An Application for Reconsideration

- by -

William O. Valmonte and Mary Ann Valmonte
(the "Valmontes")

- 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.: 2010A/29

DATE OF DECISION: April 27, 2010

DECISION

SUBMISSIONS

Mary Ann Valmonte	on behalf of William O. Valmonte and Mary Ann Valmonte
Melba Oabe	on her own behalf
Joy Archer	on behalf of the Director of Employment Standards

OVERVIEW AND FACTS

1. Mr. William O. Valmonte and Mrs. Mary Ann Valmonte ("the Valmontes") hired Ms. Melba Oabe ("Ms. Oabe") as a nanny in their home in Surrey from February 2007 to September 21, 2007 at the rate of pay of $8.00 per hour and they also paid her airfare from the Philippines to Canada. After the termination of her employment with the Valmontes, Ms. Oabe, pursuant to section 74 of the *Employment Standards Act* (the "*Act*"), filed a complaint (the "Complaint") against the Valmontes alleging that the latter contravened the *Act* by failing to pay her regular wages, overtime wages, annual statutory holiday pay, compensation for length of service and by making unauthorized deductions from her wages.

2. The Delegate of the Director conducted a hearing of the Complaint at which the Valmontes were represented by legal counsel, and issued a determination on October 16, 2009 (the Determination"). The Determination found that the Valmontes contravened Part 3, sections 17, 18 and 21 of the *Act*, Part 4, section 40, Part 5, sections 45 and 46 and Part 7, section 58 of the *Act* in respect of the employment of Ms. Oabe and ordered the Valmontes to pay Ms. Oabe $5,842.92 in wages and interest. In addition, pursuant to section 29(1) of the *Employment Standards Regulation* (the "*Regulation*"), the Delegate levied administrative penalties of $500 each in respect of six contraventions of the *Act* for a total of $3000. The total amount of the Determination was $8,842.95.

3. The Valmontes appealed the Determination on the basis that new evidence had become available that was not available at the time the Determination was being made and adduced in the appeal sworn statements from an individual in the Philippines concerning Ms. Oabe's true identity and further submitted the following categories of evidence: (i) daily work schedule for Ms. Oabe; (ii) time sheets; (iii) excerpts from a desk calendar covering the period April, August and September 2007 and (iv) payroll information. This "new information" was presented on appeal by the Valmontes with a view to showing that the Delegate's Determination was incorrect with respect to the matters of wages, overtime wages, annual and statutory holiday pay and the deductions from wages as well to show that Ms. Oabe's evidence was fabricated and fraudulent and the Delegate was wrong to consider the latter's evidence.

4. The Tribunal Member, in the original decision dated February 2, 2010 (BC EST # D015/10) (the "Original Decision"), rejected the "new evidence" adduced by the Valmontes because it did not qualify for acceptance under the criteria delineated by the Tribunal in *Davies and others* (*Merilus Technologies Inc.*), BC EST # D171/03. More specifically, the Tribunal Member noted in context of the "new evidence" relating to the "true" identity of Ms. Oabe that the latter's identity was irrelevant and sided with the Delegate's conclusion in the Determination that there was no issue that Ms. Oabe signed the employment contract with the Valmontes, performed work for them and made a claim for unpaid wages. The Member also pointed out that all of the "new evidence" submitted by the Valmontes in the appeal existed before the Determination was made and could, with some diligence, have been discovered and provided during the complaint process. The Member

was also not persuaded that the "new evidence" was credible or probative particularly when it contradicted the Valmontes' evidence at the hearing of the Complaint and contrary to the findings of facts made by the Delegate. On the latter point, the Member noted that the Tribunal's limited authority to consider appeals based on alleged errors in findings of facts or conclusions of fact. Finally, the Tribunal Member noted that the Delegate issued the Valmontes a Demand for Employer Records during the complaint process but they, inexplicably, did not produce the evidence or documents they now wished to adduce on appeal as new evidence. For all these reasons, the Member rejected the "new evidence" of the Valmontes and sought to consider the appeal based on Reasons for the Determination and the section 112(5) record.

5. After thoroughly reviewing the Reasons for the Determination and the record, including the submissions of the parties, the Member confirmed the Determination as issued stating:

> In this case, nothing in the appeal has shown the Director ignored the evidence the Valmontes provided during the complaint process or was not aware of the inconsistencies in some of the evidence provided at the complaint hearing, including evidence provided by the Valmontes. In all of the areas challenged by the Valmontes in their appeal, the Director was faced with competing evidence. The Determination quite clearly indicates the evidence submitted by the Valmontes was considered but, in some areas, this evidence was totally rejected in favour of evidence provided by Oabe, in some areas it was rejected in part in favour of a view of the evidence that, overall, was more probable in the circumstances and in other areas it was accepted. The reasons for the conclusions made by the Director on how this evidence was dealt with are set out in the Determination and they do not indicate any reviewable error.
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> There are other elements to the appeal, such as the arguments relating to the annual and statutory vacation pay claims and the penalty for making unauthorized deductions, that are fundamentally misconceived and are not accepted.
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> The suggestion in one of the appeal submissions that William O. Valmonte is not an employer under the *Act* is also not accepted. This position was never argued before the Director, has no factual foundation and was never pursued in any substantive way in the appeal.
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> The allegations of fraud and misrepresentation are serious allegations that require clear proof. These allegations are not established on any of the evidence found in the Record.
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> As a result of my conclusions on the grounds and arguments made by the Valmontes in this appeal, I find this appeal is an effort by the Valmontes to have the Tribunal review and alter findings of fact made in the Determination without persuading me there is any basis or authority for me to do so under any of the grounds set out in section 112(1). Accordingly, the Valmontes have not met their burden and the appeal is dismissed.

6. The Valmontes are now applying for a reconsideration of the Original Decision and requested an in-person hearing of the application. Pursuant to Section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated into the *Act* (S. 103), and Rule 26 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*"), the Tribunal may hold a written hearing, a telephone conference hearing, an in-person hearing or any combination thereof. It is also noteworthy that Rule 26(2) of the *Rules* provides that, in the ordinary course, a reconsideration hearing will proceed as written submissions. In this case, the Valmontes have not provided any compelling reason for me to deviate from the usual mode for a hearing of a reconsideration application. In my view, an oral hearing of the reconsideration application is not necessary and therefore, I propose to adjudicate the reconsideration application based on the written submissions of the parties and a review of the Determination, the Original Decision and the record.

ISSUES

7. In a reconsideration application there is a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the Original Decision. Only if the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issues raised in the reconsideration application will be considered. In this case, the substantive issues include whether the Original Decision wrongly concluded: (i) there did not exist any reviewable error in the Determination of the Director; (ii) the "new evidence" comprising of the information pertaining to the "true" identity of Ms. Oabe was irrelevant in the determination of the Complaint; (iii) the evidence adduced on appeal relating to the daily work schedule for Ms. Oabe, time sheets, excerpts from the desk calendar, and payroll information introduced for the first time in the appeal, did not constitute "new evidence";; (iv) there was no factual foundation for the argument that Mr. William O. Valmonte is not an employer of Ms. Oabe under the *Act*; and (v) there was no foundation to support the allegations of fraud and misrepresentation levelled by the Valmontes against Ms. Oabe.

DISCUSSION AND ANALYSIS

8. Section 116 of the *Act* delineates the statutory authority of the Tribunal to reconsider any order or decision of the Tribunal:

> ***Reconsideration of orders and decisions***
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> ***116*** *(1) On application under subsection (2) or on its own motion, the tribunal may*
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> *(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. Reconsideration is not an automatic right of any party dissatisfied with an order or a decision of the Tribunal. Instead, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *Act* in exercising its discretion as indicated in *Re Eckman Land Surveying Ltd.,* BC EST # RD413/02:

10. Also noteworthy in context of reconsideration applications is the decision of the Tribunal in *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST # D313/98, which delineates a two-stage process for the exercise of its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) 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; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

11. Having delineated the parameters, both statutory and in the Tribunal's own decisions, governing reconsideration applications, I find this is not a case warranting the exercise of the Tribunal's decision in

favour of reconsideration of the Original Decision, as the Valmontes' application fails on the preliminary issue for the reasons that follow.

12. First, the Valmontes have not raised any significant questions of law, fact, principle or procedure or any arguable case of sufficient merit to warrant a reconsideration of the Original Decision.

13. Secondly, I have reviewed the Valmontes appeal submissions and closely compared them to their submissions in their reconsideration application and find that the Valmontes are largely disputing findings of facts made by the Delegate in the Determination which the Tribunal Member, in the Original Decision, rejected. I also find that this is yet another attempt by the Valmontes, using largely evidence that did not qualify as "new evidence" and was rejected by the Tribunal Member in the Original Decision, to reargue their position with a view to having this Tribunal reweigh that evidence and hopefully come to a different conclusion. This is contrary to or inconsistent with the purpose of reconsideration.

14. I also note that the Valmontes, in the reconsideration application, appear to rehash the matter of the "true" identity of Ms. Oabe by producing further new documentation purportedly issued from a trial court in the Philippines pertaining to some violation of the local Passport Act. I only point this out as another example of an attempt by the Valmontes to reargue a matter previously raised and disposed off as irrelevant in the context of the hearing of the Complaint and subsequently in the appeal of the Determination by the Tribunal Member only to be reargued in the reconsideration application.

15. On the whole, having carefully reviewed the Determination, the Original Decision and the submissions of all the parties I find that it was open to the Delegate to make the findings of facts and conclusions she made in the Determination and I also find that the Tribunal Member did not err in confirming the Determination in the Original Decision based on the Member's conclusion that the Valmontes failed to show any reviewable errors in the Determination.

ORDER

16. Pursuant to Section 116 of the *Act*, I order the original decision, BC EST # D015/10, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal