

An Application for Reconsideration

- by -

Siegfredo Bercasio

- 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.: 2010A/36

DATE OF DECISION: May 12, 2010

DECISION

SUBMISSIONS

Siegfredo Bercasio on his own behalf

Gagan Dhaliwal on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Siegfredo Bercasio for a reconsideration of BC EST # D088/09 (the “Original Decision”), issued by the Tribunal on August 24, 2009.
2. Mr. Bercasio filed an unpaid wage complaint against his employer, Hallmark Ford Sales Ltd., on November 13, 2008, shortly after he was dismissed from his employment. A delegate of the Director of Employment Standards dismissed his complaint following an investigation.
3. Mr. Bercasio appealed the decision on the grounds that the delegate had erred in law and failed to observe the principles of natural justice in making the Determination. The Employer chose not to file any submissions in response to the appeal. The Member decided that the appeal could be decided on the written submissions of the Appellant and the Director.
4. The Member reviewed the extensive submissions of the parties, including Mr. Bercasio’s supplemental written submissions dated July 10, 21 and 23, 2009. The Member determined that the July 21, 2009 submission was not admissible as it contained evidence that was, or could have been, before the delegate and thus did not meet the test of new evidence. He also found that, in any event, the evidence had little probative value to the issue before him.
5. The Member rejected Mr. Bercasio’s assertion that the delegate had failed to observe the principles of natural justice. He found Mr. Bercasio’s assertion that the delegate was biased against him to be “wholly unsupported by any evidence”.
6. The Member addressed each of Mr. Bercasio’s specific allegations that the delegate had failed to observe natural justice and concluded that there was no basis to cancel the Determination on this basis.
7. The Member noted that Mr. Bercasio had not specifically identified any alleged errors of law but addressed Mr. Bercasio’s suggestion that his employment had been wrongfully terminated and that the delegate had erred in rejecting his claims for unpaid wages, recovery of an unauthorized wage deduction and compensation for a section 8 misrepresentation.
8. The Member concluded that the evidentiary record amply supported the delegate’s conclusion that there were no unauthorized wage deductions.
9. The Member then reviewed the delegate’s analysis of “just cause” and found that she appeared to have “inappropriately blended” the distinct concepts of just cause for poor performance and just cause based on “insubordination”. The Member concluded that while the Employer may well have had just cause for some disciplinary action, it did not have just cause for summary dismissal. The Member found that the delegate had erred in finding that there was just cause for summary dismissal without written notice. The Member

concluded that while the Employer could have given Mr. Bercasio two week's written notice of termination, having failed to give any notice at all, Mr. Bercasio was entitled to the equivalent of 2 weeks' wages under s. 63(2)(a) of the *Act*. The Member varied the Determination in that respect and referred the matter of Mr. Bercasio's precise monetary entitlement back to the Director for calculation.

ISSUES

10. There are two issues on reconsideration:
 1. Does this 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 Member?

ARGUMENT

11. On March 12, 2010, Mr. Bercasio sought reconsideration of the Original Decision on the grounds that the Member did not offer "an adequate explanation why the employer's commission structure was not in violation of section 21 of the Act". Mr. Bercasio also submitted that "the 30 day period for filing this request must be waived" because he continued to seek relief through the Office of the Ombudsman.
12. The Director opposes the application on the basis that Mr. Bercasio's application is late. The Director submits that even though Mr. Bercasio may be seeking redress through the Ombudsman's office, he still has not explained why his application is late. The Director made no further submissions on the reconsideration application.

ANALYSIS

13. 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
 - (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.

1. The Threshold Test

14. 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."
15. In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal 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.

16. 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)

17. 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.

18. 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.

19. 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...

20. 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.

21. One of the issues to be considered in a Reconsideration application is the timeliness of the application. The Tribunal will consider delay in deciding whether to exercise the reconsideration discretion and where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will militate against reconsideration. (*The Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BC EST # RD046/01)

22. I find that Mr. Bercasio has not met the threshold test.

23. Mr. Bercasio alleges that both the Director and the Member failed to explain why his commission structure did not comply with the *Act*. In his initial complaint, Mr. Bercasio alleged that his Employer had failed to pay regular wages and commissions. There is nothing in the record that suggests that Mr. Bercasio's commission structure was an issue before the Director. Nevertheless, the delegate determined that Mr. Bercasio had been paid the wages and salary to which he was entitled for the period between May 8, 2008 and November 8, 2008, or that period beginning 6 months before the termination of Mr. Bercasio's employment.
24. There was nothing in Mr. Bercasio's appeal documentation that suggested "an explanation of why his commission structure did not comply with the Act" was an issue. As noted in paragraph 7, the Member found that Mr. Bercasio had not specifically identified any errors of law. Nevertheless, the Member addressed all of the issues raised by Mr. Bercasio.
25. In my view, Mr. Bercasio's reconsideration request has not raised questions of law, fact, principle or procedure that are so significant that they ought to be reviewed.
26. I am not persuaded that Mr. Bercasio has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.
27. Furthermore, Mr. Bercasio's request for reconsideration was received March 16, 2010, almost seven months after the Original Decision was issued and has not satisfactorily explained why the request was not received in a timely manner.

ORDER

28. The request for reconsideration is denied.

Carol L. Roberts
Member
Employment Standards Tribunal