An Application for Reconsideration

- by -

Courtenay Marshall
("Marshall")

- 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: Robert E. Groves

FILE No.: 2011A/14

DATE OF DECISION: May 4, 2011

DECISION

SUBMISSIONS

Courtenay Marshall	on his own behalf
Peter W. Lightbody	Counsel for Convoy Supply Ltd.
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application brought pursuant to section 116 of the *Employment Standards Act* (the "*Act*") by Courtenay Marshall ("Marshall"). He seeks a reconsideration of a decision of a Member of the Tribunal (the "Member") dated November 2, 2010, under BC EST # D115/10 (the "Original Decision").

2. Marshall filed a complaint alleging that his former employer, Convoy Supply Ltd. (the "Employer"), had failed to pay him compensation for length of service following the termination of his employment in September 2009. In a determination dated July 8, 2010 (the "Determination"), a delegate of the Director of Employment Standards (the "Delegate") decided that the Employer had not contravened the *Act*.

3. Marshall appealed the Determination. In its Original Decision, the Tribunal confirmed the Determination. Marshall now seeks a reconsideration.

4. The Delegate raises an objection that the application for reconsideration has been filed late. Marshall responds that material was mailed to his wrong address, and that he was ill.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 26 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. All of Marshall, counsel for the Employer, and the Delegate have delivered helpful written submissions regarding this application. I have therefore concluded that this application shall be decided having regard to the written materials filed, without an oral or electronic hearing.

FACTS

6. The Employer operates a construction supply and delivery business at several locations within the province. Marshall was employed as a truck driver at the Employer's premises in Surrey from May 1, 2006, until September 28, 2009.

7. The Employer terminated Marshall's employment following a series of incidents involving behaviour on his part that it considered inappropriate. Marshall's position was that the Employer's disciplinary process was unfair, at least in part because it had relied on hearsay statements from third parties, and assumptions that he maintained were false.

8. The Delegate conducted a hearing at which the parties led evidence and made submissions regarding the factual circumstances informing the Employer's decision to dismiss. In the Determination that followed, the

Delegate reviewed that evidentiary record carefully and concluded that the Employer had lawfully terminated Marshall's employment for just cause.

9. Marshall appealed to the Tribunal, asserting that the Delegate had failed to observe the principles of natural justice, and that evidence had become available which was not available at the time the Determination was made.

10. The Member found that Marshall had alluded to no matters in his submissions on appeal which would warrant a conclusion that the Delegate had failed to observe the principles of natural justice. Indeed, the Member noted that the Delegate had conducted a hearing at which the parties and a witness had testified under oath, and that the Determination provided detailed reasons for the conclusion reached.

11. As for new evidence, the Member determined that the items to which Marshall referred were either irrelevant, had been presented to the Delegate prior to the issuance of the Determination, or they were available to Marshall at the time the hearing occurred.

12. As Marshall had not established plausible grounds for his appeal having regard to the jurisdictional categories set out in section 112 of the *Act*, the Member concluded that Marshall's appeal must fail. Accordingly, the Member confirmed the Determination.

ISSUES

13. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

14. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

15. The reconsideration power is discretionary, and must be exercised with restraint. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision with which it is unhappy. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Having regard to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

16. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration of the Tribunal's original decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness.

17. In my opinion, the matters raised in Marshall's application do not warrant a reconsideration of the Original Decision. I am not persuaded that Marshall has demonstrated any basis upon which I might interfere with the disposition set out in the Original Decision. In light of this conclusion, I do not propose to deal with the question whether Marshall's application should be rejected due to its being untimely.

18. I do, however, wish to make a few comments regarding the matters raised in the voluminous, and highly repetitive, material submitted by Marshall for the purposes of this application.

19. A principal element of Marshall's argument is that the Delegate made findings of fact which were incorrect. However, it is trite to say that an appeal to the Tribunal is not meant to provide an opportunity to re-argue matters that have been settled in the proceedings leading to the issuance of a determination. In particular, the Tribunal has a very restricted jurisdiction to examine a delegate's findings of fact. It has been stated in numerous decisions of the Tribunal that it may not correct a delegate's errors of fact unless they amount to errors of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. An example would be a situation where a finding of fact is irrational or inexplicable because it is based on no evidence at all. Absent palpable and overriding error, the Tribunal cannot disturb a delegate's findings of fact, even in circumstances where the evidence might have led the Tribunal to reach different factual conclusions than those appearing in a determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No. 331).

20. In view of this, it is unhelpful for Marshall to insist that the events the Delegate concluded had taken place, and which led to his dismissal, did not occur in the way the Delegate described them in the Determination. This is so because there was at least some evidence supporting the Delegate's conclusions, either in the form of documents, or the oral evidence tendered at the hearing. In the circumstances of this case, that is the end of the matter.

21. The fact that Marshall claims the Employer should have led other, more compelling evidence in order to demonstrate its grounds for dismissal is also of little assistance. Given the Delegate's findings, such evidence would have been superfluous.

22. Marshall appears to assert that he somehow suffered prejudice because a hearing was re-scheduled. He provides no details, however, and so it is impossible to analyze whether any prejudice did in fact occur, and if so, how.

23. Marshall also alleges that the Employer failed to give proper disclosure and access to records which would have assisted him in preparing his argument in the proceedings, despite his requests. The difficulty I have with this suggestion is that Marshall nowhere identifies with clarity what the documents or information would be that he requested, and which were not made available to him. He also fails to explain how those materials might reasonably have affected the outcome at first instance, or before the Member.

24. Marshall makes a further submission. He states it more than once. Examples include the following:

> (The Delegate's) conduct was not impartial and was biased when he stated he worked for the bylaws office ...
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> The Delegate should not have considered the information upon admitting he worked for bylaw ...
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> The complainent (sic.) filed his complaint Aug 6/09 and the arbitrator made comments. He worked for the by-laws. He was not impartial ...

25. It is difficult to discern with precision to what Marshall is referring in these passages, but I will assume for the purposes of these reasons that he is suggesting that the Delegate may have had some sort of connection with a local government authority at some earlier time, which must be taken to impugn his status as an independent decision-maker. The reason for this, I speculate, is that it was the report of a supervisor representing the City of Surrey Parking Enforcement apparatus that served as the culminating incident which induced the Employer to dismiss Marshall. If that is what Marshall is suggesting, I reject it. Bald statements of this type are entirely insufficient to raise a reasonable apprehension of bias. Absent significantly more detailed, and more compelling, facts proven by Marshall supporting an inference that the Delegate's antecedents disqualified him from deciding this case, there is simply no basis for concluding that the Delegate failed to act impartially.

26. Marshall has taken pains, after the fact, to accumulate evidence that he asserts will prove that the Employer's version of events tendered at the hearing was inaccurate. In particular, he refers to the evidence of the Employer at the hearing to the effect that Marshall had a history of interacting poorly with other employees of the Employer. Apparently, the name of one employee was given at the hearing. Thereafter, Marshall obtained information from this employee to the effect that the Employer's version was untrue. I have two observations to make about this evidence. First, it must be said that if Marshall had a concern relating to the Employer's evidence on this point, and felt he had been taken by surprise, he ought to have asked the Delegate for an adjournment so that he could address the matter, and perhaps speak to the employee in question. There is no indication that he did so. Second, it does not appear that the incident described, relating to this employee, had any substantial bearing on the Delegate's determination of the outcome, as revealed in the Determination.

27. Marshall alludes to proceedings he has taken in order to obtain employment insurance benefits, and a remedy under the Human Rights Code. Proceedings under those statutes are aimed at vindicating different policy objectives than those embedded in the *Act*. Moreover, the language Marshall employs when he refers to those other proceedings has failed to make it clear to me how they are relevant to the matters of concern to me on this application. For example, Marshall refers to information before a Board of Referees suggesting that the Employer provided him with three written warnings before he was dismissed. Marshall appears to say that no evidence was ever produced in support of that suggestion. He makes this point, I suspect, to demonstrate that the Employer's evidence tendered to the Delegate should not be relied upon. However, as the Member pointed out in the Original Decision, the Determination made no reference to three written warnings. Rather, the Delegate's reasons focused on a single written warning notifying Marshall that his employment was at risk should a further event occur that was worthy of discipline. I do not discern that Marshall disputes there was one written warning that he did, in fact, receive from the Employer. Whether there were, or were not, other written warnings that were delivered to Marshall by the Employer was entirely irrelevant to the decision contained in the Determination, and to the conclusion reached by the Member in the Original Decision.

28. Finally, I note that Marshall claims the protection of the Canadian Charter of Rights and Freedoms. Section 45 of the *Administrative Tribunals Act*, also incorporated into these proceedings via section 103 of the *Act*, provides that I have no jurisdiction over constitutional questions relating to the Charter.

29. In summary, I am satisfied that that Marshall has established no sufficient basis for my interfering with the Original Decision pursuant to section 116. The Member decided that Marshall had failed to satisfy the grounds for an appeal under section 112 to which he had referred in his Appeal Form. Marshall has failed to persuade me that the Member made an error.

ORDER

30. Pursuant to section 116(b) of the *Act*, I order that the Original Decision of the Tribunal issued under BC EST # D115/10 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal