reconsideration has persuaded me that the interpretation and application of Section 97 adopted by the Tribunal should be rejected in favour of the view of that provision taken by the applicants.

19. The applicants contend the Tribunal Member "failed to properly apply the legal principles and consider the case in its proper context". The central dispute, however, is not with the application of legal principles, including the interpretation and application of Section 97, but with the finding made in the Determination, and confirmed in the original decision, that the affected employees were terminated by Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. on or before the disposition.

20. As submitted by the applicants on page 5 of the reconsideration application submission, "[w]e say the facts of this case clearly establish a continuous employment relationship . . .". The applicants argue the Tribunal Member erred in not agreeing with that assertion.

21. In respect of that predominantly factual finding, the following statement is found in the original decision:

> The Delegate concluded that the employment of the employees was terminated on or before 7:00 am September 9, 2004. Even if I disagreed with his conclusion, which I do not, in my opinion, the Delegate did not err in law in his interpretation of what constituted a termination, nor was his conclusion one that could not reasonably be entertained, within the meaning of the tests enunciated in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

22. In making the above statement, the Tribunal Member accepted the question as being whether the notices of termination provided to the employees on August 4, 2004 were effective and met the appropriate standard, which included a consideration of whether the notices were unequivocal in their meaning, clearly communicating the fact of termination of employment as of a certain date. I do not find the applicants' discussion of *Kalaman v. Singer Valve Co.*, [1997] BCJ No. 1393 (B.C.C.A.) to be particularly helpful. It is apparent from the excerpt provided from that decision that the legal test applied in that case was the same as that applied in *Yeager v. Hastings Agencies Ltd.*, [1985] 1 WWR 218, 5 CCEL 266 (B.C.C.A.) and which is referred to in the original decision. In fact, in the *Yeager* decision the Court specifically acknowledged the importance of the facts in determining the effectiveness of a notice of termination: "Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case".

23. The applicants are doing no more here than asking me to reach a different conclusion on the facts about whether the notices of termination given to the affected employees were clear and unequivocal and therefore effective.

24. In response, I need do no more than paraphrase the decision made by the Tribunal Member in the original decision, that even if I disagreed with the result found in the original decision, which I do not, no error of law has been shown.

25. The applicants say the result in this case is contrary to public policy and the purposes of the *Act* and on that basis should be reconsidered. The short answer to that submission is found in the facts. Where the evidence demonstrates, as it did in this case, an intention on the part of the employer to terminate the employment of employees and that intention is clearly and unequivocally expressed in writing in a notice given to the employees, both public policy and the policy of the *Act* would demand that those facts find the intended expression.

26. The application for reconsideration of BC EST #D010/07 is denied. It follows that the applications for reconsideration of BC EST #D08/07 and BC EST #D09/07 are also denied.

27. One further comment concerning aspects of the original decision is warranted.

28. In the original decision there is an indication that some of the comments found in the reconsideration decisions *Lari Mitchell, and others*, *supra.*, and *Director of Employment Standards (Re Primadonna Italiano Ristorante)*, BC EST #RD046/01 relating to the interpretation and application of Section 97 should be considered *obiter dicta*.

29. I do not subscribe to that view.

30. Technically speaking, the term *obiter dicta* is reserved to describe a remark or observation made by a judge that, although included in the body of the court's opinion, does not form a necessary part of the court's decision.

31. In my view, it is not helpful to speak of the doctrine applying in the context of decisions made by the Tribunal. There are two principal reasons for that.

32. First, to suggest that comments made in the above Tribunal decisions relating to the proper application and interpretation of Section 97 were *obiter dicta*, literally "said by the way, or in passing", fails to give full effect to the nature of reconsideration under the *Act*. The Tribunal applies its reconsideration power in a policy-making and policy developing context as well as in an error correcting context. As the Tribunal stated in *Milan Holdings Ltd.*, *supra*.:

> 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.

33. Both the *Lari Mitchell and Re Primadonna Ristorante Italiano* decisions were constructed and issued with the intention of providing the community governed by the *Act* with a clear indication of not only how Section 97 would be interpreted and applied in the context of those particular cases, but also how Section 97 would be interpreted and applied generally, thus allowing members of that community to plan

their affairs in an atmosphere of uniformity and predictability concerning the application of that provision.

34. Second, the application of the doctrine of *obiter dicta* is more properly reserved for bodies legally bound by the related doctrine of *stare decisis*, a common law doctrine that legally requires judges to apply previous binding decisions of their own court or any higher court. A description of comments in a court's decision as being *obiter dicta* avoids the application of the principle of *stare decisis*.

35. The jurisdiction of the Tribunal, however, does not lie in the common law, but in statute and the Tribunal is not legally bound by the doctrine of *stare decisis* (see *Park Lane Ventures Ltd.*, BC EST #D211/03). Largely for that reason, consideration of the doctrine of *obiter dicta* is unnecessary to the decision making process of the Tribunal.

36. That is not to say the Tribunal does not strive for consistency and uniformity in its decision making, but, as noted in *Park Lane*, a strict application of that doctrine would interfere with the ability of the Tribunal to evolve and remain responsive to changing legislative and policy objectives.

ORDER

37. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed in respect of the matters raised in this application.

David B. Stevenson
Member
Employment Standards Tribunal