An Application for Reconsideration

- by -

the Director of Employment Standards
(the "Director")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2012A/36

DATE OF DECISION: May 23, 2012

DECISION

SUBMISSIONS

Andres Barker — on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application filed by the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal appeal decision (BC EST # D028/12) issued on March 14, 2012, (the "Appeal Decision"). Although the original complainant, Mary Zhang (the "Employee"), and the original respondent, Stephen Law (the "Employer"), were both advised that this application had been filed and were invited to file submissions in response to it, neither party did so.

2. I am adjudicating this application based on the written record before me that includes all of the material before the Member who issued the Appeal Decision and the Director's written submission in support of the reconsideration application. As will be seen, I find this application to be well founded and my reasons for so concluding are set out below.

PRIOR PROCEEDINGS

3. On June 22, 2011, the Employee filed an unpaid wage complaint against the Employer alleging that she had been employed from April 28 to May 26, 2011, but had not received her full contractually agreed wages (she did acknowledge receiving 4 cash payments totalling $400 but claimed a $620 shortfall based on her $10 hourly wage). The Director's delegate investigated this complaint and following an October 14, 2011, meeting with parties (the Employee appeared in person; the Employer by teleconference), and subsequent receipt of further submissions, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). The Determination and the delegate's reasons are both dated November 22, 2011.

4. By way of the Determination, the delegate ordered the Employer to pay the Employee the total sum of $670.37 representing her unpaid wages together with concomitant vacation pay (at 4%) and section 88 interest. Further, and also by way of the Determination, the delegate levied 2 separate $500 monetary penalties against the Employer (see *Act*, section 98). Thus, the Employer's total obligation under the Determination was fixed at $1,670.37.

5. Briefly, the nature of the business relationship between the two parties was as follows. The Employee was hired to sell goods, that the Employer (who described himself as a "Bailiff & Estate" dealer) somehow secured, through internet services such as "eBay.ca" and "Amazon.ca". The Employee, who responded to an online employment advertisement on "Craig's List" for a "sales co-ordinator/administrator" position that would pay $10 to $15 per hour plus commissions, was obliged to set up a personal online account and then sell the Employer's goods through that account. There were no sales but the Employee credibly documented having worked for 102 hours during her brief tenure.

6. The Employer's position before the delegate was that there was no employment relationship between the parties but, rather, that he was some sort of consultant to the Employee's own on-line sales business or, alternatively, that the parties were co-venturers. He also claimed that the Employee was to be paid on a pure commission basis, not an hourly rate, and since no sales were generated, he had no liability. The Employer

did not satisfactorily explain why, if the agreed payment scheme was purely a commission arrangement, he paid the Employee $400 in the face of no sales revenue other than to suggest that the payments were "personal" and paid as a demonstration of "goodwill". Given the overwhelming evidence that the parties were in an employment relationship (recounted in the delegate's reasons at pages R5 – R7), the delegate rejected the Employer's position and found in favour of the Employee.

7. The Employer appealed the Determination alleging all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice and that he now had evidence that was not available when the Determination was being made (see *Act*, subsections 112(1)(a), (b) and (c)).

8. The Member adjudicating the appeal rejected both the "error of law" and "natural justice" allegations (Appeal Decision, para. 24) but did find that there was merit to the "new evidence" ground. Accordingly, he issued an order referring the matter back to the Director "to further investigate and consider the new evidence" (Appeal Decision, para. 26).

9. I have reproduced, below, all of the salient assertions regarding the so-called "new evidence" that was identified in the Employer's handwritten letter he appended to his appeal form:

- "Mary Zhang own A/C [account?] was terminated abruptly by ebay thus rendering her service as a viable seller impossible to accomplish without informing Stephen Law of the termination…";
- "Mary Zhang approached Steven Law and claimed to be his employee during the 2 weeks of seller/supplier relationship, to which Stephen Law promptly refused";
- "Mary Zhang explained that there were sales pending (still hiding her A/C termination @ ebay) and asked Stephen Law to advance $400 to be recovered in future sales."; and
- "Stephen Law had no records &/or access to her ebay business. As such, Stephen Law could not assist her with items due to her ebay cancellation/termination. Stephen Law had decided to terminate the tentative verbal agreement of seller/supplier due to her erroneous actions @ ebay. She could not fulfil her responsibility as a legally-registered business anymore at ebay."

10. At this juncture, I should note that the second of the above assertions is not in any manner "new evidence" – it is precisely the same assertion that was raised before (and later rejected by) the delegate (see delegate's reasons, page R4). Further, the third assertion regarding the $400 payment is wholly contrary to the Employer's evidence before the delegate where he said nothing about an advance against further commissions but rather termed the payment as "personal" and made as a "goodwill" gesture (see delegate's reasons, page R4). New evidence is not admissible on appeal unless, among other considerations, it is "credible in the sense that it is capable of belief" (see *Davies et al.*, BC EST # D171/03 at page 3). I fail to see how an appellant's assertion tendered on appeal that is the polar opposite to a statement made by the same party before the delegate can, in any reasonable view, be considered credible especially when there is absolutely nothing provided to explain why there is such a glaring inconsistency. The first and fourth assertions are linked in that they both refer to the cancellation of the eBay account. However, the thrust of the fourth assertion is that the Employer knew about the account cancellation and thus he decided to terminate the parties' relationship. If this is the correct interpretation, then, once again, this is not "new evidence" since this evidence was "available" and could have been provided to the delegate. I might add, however, that the Employer's position before the delegate was that he terminated the relationship because of the Employee's "poor performance" (see delegate's reasons, page R4) not because of the cancellation of her eBay account – yet another credibility problem for the Employer.

11. As noted above, the Member allowed the appeal and referred the matter back to the Director based solely on the "new evidence" ground. The Member, at para. 22 of the Appeal Decision, set out the governing test for the admissibility of new evidence as explicated in *Davies et al.*, *supra* and then, at para. 23, set out his entire reasoning and conclusion on the matter:

> In my opinion Mr. Law has established the four criteria necessary for the proposed new evidence to be considered. Although the Director may place whatever weight he chooses on the evidence as he determines it, the evidence, if believed, could certainly lead the Director to a different conclusion in respect of the legal relationship between Mr. Law and Ms. Zhang or it may be important in determining whether compensation is payable; and if so, to what value. Finally, depending on the Director's findings the administrative penalties imposed may also change.

THE RECONSIDERATION APPLICATION

12. The Director's position is that the Appeal Decision reflects an improper approach to the admissibility of new evidence on appeal and that the Tribunal Member completely ignored other important evidence in the record before him that, had he given it proper consideration, would have militated against upholding the appeal. The Director asks the Tribunal to vary the Appeal Decision by substituting an order confirming the Determination.

FINDINGS AND ANALYSIS

13. Reconsideration applications must be evaluated in light of the two-stage framework set out in *Milan Holdings* (see BC EST # D313/98). At the first stage, the Tribunal will consider, for example, whether the Appeal Decision is arguably wrong in law or otherwise reflects an improper application of settled legal principles. If the application can be so characterized, the Tribunal will then move to the second stage and consider the application on its merits.

14. In my view, the Director's application passes the first stage of the *Milan Holdings* test. The Member's reasons regarding the "new evidence" ground of appeal, set out in para. 11 above, do not pass muster as meeting the "justification, transparency and intelligibility" criteria established by the Supreme Court of Canada regarding the content of reasons for decision in the administrative context (see, *e.g.*, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 70). The Member simply declared that the "new evidence" met the *Davies* criteria without any analysis supporting that conclusion.

15. Turning to the merits of the reconsideration application, and as I noted above, some of the Employer's assertions were not at all "new" (having been advanced before the delegate) and thus failed to pass the first *Davies* criterion. Further, although some of the assertions might have been relevant – the Member's reasons do not indicate how or why the evidence would be relevant. It must be remembered that this was not a "just cause" case where the Employer was asserting cause for dismissal under subsection 63(3)(c) of the *Act*; rather, it was a claim for unpaid wages and whether or not the eBay account had been cancelled may or may not have been relevant. The Member did not explain why the evidence was relevant to the Employee's unpaid wage claim. It does not, for example, speak to the question of whether she worked, as she asserted, 102 hours during the period from April 28 to May 26, 2011. In addition, the Member did not explore whether the evidence was credible and, as I have already observed, in my judgment, the Employer's evidence was plainly not at all credible.

16. Most importantly, the Employer simply advanced some *assertions* without any corroboration. The record before the Member indicated – and the Employer did not in any way contest this point although he was given a fair opportunity to do so – that the eBay account was not *suspended* until July 11, 2011, (the account was not *cancelled*) for non-payment of a $31.75 fee. The Employee's uncontroverted evidence was that she did not reinstate her account since she was no longer working for the Employer and saw no reason to continue maintaining the account. It bears repeating that the parties' employment relationship ended on May 26, 2011. In light of that uncontested fact, what is the relevance of the suspension of the account some 6 weeks after the parties' employment relationship ended? I cannot see any possible relevance to this fact.

17. In my view, the only viable order to have been made in the appeal was one dismissing the appeal and confirming the Determination since the "new evidence" ground was not, on the record before the Member, made out. Accordingly, I propose to allow the reconsideration application and issue an order varying the Appeal Decision.

ORDER

18. Pursuant to section 116(1)(b) of the *Act*, para. 27 of the Appeal Decision is deleted and the following is substituted:

> ORDER
>
> Pursuant to section 115(1)(a) of the *Employment Standards Act*, I order that the Determination be confirmed as issued in the amount of $1,670.37 together with whatever further interest that may have accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal