An application for Reconsideration

- by -

Dr. D. Ciarniello Inc.
("Employer")

- 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.: 2008A/36

DATE OF DECISION: May 28, 2008

DECISION

OVERVIEW

1. This is an application filed by Dr. D. Ciarniello ("Employer") pursuant to section 116 of the *Employment Standards Act* (the "Act"). The Employer applies for reconsideration of a decision of a Member (the "Member") issued on March 3, 2008 (BC EST #D027/08) (the "Original Decision"). The Member confirmed a determination, issued on November 2, 2007 (the "Determination") by a Delegate of the Director of Employment Standards, ordering the Employer to pay its former employee, Deanne Veltri ("Veltri"), the sum of $770.78 for compensation for length of service and vacation pay thereon and interest pursuant to section 88 of the Act. The Delegate also imposed an administrative penalty of $500 on the Employer pursuant to section 29 of the *Employment Standards Regulation*.

FACTS AND SUBMISSIONS

2. Deanne Veltri ("Veltri") filed a complaint under section 74 of the *Act* alleging that the Employer contravened the *Act* by failing to pay her vacation and statutory holiday pay as well as compensation for length of service.

(i) The Hearing and the Determination

3. A hearing of the Complaint was held on June 27, 2007 (the "Hearing"). Veltri did not attend at the Hearing but a representative of the Employer, Ms. Marianna Ciarniello ("Mrs. Ciarniello"), did. Mrs. Marianna Ciarniello managed the Employer's dental clinic and performed administrative and payroll services for the Employer. The Employer also presented Ms. Velitchca Baudin ("Ms. Baudin"), a Certified Dental Assistant in its employ for 17 years, as a witness.

4. The Delegate relied on the submissions of Veltri in the Complaint Information Form wherein she indicates that she was employed by the Employer as a certified dental assistant in its dental clinic from January 24, 2006 to August 24, 2006 and alleges that the Employer terminated her employment by telling her to leave the work place. In addition to her claim for compensation for length of service, Veltri also claimed, in her Complaint, wages for four statutory holidays and overtime pay, but she was uncertain as to the amount of overtime pay she was due.

5. As the Delegate dismissed Veltri's overtime, vacation and statutory holiday pay claims and the Employer's appeal and reconsideration applications, understandably, do not challenge those results, no reference will be made in this decision to any facts or earlier submissions of the parties relating to those claims. Only evidence and submissions relating to Veltri's claim for compensation for length of service will be referenced in this decision.

6. At the Hearing, the Employer's witness, Baudin, explained that on August 24, 2006, at approximately 11:00 a.m., Veltri was assisting Dr. Ciarniello with his patient when the office was suddenly disrupted by Veltri shouting to Dr. Ciarniello "what do you want me to do next?" repeatedly in a loud voice. Baudin states that she stepped in the room to see what was going on and witnessed Dr. Ciarniello asking Veltri to leave his side as she was getting the patient upset. Dr. Ciarniello then asked Baudin to assist him in place of Veltri and the latter left Dr. Ciarniello and the patient and proceeded to walk towards the lunchroom

area in the clinic. Shortly thereafter Veltri left the clinic with her personal belongings from her desk, which included her coffee cup.

7. Baudin further testified that Veltri was scheduled to work the rest of the day but Veltri did not indicate when she left the clinic or whether she was returning after lunch. Veltri also did not call or return to work that afternoon. Baudin also stated that, while there was an expectation that Veltri would return to work in the afternoon and the next day for her shift, no one was able to call Veltri to enquire, as the Employer was short staffed.

8. On the following day, on August 25, 2006, Baudin testified that Veltri failed to come to work but called the clinic at approximately 2:00 p.m., which was the closing time. According to Baudin, Veltri spoke with both the receptionist and Dr. Ciarniello, but Baudin could not hear that conversation. However, Baudin stated that the receptionist told her that Veltri inquired when she was next scheduled to work, as she had not quit her employment. She also further inquired about her paycheque.

9. Mrs. Ciarniello, in her evidence at the Hearing, explained that she was not present on August 24, 2006 to witness the incident between Veltri and Dr. Ciarniello but heard about it that evening from Dr. Ciarniello who said that there were "issues with Dee" (referring to Veltri). Mrs. Ciarniello also testified that while there had been previous arguments with Veltri and other staff, Veltri did "seem to be working out".

10. Mrs. Ciarniello also testified that while she called Baudin the next day (that is, presumably August 25, 2006) to further inquire about what happened at the Employer's clinic between Dr. Ciarniello and Veltri the previous day, she testified that neither she nor Dr. Ciarniello called Veltri to inquire about her intentions. However, based on hearsay evidence from Baudin and Dr. Ciarniello, Mrs. Ciarniello assumed that Veltri had quit and proceeded to prepare her paycheque and Record of Employment.

11. In the reasons for the Determination, the Delegate, on the subject of whether Veltri quit or was fired, was guided by the following passage in the Tribunal's Decision in *Burnaby Select Taxi*, BC EST #D091/96:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment.

12. The Delegate in concluding that Veltri had not quit her employment, reasoned as follows:

> The employer argues Veltri quit when she walked out of the clinic the morning of August 24, 2006. Veltri did not return to work in the afternoon even though she was scheduled to work, nor did she report to work the following day and that it was not until the clinic had closed on Friday afternoon that Veltri telephoned to speak with Dr. Ciarniello. Baudin, the Employer's witness, also stated that she believed Veltri quit when she took with her, her personal belongings. It is reasonable to conclude that the accumulative effect of these events led the Employer, on balance, to believe that Veltri had resigned her position.
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> However, an employee's intention must be unequivocal before an employer can treat an employee's conduct as a resignation. Based on Veltri's actions where she called the next day and told the receptionist that she did not quit and wanted to know when she was scheduled to work, I am not persuaded that it was her intention to quit.

> It was Baudin's testimony that on the day of the incident she heard Dr. Ciarniello order Veltri to leave the area. Why Dr. Ciarniello was demanding Veltri to leave is not known. However, as a result, I believe that on a balance of probabilities that Veltri, in the heat of the moment, was simply reacting to Dr. Ciarniello's order to leave his side when she took her belongings and left.
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> Further, there is inconclusive evidence about what was actually said by Veltri regarding her position when she called the clinic. Baudin's testimony was that the receptionist stated to her that Veltri had "not quit" her job and wanted to know when she was scheduled to work next. Dr. Ciarniello and the receptionist, who were in the best position to hear what Veltri said, were not available to testify at the Hearing. Their evidence would have been conclusive about what was actually said by Veltri. However, neither was available to present their evidence at the Hearing. Most of the evidence produced at the Hearing relevant to Veltri's termination, is second hand and therefore hearsay. Hearsay has little, if any, probative value.
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> There are instances where an employee, in the heat of the moment because of frustration or other reasons, quits their employment and then upon reflection rescinds their hasty decision. Therefore, this is not taken as really manifesting intent by the employee to sever their employment. I believe that this is such a case.

13. It is also noteworthy that the Delegate, in the Determination, found no evidence to contradict the Employer's version of events regarding Veltri wanting to know when to return to work, although that evidence was in the form of hearsay from Beaudin based on what the receptionist told her. The Delegate relied on this fact, in part, to conclude that, on a balance of probabilities, Veltri's actions were not largely consistent with the Employer's position that she resigned from her employment and held that Veltri is entitled to one week's compensation for length of service and vacation pay thereon.

(ii) The Appeal

14. The Employer appealed the Determination on the grounds that the Delegate failed to observe the principals of natural justice in making the Determination. The Member, on appeal, reviewed the argument presented by Dr. Ciarniello on behalf of the Employer and concluded that the Employer's argument also suggested a further ground of appeal, namely, that the Delegate erred in law in determining that Veltri did not quit and the Employer failed to comply with section 63 of the *Act*. Accordingly, the Member sought to consider the error of law ground of appeal, in addition to the natural justice ground of appeal.

15. With respect to the natural justice ground of appeal, the Member notes that the Employer is asserting that the Delegate did not have "sufficient direct information to make a fair and unbiased determination" because Veltri did not attend at the Hearing and her non-attendance deprived the Employer the opportunity to cross-examine her and obtain an explanation for her actions or behaviour at the Employer's clinic on August 24, 2006. According to the Employer, the Hearing should have been rescheduled and Veltri subjected to a penalty for not attending at the Hearing.

16. The Member, in rejecting the Employer's submissions on the natural justice ground of appeal, references in the Original Decision the basic components of the principles of natural justice, namely, "the right to know the case against one self and respond; the right to an unbiased decision maker who both hears and decides the case; and the right to receive reasons for the Decision". According to the Member, the Employer was informed of the Complaint, had the opportunity to respond to it at the investigation and the

Hearing stages. According to the Member, Veltri's absence from the Hearing did not take away from the Employer's opportunity to respond fully to the allegations in the Complaint.

17. The Member also noted that there was no evidence of bias on the part of the Delegate and the latter provided reasons for her decision in the Determination.

18. Finally, the Member stated that parties who do not attend at the Hearing are not subject to a penalty under the *Act*, and the Hearing simply proceeds without them having an opportunity to present their evidence.

19. With respect to the error of law ground of appeal, the Member stated:

> In this case, the facts are not clear and unequivocal to support a conclusion that Ms. Veltri quit. At best, they are ambiguous. For instance, it is undisputed that Ms. Veltri took her personal possessions with her when she left the work place on August 24th. The Employer interpreted this act as conduct that objectively showed Ms. Veltri was quitting her employment. However, this act could just as easily be interpreted as an indication that Ms. Veltri thought she had been fired from employment when told by Dr. Ciarniello to leave. The same could be said for Ms. Veltri's failure to attend work later on August 24th and on August 25th.
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> With respect to the subjective element necessary to find that an employee has quit, there simply was no clear communication by Ms. Veltri of an intention to quit. On the contrary, according to the evidence of the Employer's witness, she stated to the receptionist that she did not quit, and asked for her work schedule. In my view, an "outside observer" viewing these actions would not be satisfied that Ms. Veltri intended to resign.

20. Accordingly, the Member concluded that the error of law ground of appeal also fails and the Employer was thus liable for compensation for length of service.

(iii) The Reconsideration Application

21. In the Reconsideration Application, the Employer summarizes its reasons for requiring Reconsideration under two headings, namely, "new evidence" and "error in law" as follows:

> New Evidence
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> 1. Mrs. Ciarniello did phone Ms. Veltri and did leave a message on the evening of August 24, 2006. This call was omitted in the Determination. It was in the Appeal Information, but the Member missed it completely.
> 2. When the receptionist was asked for the "exact words" used by Ms. Veltri, they were different from those conveyed by Ms. Baudin.
> 3. There is tribunal *jurisprudence* whereby an employer is entitled to assume that an employee has quit when all the belongings are taken: BC EST #D 192/96
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> Error in Law
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> 4. Acting on a review of the facts which could not reasonably be entertained.
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>   Ms. Baudin was told by the receptionist so that Ms. Baudin did not really hear what Ms. Veltri said. Little weight should have been given.

22. In support of the points delineated under the "new evidence" and the "error in law" grounds in the application for Reconsideration, the Employer presents lengthy written submissions which I have carefully reviewed but do not find it necessary to reiterate here as I am not persuaded that the Employer's Reconsideration application passes the preliminary or threshold issue to warrant the exercise of my discretion under section 116, to reconsider the Original Decision. I will explain my reasons for my decision under the heading "Analysis" herein.

ISSUE

23. In an application for reconsideration pursuant to section 116 of the Act, there is a preliminary or a threshold issue of whether the Tribunal should exercise its discretion to reconsider the Original Decision. Only if the Tribunal is satisfied that the case is appropriate for reconsideration, the Tribunal will move to consider the substantive issues in the reconsideration application. Thus, the first question or issue in this application is: Does the Employer's application meet the threshold for reconsideration established by the Tribunal? If the answer to this question is in the affirmative then the Tribunal considers the substantive issues in the Reconsideration application. In this case those issues are delineated under the headings "new evidence" and "error of law" referred to above.

ANALYSIS

24. Section 116 of the Act sets out 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*
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> *(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.*
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> *(3) An application may be made only once with respect to the same order or decision.*

25. The Tribunal has indicated in numerous reconsideration decisions that reconsideration is not an automatic right of any party dissatisfied with an order or a decision of the Tribunal. This Tribunal has also repeatedly espoused the position that it is within the sole discretion of the Tribunal whether or not it will reconsider an order or a decision of the Tribunal, as section 116 uses permissive (and not mandatory) language, since the word "may" is employed in describing the jurisdiction of the Tribunal to reconsider any order or decision of the Tribunal.

26. As indicated in *Re Eckman Land Surveying Ltd.* BC EST #RD413/02, in exercising its discretionary power in section 116, the Tribunal is to be very cautious and mindful of the objects of the *Act*:

> Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of Employers and employees.

27. Noteworthy and often quoted decision governing the reconsideration process under Section 116 is the Tribunal's decision in *British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98. In *Milan Holdings*, the Tribunal delineated a two-stage process governing its decision to exercise the 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 Member; (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.

28. Based on the guidelines, both statutory and in the tribunals own decisions referred to above, I am not persuaded that this is a case where the Tribunal should exercise its discretion in favour of reconsidering the Original Decision as the Employer fails on the preliminary issue. The Employer is essentially advancing the arguments previously considered and rejected in the Appeal of the Determination with a view to obtaining a favourable interpretation of the facts adduced in the Hearing of the Complaint. The purpose of the Reconsideration application is not to allow a party dissatisfied with the Determination and the Original Decision another opportunity to reargue its case.

29. Having said this, I also note that even if the Employer passed the threshold for reconsideration applications established by the Tribunal (which is not the case here), the grounds advanced by the Employer in support of its Reconsideration application would fail. With respect to the "new evidence" ground, there is no new evidence produced in the Employer's submissions that would qualify under the test for admitting new evidence set out in *Re Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 17 (QL). The points under the "new evidence" heading in the Employer's written submissions are really arguments advanced by the Employer to persuade the Reconsideration panel to interpret differently the evidence that was already adduced by the Employer at the Hearing before the Delegate and subsequently, in the Appeal of the Determination before the Member.

30. With respect to the error of law ground advanced by the Employer, the Employer challenges the Delegate's reliance on Baudin's hearsay testimony relating to what the receptionist told her what Veltri said to her when she called the clinic at 2:00 p.m. on August 25, 2006-i.e. enquiring when she was next scheduled to work. Clearly Baudin's testimony in this regard is hearsay but it is unchallenged by any direct or other evidence. The Employer did not call the receptionist or Dr. D. Ciarniello at the Hearing, both of whom were in a position to provide direct evidence of their telephone conversations with Veltri on August 25, 2006. While hearsay is, generally speaking, not admissible in judicial proceeding because of its unreliability, it is, in administrative proceedings admissible but given less weight. In this case, I do not think that the Delegate placed disproportionate or undue weight on the hearsay evidence. Accordingly, I find no error of law in this respect.

ORDER

31. Pursuant to Section 116 of the Act, I order the Original Decision, BC EST #D027/08, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal