An application for Reconsideration

- by -

Quigg Development Corporation
("Quigg")

- 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: Carol L. Roberts

FILE No.: 2008A/25

DATE OF DECISION: April 30, 2008

DECISION

SUBMISSIONS

Paul Pulver, Coutts Pulver	on behalf of Quigg Development Corporation
Connie Jansen	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Quigg Development Corporation ("Quigg") for a reconsideration of Decision #D014/08 (the "Original Decision"), issued by the Tribunal on February 6, 2008.

2. Rebecca Young began working as a project co-ordinator for Quigg, a construction company on November 6, 2006. Her employment agreement provided for a three month probationary period after which the *Employment Standards Act* ("*Act*") would apply. The agreement further provided that Quigg would pay Ms. Young "one month's severance" during the first year of employment if it decided to end the relationship after the end of the probationary period. On November 22, 2006, Ms. Young advised Quigg that she was pregnant. Her employment was terminated on January 25, 2007, two weeks before the end of her three month probationary period. Ms. Young filed a complaint alleging that Quigg terminated her employment because she was pregnant.

3. Following an investigation into Ms. Young's complaint, the delegate concluded that Ms. Young's pregnancy played some role in her termination and that Quigg had contravened section 54 of the *Employment Standards Act.* The delegate concluded that reinstatement was not an option as the relationship between the parties had broken down and determined that she was entitled to compensation for four month's lost wages in the total amount of $13,428.81 plus interest, for a total of $14,001.56.

4. The delegate also imposed an administrative penalty in the amount of $500 for Quigg's contravention of the *Act.*

5. Quigg appealed the decision on the grounds that the delegate had erred in law in finding that Ms. Young was terminated because of her pregnancy. In the alternative, it argued that the compensation ordered was excessive in the circumstances. Quigg also raised an allegation of bias against the delegate in its submissions although that had not been identified as a ground of appeal.

6. The member reviewed the submissions, the facts and the law, and concluded that Quigg had not discharged the burden of demonstrating that the delegate was biased. He also found no basis for the allegation that the delegate had made factual errors in the Determination.

7. The member concluded that the delegate had not erred in placing the legal burden on Quigg to prove that Ms. Young's pregnancy was not the reason for the termination of her employment. He noted that the Director found no evidence that Quigg had communicated its alleged dissatisfaction with her performance in any meaningful way, no evidence that Ms. Young was ever made aware that her behaviour was as serious as alleged or that her performance was inadequate, no evidence that she was ever made aware that her performance needed to improve significantly if she was to be kept on, and that her termination on January 25, 2007 was sudden and unpredicted.

8. The member concluded:

> In the absence of evidence supporting the reasons given for her termination, the Delegate was, in my view, entitled to infer that Young's pregnancy played at least some role in the termination.
>
> The finding that the employer has either met or not met the burden imposed is in large part a finding of fact. I say "in large part" because it always remains open to the employee or the employer to show an error of law in the findings of fact made in the Determination. In this case, I am of the view that there was evidence on the basis of which the Director could have made this finding and cannot find that those findings were irrational, perverse, inexplicable or unreasonable in the sense contemplated by the relevant legal authorities. Accordingly, no error of law arises.

9. Finally, the member found no error in the delegate's conclusion that Ms. Young was entitled to a "make whole" award of almost six month's wages. He noted that Quigg had the burden of showing that Ms. Young could have avoided some of the losses and mere assertions were insufficient to discharge this burden.

ISSUE

10. There are two issues on reconsideration:

> 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
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> 2. If so, should the decision be cancelled or varied or sent back to the member?

ARGUMENT

11. Quigg submits that the member erred in dismissing its appeal. It says that the member failed to properly address its main argument that the delegate improperly applied a "just cause" legal standard to an employee who was on probation, spending the bulk of his analysis on its subsidiary arguments. It also submits that the member failed to address "the legal significance" of the delegate's statement that a just cause standard need not apply during a probationary period unless the employee is pregnant. Quigg says that although the delegate noted that an employer was not required to prove just cause during the first three months of employment, she concluded that this did not apply where an employee was pregnant. It contends that the delegate erred in applying the wrong test and the member repeated the delegate's error by applying the same just cause standard to a probationary employee.

12. Quigg says that the proper test is that of suitability as outlined in the Tribunal's decision in *Tam (Re)* BC EST #D535/02. It contends that it concluded that Ms. Young was not suitable for the position during her probationary period and that her pregnancy played no role in its decision to dismiss her.

13. Quigg submits that the sole test to be applied is whether Ms. Young's termination was related to her pregnancy not whether it had established just cause for her termination. It submits that, taking the correct legal test into account, the delegate had "ample evidence" that Ms. Young's pregnancy played no part in her termination.

THE FACTS AND ANALYSIS

14. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides

> (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.

The Threshold Test

15. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

16. In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

17. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96*)*

18. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

19. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

20. In *Voloroso* (BC EST #RD046/01*),* the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…

21. 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" is not 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 favor 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.

22. I am not persuaded that Quigg has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.

23. The record discloses that, when asked to demonstrate that Ms. Young's pregnancy was not a basis for her termination, Quigg said that it did not have a formal system established to document performance reviews and could not establish just cause. However, it alleged that, despite feedback and clearly communicated standards of performance, Ms. Young's performance was determined to be wanting. In other words, Quigg asserted that Ms. Young's competency was the basis for her termination. Although the delegate incorporated a "just cause" test into her initial communications with Quigg, she ultimately concluded there was no evidentiary foundation for Quigg's assertions that Ms. Young was not competent. She concluded that in the absence of this evidence, it was reasonable to infer that pregnancy played a role in Ms. Young's termination.

24. Member Stevenson said

> Quigg argues the Director erred by linking the purported failure to show there was "just cause" to terminate Young with the failure to prove Young was not terminated by reason of her pregnancy. Quigg says that because Young was a probationary employee, they are not legally required to prove "just cause" only to show unsuitability. (paragraph 17)

25. The member clearly understood the basis for Quigg's appeal. After setting out the provisions of sections 54(2) and 126 (4), the member said as follows:

> The reverse onus imposed on the employer in the above provision is a statutory recognition of the difficulty for a terminated pregnant employee in trying to establish the employer's motive in evidence. The legislature has decided that in such circumstances, the employer must bring forward

> evidence which, on balance, shows that the action taken was free of any prohibited reason…. (para 46)
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> …
>
> Quigg says the Director erred by requiring Quigg to establish just cause for terminating Young, who was at the time a probationary employee. Quigg seems to have misunderstood what the Director decided, which was that the reasons relied on by Quigg as the sole reasons for terminating Young's employment – her constant mistakes and substandard performance – were not borne out by the evidence. …In the absence of evidence supporting the reasons given for her termination, the Delegate was, in my view, entitled to infer that Young's pregnancy played at least some role in the termination. (para. 48)

26. I am also not persuaded that the member failed to address the "legal significance" of the delegate's words contained in her letters of June 6 and July 6. I have noted above that although the delegate appeared to import the just cause test into her analysis, she ultimately concluded that there was no evidentiary basis for Quigg's argument, which was that Ms. Young was incompetent. Although Quigg now asserts that the test is not one of incompetence but suitability, the fact remains that it asserted performance issues, or incompetence, as the basis for the termination before the delegate. Quigg cannot now raise "suitability" as the basis for Ms. Young's termination.

27. As noted by the Tribunal in *Rose Miller* (BC EST #D062/07)

> …[A]n appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 B.C.L.R. 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 - Richmond/Delta)* [2000] B.C.J. No. 331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06).

28. The Member noted that section 126(4) places a heavy burden on the employer to substantiate that an employee's pregnancy plays no role in its reason for terminating her employment. The Member concluded that Quigg had failed to show neither a palpable or overriding error in the factual conclusions of the delegate nor that the inferences drawn from those conclusions were either inadequately or wholly unsupported by the evidentiary record. He found a rational basis for the delegate's conclusion:

> The finding that the employer has either met or not met the burden imposed is in large part a finding of fact. I say "in large part" because it always remains open to the employee or employer to show an error of law in the findings of fact made in the Determination. In this case, I am of the view that there was evidence on the basis of which the Director could have made this finding and cannot find that those findings were irrational, perverse, inexplicable, or unreasonable in the sense contemplated by the relevant legal authorities. Accordingly, no error of law arises. (para. 49)

29. I find no basis to exercise the reconsideration power.

ORDER

30. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal