An application for Reconsideration

- by -

94 Employees

- 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/13

DATE OF DECISION: May 14, 2007

DECISION

SUBMISSIONS

G. James Baugh	on behalf of 94 employees
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.
Michelle Alman	on behalf of the Director

OVERVIEW

1. 94 Employees seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST #D010/07, made by a Member of the Tribunal on January 23, 2007 (the "original decision"). The original decision considered an appeal by Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. of a Determination issued by a delegate of the Director of Employment Standards on July 26, 2006. The Determination considered whether there had been a group termination of employees at Nanaimo Seniors Village.

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 issues of the exclusion of "casual employees" from the group entitled to notice or compensation under Section 64 of the *Act* and the failure to observe principles of natural justice.

6. The issues are stated as follows in the reconsideration submission:

- The adjudicator's findings with respect to Section 65 and the resulting exclusion of the casual employees from the group entitled to Section 64 notice;

- The finding of a breach of natural justice; and

- Any changes in the calculation of the award stemming from the findings with respect to casual employees.

7. I digress briefly to make one point. Throughout the original decision, the submissions of the parties and this decision, there is reference to "casual employee, or employees". The *Act* defines "employee" in Section 1 without reference to the term "casual employee". No other provision of the *Act* contains a reference to the term "casual employee". Section 3(1) says:

> *3 (1) Subject to this section, this Act applies to all employees except those excluded by regulation.*

8. The *Employment Standards Regulation* (the *"Regulation"*) lists several classes or groups of employees to whom the *Act*, either in whole or in part does not apply. There is no reference in the *Regulation* to the term "casual employee".

9. Section 65 excludes employees whose employment or circumstances bears the characteristics that are described in that provision from the entitlements set out in Sections 63 and 64 of the *Act*.

10. Whether an employee is excluded from the application of Sections 63 and 64 is a question of mixed fact and law that requires an analysis of the circumstances of the employee's employment considered against the applicable legal test. While I accept, as the Tribunal Member did in the original decision, that using the term "casual employee" is a comfortable shorthand for describing the affected group, it should be

made absolutely clear that using that description for the affected employees neither enhances nor diminishes the required analysis.

11. As the Tribunal has noted in other contexts, the person's status will be determined by application of the *Act*, not by the title chosen by the employer or understood by some third party.

12. Having made that point, I will continue to use the term "casual employees" to identify the affected group.

ISSUE

13. 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 issues raised in this application are listed above.

ANALYSIS OF THE PRELIMINARY ISSUE

14. 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.*

15. 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.

16. 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.

17. 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) . . .

18. 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.

19. 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.

20. 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.

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

22. The 94 Employees say this is an appropriate case for reconsideration because of "two serious errors of law" in the original decision:

> The Adjudicator erred in finding a breach of natural justice with respect to the delegate's change from the position taken in the Preliminary Report on the application of Section 65. The Adjudicator also erred in finding that the Delegate erred in finding that Section 65 did not apply to the casual employees. Instead of referring the issue back to the Delegate the Adjudicator determined that Section 65 applied so as to exclude casual employees from the protection afforded by Section 64 of the *Act*. Specifically, the Adjudicator erred in law by applying the wrong legal test in reaching the conclusion that Section 65 applied.

23. The Tribunal Member deciding the original decision adopted the approach and the test outlined in *Covert Farms Ltd.*, BC EST #D077/99 in deciding the casual employees were excluded from the application of Section 64. In this reconsideration, there is no argument from any of the parties that the test for the application of Section 65(1)(a) enunciated in the *Covert Farms Ltd.* decision is the wrong legal test.

24. In reality, the essential character of the dispute taken by the 94 Employees on the Section 65 issue is not that the wrong legal test was applied, but that the Tribunal Member misinterpreted that test when applying it to the facts. There are two particular areas of disagreement.

25. The first area of disagreement is found in the following passage from the reconsideration submission, at para. 34:

> . . . the Adjudicator's conclusion that, "there was no risk to 'continued' employment", . . . is completely wrong on the facts before him.

26. This dispute relates to that element of the test which examines whether "the employee may reject the temporary period without risk to his or her continued employment".

27. The 94 Employees say the error in the original decision lies in the failure to recognize the relevance of "seniority" in examining that element of the test:

> The fourth requirement of the *Covert Farms* test is merely that the employee has the option of rejecting or accepting a work opportunity without risk of continued employment. Clearly, there is a risk of continued employment in moving down the seniority list resulting in fewer or no work opportunities and decreased chances of obtaining permanent employment.

28. The above comment misses the purpose of the fourth part of the test enunciated in the *Covert Farms Ltd.* decision. That part of the test exists to protect the integrity of the choice given to the employee in that provision of accepting or rejecting temporary periods of work. In other words, it exists to ensure, to the greatest extent possible, that an employee's decision to accept or reject temporary periods of work is not coerced by a threat to his or her continued employment.

29. The inclusion of that requirement in the test is consistent with the purposes of the *Act*, particularly those designed to protect the entitlements provided in the *Act* and the principle of fairness.

30. It is not intended to account for consequences which are voluntarily assumed by the employee when a decision not to accept temporary work is made.

31. The decision of an employee to reject a temporary period of work is accompanied by consequences that the employee is aware of when the choice is made. The most direct and obvious consequence is that the employee gives up the wages that otherwise would have been earned if he or she had worked. In the circumstances of this case, apparently the employee not only gives up the wages, but also gives up the seniority that would accompany the temporary period of work if it was accepted. Ultimately, the result of an employee rejecting too many temporary periods of work could be as suggested in the above excerpt from the reconsideration submission, but that would be a consequence of a freely made choice by the employee.

32. Consequences that are the result of the "option" given to, and freely exercised by, the employee are not to be factored into an examination of whether that employee is excluded from the application of Section 64 of the *Act*.

33. The Tribunal Member did not err in the original decision in finding there was "no risk to continued employment" if an employee chose to reject a temporary period of work.

34. The second area of disagreement relates to the conclusion in the original decision that the second part of the test in the *Covert Farms Ltd.* decision was met in the circumstances.

35. The reconsideration submission says the view set out in the Determination was the correct one and should be reinstated. That would not, of course, get past the conclusion that the fourth part of the test applied to exclude the "casual employees" from the application of Section 64 of the *Act*.

36. In any event, I do not find the decision to reject the Delegate's conclusion that Section 65(1)(a) did not apply because there was "an expectation of continued employment" would warrant reconsideration. The original decision on that point was consistent with the test enunciated in the *Covert Farms Ltd.* decision and with the language of Section 65(1)(a) of the *Act* as an expression of legislative intent. There is nothing in the language of Section 65(1)(a) that relates entitlement to the benefits provided under Sections 63 and 64 to the "expectations" of an employee relating to his or her employment. I agree with the analysis in the original decision on that point. Parts of Section 65(1)(a) only make sense in the context of an on-going relationship between the employee and the employer.

37. While I accept that the *Act* is remedial legislation and should be interpreted to extend its protection to as many employees as possible, there are nonetheless limits to the allowable scope of that approach to statutory interpretation. In *Office and Professional Employees' International Union, Local 378 -and- British Columbia (Labour Relations Board)*, [2000] B.C.J. No. 1225; [2000] BCSC 939, the Court said, at para. 24:

> However, the permitted ambit of interpretation is not infinite. The Board may not under the guise of interpretation substitute its own policy judgment for that of the Legislature. As the Court of Appeal, in a slightly different context, has stated:
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> > The fact that the Council and the arbitrator have special expertise with respect to the field of industrial relations does not give them the power to usurp the legislative function. (*cf. BCGEU v. British Columbia (Industrial Relations Council)* (1988), 33 B.C.L.R. (2d) 1 at 23 (B.C.C.A.)).

38. I do not consider that the natural justice issue, as it is framed and developed in the reconsideration application, raises a question of law at all but rather raises a dispute about whether the facts justified the conclusion reached in the original decision.

39. The Tribunal has accepted the proposition that, at its root, natural justice is only "fair play in action". The Tribunal must be cognizant of the need to ensure there is a basic fairness to the complaint process. As the Tribunal stated in *J.C. Creations Ltd. operating as Heavenly Bodies Sport*, BC EST #RD317/03:

> Basic fairness requires those charged with the responsibility of making statutory decisions to ensure that a party who may be adversely affected by a decision is given notice of and a chance to respond to the essentials of the case they have to meet.

40. Clearly, on the facts before him, it was open to the Tribunal Member making the original decision to conclude that Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd. were not given

a fair opportunity to respond on the matter of the entitlement of casual employees to group termination pay under Section 64 of the *Act*.

41. The reconsideration submission of 94 Employees argues that if there was a breach of natural justice, it was cured through the appeal process. That might be so, but it does not derogate from the finding that there was a breach of natural justice or make the decision of the Tribunal Member to examine the merits of the Delegate's decision wrong.

42. The reconsideration application is denied.

ORDER

43. 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