An application for Reconsideration

- by -

Golden Rock Products Inc.
("GRP")

- 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/47

DATE OF DECISION: July 3, 2008

DECISION

OVERVIEW

1. Golden Rock Products Inc. ("GRP") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of a Decision of the Employment Standards Tribunal B.C.E.S.T. #D040/08, dated April 17, 2008 (the "Original Decision"). The Original Decision confirmed the Determination made by a Delegate of the Director of Employment Standards (the "Director") on February 15, 2008 (the "Determination") that GRP owed Richard J. Vandergrift ("Vandergrift") $668.80 compensation for length of service, $26.75 for annual vacation pay and $25.13 in accrued interest on the first two amounts. The Original Decision also confirmed the Determination in respect of the administrative penalty of $500 under section 29 of the *Employment Standards Regulation*, B.C. Reg 396/95 levied against GRP for its contravention of section 63 of the Act.

FINDINGS OF FACT AND ANALYSIS IN THE DETERMINATION AND THE ORIGINAL DECISION

2. GRP operates a quarry, which harvests rock and processes it for use in landscaping and construction.

3. Vandergrift worked with GRP as a machine operator seasonally starting in June 2004. He was laid off from him employment on December 15, 2006 and rehired subsequently on March 27, 2007.

4. Vandergrift filed a complaint against GRP under Section 74 of the *Employment Standards Act* (the "Act") alleging that GRP contravened the Act by failing to pay him compensation for length of service pursuant to Section 63 of the Act (the "Complaint").

5. The Delegate investigated the Complaint and held a hearing of the Complaint (the "Hearing") by teleconference. It should be noted that the Delegate's decision to hold a teleconference Hearing was a rejection of the request of Paul Simonson ("Simonson"), one of GRP's owners, for an in person Hearing. Simonson, in support for his request for an in person Hearing, submitted that he had serious doubts regarding Vandergrift's credibility and in his experience telephone interviews lack interpersonal reactions such as body language. The Delegate did not find that credibility was an issue in this case and "the key facts were not in dispute" and therefore denied Simonson's request for an in person Hearing.

6. At the teleconference Hearing, Vandergrift attended on his own behalf and GRP was represented by its employee, Jeff Patterson ("Patterson") who was Vandergrift's supervisor at GRP. Simonson also may have attended at the teleconference Hearing as GRP's representative as the Reasons for the Determination show that he testified at the Hearing but his name does not appear on the face page of the Reasons for the Determination where Patterson's and Vandergrift's names are shown. This may be an oversight on the Delegate's part and frankly nothing really turns on it.

7. Vandergrift testified that on June 13, 2007, he was injured at work when a rock struck him on the head. Vandergrift was then off work until his return to work in early July 2007. He felt that GRP did not consider his injury seriously and, as a result, on July 11, 2007 he verbally gave two-weeks notice of termination of his employment to his supervisor, Patterson. Patterson asked Vandergrift to "think it over" with respect to his decision to quit his employment.

8. Patterson testified that he then informed the owners of GRP, Simonson and Vince Simonson, of Vandergrift's decision to quit his employment and both owners advised him to accept Vandergrift's resignation at the end of the next working day-i.e. July 12, 2007.

9. Simonson testified that he advised Patterson to accept Vandergrift's resignation early because there was a possibility that Vandergrift would re-injure himself and there was no value to keeping him employed at GRP.

10. Patterson, accordingly informed Vandergrift, at the end of the day on July 12 2007, that his resignation had been accepted and that he was no longer employed with GRP.

11. The Delegate notes in the Determination that he considered evidence pertaining to the behaviour of both, GRP and Vandergrift, during the latter's convalescence after his June 13, 2007 injury at work but gave it no weight as it was not relevant to the question of Vandergrift's entitlement to compensation for length of service.

12. The Delegate notes in the Determination:

> When Golden Rock accepted Mr. Vadergrift's resignation 'early' it deprived Mr. Vandergrift of the two weeks of employment he intended to complete. Mr. Vandergrift was in the process of exercising his right to quit voluntarily on July 25, but instead Golden Rock terminated his employment on July 12, 2007. Therefore Mr. Vandergrift must be paid his statutory entitlement under the Act.

13. The Delegate then sought to determine Vandergrift's compensation for length of service noting that Vandergrift was seeking two weeks' length of service compensation on the basis that he was hired on July 15, 2004 and terminated from his employment on July 12, 2007, three days short of three years' employment.

14. The Delegate also noted and accepted GRP's contention that Vandergrift's employment was seasonal and he did not work nearly three consecutive years. On December 15, 2006 he was laid off more than 13 weeks before he was rehired on March 27, 2007 in his last period of employment with GRP. Therefore, the Delegate found that Vandergrift was hired "as a new employee on March 27, 2007" and he then worked more than 3 consecutive months before his employment was terminated by GRP on July 12, 2007. Accordingly, the delegate concluded that Vandergrift was entitled to one week's notice in the amount of $668.80 plus 4% annual vacation pay thereon in the amount of $26.75 plus interest on both these amounts in the amount of $25.13. The Delegate also levied an administrative penalty of $500 against GRP for failing to pay Vandergrift compensation for length of service as previously indicated.

15. GRP then appealed the Determination on the basis that the Director failed to observe the principles of natural justice in making the determination. The Member deciding the Appeal concisely summarized GRP's submissions as follows:

> On appeal, GRP argues that 'it has the right to protect itself against delinquent employees' and that Mr. Vandergrift was delinquent because, while he was off work on disability, he worked on his truck. When GRP raised the issue with him, apparently Mr. Vandergrift suggested it could not assess his ability to work because of a lack of medical training. GRP acknowledged that Mr. Vandergrift had a doctor's note indicating that he was unable to work due to injury.

> GRP contends that Mr. Vandergrift's credibility was at issue because of issues with WCB benefits he received. It also argues that, in giving his two weeks' notice, Mr. Vandergrift was in fact quitting. Mr. Simonson repeats his argument before the delegate, which was that there was a real risk of Mr. Vandergrift re-injuring himself in the two weeks he would be remaining at the work site.
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> Mr. Simonson also asserts that the hearing ought to have been held in person as credibility was at issue and that, if it had, there would have been a 'fair outcome'.

16. The Member then delineates the gist or essence of what GRP is contending in its appeal as follows:

> In essence, GRP's appeal is a disagreement with the result. As I understand the essence of its submission, it should not be liable to pay Mr.Vandergrift compensation for length of service because of Mr. Vandergrift's alleged dishonesty and fraud with respect to WCB benefits. GRP's appeal document does not identify any errors of law or describe how it is of the view it was denied natural justice other than to say the delegate ought to have held an oral hearing.

17. In dismissing GRP's appeal on the basis of denial of natural justice, the Member observed that GRP did not discharge the onus placed on it to establish this ground of appeal. In particular, the Member noted that GRP did not provide any evidence that it was denied an opportunity to have its case heard by an impartial decision-maker or denied an opportunity to make or respond to Vandergrift's case. The Member also noted that in light of GRP's acknowledgement that it instructed Patterson to accept Vandegrift's resignation earlier, there "were no issues of credibility for the delegate to make determinations about".

18. Beyond the rejection of GRP's "natural justice" ground of appeal, the Member also did not find that that the Delegate committed any error of law in making the Determination. In particular, the Member observed that the Delegate was correct in concluding that GRP effectively pre-empted Vandergrift's decision of July 11, 2007 to terminate his employment two weeks later when GRP accepted his resignation earlier on July 12, 2007.

19. Finally, the Member observes that GRP, in its appeal, appears to be arguing that it had grounds to terminate Vandergrift's employment because he committed fraud or dishonesty in context of his injury and WCB claim. However, the Member notes that in addition to there being an absence of evidence to support grounds for termination of Vandergrift's employment, there is a note from Vandergrift's doctor indicating he was unable to work which fact was concede by GRP at the Hearing. Accordingly, the Member confirmed the Delegate's conclusion in the Determination and dismissed GRP's appeal.

ISSUE

20. In reconsideration applications there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the Act to reconsider the original decision. If the Tribunal, in the threshold issue, is satisfied that the case is appropriate for reconsideration, then the Tribunal will proceed to the next stage, which involves consideration of the substantive issue or the merits of the application. In this case, the question for the Tribunal, at the second stage, is whether the GRP was denied natural justice when the Delegate decided to hold the Hearing via teleconference and not in person and decided to disregard the evidence of GRP calling into question the evidence of Vandergrift that he was earlier injured at work and therefore questioning his credibility and character.

GRP'S SUBMISSIONS

21. GRP's submissions, in the reconsideration application, include:

(i) Submissions challenging the credibility of Vandergrift on the basis of GRP's allegations that if Vandergrift was medically unfit to work as suggested by his doctor and off on WCB then he would not have been able to perform repair on his truck during the same period.

(ii) Submissions challenging the decision of the Delegate to conduct a teleconference Hearing when GRP asked for an in person Hearing. GRP alleges that it has the right to face its accuser, Vandergrift, particularly because if "all parties had attended the hearing, [the Delegate] might have been able to read between the lines and ask pertinent questions of Mr. Vandergrift regarding working on his vehicle and perhaps he would have been able to assess both parties properly and fairly (sic)." The essence of this submission is that the Delegate, according to GRP, would have properly been able to assess the lack of credibility of Vandergrift in an in person hearing and made a determination in favour of GRP.

(iii) Submissions suggesting that GRP was entitled to terminate Vandergrift's employment earlier than the two week notice provided by Vandergrift without any consequence or exposure to GRP for compensation for length of service. In particular, GRP submits that as Vandergrift was quitting in two weeks, "(w)hy would GRP be obligated to employ Mr. Vandergrift who was dishonest about his injury and therefore not trustworthy and a further risk to GRP?"

DIRECTOR'S SUBMISSIONS

22. The Director submits that during the teleconference Hearing, GRP "knew the case against it, was given an opportunity to respond and the case was heard by an unbiased decision-maker and the person who heard the evidence made the decision." Further, the Director states that while GRP states that the Delegate "might have been able to read between the lines" if the Hearing were held in person, the facts presented by GRP were "sufficient in and of themselves" and "no reading between the lines was necessary". Therefore, GRP was not denied any natural justice rights, according to the Director.

23. The Director further asserts that there is no dispute on the relevant facts pertaining to the issue between the parties. The Director then goes on to assert that the issue between the parties is whether Vandergrift quit his employment or GRP terminated not whether Vandergrift lied to WCB or to his employer or whether Vandergrift was injured. Therefore, the Director argues that the Delegate need not review or take into consideration irrelevant facts.

24. The Director, in conclusion, submits that GRP has not raised any issues of sufficient importance within the meaning of the Tribunal's decision in *Biport Forest Products Ltd.* BC EST #RD149/00 to warrant a reconsideration of the Determination.

VANDERGRIFT'S SUBMISSIONS

25. Vandergrift, to a very large extent, repeats his testimony at the teleconference Hearing and I find it is unnecessary to reiterate his evidence here, particularly since I have already referred to it when reviewing the findings of fact in the Determination earlier in this decision.

ANALYSIS

26. Section 116 of the Act delineates the Tribunal's power of reconsideration. Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. It is only in exceptional circumstances that the Tribunal will agree to reconsider a decision because the Act intends that the Tribunal appeal decisions be final and binding: *Re Ekman Land Surveying Ltd.*, [2002] B.C.E.S.T.D. No. 413 (QL).

27. In *Milan Holdings Ltd.* [1998] B.C.E.S.T.D. No. 339 (QL), the Tribunal articulated a need for a principled and responsible approach to the reconsideration power in Section 116 of the Act. The Tribunal then went on to delineate a two-stage analysis for deciding whether it should exercise its discretionary reconsideration power. In the first stage, the Tribunal is to decide whether the matter raised in the application for reconsideration warrants reconsideration. If the answer in the first stage is in the affirmative then, in the second-stage, the Tribunal is to consider the merits of the application.

28. What then are the considerations in the first stage of the analysis? According to the Tribunal in *Milan Holdings*, the following factors weigh against reconsideration:

a) where the application has not been filed in a timely fashion and there is no valid cause for the delay;

b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Tribunal; and

c) the application arises out of a preliminary ruling made in the course of an appeal.

29. In Re *Zoltan Kiss* [1996] B.C.E.S.T.D. No. 129 (QL), the Tribunal delineated a non-exhaustive list of grounds in favour of exercising the reconsideration power under Section 116 of the Act. These grounds include:

a) a failure by the adjudicator to comply with the principles of natural justice;

b) there is a mistake in stating the facts;

c) a failure to be consistent with other decisions which are not distinguishable on the facts;

d) some significant and serious new evidence has become available that would have led the adjudicator to a different decision;

e) some serious mistake in applying the law;

f) some misunderstandings of a failure to deal with a significant issue in the appeal; and

g) some clerical error exists in the decision.

30. Having reviewed GRP's reconsideration application it is clear to me that GRP's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Tribunal in the appeal of the Determination because GRP, as previously indicated by the Member in context of the appeal, is in "disagreement with the result". This is evident in the reconsideration submissions of GRP as GRP is adducing the same arguments as those it made before the Member in its appeal of the Determination. This Tribunal has unequivocally indicated in numerous other cases that reconsideration is not a further opportunity for a party dissatisfied with the decision of the appeal Tribunal to have its case reweighed. Therefore, I find that GRP's request for reconsideration fails in the first stage of the two-stage analysis referred to in *Milan Holdings*, *supra*.

31. While I am not required to proceed to the second stage of the reconsideration analysis since GRP has failed to satisfy me on the threshold issue, I wish to observe that the Member correctly upheld the Determination as there is no evidence of any errors of law or breach of natural justice on the part of the Delegate in conducting a teleconference Hearing. In my view, the Delegate correctly rejected any evidence adduced by GRP pertaining to Vandergrift's injury and WCB claim as irrelevant and properly applied Section 63 of the Act to hold that GRP pre-empted Vandergrift's decision to terminate his employment when it terminated his employment the day after he provided his two weeks' advance notice of termination.

32. Further, I also find that the Member was correct in holding that GRP did not adduce any evidence of breach of natural justice on the part of the Delegate and that failure to hold an in person Hearing was not a breach of natural justice in this case. I agree with both the Member's analysis and the submissions of the Director that on the pertinent or penultimate issue of who terminated Vandergrift's employment, there was no dispute in the facts adduced by the parties. Therefore, there were no issues of credibility to determine or assess in context of the penultimate issue to warrant an in person hearing.

33. I also add that an in person hearing is not an automatic right enshrined in the principles of natural justice. As indicated by the Tribunal in *Re D. Hall & Associates Ltd.* [2000] B.C.E.S.T.D. No. 251:

> At common law, natural justice does not dictate that the only fair hearing is an oral hearing according to the traditional civil trial model in which viva voce evidence is led and witnesses are cross-examined. It has long been recognized that what is procedurally fair varies with the circumstances. Administrative tribunals are created as an alternative to courts, and it would therefore be wrong to automatically import the full panoply of trial procedures onto such tribunals.
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> Several factors inform the content of the duty of fairness at common law. These include the nature of the decision being made, the terms of the statute, the impact of the decision on the individual, any legitimate expectations occasioned by agency promises or procedural practices and the agency's own choice of procedures made in light of its institutional constraints. The common law's concern is not for perfect or idealized justice, but for a hearing in which each side has been given a meaningful opportunity to be heard: Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193 (S.C.C.). Even in those administrative contexts requiring "full and fair consideration of the issues", where a claimant's "important interests are affected by the decision in a fundamental way", an oral hearing is not necessarily a pre-condition to fairness: Baker, paras. 32-34. The courts themselves recognize that fundamental justice in civil proceedings does not require a full trial proceeding, and that justice may be done in summary proceedings, even in the face of conflicting evidence: Johnstone v. Island Scales Ltd., [1999] B.C.J. No. 1892 (S.C.), citing Inspiration Management Ltd. v. McDermid (1989), 36 B.C.L.R. (2d) 202 (C.A.). The same is true in judicial review proceedings: BX Neighbourhood Pub Ltd. v. British Columbia (Minister of Labour and Consumer Services [1990] B.C.J. No. 2946 (S.C.).

34. In this case, there is no evidence that the Delegate's decision to hold a teleconference hearing and not an in person hearing prevented GRP a meaningful opportunity to be heard or the Delegate an opportunity to make a full and fair consideration of the penultimate issue of who terminated Vandergrift's employment. Therefore I find that that an in person hearing was not a necessary pre-condition to fairness here.

ORDER

35. The Original Decision dated April 17, 2008 is confirmed with interest to be calculated to date.

Shafik Bhalloo
Member
Employment Standards Tribunal