Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

A1 Fencing & Contracting Services Inc.
("A1 Fencing")

- 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.: 2017A/43

DATE OF DECISION: May 3, 2017

DECISION

SUBMISSIONS

Sandra Collins — on behalf of A1 Fencing & Contracting Services Inc.

INTRODUCTION

1. This is an application filed by A1 Fencing & Contracting Services Inc. ("A1 Fencing") under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D024/17 issued on February 28, 2017 (the "Appeal Decision").

2. Reconsideration applications are assessed using a two-stage framework set out in *Milan Holdings* (see BC EST # D313/98). Under the *Milan Holdings* framework, the application is first reviewed to determine if it raises a serious question of law, fact, principle or procedure. At the first stage, the Tribunal will consider, among other things, whether the application is timely or if it is, in essence, simply a request to have the Tribunal reweigh evidence and come to a different conclusion from the appeal panel. In these latter instances, the Tribunal will ordinarily refuse to engage in a searching analysis of the merits of the application but, rather, will dismiss it without hearing from the respondent parties.

3. In my view, this application does not pass the first stage of the *Milan Holdings* test and thus must be summarily dismissed. My reasons now follow.

FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

4. Bryan Wrightson ("Wrightson") filed an unpaid wage complaint against A1 Fencing that was, in due course, the subject of an oral complaint hearing before a delegate of the Director of Employment Standards (the "delegate"). The delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") on September 26, 2016. The delegate determined that Mr. Wrightson was an employee rather than an independent contractor, and that he was entitled to regular wages, overtime pay, statutory holiday pay, compensation for length of service and vacation pay. Including section 88 interest, the total unpaid wage award issued in Mr. Wrightson's favour totalled $16,077.71.

5. Further, and also by way of the Determination, the delegate levied three separate $500 monetary penalties (see section 98 of the *Act*) thus bringing A1 Fencing's total liability under the Determination to $17,577.71.

6. A1 Fencing appealed the Determination alleging that the delegate failed to observe the principles of natural justice and that it had evidence that was not available when the Determination was being made (see subsections 112(1)(b) and (c) of the *Act*). With respect to this latter ground, A1 Fencing provided some documentary evidence and, additionally, requested a 1-month extension of the appeal period "to gather mounting evidence in our favour".

7. A1 Fencing's appeal was dismissed under subsection 114(1)(f) of the *Act* on the basis that the appeal had no reasonable prospect of succeeding.

8. With respect to A1 Fencing's "new evidence" ground of appeal, the appeal panel held that A1 Fencing had not provided a credible explanation for its failure to submit the evidence in question to the delegate and that, in any event, this evidence was not "new" since it was available (or with due diligence could have been

discovered) and should have been provided to the delegate. Further, the proffered evidence (and evidence that might be submitted later) was not sufficiently cogent and probative (Appeal Decision, paras. 38 – 39):

> …all of the additional documentary evidence could have been produced and relied upon at the investigative hearing stage, with the advantage of such evidence being verified and authenticated by one or more of A1's five witnesses and then considered contextually by the Director in its overall analysis. The production of them now, without reasonable justification, is to simply reargue the merits of the claim in front of a different decision maker and is not a valid ground of appeal…
>
> … while the materials *may* be arguably be relevant to a material issue, none of these materials are "new" as they could have been produced at the hearing given reasonable diligence, they are unauthenticated and therefore of low credibility and I do not find the materials highly probative in that they would have resulted in a different Determination had they been produced. Consequently, I am not persuaded to exercise my discretion to accept or consider any of the supporting documentation included by A1. *(italics in original)*

9. A1 Fencing's "natural justice" argument was similarly rejected with the Tribunal Member finding that A1 Fencing advanced only "unproven allegations", that the delegate conducted a fair and balanced hearing and that his credibility findings and assessment of the evidence before him were reasonable (see Appeal Decision, paras. 40 – 45).

THE APPLICATION FOR RECONSIDERATION

10. In a memorandum appended to A1 Fencing's "Reconsideration Application Form" (Form 2), A1 Fencing asserts:

- Mr. Wrightson was an independent contractor rather than an employee;
- Mr. Wrightson's hourly wage was $16 rather than the $20 hourly rate the delegate used to calculate his unpaid wage claim;
- Mr. Wrightson was not entitled to any overtime pay because A1 Fencing never authorized him to work overtime;
- Mr. Wrightson was not entitled to any section 63 compensation for length of service (he was awarded 1 week's wage's on this account) because he "quit Jan 13, 2016" and "never did any work for A1 Fencing after Jan 13, 2016"; and
- Mr. Wrightson's actual working hours were far less than as determined by the delegate and after accounting for payments made to him, Mr. Wrightson "was over paid by $274.29" [*sic*].

11. More generally, A1 Fencing says that Mr. Wrightson's claim was, essentially, fraudulent and that he "stole company money".

FINDINGS AND ANALYSIS

12. As noted above, one consideration under the first stage of the *Milan Holding* test is whether the application is timely. A1 Fencing's application was not properly filed within the statutory 30-day period (see subsection 116(2.1) of the *Act*), although the Tribunal has the statutory authority to extend the reconsideration period (see subsection 109(1)(b) of the *Act*). A1 Fencing's application was submitted, by fax, on March 30, 2017 (being the last day of the reconsideration application period), but the application was illegible and otherwise incompletely transmitted. The applicant bears the burden of ensuring that an application is in the proper

form and otherwise legible (see Rule 15(9) of the Tribunal's *Rules of Practice and Procedure*). The Tribunal contacted A1 Fencing requesting that it provide a legible copy of its application and, on April 6, 2017, A1 Fencing filed a separate application (88 pages in total) by electronic mail.

13. While I am not resting my decision on the "timeliness" issue, I do find that A1 Fencing did not properly file its application within the 30-day reconsideration period. I understand that its original application, filed by fax, was 95 pages and A1 Fencing did not have prior Tribunal permission to file an application, by fax, exceeding 50 pages (see Rule 15(3)(c)).

14. Turning to the substantive arguments raised by A1 Fencing, I am unable to conclude that any of them raises a serious question. I shall briefly address each of its arguments.

15. A1 Fencing's original appeal only obliquely raised the "employee versus contractor" issue and it also referred to him as a "newly hired person". Although the Appeal Decision did not specifically address this issue, the evidentiary record before the delegate was such that he was properly entitled to find Mr. Wrightson to be an employee. In particular, the delegate's reasons at pages R7 – R8 are not, in any fashion, tainted by serious legal error.

16. As for the wage rate, this does not appear to have been a matter that was contested before the delegate. A1 Fencing did not raise this issue in its appeal, and thus this issue is not one that can properly be raised, seemingly for the very first time, on reconsideration. Further, the record shows that A1 Fencing's documents submitted at the complaint hearing show his wage rate at $20 per hour (invoiced rate) and there is nothing in the record indicating that A1 Fencing ever contested this rate, although it apparently did query the total number of hours worked.

17. Mr. Wrightson's unpaid wage (including overtime) claim was complicated by the fact that A1 Fencing, contrary to its obligations under the *Act*, never maintained proper payroll records concerning Mr. Wrightson. The delegate assessed the rather unsatisfactory evidence before him regarding Mr. Wrightson's working hours as best he could. The delegate did not uncritically accept Mr. Wrightson's evidence as to hours worked and, indeed, allowed fewer working hours than were claimed. However, there was independent evidence before the delegate corroborating an overtime claim and, on balance, I cannot say that the delegate erred in awarding overtime pay, or any of the other unpaid wage items, or that the Appeal Decision is in error in confirming the delegate's unpaid wage award as set out in the Determination.

18. In its appeal documents, A1 Fencing did not argue that it was not obliged to pay Mr. Wrightson compensation for length of service because he quit (see subsection 63(3)(c) of the *Act*) and, indeed, its appeal submissions strongly suggest that A1 Fencing's position was that it dismissed Mr. Wrightson (apparently, for cause): "When he could not supply that [confirmation of proper WCB enrolment/payment], I told him that we no longer needed his services and the fact he was doing bad business and tarnishing A1contracting's name" [*sic*]; and "I told him not to do anymore for us January 15 in a telephone conversation". In its reconsideration application, A1 Fencing says "On Jan 13, 2016, Mr. Wrightson informed A1 Fencing that he quit" and "And he had quit Jan 13, 2016". But, at a later point in its submission, A1 Fencing says: "*Bryan was dismissed* because he lacked integrity, he was warned about theft" (my *italics*) and that "he was let go". Even assuming that the "quit versus dismissal" issue is properly before me (and I do not believe that it is), I am unable to conclude that the delegate erred in finding that Mr. Wrightson was entitled to section 63 compensation or that the Appeal Decision is in error in this latter regard.

ORDER

19. A1 Fencing's application to reconsider the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal